IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARTER OAK FIRE INSURANCE COMPANY, et al.	:	
v.	:	Civil Action No. DKC 09-0100
AMERICAN CAPITAL, LTD., et al.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this insurance case is a motion for leave to file third amended counterclaims (ECF No. 284), filed by Defendants and Counterclaimants American Capital, Ltd., Scientific Protein Laboratories LLC ("SPL"), and Spectator Management Group ("SMG"). Also pending are three motions to seal filings in connection with the motion for leave to file third amended counterclaims. (ECF Nos. 286, 308, 322).[1] The issues have been fully briefed, and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the following reasons, Defendants' motion for leave to file third amended counterclaims will be granted. The three motions to seal will be denied, but the parties will have fourteen (14) days to cure the deficiencies discussed below.

[1] Defendants' motion for sanctions and the parties' motions to seal in connection therewith will be addressed by separate memorandum opinion.

I. Background

Familiarity with the underlying facts of this case – spanning five years and over 300 docket entries - is presumed. (*See* ECF Nos. 42, 64, 77, 92, 170, 184, 267). In short, this case concerns an insurance coverage dispute between two insurance companies, Plaintiffs Charter Oak Fire Insurance Company and Travelers Property Casualty Company of America (together, "Travelers" or "Plaintiffs"), and an investment fund, Defendant American Capital, Ltd. ("American Capital"). Beginning in 2008, Defendants American Capital and SPL became involved in more than 100 lawsuits pertaining to the allegedly defective drug heparin. Many of the complaints in these lawsuits allege that SPL is a subsidiary of American Capital. A dispute subsequently arose about whether the underlying heparin lawsuits implicate certain primary and umbrella insurance policies that Plaintiffs issued to American Capital for the years 2006 through 2009 ("the Policies"). Travelers filed the instant declaratory judgment action seeking rescission or reformation of the Policies, or, alternatively, a declaration that Travelers does not owe defense or indemnity coverage to either American Capital or any of its alleged subsidiaries for the underlying heparin lawsuits.

Defendants filed counterclaims on April 17, 2009 alleging various causes of action for breach of contract and declaratory

judgment. (ECF No. 19). Defendants filed amended counterclaims on June 10, 2009. (ECF No. 19). Defendants proposed to file second amended counterclaims on October 27, 2011 that included counts for bad faith and promissory fraud. (ECF No. 87-3). Travelers objected to adding these claims, and Defendants subsequently withdrew the proposed second amended counterclaims, stating that "having reviewed Plaintiffs' objections [], Counterclaimants have elected to seek leave to file a new version of the Counterclaims that removes those objected-to counts and includes only counts which Plaintiffs have not objected to in response to the previously-proposed amendment." (ECF No. 101, at 1). In their motion for leave to file second amended counterclaims, Defendants stated:

> because Plaintiffs' objections to the fraud and bad faith counts originally articulated in the September 30 draft can be met via expected admissions that Counterclaimants will obtain during discovery, an amendment asserting these two counts *after* such admissions have been obtained should engender a *stipulated amendment* to add these two counts and *not* an opposed motion to amend.

(ECF No. 102-1, at 4 n.2) (emphases in original).

The parties commenced discovery on January 20, 2012 and the case was referred to Magistrate Judge Schulze for resolution of all discovery disputes on November 27, 2012. (ECF No. 145). Soon thereafter, discovery problems began to arise, primarily

surrounding Plaintiffs' rescission claim. Plaintiffs filed this action on January 16, 2009, and initially took the position that documents created on or after September 2, 2008 were created in anticipation of litigation and thus were protected. On November 20, 2012, Defendants moved to compel production of claims handling materials. On December 21, 2012, Judge Schulze granted Defendants' motion and ordered production of *all* withheld documents created after September 18, 2008, with redactions only for attorney impressions and opinions. Numerous objections to Judge Schulze's ruling followed from Plaintiffs. A memorandum opinion issued on February 11, 2013 overruled Plaintiffs' objections in part and sustained them in part. (ECF Nos. 170 & 171). Plaintiffs were ordered to produce - by March 1, 2013 - all documents, or portions thereof, concerning eight areas of factual information outlined in the opinion. (ECF No. 170, at 25). Plaintiffs subsequently produced 4,900 pages of previously withheld documents and submitted to Judge Schulze for *in camera* review documents that they believed were privileged. Following this submission, on May 9, 2013, Defendants again moved to compel claims handling materials based on newly discovered evidence, arguing that the documents produced showed that Plaintiffs were performing business, rather than legal, claims handling functions before December 2008; thus, Plaintiffs did not anticipate litigation any earlier than December 8 or 19,

