IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RETAIL VENTURES, INC.,
et al.,

Plaintiffs,

vs.

Civil Action 2:06-CV-443
Judge Watson
Magistrate Judge King

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendant.

OPINION AND ORDER

Plaintiffs seek recovery in connection with a computer hacking incident under a computer fraud insurance policy ("the Policy") issued by defendant. Plaintiffs also assert a claim of bad faith and seek an award of punitive damages. This matter is before the Court on *Plaintiffs Retail Ventures, Inc.'s DSW Inc.'s, DSW SHOE Warehouse, Inc.'s Motion to Compel the Production of Documents and Testimony and Memorandum in Support*, Doc. No. 63 ("*Plaintiffs' Motion*"). For the reasons set forth below, *Plaintiffs' Motion* is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

In March 2005, plaintiffs learned that there had been unauthorized access and theft of customer data on their retail and corporate computer systems. *Complaint*, at ¶ 24. Plaintiffs allege that, as a consequence, they paid the cost of re-issuance of credit cards, monitored cards for fraudulent usage, hired additional staffing and were sued as a result of this computer hacking

incident. *Id*. at ¶¶ 28-33. Plaintiffs notified defendant, which issued a computer fraud insurance policy ("the Policy"), of the computer hacking incident and sent to defendant a preliminary itemization of losses. *Id*. ¶¶ 34-37. Defendant determined that the Policy excluded plaintiffs' claim. *Id*. at ¶ 38. Plaintiffs subsequently filed this lawsuit.

On July 28, 2006, plaintiffs served upon defendant a first set of requests for production of documents. Defendant objected to certain requests, but agreed to produce the claims file and underwriting file. On January 25, 2007, plaintiffs served upon defendants a second set of requests for production. Defendant responded to the second request, again objecting to certain requests. The parties subsequently communicated regarding both sets of requests and defendant's responses, but were unable to resolve their dispute regarding the production of documents and certain requested testimony. Accordingly, *Plaintiffs' Motion* was filed. On July 26, 2007, defendant filed its opposition to *Plaintiffs' Motion*. *Defendant National Union Fire Insurance Company of Pittsburgh, PA.'s Memorandum in Opposition to Plaintiff's Motion to Compel*, Doc. No. 70 ("*Defendant's Opposition*"). Plaintiffs filed their reply in support of their motion on August 9, 2007. *Plaintiffs' Reply Memorandum of Law in Support of Their Motion to Compel The Production of AIG Documents and Testimony*, Doc. No. 74 ("*Reply*").

II. STANDARD

Determining the proper scope of discovery falls within the broad discretion of the trial court. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). Rule 37 of the Federal Rules of Civil Procedure authorizes a motion to compel discovery when a party fails to provide proper response to requests for production of documents under Rule 34. Rule 37(a) expressly provides that "an evasive or incomplete disclosure, answer, or response is to be treated

as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(3). The burden of proof falls on the objecting party to show in what respect the discovery requested is improper. *Trane Co. v. Klutznick*, 87 F.R.D. 473 (D. Wis. 1980).

Discovery may relate to any matter that can be inquired into under Rule 26(b). Fed. R. Civ. P. 34(a). Rule 26(b) authorizes discovery regarding any non-privileged matter relevant to the subject matter of the pending action. Fed. R. Civ. P. 26(b). The information sought need not be admissible at trial so long as it appears reasonably calculated to lead to the discovery of admissible evidence. *Id*. These discovery provisions are to be liberally construed. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission*, 418 F.2d 355 (6th Cir. 1969).

III. APPLICATION

A. Discovery concerning drafting history (First Set of Requests for Production of Documents, Nos. 12 and 13)

Plaintiffs move to compel production of documents concerning the origin, drafting, construction, interpretation, application and/or modification of the Policy and its endorsements, specifically Endorsement #17.[1] *Plaintiffs' Motion*, at 7-10. Plaintiffs contend that this information is relevant because defendants have denied insurance coverage based on an undefined term ("confidential information") in an exclusion under paragraph 9 of Endorsement

[1]Endorsement #17 provides "Computer Fraud Coverage" in the amount of $10,000,000.00. *Complaint*, Exhibit A, Endorsement #17, ¶ 1. "Computer Fraud means the wrongful conversion of assets under the direct or indirect control of a Computer System by means of . . . [t]he fraudulent accessing of such Computer System[.]" *Id*. at ¶ 3.

#17.[2] *Id*. at 8. Plaintiffs seek to determine the full meaning of this Policy term and whether the term has special meaning in the insurance industry. *Id*. Plaintiffs further argue that they have the right to discover whether the Policy and its terms, including Endorsement #17, are ambiguous. *Id*. at 8-9. Plaintiffs contend that no responsive documents have been produced. *Id*. at 9. Plaintiffs also state that they doubt defendant's Fed. R. Civ. P. 30(b)(6) representative when he testified that he did not know the origins of or entity that drafted Endorsement #17. *Id*. at 9-10. In response, defendant states that it has "diligently searched" and produced "everything that it has been able to locate, including the entire underwriting file for the Policy." *Defendant's Opposition*, at 7. Defendant argues that plaintiffs have already specifically questioned its Fed. R. Civ. P. 30(b)(6) representative on the drafting history of Endorsement #17. *Id*. at 7-8. Defendant states that it "will continue to search for documents responsive" to this request and "will supplement its production" if any additional documents are discovered, but that the Court cannot compel defendant to produce that "which it does not have and/or does not exist." *Id*. at 8. Plaintiffs ask the Court to compel defendant to perform a timely and good faith search for responsive documents and to produce such documents. *Id*. at 4.

Defendant represents to the Court that it has diligently searched for and produced all responsive documents located by it and assures that it will continue searching for responsive documents. The Court can compel nothing more. *See Rockwell Int'l Corp. v. H. Wolfe Iron and Metal Co.*, 576 F. Supp. 511, 511 (W.D. Pa. 1983) (Rule 34 requires only that a party produce documents that are already in existence); *see also* 8A CHARLES ALAN WRIGHT *et al.*,

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[2]Paragraph 9 of Endorsement #17 provides that "[c]overage does not apply to any loss of proprietary information, Trade Secrets, Confidential Processing Methods or other confidential information of any kind." *Id*. at ¶ 9.

FEDERAL PRACTICE AND PROCEDURE § 2210 (2d ed. 1994) (same).

Accordingly, plaintiffs' request for an order compelling defendant to supplement its responses to Request Nos. 12 and 13 is **DENIED** as moot.

B. Discovery regarding defendant's claims file, claim adjustment and reserves (First Set of Requests for the Production of Documents, Nos. 6 and 16)

Plaintiffs move to compel the underwriting and claims files and information and documents related to any reserves set by defendant in connection with plaintiffs' claim. *Plaintiffs' Motion*, at 10-13.

1. Claims file and claims adjustment

As to the claims and underwriting files, plaintiffs acknowledge that defendant has provided "the majority" of these files, but complain that defendant continues to withhold documents on the basis of privilege. *Id*. at 10. Plaintiffs specifically contend that defendant, who bears the burden of proving privilege, waived its claims of privilege when it asserted the defense of advice of counsel. *Id*. at 10-12 (citing *Amended Answer and Counterclaim*, at ¶ 88). Plaintiffs argue that the underwriting and claims files are relevant to the question of coverage and defendant's bad faith. *Id*. at 11. In response, defendant states that only five documents from the claims file have been withheld. *Defendant's Opposition*, at 9:

- Two documents were generated after the lawsuit was filed on May 9, 2006: The May 19, 2006 email between John J. Petro, Esq. and a claims note generated after May 11, 2006
- Two documents were inadvertently misfiled in plaintiffs' claims files and contain proprietary, confidential, trade secret information protected by privilege and self-critical analysis: The July 12, 2005 email authored by Thomas Hanlon, Esq. to Ms. Riley (NU 456) and the redacted October 20, 2005 claims note
- The fifth document, "claims digests," was previously produced with redactions relating

to reserves information[3]

Id. In reply, plaintiffs contend that these requested documents pre-date the litigation. *Reply*, at 4-5. More specifically, plaintiffs argue that the claims notes (NU 243 - NU 253), authored by Ms. Riley, span April 14, 2005 through May 2006. *Id*. In addition, these claims notes are listed on defendant's privilege log;[4] however, defendant waived privilege and should produce the claims notes up until the date May 9, 2006. *Id*.

The Court notes that plaintiffs have failed to respond to defendant's argument that two of the requested documents (an email bates-stamped NU 456 and a redacted October 20, 2005 claims note) were misfiled in plaintiffs' claims files and do not relate to plaintiffs' claims. Accordingly, the Court concludes that these documents, which are unrelated to the claims in this case, need not be produced. *See* Fed. R. Civ. P. 26(b).

The parties previously agreed that they would not seek discovery of information prepared after the filing of this lawsuit. *Plaintiffs' Motion*, at 11; *Defendant's Opposition*, at 9; *Reply*, at 4. Therefore, to the extent that plaintiffs seek information generated after the filing of this litigation on May 9, 2006, the Court will not compel defendant to produce such documents, including the May 19, 2006 email authored by Mr. Petro and a claims note generated after May 11, 2006.