2008. (ECF No. 193, at 6). On July 24, 2013, Judge Schulze granted Defendants' motion to compel, ordering Plaintiffs to produce all claims handling documents created before December 8, 2008. (ECF Nos. 213 & 214).[2] In ordering this production, Judge Schulze deferred *in camera* review of post-December 7, 2008 documents. (ECF No. 213, at 11).

On December 2, 2013, Defendants once again moved to compel, this time seeking claims-handling documents post-dating December 8, 2008 on the basis that Plaintiffs did not anticipate denying coverage as of that date. (ECF No. 264). During the pendency of this motion, on January 21 and 24, 2014, Plaintiffs produced a group of post-December 7, 2008 documents (which Plaintiffs believe were privileged). (ECF No. 332, at 22). Plaintiffs state that the documents were produced as part of a compromise production under a non-waiver agreement. The January 2014 compromise production, however, actually prompted Defendants to file an amended motion to compel on February 10, 2014. (ECF Nos. 280 & 281). The December 2013 and February 2014 motions to compel filed by Defendants were both withdrawn with prejudice on April 11, 2014 pursuant to a stipulated order after Plaintiffs produced all the documents. (ECF No. 325).

[2] Plaintiffs objected to Judge Schulze's July 24, 2013 ruling, which was overruled. (*See* ECF No. 267).

Defendants moved for leave to file third amended counterclaims on February 25, 2014. (ECF No. 284). Plaintiffs opposed the motion, and Defendants replied. (ECF Nos. 307 & 321). Both parties also filed unopposed motions to seal their respective filings in connection with Defendants' motion. (ECF Nos. 286, 308, 322).

II. Analysis

A. Motion for Leave to File Third Amended Counterclaims

Defendants[3] seek leave to file third amended counterclaims to add two claims: (1) statutory tort of lack of good faith; and (2) common law tort of promissory fraud. (ECF No. 285). Plaintiffs argue that the motion should be denied because it is untimely, prejudicial, and would be futile.

"Motions for leave to amend counterclaims are subject to the same standards as all motions for leave to amend pleadings." *Ground Zero Museum Workshop v. Wilson*, 813 F.Supp.2d 678, 706 (D.Md. 2011). Fed.R.Civ.P. 15 provides that courts should "freely give leave [to amend a pleading] when justice so requires." Fed.R.Civ.P. 15(a). Although neither party explicitly cites the "good cause" requirement under Rule 16(b), Plaintiffs argue that Defendants' motion to amend is untimely.

[3] For ease of reference, Counterclaimants American Capital, Scientific Protein Laboratories, and SMG will be referred to as Defendants throughout the opinion. Counterdefendants will be referred to as Plaintiffs.

Multiple orders have been issued throughout the course of discovery extending the deadline for completing discovery, (*see* ECF Nos. 99, 144, 182), but both parties agree that the most recent order from Judge Schulze set September 12, 2013 as the deadline for completing discovery. (ECF No. 212). Rule 16(b) focuses on the timeliness of the proposed amendment and the reasons behind its tardy submission. *Rassoull v. Maximus, Inc.*, 209 F.R.D. 372, 374 (D.Md. 2002). In particular, Rule 16(b) requires the movant to show that it acted diligently. *Id.* The court also considers whether the non-moving party could be prejudiced by the delay, the length of the delay, and whether the movant acted in good faith. *Tawwaab v. Va. Linen Serv., Inc.*, 729 F.Supp.2d 757, 768-769 (D.Md. 2010).

1. Good Cause

Plaintiffs argue that Defendants affirmatively chose not to amend their counterclaims timely and now attempt to add claims which "change the character" of this litigation because the case currently involves purely contractual claims surrounding insurance coverage. (ECF No. 307, at 13). Plaintiffs contend that Defendants believed a basis existed for the bad faith and promissory fraud claims when they first asserted them in 2011, thus their attempt to "revive" the claims they previously withdrew should be rejected. Defendants explain that they were forced to file several motions to compel to obtain claims

handling documents from Plaintiffs and only received relevant documents justifying the bad faith and promissory fraud claims on January 21 and 24, 2014.