While defendant contends that only five documents are in dispute, plaintiffs identify other documents that are listed on defendant's supplemental privilege log that defendant has

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[3]The Court will address the arguments related to reserves information in the next subsection of this *Opinion*.

[4]Defendant's supplemental privilege log is attached as Exhibit A to *Plaintiffs' Motion*.

refused to produce, including claims notes (NU 243-NU 253) up to May 9, 2006, and three documents entitled "First Notice Assignment" (NU 135, WP 206 and DL 62). *Reply*, at 4-5; Exhibit A, attached to *Plaintiffs' Motion*. As plaintiffs point out and as defendant concedes, defendant has waived privilege as to counsel. *Defendant's Opposition*, at 1. Defendant fails to explain why these documents should not be produced. *Id*. at 9. Therefore, plaintiff's argument that these documents should be produced is well-taken.

Accordingly, to the extent that plaintiffs seek to compel the production of the two documents inadvertently misfiled in plaintiffs' file and of documents generated after the filing of this lawsuit, plaintiffs' motion is **DENIED**; to the extent that plaintiffs seek claims notes (NU 243- NU 253) up to May 9, 2006, and the three documents entitled "First Notice Assignment" (NU 135, WP 206 and DL 62), plaintiffs' motion is **GRANTED**. Defendant shall produce such documents within seven (7) days from the date of this *Order*.

2. Reserves set by defendant in relation to plaintiffs' claims

Plaintiffs seek to compel the production of information regarding reserves in connection with plaintiffs' claims, arguing that such information is "relevant and material to determining" defendant's evaluation of plaintiffs' coverage claim. *Plaintiffs' Motion*, at 12-13. In response, defendant argues that information regarding reserves, which is probative of potential liability, may be relevant to good faith in "third party policy"[5] cases where a defendant acknowledges potential liability (through its reserves) but fails to attempt to settle a claim. *Defendant's*

[5]Defendant explains that "third party policies provide coverage for the insured's liability to a third party. Third party coverage therefore turns upon whether the policy language at issue provides for the defense of the insured against the allegations of the third party, and for the payment of any damages that may be awarded in favor of the third party against the insured." *Defendant's Opposition*, at 3 n.1.

Opposition, at 3-6. However, defendant contends, this case involves a "first party policy"[6] in which coverage is disputed and therefore "potential liability," as reflected in reserves, is not relevant. *Id*. Defendant further contends that reserves do not necessarily take into account all of the facts and law of the case. *Id*. Accordingly, defendant argues, its reserves are irrelevant and not reasonably calculated to lead to the discovery of relevant information. *Id*. at 6. In reply, plaintiffs argue that reserves information is relevant and discoverable because the mere existence or non-existence of reserves can indicate an absence of good faith regarding the adjustment and settlement of the claim. *Reply*, at 5-7. Plaintiffs also dispute defendant's characterization of its policy as a "first party policy" and argue that, in any event, courts do not draw a bright-line distinction between first party and third party cases in the *discovery* context. *Id*. at 5-6. Plaintiffs further contend that defendant cannot use privilege as a basis for withholding this information because defendant raised the defense of advice of counsel, which defendant has conceded. *Id*. at 7.

The Court is unable, on the record presently before it, to determine whether the Policy provides simply "first party" coverage or "third party" coverage. Under these circumstances, this Court concludes that information regarding reserves in this case, even if not determinative of every issue, is nevertheless reasonably calculated to lead to the discovery of admissible evidence. *See* Fed. R. Civ. P. 26(b)(1).[7]

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[6]Defendant states that first party policies "provide coverage for a loss that an insured itself incurs. Thus, first party coverage turns upon whether the policy language at issue covers the event causing the loss, and the type of loss incurred." *Id*.

[7]In its response to the discovery request for reserve information, defendant initially objected based on the attorney-client and work-product privileges and on the basis of self-critical analysis privilege. *Plaintiffs' Motion*, Exhibit 6, at 16-17. However, defendant fails to argue the

Accordingly, plaintiffs' request for production of information regarding reserves as to plaintiffs' specific claims in this case is **GRANTED**. Defendant shall produce information regarding its reserve information as to plaintiffs' claim in this case within seven (7) days from the date of this *Order*.