It appears that Defendants' proposed amendments are based on a combination of: pre-December 8, 2008 documents they obtained in late August 2013 (after Judge Schulze ordered their production); post-December 8, 2008 documents that Plaintiffs turned over as part of a "compromise production" in January 2014 after Defendants moved to compel; and various depositions taken of Tracey Seitz in October 2013 and Edward Zawitosky. Plaintiffs believe, however, that Defendants received discovery relevant to the promissory fraud claim by 2012. **REDACTED**

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Defendants assert that "these underwriter notes are particularly

important because **REDACTED**

(*Id.*). Defendants aver that these notes - first produced in January 2014 - reveal that **REDACTED**

The temporal connection between the time Defendants obtained the evidence supporting the promissory fraud counterclaim in late January 2014 and the time they filed the instant motion, on February 25, 2014, is brief enough to suggest timeliness and diligence on their part. See *Ground Zero Museum Workshop*, 813 F.Supp.2d at 707 (suggesting that seeking to amend a counterclaim within a month of first obtaining supporting evidence in discovery is an adequate temporal connection to find good cause).

As for the lack of good faith counterclaim, Plaintiffs argue that Defendants "point to nothing new learned as a result of [the discovery disputes] without which they could not have brought these claims." (ECF No. 307, at 15). Plaintiffs assert that "[t]he unjustified and inexcusable delay is confirmed by the May 9, 2013 affidavit of [defense counsel] Mr. Schryber stating that he had received 'newly discovered evidence'

suggesting improper meddling in the claims handling process." (*Id.*).

Defendants' failure to identify every single newly produced document that justifies the late amendment is not fatal to amending the counterclaims to add the two new counterclaims adduced in discovery. *Ground Zero Museum Workshop*, 813 F.Supp.2d at 707 ("although Defendant does not identify specific pages within this production that support his new counterclaims, the implication is that there is a temporal connection between the two."). Moreover, Plaintiffs' contention that Defendants received documents pertinent to the lack of good faith counterclaim by May 2013 is belied by the record. REDACTED

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REDACTED Defendants did not receive pre-December 8, 2008 documents until August 2013, after Judge Schulze granted Defendants' motion to compel, finding misleading prior evidence presented by Plaintiffs to support a September 2008 "anticipation of litigation" date. (ECF No. 213, at 5). Defendants' lack of good faith claim is also premised on post-December 8, 2008 documents, which were produced only in January 2014. **REDACTED**

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Defendants explain that it was not until January 2014 that they received documents providing this evidentiary support for the counterclaim of lack of good faith.

There is no undue delay in seeking leave to amend if Defendants acquired knowledge of the facts behind the new counterclaims only through recent discovery and after conducting a reasonable investigation of that information. *See Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) ("The plaintiffs were entitled to a reasonable time to investigate through other sources the information they had secured from the deposition of defendant's witnesses.").

Although Plaintiffs question whether the recently obtained information provides support that could not have been uncovered earlier, given Plaintiffs' intransigence during discovery and the court orders needed to ensure Plaintiffs' compliance with discovery requires, it is reasonable to infer that Defendants could not have learned about new facts to buttress the lack of good faith and promissory fraud counterclaims any earlier. *Ground Zero Museum Workshop*, 813 F.Supp.2d at 678 (granting leave to amend to add new counterclaim where defendant referenced a production of 902 pages of documents by plaintiff); *Aloi v. Moroso Inv. Partners, LLC*, Civil Action No. DKC 11-2591, 2013 WL 6909151, at *7 (D.Md. Dec. 31, 2013) ("it appears that [p]laintiff's belated filing is largely attributable to [d]efendant's delay in responding to discovery requests, rather than [p]laintiff's lack of diligence.").