C. Discovery concerning defendant's treatment of similar claims of other policyholders (Second Set of Requests for the Production of Documents, Nos. 1-4)

Plaintiffs seek to compel "information or documents concerning claims by other policyholders for coverage for computer fraud losses[.]" *Plaintiffs' Motion*, at 13-14. Plaintiffs contend that such information is "central" to defendant's defenses to coverage and is recognized as relevant under Ohio law. *Id*. (citing *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 74 Ohio Misc.2d 174, 660 N.E. 2d 765 (Lucas C.P. 1993)). In response, defendant argues that the requests for such information amount to a burdensome "fishing expedition" and are irrelevant to the issues in this case. *Defendant's Opposition*, at 10-12. Defendant also contends that information regarding these other claims are privileged, confidential, proprietary, subject to the other insureds' right to privacy and protected by the self-critical analysis doctrine. *Id*. at 12. In reply, plaintiffs suggest that defendant redact sensitive information of other policyholders. *Reply*, at 8.

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attorney-client and work-product defenses in its opposition to *Plaintiffs' Motion*, relying instead on the distinction between first party and third party coverage cases. *Defendant's Opposition*, at 3-6. In addition, defendant concedes that it has waived privilege as to counsel. *Id*. at 1. Accordingly, this Court will not address defendant's defenses that are not argued in its brief. Defendant raises and relies on self-critical analysis privilege as to production of "subsequent remedial measures" (the drafting history of the Policy and Endorsement #17), but does not raise it as a basis for opposition production of reserve information. *Defendant's Opposition*, at 13-16.

Taken together, Nos. 1-4, seek information related to any policyholder's claim based on computer crime, computer fraud, computer hacking, the fraudulent accessing of a computer system or loss of electronically captured information on any policy ever issued by defendant. *Motion to Compel*, Exhibit D. This Court agrees with defendant's argument that these requests are overbroad and unduly burdensome.

Moreover, this court is not persuaded that information related to other policyholders' claims and complaints is relevant. *See St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 644 (N.D. Iowa 2000); *Fidelity and Deposit Co. of Maryland v. McCulloch*, 18 F.R.D. 516, 525-26 (E.D. Pa. 1996); *Leksi v. Federal Ins. Co.*, 129 F.R.D. 99 (D. N.J. 1989); *Missouri Pacific Railroad Co. v. Aetna Cas. & Surety Co.*, 1995 WL 861146, at *2 (N.D. Tex. May 17, 1995); *Moses v. State Farm Mut. Auto. Ins. Co.*, 104 F.R.D. 55, 57 (N.D. Ga. 1983) (an insurer's conduct regarding the insurance claims of other insureds is "of no consequence" to the adequacy of its conduct toward the plaintiff). Additionally, at least one court has characterized the production of files of other insureds as unduly burdensome, particularly since such production may present "problems inherent in the involuntary production of documents in which non-parties may hold valid privileges." *Leksi*, 129 F.R.D. at 106 n.3. For all of these reasons, this Court concludes that the requested information is not reasonably calculated to lead to the discovery of admissible evidence, *see* Fed .R. Civ. P. 26(b)(1), and that the burden and expense of responding to this extensive discovery request outweighs its likely benefit. *See* Fed. R. Civ. P. 26(b)(1), (2)(C)(i), (iii). Plaintiffs' *Motion to Compel* information related to the claims of other policyholders is therefore **DENIED**.

D. Discovery regarding defendant's separate security breach

Plaintiffs move to compel information regarding an alleged security breach in March 2006 at one of defendant's offices that allegedly resulted in the theft of customer information. *Plaintiffs' Motion*, at 14-15. Plaintiffs contend that information "regarding this breach may provide evidence regarding" how defendant characterizes customer information and undermine defendant's defenses in this case. *Id*. at 15; *Reply*, at 9. In response, defendant characterizes this security breach as completely distinct from issues presented in this case. *Defendant's Opposition*, at 12. Defendant also contends that information sought by plaintiffs is privileged, confidential and in the possession of a company that is not under its control and not a party to this litigation. *Id*. at 12-13.

Other than asserting that this discovery "*may* provide evidence" regarding defendant's defenses in this case, plaintiffs fail offer any justification for the requested discovery. *Plaintiffs' Motion*, at 15 (emphasis added). This Court agrees that a March 2006 breach was has no relevance to the issues in this case. Therefore, discovery regarding the March 2006 breach is not reasonably calculated to lead to the discovery of admissible evidence. *See* Fed. R. Civ. P. 26(b)(1).

Accordingly, plaintiffs' request for information regarding the March 2006 breach is **DENIED**.

WHEREUPON, in light of the foregoing, *Plaintiffs Retail Ventures, Inc.'s DSW Inc.'s, DSW SHOE Warehouse, Inc.'s Motion to Compel the Production of Documents and Testimony and Memorandum in Support*, Doc. No. 63, is **GRANTED** in part and **DENIED** in part in

accordance with this *Opinion and Order*.

November 8, 2007

s/Norah McCann King
Norah McCann King
United States Magistrate Judge