Moreover, the two counterclaims Defendants seek to add differ markedly in nature and substance from the original declaratory judgment and breach of contract claims. Thus, there is no reason to believe that Defendants had enough evidentiary support to bring these two counterclaims earlier. Plaintiffs assert that they would be prejudiced by the late amendment precisely because these new claims differ from the original counterclaims, change the nature of the litigation, and will require additional discovery as they "involve completely

different factual elements." (ECF No. 307, at 16). Defendants represent that these two new counterclaims will not require any additional discovery. Plaintiffs disagree, arguing that the claims involve different claimed damages (including punitive damages for the promissory fraud counterclaim) and that new discovery-intensive issues will concern Defendants' good faith and justified reliance upon any alleged fraudulent representations. It does not appear that the new counterclaims will require extensive discovery because they largely concern Plaintiffs' state of mind at the time they issued the insurance policies and their coverage position to American Capital.[4] (*See* ECF No. 285, at 11 ("[t]he promissory fraud [] claim relates entirely to Travelers' conduct and state of mind at the time it sold the insurance policies at issue to American Capital . . . [and] the statutory tort claim for lack of good faith relates entirely to Travelers' conduct during the claims handling process.")). In any event, Plaintiffs should not benefit from their own resistance to producing discoverable documents for

[4] Moreover, as Defendants point out, some additional discovery that Travelers will need to take (such as certain damages discovery) has already been stayed pending settlement of the underlying heparin lawsuits. (ECF No. 321, at 27 n. 15 & ECF No. 231, at 4).

most of this litigation, which contributed to the belated amendments.[5]

Based on the foregoing, Defendants' motion is not untimely, and they have acted with appropriate diligence in seeking leave to amend. The good cause requirements of Rule 16(b) are satisfied.

2. Futility

Turning to Rule 15(a)(2), "leave to amend should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or amendment would be futile." *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 193 (4th Cir. 2009). "An amendment is futile when the proposed amendment is clearly insufficient on its face, or if the amended claim would still fail to survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6)." *El-Amin v. Blom*, Civ. No. CCB-11-3424, 2012 WL 2604213, at *11 (D.Md. July 5, 2012). Counterclaims, like complaints, may be dismissed for inadequate pleading per Rule 12(b)(6). Under the Rule 12(b)(6) standard, the court must take all well-pled allegations as true and construe them in the light

[5] Plaintiffs noted in their opposition that this case is at the dispositive motion stage. Although this was an accurate statement at the time the opposition was filed, Plaintiffs have since withdrawn their motion for summary judgment. (ECF No. 314). The parties are reminded that dispositive pre-trial motions will be due within thirty (30) days after the motion for sanctions is adjudicated. (*See* ECF No. 350).

most favorable to the Plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). A complaint need not contain detailed factual allegations, but if the plaintiff fails to allege enough facts to make the claim appear "plausible on its face," then the court must dismiss the complaint. *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007). Plaintiffs contend that the proposed amendment is futile.

a. Lack of Good Faith

Count XIII of the proposed third amended counterclaims alleges that Travelers failed to act in good faith in denying insurance coverage pursuant to Md.Code.Ann., Cts. & Jud. Proc. § 3-1701 and its companion, Md.Ins.Code § 27-1001. (ECF No. 285-2 ¶¶ 292-296). This counterclaim relates to alleged misrepresentations by Travelers regarding its internal coverage position when it wrote the January 16, 2009 letter to American Capital denying defense insurance coverage for the heparin lawsuits. Plaintiffs argue that the lack of good faith counterclaim is subject to dismissal "because the statute upon which it is based, Md. Code § 3-1701, does not apply to claims or claims handling under third party liability policies such as [those at issue here]." (ECF No. 307, at 17). In other words, Travelers maintains that the statutory tort of lack of good faith does not apply "where the insured [such as American Capital] seeks liability insurance coverage for claims by third

parties for damages rather than coverage for direct damages to its own insured property." (*Id.* at 18).

In *Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co.*, 912 F.Supp.2d 321 (D.Md. 2012), Judge Hollander rejected the very arguments offered by Plaintiffs. The two statutes invoked by Defendants require an insurer to make "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." C.J. § 3-1701(a)(4); Ins. § 27-1001(a). The statutes authorize a cause of action against an insurer that fails to act in good faith in denying coverage, and authorize the insured to recover "actual damages," up to the limits of the applicable insurance policy, along with attorneys' fees, expenses, other litigation costs, and interest. C.J. § 3-1701(e). As Plaintiffs point out, the statutory cause of action for failure to act in good faith "applies only to *first-party claims* under property and *casualty insurance policies* issued, sold, or delivered in the State [of Maryland]." C.J. § 3-1701(b) (emphases added). In Plaintiffs' view, this case involves a third-party claim, not a first-party claim because American Capital seeks insurance for potential liability to third-parties in connection with the heparin lawsuits. As Judge Hollander noted in *Whiting-Turner*, 912 F.Supp.2d at 339, however, casualty insurance under Section 1-101 of the Insurance

Article includes, *inter alia*, "insurance against legal, contractual, or assumed liability for death, injury, or disability of a human being, or for damage to property." Ins. § 1-101(i)(1)(i). Judge Hollander reasoned:

> [i]f the limitation to "first-party claims" were intended to exclude claims by an insured against its insurer for coverage against liability on a claim brought by a third-party against the insured, the inclusions of claims for coverage under "casualty insurance" would be meaningless. Such liability claims are precisely the type that "casualty insurance" ordinarily covers. In my view, *the limitation to "first-party" claims simply means that only an insured, rather than a claimant against the insured, may bring a claim under C.J. § 3-1701 against an insurer that denies coverage.*

Id. (emphasis added).

Judge Hollander further noted that "the statute establishes an administrate claims process with the Maryland Insurance Administration ("MIA") for claims under the statutes, and the MIA's decisions are in harmony with the foregoing interpretation of the statutory text." *Id.* For instance, in at least two decisions under Section 27-1001, the MIA has held that it lacked jurisdiction over a claim because the plaintiff was not the insured. *See, e.g., K.T. v. Churchill Casualty, Ltd.*, Case No. 27-1001-08-00031, at 3 (Md.Ins.Admin. Sept. 29, 2008) ("[o]nly first-party claims may be brought under § 27-1001 and Plaintiff admits that the insured in this case is Murry's."); *see also*

I.M. v. Am. Skyline Ins. Co., Case No. 27-1001-08-00040 (Md.Ins.Admin. Oct. 31, 2008) (reaching the same conclusion in an analogous case). Lastly, Judge Hollander pointed out that "[t]he MIA's interpretation is also reflected in its instructions for filing an administrative claim under Ins. § 27-1001, which state expressly: '[a] first party claim is one made *by the policy holder* with the policy holder's own insurance company.'" *Whiting-Turner,* 912 F.Supp.2d at 340 & n.19 (emphasis added).

Here, American Capital is the insured under the insurance policies at issue, thus its claim against Travelers, the insurer, is a "first-party" claim within the meaning of Section 3-1701. Plaintiffs seem to recognize that *Whiting-Turner* contradicts their futility argument, but they contend that this case was wrongly decided. To the contrary, the sound reasoning in *Whiting-Turner*, a recent and published decision from this district, is adopted. Accordingly, Plaintiffs' argument that the statutory counterclaim for lack of good faith is futile will be rejected.

b. Promissory Fraud

Defendants' second proposed counterclaim for promissory fraud is based upon allegations that "notwithstanding issuing the policies in their intended form to include 'alter ego' coverage for American Capital itself and coverage for subsidiary

and 'ownership or majority interest' companies of American Capital, Travelers intended from the time it sold the policies only to cover 'slip and fall' claims relating to American Capital's failure to maintain its office workspace." (ECF No. 285, at 9). Defendants allege that Travelers intended to induce American Capital to rely on the representations that coverage was comprehensive and was based on the express policy terms. (ECF No. 285-1, at 34).

Plaintiffs argue that Defendants' promissory fraud counterclaim is futile for several reasons. First, Plaintiffs assert that Maryland does not recognize a cause of action for promissory fraud. "[W]hile 'fraud cannot be predicated on statements that are merely promissory in nature, or upon expressions as to what will happen in the future,' . . . 'the existing intention of a party at the time of contracting is a matter of fact' and 'fraud may be predicated on promises made with a present intention not to perform them.'" *Parker v. Columbia Bank*, 91 Md.App. 346, 360-61 (1992); *Orteck Int'l Inc. v. TransPacific Tire & Wheel, Inc.,* No. DKC-05-2882, 2006 WL 2572474, at *11 (D.Md. Sept. 5, 2006). "The gist of the fraud in such cases is . . . the false representation of an existing intention to perform where such intent is in fact non-existent." *Tufts v. Poore*, 219 Md. 1, 12 (1959); *Hale Trucks of Md., LLC v. Volvo Trucks N.A., Inc.*, 224 F.Supp.2d 1010, 1032 (D.Md. 2002)

("a deliberate misrepresentation of one's existing intentions, where the misrepresentation is material, 'may form the basis for an action in fraud or deceit'"). This is exactly the theory on which Defendants base the promissory fraud counterclaim. Specifically, the proposed fraud counterclaim alleges that at the time Travelers issued the three policies, it did not intend to perform "according to the very terms that Travelers specifically intended to include in the [p]olicies." (ECF No. 285-2 ¶ 301). Defendants further allege in support of this counterclaim that "Travelers' intention was to perform only those promises of coverage that Travelers was not seeking to remove via its 'reformation claim.'" (ECF No. 285-1 ¶ 84). Defendants also state that:

> to maintain the "important" American Capital account and Travelers' lucrative relationship with McKee, Travelers issued an e-mail, to be forwarded to American Capital, confirming that American Capital's coverage was "comprehensive" and was based on the express policy and, thus, not based on Travelers' perception of coverage "sought" by American Capital.

(*Id.*).

Next, Plaintiffs assert that the fraud claim is not alleged with the required particularity. The elements of fraud under Maryland law are:

> (1) that the defendant made a false representation to the plaintiff; (2) that its falsity was either known or that the

> representation was made with reckless indifference as to its truth; (3) that the misrepresentation was made for the purpose of defrauding the plaintiff; (4) that the plaintiff relied on the misrepresentation and had the right to rely on it; and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation.

Md. Envtl. Trust v. Gaynor, 370 Md. 89, 97 (2002). In addition to satisfying Rule 8(a), a party asserting fraud is subject to the heightened pleading standard set forth in Rule 9(b). *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999). Rule 9(b) states that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The word "circumstances" is interpreted "to include the 'time, place, and contents of the false representation, as well as the identity of the person making the misrepresentation and what [was] obtained thereby.'" *Superior Bank, F.S.B. v. Tandem Nat'l Mortg., Inc.*, 197 F.Supp.2d 298, 313-14 (D.Md. 2000) (*quoting Windsor Assocs. v. Greenfeld*, 564 F.Supp. 273, 280 (D.Md. 1983)). The purposes of Rule 9(b) are to provide the opposing party with sufficient notice of the basis for the counterclaim, protect against frivolous suits, eliminate fraud actions where all of the facts are learned only after discovery, and safeguard the opposing party's reputation.

Harrison, 176 F.3d at 784. In keeping with these objectives, a "court should hesitate to dismiss a [counterclaim] under Rule 9(b) if the court is satisfied (1) that the [plaintiff] has been made aware of the particular circumstances for which [he] will have to prepare a defense at trial and (2) that [the defendant] has substantial prediscovery evidence of those facts." *Id.*

Plaintiffs contend that **REDACTED**

(ECF No. 307, at 25). Furthermore, Plaintiffs assert that the counterclaim only includes one alleged misrepresentation, which occurred after the issuance of the 2006 policy, in an email from desk underwriter Maureen McEwen when she wrote **REDACTED** [6]

Defendants' fraud counterclaim is sufficiently particularized to survive dismissal. As Defendants point out,

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the promissory fraud counterclaim is premised on the allegation that Travelers included specific terms in *each* of the policies (in 2006, 2007, and 2008) in an effort to obtain American Capital's business, yet Travelers had no intention to perform the express contractual terms. Specifically, the allegations include that "[t]he same terms and conditions that Travelers intended, at the time of policy issuance, to appear in the 2006 Travelers Policies, do appear in the 2006 Travelers Policies." (ECF No. 285-1 ¶ 83). Defendants aver in the proposed counterclaims:

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(*Id.* ¶ 5). According to Defendants, Plaintiffs also provided an optional endorsement, the "Xtend" endorsement, which "promised, on a blanket basis, 'insured' status to any OMI [ownership or majority interest] entities (other than joint ventures) that American Capital had not yet acquired, but which American Capital later does acquire, during the policy period, for a term

of up to 180 days." (*Id.* ¶ 73). Defendants contend, however, that:

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(ECF No. 321, at 19); (*see also* ECF No. 185-1 ¶ 84). The proposed counterclaims also point to testimony and interview comments made by Donald Drennen, the underwriting supervisor for all of the policies at issue:

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(ECF No. 185-1 ¶ 139) (emphasis added); *Orteck Intern. Inc.*, 2006 WL 2572474, at *12 ("Plaintiffs allege that Defendants made promises to Orteck regarding the customer list, with no

intention of keeping them. Hence, such misrepresentations can provide the basis for a fraud claim."). **REDACTED**

These allegations are also sufficient to show fraudulent intent. As Defendants point out, the allegations include that while Travelers was collecting premiums for comprehensive coverage, **REDACTED**

(ECF No. 321, at 22) (emphasis in original). The allegations suggest that Travelers made promises which it did not intend to honor to induce American Capital to accept its bid, recognizing that American Capital rejected an insurance proposal in 2005, that "unlike Travelers' proposals in 2006, 2007, and 2008, proposed to exclude alter ego claims and not to extend coverage to other entities that American Capital had acquired or may acquire in the future." (*Id.*; *see also* ECF No. 285-1 ¶¶ 39, 56, 62-63, 68).[7] Plaintiffs contend that

[7] Plaintiffs also contend that Defendants cannot use Plaintiffs' reformation claim as evidence that Travelers never intended to perform the contractual terms. Defendants'

Defendants raise the promissory fraud counterclaim in an attempt to obtain punitive damages for a pure "contractual dispute over the proper application of insurance policies." (ECF No. 307, at 23). Whether Defendants will ultimately succeed on the promissory fraud counterclaim remains to be seen, but at this stage, the allegations in the proposed third amended counterclaim are sufficiently detailed to state a claim.[8] Based on the foregoing, the promissory fraud counterclaim will proceed at this time.[9]

B. Motions to Seal

Each party has filed motions to seal documents in connection with the two pending motions discussed *supra*. (*See*

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allegations, however, rely on direct correspondence from Travelers and internal emails to show fraudulent intent.

[8] Plaintiffs also assert that the "incredibly detailed" factual allegations in the proposed counterclaim are "demonstrably false." (ECF No. 307, at 23). This argument is unpersuasive as factual disputes cannot be resolved when considering the futility of the proposed amendment. The allegations in the proposed third amended counterclaim must be taken as true.

[9] Alternatively, Plaintiffs argue that the motion for leave to file third amended counterclaims should be deferred pending resolution of Plaintiffs' claims. Defendants object to staying the motion until after dispositive motions are decided, arguing that adjudication of the underlying claims will necessarily involve "Travelers' unclean hands (demonstrated by its fraudulent conduct)." (ECF No. 321, at 29). It does not appear that deferring ruling on the pending motion to amend will streamline the litigation or save any more resources for either the parties or the court. Accordingly, Plaintiffs' request to stay will also be rejected.

ECF Nos. 286, 308, 322). The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004). "The common law presumes a right of the public to inspect and copy 'all judicial records and documents,'" *id.* at 575 (*quoting Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)), although this presumption "can be rebutted if countervailing interests heavily outweigh the public interests in access." *Id.* (*quoting Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–99 (1978). Under this common law balancing analysis, "[t]he party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption." *Rushford*, 846 F.2d at 253. "Ultimately, under the common law[,] the decision whether to grant or restrict access to judicial records or documents is a matter of a district court's 'supervisory power,' and it is one 'best left to the sound discretion of the [district] court.'" *Va. Dep't of State Police*, 386 F.3d at 575 (*quoting Nixon*, 435 U.S. at 598–99) (second alteration in original).

In addition to the public's common law right of access, the First Amendment provides a "more rigorous" right of access for

certain "judicial records and documents." *Va. Dep't of State Police*, 386 F.3d at 576; *see also In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013) (explaining the "significant" distinction between the two rights of access). Where the First Amendment does apply, access may be denied "only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Stone*, 855 F.2d at 180; s*ee also, Doe v. Public Citizen*, 749 F.3d 246, 265-66 (4th Cir. 2014). "For a right of access to a document to exist under either the First Amendment or the common law, the document must be a 'judicial record'" in the first instance. *In re Application*, 707 F.3d at 290. The Fourth Circuit recently held that judicially authored or created documents are "judicial records," as are documents filed with the court that "play a role in the adjudicative process, or adjudicate substantive rights." *Id.* (*citing Rushford*, 846 F.2d at 252; *In re Policy Mgt. Sys. Corp.*, 67 F.3d 296 (4th Cir. 1995) (unpublished table decision)).

Thus, as a substantive matter, when a district court is presented with a request to seal certain documents, it must determine two things: (1) whether the documents in question are judicial records to which the common law presumption of access applies; and (2) whether the documents – if judicial records -

are also protected by the more rigorous First Amendment right of access. *In re Application*, 707 F.3d at 290; *see also Va. Dep't of State Police*, 386 F.3d at 576.

The sealing of any documents filed with the court must also comport with certain procedural requirements. First, the non-moving party must be provided with notice of the request to seal and an opportunity to object. *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984). This requirement may be satisfied by either notifying the persons present in the courtroom or by docketing the motion "reasonably in advance of deciding the issue." *Id. at* 234. In addition, "less drastic alternatives to sealing" must be considered. *Va. Dep't of State Police*, 386 F.3d at 576; *see also* Local Rule 105.11 (requiring any motion to seal to include both "proposed reasons supported by specific factual representations to justify the sealing" and "an explanation why alternatives to sealing would not provide sufficient protection"). Finally, if sealing is ordered, such an order must "state the reasons (and specific supporting findings)" for sealing and must explain why sealing is preferable over its alternatives. *Va. Dep't of State Police*, 386 F.3d at 576.

It is not possible to determine whether the documents at issue satisfy either the common law or First Amendment right of access (or whether any right of access applies at all), because

the three motions to seal do not comply with Local Rule 105.11, which applies to all documents sought to be filed under seal and requires the party seeking sealing to include: "(a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection." To justify sealing, both parties point to the court-approved Stipulated Protective Order (ECF Nos. 112 & 113) and emphasize that all of the materials submitted with the respective filings constitute documents or deposition testimony that are "confidential" pursuant to the Stipulated Protective Order, or include correspondence between counsel for the parties that discuss or reference "confidential" documents or deposition testimony. (ECF No. 286 ¶ 5). Both parties request that the respective filings be sealed to "give force to the Stipulated Protective Order, and thereby to protect from disclosure the parties' confidential information." (ECF No. 322 ¶ 6). Although the parties have attempted to redact portions of the respective filings, the documents are essentially redacted in full, leaving unredacted, if anything, the introductions and conclusions. (*See* ECF Nos. 284-1, 309, 320). Both parties make boilerplate arguments that the referenced confidential material is interspersed throughout the entirety of these documents and as such they are filed under seal. (*See, e.g.,* ECF No. 308 ¶ 6).

Moreover, Defendants have filed the proposed third amended counterclaims (ECF No. 285-1) under seal and have not suggested any redactions.

The undersigned recognizes that there are sensitive matters at issue in this case which could be kept out of the public realm, but the parties have failed to explain why references to case-law or procedural history of this case should be redacted and the parties' submissions indicate that they have not truly explored alternatives to sealing. *See Visual Mining, Inc. v. Ziegler*, No PWG 12-3227, 2014 WL 690905, at *5 (D.Md. Feb. 21, 2014) (denying motion to seal when the only justification was that the documents are "confidential" under a court-approved Protective Order); *Under Armour, Inc. v. Body Armor Nutrition, LLC*, No. JKB-12-1283, 2013 WL 5375444, at *9 (D.Md. Aug. 23, 2013) (denying motions to seal where "[t]he parties . . . provided only the barest support for the motions to seal, usually relying on the protective order issued in th[e] case" and failed to "provide 'specific factual representations' to justify their arguments"); *Butler v. DirectSAT USA, LLC*, 876 F.Supp.2d 560, 577 n.18 (D.Md. 2012) ("In their motion to seal, Plaintiffs state only that they seek to seal the exhibits pursuant to the confidentiality order, an explanation insufficient to satisfy the 'specific factual representations' that Local Rule 105.11 requires.").

Consequently, the motions to seal (ECF Nos. 286, 308, 322) will be denied and the parties will have fourteen (14) days to submit redacted copies of their briefs and accompanying exhibits with justifications for such redactions or explain why nothing less than the redactions they have recommended is appropriate. Furthermore, the court will not undertake to determine whether any portion of this Memorandum Opinion will be filed under seal. Accordingly, the Memorandum Opinion will be filed under seal temporarily, and the parties are directed to review it and suggest jointly within fourteen (14) days from this memorandum opinion any necessary redactions that should be made before it is released to the public docket.

III. Conclusion

For the foregoing reasons, Defendants' motion for leave to file third amended counterclaims will be granted. The motions to seal will be denied, but the parties will have fourteen (14) days to cure the deficiencies. A separate order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge