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AUG 27 2018

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

S.C. SUPREME COURT

ON CERTIFICATION FROM THE FOURTH CIRCUIT COURT OF APPEALS

Upon *Writ of Mandamus* being held in Abeyance to  
The United States District Court  
for  
The District of South Carolina

The Honorable David C. Norton, District Court Judge

Appellate Case No. 2018-001170  
Fourth Circuit Court of Appeals Case No. 18-1401  
District Court Case No. 9:15-cv-00304-DNC

In re: MT. HAWLEY INSURANCE COMPANY.....Petitioner,

in which

CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY  
AND PLANTATION POINT HORIZONTAL PROPERTY REGIME OWNERS  
ASSOCIATION, INC., as assignees are.....Respondents.

RESPONDENT’S MOTION TO RECONSIDER, ALTER, OR AMEND  
THE CERTIFIED QUESTION  
or in the Alternative  
TO RESCIND CERTIFICATION

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COME NOW the Respondents, who, pursuant to Rules 221<sup>1</sup>, 240, and 244, of the South Carolina Appellate Court Rules, do herein petition this Honorable Court for rehearing, or in the alternative, move this Honorable Court to reconsider, alter, or amend the Order issued August 9, 2018, accepting certification from the United States Court of Appeals for the Fourth Circuit of the following interlocutory question:

Does South Carolina law support application of the “at issue” exception to the attorney-client privilege such that a party may waive the privilege by denying liability in its answer?

In this insurance bad faith claim brought by Respondents (*i.e.*, the insureds) against Petitioner (hereinafter “Insurer”), this Honorable Court has misapprehended and overlooked that the question, as written and accepted, is overly broad. So much so that it fails to address the issues pending before the certifying court—to wit, whether South Carolina recognizes the “at issue” exception in the context of an insurance bad faith claim as set out in *City of Myrtle Beach v. United Nat. Ins. Co.*, 2010 U.S. Dist. LEXIS 89725.<sup>2</sup> *Contra* (**Exhibit 4**, p. 6) (Circuit Court of Appeals stating, “if South Carolina law does not support the ‘at issue’ exception **applied in *City of Myrtle***

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<sup>1</sup> Although captioned as a motion, Respondents additionally file the instant motion as Petition for Rehearing pursuant to Rule 221, SCACR, which provides that a petition for rehearing may be had upon any order except one denying a petition for writ of certiorari, provided that the action made by the Court upon the motion or petition has the effect of finally deciding a party’s appeal. Here the Fourth Circuit has—incorrectly—asserted that this Court’s acceptance of the certified question will resolve the appeal pending before it. By accepting certification this Court has made a final determination on Insurer’s contention that an answer to the purported question is controlling of the matter pending in Federal Court and that South Carolina law does not speak to the issue pending therein.

Therefore, and to the extent this Court shall find it proper to treat the instant motion as a petition for rehearing, the same being timely pursuant to Rule 221, this filing is accompanied by the necessary filing fee. This fee being otherwise not necessary. *See* Rule 240(d), SCACR (exempting motions made upon a matter pending on a certified question from a filing fee).

Respondents alternative relief for recession of certification is based upon Rule 244(f), SCACR, (providing this Court with the discretion to withdraw or rescind any certification).

<sup>2</sup> Cited also as *City of Myrtle Beach v. United Nat’l Ins. Co.*, No. 4:08-cv-1183, 2010 WL 3420044,

*Beach*, the [D]istrict [C]ourt’s order granting the motions to compel was erroneous.”) (emphasis added).

### BACKGROUND

On December 22, 2014, Respondents commenced this action against Insurer, an insurance carrier, in the South Carolina Court of Common Pleas for Beaufort County, alleging, *inter alia*, bad faith stemming from Insurer’s failure to defend Respondents. Insurer removed the case to the United States District Court on January 22, 2015, prior to filing an answer in state court. Upon answering in District Court, Insurer admitted both the existence of an insurance contract and that it owed a duty of good faith and fair dealing under its insurance contract. (**Exhibit 1**) (ECF No. 3, ¶ 28). Additionally, and by way of counterclaim, Insurer alleged that it “performed under the insurance contract.” (**Exhibit 1**) (ECF No. 3, ¶ 171). Thus, whether to apply the “at issue” exception here turns on much more than a mere denial of liability as posited by the current phrasing of the Certified Question, which further fails to confine the analysis to a bad faith claim.

Between June 24, 2016, and July 7, 2016, Respondents filed four separate motions to compel production various documents withheld by Insurer on a claim of attorney-client privilege. A hearing was held on these motions before the United States Magistrate Judge on September 19, 2016, and the Magistrate subsequently issued a Report and Recommendation on December 12, 2016, in support of granting Respondents’ motions to compel.

On March 31, 2017, the Honorable David C. Norton, United States District Judge, issued an Order concurring with the Magistrate and granting Respondents’ Motion(s) to Compel, with regard to (1) communication in Insurer’s claim files that Insurer claimed to be privileged; (2) the

discoverability of Insurer's reinsurance and reserves; and (3) whether Respondent had waived certain objections to Insurer's privilege logs.<sup>3</sup> (**Exhibit 2**) (Dkt. 143 – District Court Order).

In the section of its Order entitled “**At-Issue Waiver in the Bad Faith Context**,” the District Court addressed Insurer's waiver of attorney-client privilege by reliance on *City of Myrtle Beach v. United Nat. Ins. Co.*, No. 4:08-cv-1183, 2010 WL 3420044, which addresses the waiver of attorney-client privilege **in the context of a bad faith claim against an insurer**. See (**Exhibit 2** at p. 5, § “A”) (emphasis added). The District Court additionally cited to a long line of District Court rulings in South Carolina, which have applied the reasoning of *City of Myrtle Beach* and reached the same conclusion. The fact that the issue arose in the context of a bad faith claim against an insurer was front and center to the District Court's analysis as well as the analysis of the authorities on which it relied. (*Id.*)

To further support the waiver of privilege **in the limited context of a bad faith claim**, the District Court also determined that Respondents had set forth a *prima facie* showing of Insurer's bad faith—although not specifically ruling this was necessary. **However, the District Court did not order the production of the allegedly privileged material, but instead required that the same be turned over for *in camera* review for determination by the Court of the material's relevance**. See (*Id.*) (emphasis added). This *in camera* review has yet to occur.

Thereafter, Insurer unsuccessfully moved before the District Court for reconsideration and later for certification of four separate questions to this Court. After denial of these motions, Insurer sought a *Writ of Mandamus* with the Circuit Court of Appeals and moved that court for certification of the instant question. This Court's August 9, 2018 Order followed.

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<sup>3</sup> The District Court addressed additional issues not germane hereto.

## ARGUMENT

**This Court must alter or amend the wording of the certified question to be limited to the context of a bad faith claim in which the insured has made a prima facie showing of Insurer's bad faith, or alternatively rescind its grant of certification.**

The question, as written in this Court's Order, is *far* too broad. The clear purpose for certification here is to resolve whether South Carolina would follow application of the "at issue" exception as set out in *City of Myrtle Beach*. The Circuit Court of Appeals plainly states; "if South Carolina law does not support the 'at issue' exception applied in *City of Myrtle Beach*, the [D]istrict [C]ourt's order granting the motions to compel was erroneous." (**Exhibit 4** at p. 6) (emphasis added).

However, the current wording of the Certified Question overlooks that the analysis, rationale, and holding of *City of Myrtle Beach*, are all explicitly constrained to the context of an insurance bad faith claim. See *City of Myrtle Beach v. United Nat'l Ins. Co.*, 2010 U.S. Dist. LEXIS 89725, at 7-23 (conducting a survey of those jurisdictions providing for a "per se" waiver of privilege in the context of a bad faith claim, and ultimately declining this approach in favor of that set out in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)). More specifically, the *City of Myrtle Beach*, in weighing the policy implications of privilege against "the conflicting policies [that] exist in a **bad faith claim**," found the facts, together with a *prima facie* showing of bad faith by the insured, as well as the allegations set forth in the insurer's pleadings all supported a finding of waiver. *Id.* at 12. However, this is wholly inconsistent with the present wording of the question, which fails to account for *any* of these considerations. Without amending the broad wording of the question to limit the analysis to a bad faith claim and to give consideration to Respondents' *prima facie* showing of Insurer's bad faith, the present question simply cannot compel an answer to whether South Carolina would follow *City of Myrtle Beach*, and its progeny. Nor can it address

the more fundamental question of whether the District Court's ruling is consistent with South Carolina law.

The instant question seemingly inquires whether attorney-client privilege is waived—in *toto*—by a party, in *any* type of action, who merely denies certain allegations in response to a complaint. However, this is not the scenario presented in this case. First, the “at issue” waiver in this case arises in the limited and special context of a bad faith claim. Second, the Insurer went far beyond a mere denial of liability in its Answer, affirmatively alleging it complied with all its duties, including its duties of good faith and fair dealing, under a valid contract for insurance. By failing to address these additional relevant factors that were found to be controlling by the District Court, the question here is impossibly broad. By suggesting that the mere act of answering—in *any* case as opposed to a bad faith case—would waive attorney-client privilege turns the inquiry away from whether South Carolina would follow *City of Myrtle Beach*, and onto something else entirely. This is neither what was argued (by any party) nor what was (or is to be) considered by the Federal Court. See (**Exhibit 4** at p. 6) (Circuit Court of Appeals stating the matter turns on whether South Carolina follows *City of Myrtle Beach*).

It cannot be disputed that South Carolina has acknowledged that privilege can be waived. See *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526, 530 (2010); *State v. Doster*, 284 S.E.2d 218 (1981); *Floyd v. Floyd*, 615 S.E.2d 465, 483 (S.C. Ct. App. 2005) (citing *South Carolina State Highway Dep't v. Booker*, 195 S.E.2d 615, 620 (S.C. 1973)) (all confirming that attorney-client privilege is not absolute, but waivable, and the burden is on the party claiming privilege to demonstrate the absence of waiver). However, the inquiry is not constrained to the pleadings but instead one of **fact**. See *State v. Love*, 271 S.E.2d 110, 112 (S.C. 1980) (“Whether a communication is privileged is for the trial judge to decide in the light of a preliminary **inquiry**

into all of the facts and circumstances . . . .”) (emphasis added). Thus, whether South Carolina acknowledges an “at issue” waiver—or any waiver—cannot be considered in a vacuum but must necessarily account for the facts and circumstances in which the alleged waiver arises.<sup>4</sup> *Id.* The question here however, allows for no such consideration.

Further, because waiver is well recognized and established in South Carolina, the presumably novel concept of the “at-issue” waiver<sup>5</sup> cannot therefore arise in *all* scenarios but must necessarily be limited to the specific context of a bad faith action as brought here. Yet, as written, the question fails to account for either the nature of the underlying cause of action (i.e., Insurer’s bad faith) or the nature of the material that is subject to the purported claim of privilege (i.e., Insurer’s claims file and information relative to the denial of this claim)<sup>6</sup>. Nor does it consider Insurer’s allegation that it fulfilled its duties under the insurance contract—*i.e.*, acted in good faith. This is paramount because unlike other causes of action, an insurance bad faith claim directly involves what the defendant insurer knew, and when it knew it. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994) (“Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim”); *see generally, Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n*, 947 S.C. 642, 649,

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<sup>4</sup> Respondents do not concede that South Carolina has not adopted the “at-issue” waiver, a concept no different than what is often referred to as “opening the door.” This State has plainly recognized that a waiver results when the facts demonstrate a party’s actions have made the material relevant. *See Floyd*, 615 S.E.2d at 484 (confirming that waiver results when a party claiming privilege has made the material relevant and finding a waiver because the claiming party’s testimony opened the door to admission of the privileged communications). The “at-issue” waiver is nothing more than a different name for well-established principle. For this reason, Respondents, additionally or alternatively, suggest that this Court should, in its discretion withdraw its Order granting certification. *See* Rule 244(f), SCACR (this Court has the discretion to withdraw or rescind its certification).

<sup>5</sup> Respondents do not concede the “at-issue” waiver is novel. *See supra* at n. 4.

<sup>6</sup> Respondents point out that the “privileged” nature of this material has never been established. Insurer takes this for granted and simply presumes it to be privileged. Although the District Court ordered the material be subjected to *in camera* review that review has not yet occurred.

557 S.E.2d 670, 674 (2001) (recognizing that a bad faith claim lies against an insurance carrier for the failure to make an honest and informed judgment in processing a claim, and where there is no reasonable basis supporting the coverage decision, or when it fails to settle within policy limits if settlement is the reasonable thing to do).

This is a scenario *unique* to an insurance bad faith claim and implicates considerations that simply do not exist in the context of all cases or causes of action.<sup>7</sup> Thus, any question this Court may be inclined to consider must necessarily account for this. However, the question here overlooks this fundamental distinction and therefore, should be rewritten.

The notion that a proper certified question must be considered in the context of a bad faith claim cannot reasonably be disputed. In fact, Insurer has acknowledged this. Although the wording of the present question was advanced by Insurer before the Circuit Court of Appeals, this is not at all how Insurer phrased its proposed certified question(s) when the issue was first broached with the District Court. Tellingly, Insurer suggested certification was necessary on two separate questions: (1) “Does an **insurance company** waive its attorney-client privilege, under South Carolina law, by answering a complaint for **bad faith** and denying liability?” and (2) “Does an **insurance company** lose its attorney-client privilege, under South Carolina law, if its **opponent can make a prima facie showing of ‘bad faith’?**” (Exhibit 3 at p. 1) (Dkt. 144 p. 1) (emphasis added).<sup>8</sup>

Not only do the questions Insurer proposed to the District Court acknowledge the importance of this matter being an insurance bad faith claim, but also makes clear that the true

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<sup>7</sup> The District Court likewise addressed waiver within the context of a bad faith claim—not waiver generally. See (Exhibit 3 at p. 5, § “A”) (Titling its analysis of the issue as “**At-Issue Waiver in the Bad Faith Context.**”) (bold original).

<sup>8</sup> Insurer suggested certification on two unrelated questions as well.

dispute here—if any—is not the effect the pleadings have on an asserted privilege, but rather the effect of the **facts**—*i.e.*, Respondents’ *prima facie* showing of bad faith.

Finally, the question, as written, fails to account for the undisputed fact that Insurer went well beyond merely “denying liability” and instead separately asserted a *counterclaim* against Respondents in which it affirmatively alleges to have “performed under the insurance contract.” (**Exhibit 1**) (ECF No. 3, ¶ 171). Having admitted in its answer that it owed a duty of good faith and fair dealing under the insurance contract and having affirmatively alleged it satisfied this duty, Insurer has introduced the issue into this matter, making the material relevant and discoverable. *See Floyd*, 615 S.E.2d at 484 (finding waiver because testimony opened the door to privileged communications). However, the question here ignores this, instead focusing solely on the effects of the *denials* made in the answer without considering Insurer’s additional affirmative allegations or counterclaims. To preclude waiver simply based on the pleadings not only ignores the factual nature of the inquiry but likewise has the practical effect of shifting the burden of establishing privilege and lack of waiver from the Insurer to Respondent. *Contra e.g., Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d at 530 (confirming the burden of establishing privilege is on the asserting party). Thus, this Court has overlooked that the question here fails to consider the effect (if any) of the answer as a whole in light of the counterclaims and affirmative assertions made therein. By broadly hypothesizing an answer, which consists of nothing more than general denials, the Court overly generalizes the circumstances in which this certified question arises.

Therefore, Respondents respectfully request this Court amend the wording of the question by limiting it to the context of a bad faith claim against an insurance carrier in which the Insurer (*i.e.*, defendant) has alleged in the pleadings a satisfaction of its contractual duties, and where Respondents (*i.e.*, the insured/plaintiff) have made a *prima facie* showing of the insurer’s bad faith.

Insurer concedes as much, *see* (**Exhibit 3** at p. 1) (Dkt. 144 p. 1) (acknowledging, through the certified questions proposed to the District Court that due consideration must be given to the bad faith nature of the claim and the Respondent’s prima facie showing of bad faith), and the Circuit Court of Appeals has demonstrated the need for the same. *See* (**Exhibit 4** at p. 6) (stating the matter turns on whether South Carolina follows *City of Myrtle Beach*).

Alternatively, if this Court is not inclined to amend the wording of the question as set forth herein, Respondents herein request that this Court exercise its discretion pursuant to Rule 244(f), SCACR, and rescind its certification. First, the question as written cannot be determinative of the cause. *See infra.*, and (**Id.**) (Circuit Court of Appeals stating the matter turns on whether South Carolina follow *City of Myrtle Beach*); *contra* Rule 244(a), SCACR (establishing that certification should be limited to those circumstances where the question is likely to be “determinative of the cause” pending before the certifying court).

Second, the question as written presents a question of fact, not law, and therefore is not proper for certification. *See* Rule, 244, SCACR (“the Supreme Court in its discretion may answer questions of *law* certified to it by [another court]”) (emphasis added). It cannot be disputed that waiver is a factual inquiry. *See Love*, 271 S.E.2d at 112 (“Whether a communication is privileged is for the trial judge to decide in the light of a preliminary **inquiry into all of the facts and circumstances . . .**”) (emphasis added).

Here, the District Court’s finding of waiver is grounded in fact; *to wit* the finding that Respondents made a *prima facie* showing of Insurer’s bad faith. This cannot be changed by this Court and stands as an independent sustaining basis since the question as written makes no consideration for factual finding. Thus, any answer to the question as written—no matter what that answer might be—is without consequence because whether privilege might be waived by a

denial in the answer cannot preclude waiver from being additionally found upon the **facts** as the District Court did here. See (**Exhibit 2**).


Therefore, if not amended, the answer to the instant question—whatever it may be—cannot be germane to, or dispositive of, the matter from which the question arises and threatens to needlessly undermine or alter the law of this State though a mere advisory opinion. *Contra e.g., Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992) (when answering certified questions, this court will not issue advisory opinions nor alter precedent based on questions presented in the abstract).

### CONCLUSION

For the reasons stated herein, this Court should amend the question as set forth in its August 9, 2018 Order,<sup>9</sup> or in the alternative, withdraw its certification.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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<sup>9</sup> Quite simply, the question here could be rephrased to inquire whether South Carolina follows *City of Myrtle Beach* and its progeny regarding the waiver of attorney-client privilege in the context of an insurance bad faith claim, in a manner like that reflected below:

Does South Carolina law support application of the “at issue” exception to the attorney-client privilege **in a bad faith action against an insurer, in accordance with the holding and analysis in *City of Myrtle Beach*?**

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THE STATE OF SOUTH CAROLINA  
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S.C. SUPREME COURT

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In re: MT. HAWLEY INSURANCE COMPANY.....Petitioner,

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CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY AND PLANTATION POINT  
HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC.,  
as assignees are .....Respondents

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**INDEX OF EXHIBITS FOR**

RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND  
THE CERTIFIED QUESTION  
or in the Alternative  
TO RESCIND CERTIFICATION

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**Exhibit 1** – Petitioner's Answer and Counterclaim (ECF Dkt. No. 3)

**Exhibit 2** – United States District Court Order (ECF Dkt. No. 143)

**Exhibit 3** – Petitioner's Motion to Reconsider and/or for Certification of Question (ECF Dkt. No. 144).

**Exhibit 4** – Amended Order of the Fourth Circuit Court of Appeals, Certifying a Question (ECF Dkt. No. 27-2)

**THE STATE OF SOUTH CAROLINA  
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CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY AND PLANTATION POINT  
HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC.,  
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**EXHIBIT 1**

RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND  
THE CERTIFIED QUESTION  
or in the Alternative  
TO RESCIND CERTIFICATION

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
BEAUFORT DIVISION

ContraVest, Inc., ContraVest Construction	)	Civil Action No.: 9:14-cv-304-SB
Company, and Plantation Point Horizontal	)	
Property Regime Owners Association, Inc.	)	
As Assignee	)	
Plaintiffs,	)	
vs.	)	<b>ANSWER &amp; COUNTERCLAIM</b>
	)	
Mt. Hawley Insurance Company	)	
	)	
Defendant.	)	
_____	)	

Mt. Hawley Insurance Company (“Mt. Hawley”), by and through its undersigned counsel, answers the Complaint of the Plaintiffs Plantation Point Horizontal Property Regime Owners Association, Inc. (“PPPRO”) ContraVest, Inc., and ContraVest Construction Company (collectively referred to as “ContraVest”) and brings its Counterclaim as follows:

1. Each and every allegation not specifically admitted or otherwise explained herein is denied.
2. Mt. Hawley admits the allegations of paragraph 1 on information and belief.
3. In response to the allegations of paragraph 2, Mt. Hawley admits on information and belief that PPPRO is a South Carolina corporation organized pursuant to the South Carolina Property Regime Act and that it purports to hold a judgment against and assignment of rights from ContraVest.
4. In response the allegations of paragraph 3, Mt. Hawley responds that it is an insurance company organized and existing under the laws of the State of Illinois with its principal place of business in the State of Illinois.
5. In response to the allegations of paragraph 4, Mt. Hawley responds that it is a surplus lines carrier and does issue policies in Florida and South Carolina.

6. Mt. Hawley admits the allegations of paragraphs 5 and 6.
7. In response to paragraph 7, Mt. Hawley states there is a controversy over coverage related to the Plantation Point Project in Beaufort County, South Carolina.
8. In response to the allegations of paragraph 8, Mt. Hawley alleges that jurisdiction is proper in the United States District Court for the District of South Carolina.
9. In response to paragraph 9, Mt. Hawley hereby repeats and realleges the foregoing responses as if fully restated herein.
10. In response to the allegations of paragraph 10, Mt. Hawley admits PPPRO filed suit September 16, 2011 and further responds that the action speaks for itself.
11. In response to the allegations of paragraph 11, Mt. Hawley admits "Exhibit 1" is the Fifth Amended Complaint and further responds that the action speaks for itself.
12. In response to the allegations of paragraph 12, Mt. Hawley denies all available underlying coverage has been exhausted and demands strict proof thereof. Mt. Hawley further denies that it has any duty to defend or indemnify Plaintiffs.
13. Mt. Hawley denies the allegations of paragraph 13.
14. In response to the allegations of paragraph 14, Mt. Hawley admits only that ContraVest made demand for coverage and denies the remaining allegations.
15. In response to the allegations of paragraph 15, Mt. Hawley admits that it did not contribute to the defense or indemnity. The remaining allegations of paragraph 15 are denied.
16. In response to the allegations of paragraph 16, Mt. Hawley admits ContraVest made demand on Mt. Hawley. The remaining allegations of paragraph 16 are denied.
17. In response to the allegations of paragraph 17, Mt. Hawley admits that its counsel sent the letter attached as Exhibit 2 to Plaintiffs' complaint. The remaining allegations of paragraph

17 are denied.

18. In response to the allegations of paragraph 18, Mt. Hawley, on information and belief, admits ContraVest confessed judgment to PPPRO and assigned its right to make a claim against Mt. Hawley to PPPRO. The remaining allegations of paragraph 18 are denied. In further response, Mt. Hawley craves reference to the confession of judgment and settlement documents themselves.

19. Mt. Hawley denies the allegations of paragraphs 19, 20, 21, and 22.

20. In response to the allegations of paragraph 23, Mt. Hawley admits that it received premiums from ContraVest. The remaining allegations of paragraph 23 are denied.

**PLAINTIFFS' CLAIM FOR DECLARATIVE RELIEF**

21. In response to paragraph 24, Mt. Hawley hereby repeats and realleges the foregoing responses as if fully restated herein.

22. In response to the allegations of paragraph 25, Mt. Hawley admits that Plaintiffs claim to bring this action against Mt. Hawley pursuant to S.C. Code Ann. §15-53-10, *et seq.*

23. Mt. Hawley admits the allegations of paragraph 26.

24. In response to the allegations of paragraph 27, Mt. Hawley admits that Plaintiffs contend Mt. Hawley has a duty to defend and indemnify with regard to the underlying action, but denies any such duties are owed.

25. In response to the allegations of paragraph 28, Mt. Hawley states that ContraVest purported to assign its claims to PPPRO and that PPPRO claims an interest in this proceeding.

26. Mt. Hawley denies the allegations of paragraphs 29 and 30.

**PLAINTIFFS' CLAIM FOR BAD FAITH**

27. In response to paragraph 31, Mt. Hawley hereby repeats and realleges the foregoing

responses as if fully restated herein.

28. Mt. Hawley admits the allegations of paragraphs 32 and 33.

29. Mt. Hawley denies the allegations of paragraphs 34, 35, 36, 37 and 38, including all subparts.

**PLAINTIFFS' CLAIM FOR BREACH OF CONTRACT**

30. In response to paragraph 39, Mt. Hawley hereby repeats and realleges the foregoing responses as if fully restated herein.

31. Mt. Hawley admits the allegations of paragraph 40.

32. In response to the allegations of paragraph 41, Mt. Hawley responds that the policies do contain the "Ultimate net loss" provision as quoted by Plaintiffs. Mt. Hawley further responds that coverage is subject to all applicable provisions of the excess policies and craves reference to the policies themselves.

33. Mt. Hawley denies the allegations of paragraph 42.

34. Mt. Hawley admits the allegations of paragraph 43.

35. Mt. Hawley denies the allegations of paragraphs 44, 45, and 46.

**PLAINTIFFS' CLAIM FOR UNJUST ENRICHMENT**

36. In response to paragraph 47, Mt. Hawley hereby repeats and realleges the foregoing responses as if fully restated herein.

37. In response to the allegations of paragraph 48, Mt. Hawley admits that it charged premium and was paid for the risk for which there was application for coverage.

38. Mt. Hawley denies the allegations of paragraph 49.

**FOR A SECOND DEFENSE**

39. Plaintiffs have not alleged facts sufficient to state a claim against Mt. Hawley upon which

relief can be granted.

**FOR A THIRD DEFENSE**

40. The complaint is barred in whole or in part by the terms, conditions, limitations, and/or exclusions contained in Mt. Hawley excess insurance contract number MXL0356978, excess insurance contract number MXL0359180, excess insurance contract number MXL0359627, and excess insurance contract number MXL0265074.

**FOR A FOURTH DEFENSE**

41. The coverage afforded under each of the Mt. Hawley excess insurance contracts, except where provisions to the contrary appear therein, are each subject to all of the conditions, agreements, exclusions and limitations of and shall follow the "underlying insurance" in all respects. To the extent, therefore, that any liability, loss, damage or obligation is not covered under the terms of the "underlying insurance," such would not be covered under the terms of the Mt. Hawley excess insurance contracts.

**FOR A FIFTH DEFENSE**

42. Plaintiffs have failed to allege facts sufficient to impose any duty on Mt. Hawley's part to defend ContraVest pursuant to the Mt. Hawley excess insurance contracts in the Underlying Action. The Mt. Hawley excess insurance contracts do not obligate Mt. Hawley to assume charge of, or to participate in, the settlement or defense of any claim made, or suit brought, or proceedings instituted, against the insured.

**FOR A SIXTH DEFENSE**

43. Plaintiffs have failed to allege facts sufficient to impose any duty on Mt. Hawley's part to indemnify Plaintiffs for any claims made against it in the Underlying Action pursuant to the Mt. Hawley excess insurance contracts. There exists no underlying judgment,

settlement or other obligation upon which any indemnity obligation could be premised, in an amount in excess of all underlying, primary and other, nor has coverage been established for any such liabilities.

**FOR A SEVENTH DEFENSE**

44. Under the Mt. Hawley excess insurance contracts, Mt. Hawley agreed to pay on behalf of the insured the insured's "ultimate net loss" subject to all terms, conditions, limitations, and exclusions of the contracts. "Ultimate net loss" is defined as "all sums actually paid, or which the insured is legally obligated to pay, as damages in satisfaction of claims or suits for which insurance is afforded under this policy, after proper deduction for all recoveries or salvage." There is no coverage under the Mt. Hawley excess insurance contracts to the extent the Complaint is premised on coverage that does not come within the scope of the coverage grant or satisfy the definition of ultimate net loss.

**FOR AN EIGHTH DEFENSE**

45. The Mt. Hawley excess insurance contracts apply only in excess of all underlying, primary and other insurance. There is no coverage under the Mt. Hawley excess insurance contracts unless and until all underlying, primary and other insurance has been exhausted by payment of the limits of liability of such insurance.

**FOR A NINTH DEFENSE**

46. The Mt. Hawley excess insurance contracts apply only to "ultimate net loss" if such loss results from an "occurrence" that takes place during the policy period. There is no coverage to the extent the underlying loss arises from any cause that is not an "occurrence" or takes place prior to or subsequent to any Mt. Hawley policy period. The underlying Axis policies define "occurrence" to mean "an accident, including continuous or repeated exposure to

substantially the same general harmful conditions."

**FOR A TENTH DEFENSE**

47. The Mt. Hawley excess insurance contracts apply only to liability resulting from "property damage" that occurs during the policy period, per the terms of the underlying insurance. There is no coverage to the extent the underlying loss is not caused by "property damage" as that term is defined in the insurance contracts, or to the extent that any damage takes place prior to or subsequent to any Mt. Hawley policy period.

**FOR AN ELEVENTH DEFENSE**

48. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to real property owned or occupied by or rented to an insured, used by an insured, or in the care, custody or control of an insured or as to which an insured is for any purpose exercising physical control.

**FOR A TWELFTH DEFENSE**

49. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to the extent such is excluded under any of the business risk and related exclusions contained in the underlying Axis insurance contract that may apply (including exclusions j ("Damage to Property"), k ("Damage to Your Product"), l ("Damage to your Work", m ("Damage to Impaired Property or Property Not Physically Injured"), & n ("recall of Products, Work or Impaired Property"), as set forth and defined thereunder). Likewise, the Mt. Hawley excess insurance contracts exclude coverage to the extent the Axis underlying insurance so provides, for "contractual liability" (exclusion b, as set forth and defined thereunder).

**FOR A THIRTEENTH DEFENSE**

50. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to the extent such is excluded under any of the exclusionary endorsements contained within the underlying Axis insurance contract that may apply. Exclusions found on one or more of the underlying insurance contracts of Axis insurance include those for "Fungi or Bacteria," "Exterior Insulation Finish Systems (EIFS)", and for "Known Injury or Damage."

**FOR A FOURTEENTH DEFENSE**

51. The complaint is barred as, in breach of the excess insurance contracts, ContraVest confessed judgment to PPPRO in the Underlying Action, despite having valid defenses to PPPRO's claims and despite its expert opinion regarding PPPRO's damages.

**FOR A FIFTEENTH DEFENSE**

52. The complaint is barred to the extent that ContraVest failed to satisfy the conditions under the Mt. Hawley excess insurance contracts.

**FOR A SIXTEENTH DEFENSE**

53. The complaint is barred, in whole or in part, to the extent that ContraVest negligently or intentionally failed to disclose, concealed, or misrepresented facts that were material, and that were known to the insured to be material, to the risks assumed by Mt. Hawley.

**FOR A SEVENTEENTH DEFENSE**

54. The Mt. Hawley excess insurance contracts require ContraVest to provide Mt. Hawley with prompt written notice of an occurrence that may result in a claim under the written notice of a claim or suit if a claim is made or a suit is brought against the insured and to cooperate with Mt. Hawley in its investigation of the claim or suit. To the extent that ContraVest had

notice of the Underlying Action and failed to give timely written notice to Mt. Hawley, no coverage exists for the claims made in the Underlying Action.

**FOR A EIGHTEENTH DEFENSE**

55. To the extent that the insured failed to mitigate, minimize, or avoid any damages allegedly sustained, recovery against Mt. Hawley, if any, must be reduced by that amount.

**FOR A NINETEENTH DEFENSE**

56. Each of the Mt. Hawley excess insurance contracts provides coverage, if at all, only up to specified occurrence and/or aggregate limits. The contracts provide coverage for any claims or losses referred to in the complaint, if at all, only to the extent of such limits.

**FOR A TWENTIETH DEFENSE**

57. The complaint is barred to the extent of any financial obligations or monetary payments made by ContraVest or incurred on its behalf, without the consent of Mt. Hawley.

**FOR A TWENTY-FIRST DEFENSE**

58. The complaint is barred to the extent that Mt. Hawley's subrogation rights in this matter may have been impaired by the insured by the release of the Participating Insurers.

**FOR A TWENTY-SECOND DEFENSE**

59. The complaint is barred to the extent that Mt. Hawley's obligations have been released, waived, or otherwise discharged.

**FOR A TWENTY-THIRD DEFENSE**

60. Coverage under the Mt. Hawley excess insurance contracts may be barred in whole or in part by the equitable doctrines of laches, unclean hands, waiver, and equitable estoppel. To the extent that these equitable doctrines are applicable, the complaint is barred.

**FOR A TWENTY-FOURTH DEFENSE**

61. To the extent that coverage, if any, is found under any of the Mt. Hawley excess insurance contracts, Mt. Hawley is entitled to have such loss equitably apportioned among all insurers and insurance contracts also affording coverage for such loss.

**FOR A TWENTY-FIFTH DEFENSE**

62. There is no coverage to the extent that some or all of PPPRO's damages in the Underlying Action are barred by the applicable statutes of limitations and/or repose.

**FOR A TWENTY-EIGHTH DEFENSE AND BY WAY OF  
COUNTERCLAIM FOR DECLARATORY RELIEF**

63. This is an action for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 for the purpose of determining an actual controversy between the parties.

64. This controversy involves the issue of insurance coverage availability for defects allegedly arising out of the construction and development of units and common areas at Plantation Point ("the Project"), a condominium community.

65. Construction of the Project by ContraVest as an apartment complex began in 1997 and was completed in 1999. The apartment complex was thereafter converted to condominiums in 2005.

66. ContraVest was not involved in any way in the conversion from apartments to condominiums.

67. PPPRO filed a lawsuit against, *inter alia*, ContraVest Construction Co. a/k/a ContraVest Builders and ContraVest, Inc. ("ContraVest") in the form of "Exhibit 1" to Plaintiffs' Complaint. (the "Underlying Action").

68. PPPRO entered into a settlement with ContraVest and alleged affiliates of ContraVest, ContraVest Development Partners, LLC, ContraVest Management Company, Gerald

Ogier, Mark Ogier, Steven Ogier, John Schaffer, and Center Contracting Company of Central Florida, LLC, d/b/a ContraVest Builders (hereinafter "ContraVest Affiliates").

69. PPPRO was paid a total of \$3,300,000.00 by ContraVest's participating insurers, as defined in "Exhibit A" to this action in order to settle the claims stated in the Underlying Action. "Exhibit A" is the Settlement Agreement entered into by PPPRO with ContraVest, ContraVest's Affiliates and participating insurers.
70. PPPRO performed some level of due diligence with regard to coverage before entering into the settlement attached as "Exhibit A."
71. Scottsdale Insurance Company ("Scottsdale") insured ContraVest for the years 1996 to 1998.
72. Scottsdale was a primary insurer of ContraVest.
73. Scottsdale policy limits in 1996/1997 were in excess of \$15,000.
74. Scottsdale policy limits in 1997/1998 were in excess of \$15,000.
75. Scottsdale paid \$15,000 to settle its liability under its policies and that of ContraVest.
76. Reliance Insurance Company ("Reliance") insured ContraVest for the period 1998/1999.
77. Reliance was a primary insurer of ContraVest.
78. Reliance was insolvent at the time of the settlement.
79. Reliance policy limits were in excess of \$0.
80. Reliance paid nothing to PPPRO.
81. U.S. Fire Insurance Company and Crum & Forester ("US Fire") insured ContraVest from 1999 to 2001.
82. US Fire was a primary insurer of ContraVest.
83. US Fire policy limits in 1999/2000 were in excess of \$200,000.

84. US Fire policy limits in 2000/2001 were in excess of \$200,000.
85. US Fire policy limits in 2001/2002 were in excess of \$200,000.
86. US Fire paid \$200,000 to settle its liability under its policies and that of ContraVest.
87. Great America Insurance Company ("Great American") insured ContraVest for the years 1999 to 2002.
88. Great American was either an umbrella or excess carrier for ContraVest.
89. Great American policy limits in 1999/2000 were in excess of \$200,000.
90. Great American policy limits in 2000/2001 were in excess of \$200,000.
91. Great American policy limits in 2001/2002 were in excess of \$200,000.
92. Great American paid \$200,000 to settle its liability under its policies and that of ContraVest.
93. AIG provided coverage in the year 2002/2003.
94. AIG was an excess or umbrella carrier for ContraVest.
95. AIG policy limits were in excess of "\$0."
96. AIG paid nothing to settle its liability under its policies and that of ContraVest.
97. Gemini Insurance Company ("Gemini") provided insurance for ContraVest during the policy year 2002/2003.
98. Gemini policy limits were in excess of \$250,000.
99. Gemini provided primary coverage to ContraVest.
100. Gemini Insurance Company paid \$250,000 to settle its liability under its policies and that of ContraVest.
101. Clarendon Insurance Company ("Clarendon") provided insurance during the policy year 2002/2003.

102. Clarendon policy limits were in excess of \$75,000.
103. Clarendon provided primary coverage for ContraVest.
104. Clarendon paid \$75,000 to settle its liability under its policies and that of ContraVest.
105. Arch Insurance Company (“Arch”) provided coverage for the year 2002/2003.
106. Arch policy limits were in excess of \$0.
107. Arch provided excess or umbrella coverage for ContraVest.
108. Arch paid nothing on account of its insurance coverage of ContraVest.
109. Arch Insurance Company was not a “Participating Insurer” in the Settlement Agreement. (Exhibit A)
110. Axis Surplus Insurance Company (“Axis”) provided coverage for the years 2003 to 2007.
111. Axis provided primary coverage for ContraVest.
112. Axis limits in 2003/2004 were \$1,000,000 with a \$2,000,000 aggregate limit.
113. Axis limits in 2004/2005 were \$1,000,000 with a \$2,000,000 aggregate limit.
114. Axis limits in 2005/2006 were \$1,000,000 with a \$2,000,000 aggregate limit.
115. Axis limits in 2006/2007 were \$1,000,000 with a \$2,000,000 aggregate limit.
116. Axis paid \$616,666 to PPPRO to settle its liability under its policies and that of ContraVest.
117. PPPRO and ContraVest alleged coverage for the Underlying Action under policies issued by Mt. Hawley: MXL0356978, MXL0359180, MXL0359627, and MXL0365074 for the years 2003/2004, 2004/2005, 2005/2006, and 2006/2007.
118. Mt. Hawley was an excess carrier for ContraVest.

119. Mt. Hawley was a non-participating insurer.
120. Zurich Insurance Company (“Zurich”) provided coverage for 2002-2003, 2007 to 2011.
121. Zurich provided primary coverage for ContraVest.
122. Zurich policy limits for 2007-2011 were in excess of \$1,563,000.
123. Zurich paid \$1.563 million to release these policies and year 2002/2003 and to release ContraVest.
124. Zurich Insurance Company was not a “Participating Insurer” in the settlement.  
(Exhibit A)
125. Everest Insurance Company (“Everest”) provided coverage in the year 2006/2007 and 2008/2009.
126. Everest coverage was either excess or umbrella.
127. Everest policy limits for 2007/2008 were in excess of \$450,000.
128. Everest policy limits for 2008/2009 were in excess of \$450,000.
129. Everest paid \$450,000 to settle its policies and the liability of ContraVest.
130. AIG Specialty Insurance Company f/k/a Chartis and f/k/a American International Specialty (“AIG”) provided coverage in the years 2009/2010 and 2010/2011.
131. AIG coverage was either excess or umbrella.
132. AIG policy limits in 2009/2010 were in excess of \$0.
133. AIG policy limits in 2010/2011 in excess of \$0.
134. PPPRO received a confession of judgment from ContraVest, Inc., ContraVest Construction Company, Ashley Plantation Limited Partnership and Ashley Plantation Development Corporation. (Exhibit B).

135. The Confession of Judgment was executed on May 5, 2014 and in the amount of \$9,000,000. (Exhibit B).
136. The Confession of Judgment did not include any claims for which any insurer may have a right to contribution or indemnity against ContraVest or any related entity, or individual.
137. As part of the settlement, PPPRO received an assignment of ContraVest's claims against the non-participating insurers.
138. Excluded from the assigned claims are any claims that would also be covered under any insurance policy issued by any of the "Participating Insurers."
139. Plaintiffs do not have claims against the "Participating Insurers."
140. The Assignment gave to PPPRO to the exclusion of ContraVest the legal power and right to prosecute, compromise, settle, assign or otherwise control the assigned claims.
141. PPPRO alleges it is the real party in interest to claims against Mt. Hawley.
142. PPPRO and the Class Representatives requested Court approval of the Settlement Agreement together with other settlements totaling \$12,015,000.
143. The Court approved the settlements totaling \$12,015,000, attached as "Exhibit C."
144. The funds payable pursuant to "Exhibit A" have been paid.
145. The funds the subject of "Exhibit A" have been disbursed pursuant to the Court's Order.
146. Mt. Hawley issued to ContraVest excess insurance contract number MXL0356978, in effect from July 21, 2003 through July 21, 2004, excess insurance contract number MXL0359180, in effect from July 21, 2004 through July 21, 2005, excess insurance contract number MXL0359627, in effect from July 21, 2005 through July 21, 2006, and

excess insurance contract number MXL0265074, in effect from July 21, 2006 through July 21, 2007.

147. Coverage A of the policies affords coverage for property damage liability on behalf of the insured that is otherwise covered under the policy. The Insuring Agreement states:

**INSURING AGREEMENT**

**A. Coverage**

Subject to the other provisions of this policy, we will pay on behalf of the insured the insured's ultimate net loss if such loss results from an occurrence insured by the policies designated in the Declarations as underlying insurance. However, the insurance afforded by this policy shall apply: (a) only in excess of the underlying insurance; (b) only after the underlying insurance has been exhausted by payment of the limits of liability of such insurance; and (c) only if caused by an occurrence which takes place during the policy period and anywhere in the world; provided however, if suit is brought, such suit is brought in the United States, its territories or possessions, or Canada. If the underlying insurance does not pay a loss, for reasons other than exhaustion of an aggregate limit of liability, then we shall not pay such loss.

This policy, except where provisions to the contrary appear herein, is subject to all of the conditions, agreements, exclusions, and limitations of and shall follow the underlying insurance in all respects. This includes changes by endorsement.

148. The excess insurance contracts include the following conditions:

**IV. CONDITIONS**

**K. OTHER INSURANCE** - If other insurance, whether collectible or not, is available to the insured covering a loss also covered by this policy, other than insurance that is specifically excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of, and shall not contribute with, such other insurance.

**P. PAYMENT OF LOSS** - It is a condition of this policy that the insurance afforded under this policy shall apply only after the underlying insurance has been exhausted by payment of its limits of liability ...

149. There is no coverage under the Mt. Hawley excess insurance contracts unless and until all underlying, primary and other insurance has been exhausted by payment of the limits of liability of such insurance.

150. Mt. Hawley has no duty to indemnify Plaintiffs with regard to the Underlying Action because, based on the facts and information provided to Mt. Hawley, among other things, Mt. Hawley excess insurance contracts are excess insurance contracts and contain no duty to indemnify unless and until, among other things, the limits of all underlying insurance contracts are exhausted through the actual payment of sums the insured is legally obligated to pay in settlement or satisfaction of claims or suits.

151. Mt. Hawley has no duty to defend under the excess insurance contracts.

152. The excess insurance contracts include the following definitions:

## II. DEFINITIONS

A. Ultimate net loss means all sums actually paid, or which the insured is legally obligated to pay, as damages in settlement or satisfaction of claims or suits for which insurance is afforded under this policy, after proper deduction for all recoveries or salvage. Ultimate net loss shall include defense expense payments made by the insurer of the underlying insurance, provided that such expenses are included within the limit of insurance of the underlying insurance by the terms of that policy.

B. Underlying insurance means the policy or policies of insurance scheduled per Item 5. of the Declarations

153. There is no coverage under the Mt. Hawley excess insurance contracts to the extent the Underlying Action was premised on coverage that does not come within the scope of the coverage grant or satisfy the definition of ultimate net loss.

154. The Mt. Hawley excess insurance contracts apply only to "Ultimate net loss" if such loss results from an "occurrence" that takes place during the policy period.

155. There is no coverage to the extent the underlying loss arises from any cause that is not an "occurrence" or takes place prior to or subsequent to any Mt. Hawley policy period.

156. The underlying Axis policies define "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

157. The excess insurance contracts contain certain relevant exclusionary endorsements, excerpted as follows:

PROPERTY DAMAGE LIMITATION

REAL PROPERTY

It is agreed that this policy shall not apply to any liability for property damage to real property:

- (1) owned or occupied by or rented to an insured;
- (2) used by an insured; or,
- (3) in the care, custody or control of an insured or as to which an insured is for any purpose exercising physical control.

PROPERTY DAMAGE LIMITATION - PERSONAL PROPERTY

This insurance does not apply to any liability for property damage to personal property:

1. owned by, leased, or rented to an insured;
2. used by an insured; or,
- 3, in the care, custody or control of an insured or as to which an insured is for any purpose exercising physical control.

158. The Mt. Hawley excess insurance contracts apply only to liability resulting from "property damage" that occurs during the policy period, per the terms of the underlying insurance.

159. There is no coverage to the extent the underlying loss is not caused by "property damage" as that term is defined in the insurance contracts, or to the extent that any damage takes place prior to or subsequent to any Mt. Hawley policy period. The underlying Axis policies define "property damage" to mean: "a. Physical injury to tangible property, including all resulting loss of use of that property. . . . or [¶] b. Loss of use of tangible property that is not physically injured . . ."

160. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to real property owned or occupied by or rented to an insured, used by an insured, or in the care, custody or control of an insured or as to which an insured is for any purpose exercising physical control.

161. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to the extent such is excluded under any of the business risk and related exclusions contained in the underlying Axis insurance contract that may apply (including exclusions j ("Damage to Property"), k ("Damage to Your Product"), l ("Damage to your Work"), m ("Damage to Impaired Property or Property Not Physically Injured"), and n ("recall of Products, Work or Impaired Property"), as set forth and defined thereunder).
162. Mt. Hawley asserts that some or all of the damages alleged and described in the underlying complaint and its attachments do not constitute "property damage" under the applicable policies because such alleged defective work did not cause any resulting damage to any property other than the insured's own work.
163. The Mt. Hawley excess insurance contracts exclude coverage to the extent the Axis underlying insurance so provides, for "contractual liability" (exclusion b, as set forth and defined thereunder).
164. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to the extent such is excluded under any of the exclusionary endorsements contained within the underlying Axis insurance contract that may apply. Exclusions found on one or more of the underlying insurance contracts of Axis insurance include those for "Fungi or Bacteria," "Exterior Insulation Finish Systems (EIFS)", and for "Known Injury or Damage."
165. Mt. Hawley asserts that some or all of the damages alleged in the underlying complaint are excluded based upon the EIFS exclusion.
166. Mt. Hawley asserts that some or all of the damages alleged in the underlying complaint are excluded by the fungi or bacteria exclusion.

167. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to the extent such is excluded under Designated Operations exclusion contained in the Axis policies. The 2003-2004 and 2004-2005 AXIS policies provide in part:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED OPERATIONS EXCLUSION (STRUCTURAL RESIDENTIAL WORK - INCLUDING APARTMENT CONVERSIONS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART PRODUCTS / COMPLETED OPERATIONS COVERAGE PART SCHEDULE

Description of your work:

Any "residential" work conducted by or for you.

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" included in the "products-completed operations hazard" arising directly or indirectly out of "your work" shown in the Schedule.

"Residential" means construction of structures or buildings such as tract homes, residential condominiums, residential townhouses, residential duplexes, multi-unit residential buildings, structures or homes in subdivisions and/or buildings, structures or homes in master planned residential communities. This exclusion also applies to any building or property that was originally intended for occupancy as apartments and was subsequently converted by anyone to "residential" occupancy.

168. The Project falls within Designated Operations exclusion because the apartment complex was converted to condominiums.
169. The Mt. Hawley excess insurance contracts do not apply to any liability for property damage to the extent such is excluded under the Ongoing and Completed Operations exclusion contained in the Axis policies. The 2005/2006 and 2006/2007 Axis policies provide in part:

EXCLUSION- ONGOING AND COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS COVERAGE PART

"Residential" construction of structures or buildings such as tract homes. Residential condominiums, residential townhouses, residential duplexes, multi-unit residential buildings, structures or homes in subdivisions and/or buildings, structures or homes in master planned residential communities.

This exclusion also applies to any Residential work or conversion to residential condominiums or town homes by or on behalf or at the direction of the Insured - apartments are not residential work.

170. Plaintiffs' claims fall within Ongoing and Completed Operations exclusion.
171. By virtue of the foregoing, there exists an actual, justiciable controversy between the parties. Mt. Hawley contends that it has performed under the insurance contract and does not owe coverage for the claim. Defendant disputes that contention and instead asserts a multimillion dollar claim against Mt. Hawley.
172. Mt. Hawley seeks a declaration there is no coverage under the excess insurance contracts attached as Exhibit D as a result of the Underlying Action.

WHEREFORE, Mt. Hawley respectfully prays for judgment as follows:

1. Dismissal of Plaintiffs' complaint with prejudice;
2. A declaration that Mr. Hawley had no duty to defend ContraVest in the Underlying Action;
3. A declaration that Mt. Hawley is not obligated to indemnify PPPRO or ContraVest;
4. For fees and costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

Respectfully submitted by:

**ANDREW K. EPTING, JR., LLC**

S/Andrew Epting

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ATTORNEYS FOR DEFENDANT

On this 22<sup>nd</sup> day of January, 2015  
Charleston, South Carolina

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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ON CERTIFICATION FROM THE FOURTH CIRCUIT COURT OF APPEALS  
Upon *Writ of Mandamus* being held in Abeyance to  
The United States District Court  
for  
The District of South Carolina

The Honorable David C. Norton, District Court Judge

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Appellate Case No. 2018-001170

Fourth Circuit Court of Appeals Case No. 18-1401  
District Court Case No. 9:15-cv-00304-DNC

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In re: MT. HAWLEY INSURANCE COMPANY .....Petitioner,

in which

CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY AND PLANTATION POINT  
HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC.,  
as assignees are .....Respondents

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**EXHIBIT 2**

RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND  
THE CERTIFIED QUESTION  
or in the Alternative  
TO RESCIND CERTIFICATION

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
BEAUFORT DIVISION

CONTRAVEST INC., CONTRAVEST )  
CONSTRUCTION COMPANY, and )  
PLANTATION POINT HORIZONTAL )  
PROPERTY REGIME OWNERS )  
ASSOCIATION, INC., *as assignee*, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
)  
MT. HAWLEY INSURANCE COMPANY, )  
)  
Defendant. )  
\_\_\_\_\_ )

No. 9:15-cv-00304-DCN

**ORDER**

The following matter is before the court on defendant Mt. Hawley Insurance Company’s (“defendant”) objections, ECF No. 140, to the Report and Recommendation of Magistrate Judge Mary Gordon Baker (the “R&R”), ECF No. 137, recommending the court grant plaintiffs ContraVest, Inc., ConraVest Construction Company, and Plantation Point Horizontal Property Regime Owners Association, Inc.’s (collectively, “plaintiffs”) motions to compel. ECF Nos. 103, 105, 106, and 113.<sup>1</sup> For the reasons set forth below, the court adopts the R&R and grants plaintiffs’ motions to compel.

**I. BACKGROUND**

Plaintiffs’ bring claims for declaratory judgment, bad faith, breach of contract, and unjust enrichment based on defendant’s refusal to provide benefits allegedly owed under certain policies of excess commercial liability insurance (the “excess policies”).

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<sup>1</sup> The R&R also recommended the court grant defendant’s motion to reconvene. ECF No. 117. Defendant does not challenge this portion of the R&R. Having reviewed the R&R for clear error and finding none, the court adopts the R&R’s analysis of the motion to reconvene.

Compl. ¶¶ 5, 24–48. Plaintiff ContraVest Construction Company (“Contravest”) constructed a development known as Plantation Point in Beaufort County, South Carolina. Id. ¶ 1. Defendant provided Contravest with excess commercial liability insurance from July 21, 2003 until July 21, 2007. Id. ¶ 5. In September 2011, plaintiff Plantation Point Horizontal Property Regime Owners Association, Inc. (the “Owners Association”) filed suit against Contravest alleging that the Plantation Point property was defectively constructed (the “underlying action”). Id. ¶¶ 10, 11. After repeated demands from Contravest, defendant refused to defend, indemnify, or otherwise participate in the underlying action. Id. ¶ 15. Contravest ultimately settled the underlying action and assigned the Owners Association all rights and claims it had against defendant for improperly refusing to participate in that action. Id. ¶ 18. On December 22, 2014, plaintiffs filed the instant action in the Court of Common Pleas for Beaufort County. ECF No. 1. The action was removed to this court on January 22, 2015. Id.

On May 19, 2015, plaintiffs served their first set of requests for production, seeking the file on Contravest’s claim for excess coverage in connection with the underlying action (the “Plantation Point claim”). ECF No. 117 at 1. Defendant produced the Plantation Point claim file with a corresponding privilege log on July 6, 2015, and later supplemented its production with the file’s electronic claim notes and a supplemental privilege log on January 13, 2016. Id. On February 29, 2016, plaintiffs served their second set of requests for production, this time seeking defendant’s files on all of Contravest’s claims under the excess policies. Id. at 1–2. These files contain information regarding excess coverage claims involving other Contravest construction projects that required defendant to evaluate its exposure as Contravest’s excess insurer.

Defendant produced these files on a rolling basis, providing responsive material and corresponding privilege logs on May 26, 2016, June 7, 2016, June 14, 2016, and July 7, 2016. *Id.* at 2–4.

Plaintiffs filed four separate motions in connection with this discovery. On June 24, 2016, plaintiffs filed a motion to compel material withheld in the May 26, 2016 document production. ECF No. 103. On June 29, 2016, plaintiffs filed a motion to compel materials withheld from the January 13, 2016, June 7, 2016, and June 14, 2016 document productions. ECF No. 105. On July 1, 2016, plaintiffs filed another motion to compel defendants to comply with their February 29, 2016 requests for production. ECF No. 106. Defendant filed a consolidated response to these motions on July 18, 2016. ECF No. 110. Plaintiffs filed yet another motion to compel, seeking additional documents related to the July 7, 2016 production. ECF No. 113. Defendant filed a response to the July 7, 2016 motion to compel on August 15, 2016. ECF No. 117. Plaintiffs filed a reply on August 25, 2016. ECF No. 120. The magistrate judge held a hearing on September 19, 2016, and issued the R&R on December 12, 2016. ECF No. 137. Defendant filed objections to the R&R on January 9, 2017, ECF No. 140, and plaintiffs filed a reply on January 20, 2017. ECF No. 141. The matter is now ripe for the court's review.

## **II. STANDARD**

### **A. Federal Rule of Civil Procedure 26**

The Federal Rules of Civil Procedure provide that a party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). “Information within this

scope of discovery need not be admissible in evidence to be discoverable.” Id. “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). “The scope and conduct of discovery are within the sound discretion of the district court.” Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 568 n.16 (4th Cir. 1995) (citing Erdmann v. Preferred Research, Inc. of Ga., 852 F.2d 788, 792 (4th Cir. 1988)).

**B. Federal Rule of Civil Procedure 72**

Pursuant to Federal Rule of Civil Procedure 72(a), when a party objects to the decision of magistrate judge on a nondispositive matter, the court must determine whether the magistrate judge’s decision was “clearly erroneous or [] contrary to law.” “A court’s ‘finding is clearly erroneous when . . . the reviewing court[, after reviewing all of the evidence] . . . is left with the definite and firm conviction that a mistake has been committed.” Wilson v. Jacobs, No. 0:14-cv-4006, 2016 WL 690869, at \*1 (D.S.C. Feb. 22, 2016) (alteration added) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). “[T]he phrase ‘contrary to law’ indicates plenary review as to matters of law.” Haines v. Liggett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992).

**III. DISCUSSION**

The R&R organized its analysis according to three broad issues: (1) whether communications in the defendant’s claim files are protected by the attorney-client privilege or work-product doctrine, (2) the discoverability of information regarding defendant’s reinsurance and reserves, and (3) whether plaintiffs waived any objection to

the privilege logs produced in connection with the July 6, 2015 document production.<sup>2</sup> Defendant similarly organizes its objections by issue, arguing that: (1) the R&R's attorney-client privilege analysis erred by relying on City of Myrtle Beach v. United Nat. Ins. Co., No. 4:08-cv-1183, 2010 WL 3420044, at \*5 (D.S.C. Aug. 27, 2010), ECF No. 140 at 6–11; (2) even if it were proper to apply City of Myrtle Beach, the R&R erred in finding that plaintiffs made a prima facie showing of bad faith, id. at 11–20; (3) the R&R erred in finding that reinsurance information is relevant, id. at 20–21; (4) the R&R erred in finding that reserve information is relevant and not subject to the work-product doctrine, id. at 21–24; (5) the R&R erred in finding that other information in the claim files was not protected by the work-product doctrine, id. at 24–25; and (6) the R&R erred in finding that the plaintiffs did not waive their objections to the July 6, 2015 privilege log, id. at 25–27. The court addresses each objection in turn.

#### A. At-Issue Waiver in the Bad Faith Context

Defendant has claimed that numerous communications in its claim files are protected by the attorney-client privilege. Defendant challenges the magistrate judge's evaluation of its privilege claim, arguing that the magistrate judge erred by applying City of Myrtle Beach, 2010 WL 3420044, at \*5. Id. at 6–11.

Under South Carolina law, “[t]he attorney-client privilege protects against disclosure of confidential communications by a client to his attorney.” State v. Owens,

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<sup>2</sup> At one point the R&R mistakenly references the July 13, 2016 document production. While defendant spends about a paragraph arguing that the R&R's analysis erred by “misapprehending” the defendant's argument on this issue, it is clear that the magistrate judge understood the issue and the reference to the July 13, 2016 document production was simply a scrivener's error. R&R at 20–21 (discussing the timeliness of plaintiffs' objections to the July 6, 2015 privilege log).

424 S.E.2d 473, 476 (S.C. 1992). The privilege consists of the following essential elements:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Tobacoville USA, Inc. v. McMaster, 692 S.E.2d 526, 529–30 (S.C. 2010) (quoting State v. Doster, 284 S.E.2d 218, 219–20 (S.C. 1981)). South Carolina also recognizes that an insured is entitled to recover damages caused by an insurer’s breach of the covenant of good faith and fair dealing when the insured shows:

(1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) a refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer’s bad faith or unreasonable action in breach of the implied covenant of good faith and fair dealing arising under the contract; (4) causing damage to the insured.

Founders Ins. Co. v. Richard Ruth’s Bar & Grill LLC, No. 2:13-cv-03035-DCN, 2016 WL 3219538, at \*5 (D.S.C. June 8, 2016).

When an attorney was involved in the insurer’s decision to deny coverage, much of the information relevant to a plaintiff’s bad faith claim may fall under the scope of the privilege. The fact that the attorney-client privilege covers relevant information is, in and of itself, no reason to abrogate the privilege. The entire purpose of the privilege is to preclude discovery of otherwise relevant information in an effort to promote “a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained.” Doster, 284 S.E.2d at 219. However, not every communication that falls within the ordinary scope of the privilege is entitled to

protection. Id. at 220. “The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice.” Id. These policy concerns have led some courts to restrict the availability of the privilege in bad faith cases. In fact, some states have determined that the privilege is simply inapplicable in bad faith cases. E.g. Boone v. Vanliner Ins. Co., 744 N.E.2d 154, 158 (Ohio 2001) (“[I]n an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.”).

The City of Myrtle Beach court determined that South Carolina law favors a different approach. As the magistrate judge explained:

[T]he City of Myrtle Beach decision . . . addressed the application of the attorney-client privilege in bad faith actions. The court first emphasized South Carolina’s requirement that the proponent of the privilege establish the absence of waiver. [] Drawing support from the “widely accepted approach” in Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975), the court held that “if a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer [voluntarily] waives, explicitly or impliedly, the attorney-client privilege.” Id. Applying this test to the plaintiff’s motion to compel, the court found that the defendant insurer injected a number of issues into the case through its answer and affirmative defenses, but had not shown that these issues did not waive the privilege. Id. at \*7. The court specifically noted that even though the defendant did not contend that it reasonably relied on the advice of counsel, defendant still bore the burden of disproving waiver. Id.

In reaching its conclusion, the City of Myrtle Beach court made one other significant finding: “that the City has presented a prima facie case of bad faith.” City of Myrtle Beach, 2010 WL 3420044, at \*7. To understand the function of the prima facie requirement, one must first understand the predicament a defendant insurer faces in a bad faith action. Because any defendant insurer who opposes a bad faith claim is almost forced to assert its own good faith, the City of Myrtle Beach approach makes it rather difficult for a defendant to avoid waiver. The City of Myrtle Beach court even recognized that its “ruling amount[ed] to a virtual per se waiver of the privilege.” The prima facie showing requirement serves to constrain this effect and prevent automatic waiver whenever a plaintiff brings a bad

faith claim. Though the City of Myrtle Beach court did not explain the significance of this finding in detail, the Hearn decision on which it relied supports this understanding of the doctrine. Recognizing the damage the proposed exception could do to the attorney-client privilege, the Hearn court held that “[a] substantial showing of merit to plaintiff’s case must be made before a court should apply the exception to the attorney-client privilege defined herein.” Hearn, 68 F.R.D. at 582.

R&R at 14–15. The R&R went on to apply City of Myrtle Beach and found that the documents at issue in this case were not protected by the privilege. Id. at 15–19.

Defendant argues that the City of Myrtle Beach decision has been displaced by South Carolina Supreme Court Justice Costa Pleicones’s concurrence in Davis v. Parkview Apartments, which criticized Hearn—the case that announced the basic approach adopted in City of Myrtle Beach—as inconsistent with the well-established rule that waiver of the attorney-client privilege must be “unequivocal” and “implied waiver should be treated with caution.” 762 S.E.2d 535, 549 (S.C. 2014), reh’g denied (S.C. Sept. 11, 2014). The R&R rejected defendant’s reliance on the Davis concurrence on the grounds that (1) it was not a controlling decision and (2) other courts in this district have applied City of Myrtle Beach without hesitation. R&R at 18–19.

These are both good reasons to reject the Davis concurrence. A federal court sitting in diversity jurisdiction must apply the law of the state’s highest court—here, the Supreme Court of South Carolina. Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc., 296 F.3d 308, 312 (4th Cir. 2002). Where the state’s highest court has not spoken on an issue, the court must predict how the court would rule.<sup>3</sup> Id. In making this prediction, the court may consider

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<sup>3</sup> Defendant argues that the Davis concurrence constitutes the Supreme Court of South Carolina “[speaking] on the issue,” ECF No. 140 at 9, but this is laughable. Five justices sit on the Supreme Court of South Carolina, not one. “The court” does not speak

all available legal sources, including restatements of the law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and the majority rule. The court may also consider well considered dicta, and recent pronouncements of general rules or policies by the state's highest court.

Wellin v. Wellin, 135 F. Supp. 3d 502, 512 (D.S.C. 2015) (internal quotations omitted).

The Davis concurrence certainly provides some evidence that the Supreme Court of South Carolina might reject the City of Myrtle Beach approach, but the court finds that the numerous decisions that have applied City of Myrtle Beach in this district provide stronger evidence that the Supreme Court of South Carolina would adopt such an approach. At least four separate judges in this district have applied, or at least recognized, the City of Myrtle Beach decision. See, e.g., Graham v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 0:16-cv-01153, 2017 WL 116798, at \*4 (D.S.C. Jan. 12, 2017) (relying on City of Myrtle Beach to hold that defendant "waived the attorney-client privilege by asserting that it 'did not act unreasonably or in bad-faith'"); State Farm Fire & Cas. Co. v. Admiral Ins. Co., No. 4:15-cv-2745, 2016 WL 4051271, at \*4 (D.S.C. July 25, 2016) (relying on City of Myrtle Beach to hold that the plaintiff's assertion of its own good faith "waives privilege and work product protections"); Hege v. Aegon USA, LLC, No. 1:10-cv-1635, 2011 WL 1791883, at \*5 (D.S.C. May 10, 2011) (relying on City of

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any time one justice writes on an issue. The fact remains that, to date, Justice Pleicones is the only member of the court to have endorsed the views outlined in the Davis concurrence. Notably, Justice Peicones is no longer on the Supreme Court of South Carolina. The court has no way of knowing whether any of the current justices, much less a majority, share Justice Pleicones's views. This is not to say that the Davis concurrence is of no value; it falls squarely within the category of "well considered dicta," which can be considered by the court. Wellin, 135 F. Supp. 3d at 512. But it is plainly not controlling.

Defendant also suggests that the Davis concurrence constitutes "recent pronouncement of general rules or policies by the state's highest court." ECF No. 140 (quoting Wellin v. Wellin, 2:13-cv-1831-DCN, 2016 WL 5539523, at \*6 (D.S.C. Sept. 30, 2016)). This argument fails for the same reasons.

Myrtle Beach to find that affirmative defenses of good faith and reasonableness waived the privilege); see also First S. Bank v. Fifth Third Bank, N.A., No. 7:10-cv-2097, 2013 WL 1840089, at \*12 (D.S.C. May 1, 2013) (citing City of Myrtle Beach and recognizing there are some cases, “such as . . . bad faith insurance cases . . . where advice of counsel is squarely at issue . . . or where the subject matter is so entwined with counsel’s advice simply based on the nature of the case itself”). Each of these judges is well-acquainted with South Carolina law. Thus, the fact that they each followed the City of Myrtle Beach approach is evidence that it is consistent with South Carolina law. The sheer number of decisions that have endorsed the City of Myrtle Beach approach outweighs the Davis concurrence.

There are other reasons to favor the City of Myrtle Beach decision over the Davis concurrence. Both recognize the important policy goals of the attorney-client privilege, City of Myrtle Beach, 2010 WL 3420044, at \*4; Davis, 762 S.E.2d at 549, but the City of Myrtle Beach court felt it was necessary to balance these policy goals against the substantive interests underlying an insured bad faith claim. City of Myrtle Beach, 2010 WL 3420044, at \*4. The Davis concurrence took the position that “the well-settled contours of the attorney-client privilege already balance [such] competing public interests.” Davis, 762 S.E.2d at 550. This is by no means an unreasonable position, but the court sides with the City of Myrtle Beach court on this issue. While the ordinary contours of the attorney-client privilege do account for competing public interests, most claims are not threatened by the attorney-client privilege in the same way as bad faith claims, which turn heavily on what the insurer knew at the time it denied coverage.

While it is true that the Hearn test<sup>4</sup> does damage to the attorney-client privilege, it is equally true that the attorney-client privilege is uniquely damaging to plaintiffs' ability to recover in bad faith cases. The court thinks some balancing is appropriate.

Because the City of Myrtle Beach approach is based on a balancing of the competing policies at issue, and because that approach has been widely adopted by the courts in this district, the court finds no error in the magistrate judge's reliance on that decision.<sup>5</sup>

#### **B. Prima Facie Test**

Defendant also argues that, even if the court follows the City of Myrtle Beach decision, the R&R erred in finding that plaintiffs presented a prima facie case sufficient to warrant the application of the at-issue waiver in this case. ECF No. 140 at 11–20. The R&R found that plaintiffs presented evidence that once defendant realized that the underlying policies were nearing exhaustion, it essentially changed its coverage position in an effort to avoid coverage. R&R at 15–16. The coverage dispute at the heart of this case is whether “vertical” or “horizontal” exhaustion applies when determining whether excess coverage is available in the progressive injury context, where an occurrence is

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<sup>4</sup> As the magistrate judge recognized, it is notable that the Davis concurrence addressed its criticism at the Hearn test, not the City of Myrtle Beach decision, and did not appear to acknowledge anything analogous to the prima facie showing requirement imposed by the City of Myrtle Beach court.

<sup>5</sup> Defendant also argues that because New York law is generally consistent with South Carolina privilege law, and New York courts reject the Hearn test, the court should reject the application of City of Myrtle Beach here. This argument is easily disposed of, largely because the New York courts' position on the issue was already discussed in the Davis concurrence. Davis, 762 S.E.2d 535, 550 (citing In re County of Erie, 546 F.3d 222, 227–29 (2d Cir. 2008)). Even if this argument were considered independently, the court finds it unpersuasive. While this may be an appropriate basis for predicting South Carolina law in some cases, the court places little weight on the law applied in a “substantially similar” jurisdiction when the court has multiple decisions—albeit, no controlling decisions—addressing the issue under South Carolina law.

spread across multiple policy periods. For context, it is notable that South Carolina has adopted a “time on the risk” approach for allocating liability between successive insurers in progressive damages cases, meaning that “each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.” Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 717 S.E.2d 589, 602 (S.C. 2011). Plaintiffs argue that exhaustion should be determined “vertically,” meaning that an excess policy is triggered when the underlying policies in effect during the excess insurer’s pro-rata time on the risk are exhausted. ECF No. 141 at 6. Defendant, on the other hand, contends that it is entitled to require what is known as “horizontal” exhaustion, i.e. exhaustion of all primary coverage policies that were triggered by the same progressive damages period,<sup>6</sup> even if those policies were not in effect during defendant’s time on the risk.<sup>7</sup> ECF No. 140 at 12–14. In its objections, defendant argues that it has always held this position, and thus, the magistrate judge’s prima facie analysis was factually unfounded. Id. at 15–18. Defendant also argues that, even if it did change its position, plaintiffs have failed to make a prima facie showing because this change of position was not unreasonable. Id. at 14–16, 18–20.

Before addressing defendant’s arguments, the court notes that it is debatable whether the prima facie showing is even required under City of Myrtle Beach. Though

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<sup>6</sup> This covers “all policies in effect from the time of injury-in-fact during the progressive damage.” Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 486 S.E.2d 89, 91 (S.C. 1997).

<sup>7</sup> In addition to the case law defendant offers to show that horizontal exhaustion is allowed under South Carolina law, defendant highlights the “Other Insurance” provision of its excess policies to show that the horizontal exhaustion approach is required by the excess policies. The Other Insurance provision states: “If other insurance, whether collectible or not, is available to the insured covering a loss also covered by this policy . . . the insurance afforded by this policy shall be in excess of, and shall not contribute with, such other insurance.” ECF No. 140 at 13.

the City of Myrtle Beach decision dedicated a fair amount of discussion to the prima facie showing analysis, it never fully explained the significance of this discussion. See City of Myrtle Beach, 2010 WL 3420044, at \*5–7 (discussing prima facie showing of bad faith). Based on this discussion, along with certain language in Hearn requiring that “[a] substantial showing of merit to [the] plaintiff’s case must be made before a court should apply the exception to the attorney-client privilege defined herein,” Hearn, 68 F.R.D. at 582, the magistrate judge determined that for the City of Myrtle Beach court’s version of the at-issue waiver to apply, the plaintiff must first present a prima facie showing of bad faith. R&R at 15. Given defendant’s fervent opposition to the R&R, it is interesting to note that the magistrate judge actually applied a far more insurer-friendly interpretation of the City of Myrtle Beach decision than any of the other courts that have addressed the issue in this district. As noted above, at least four district judges have applied—or in one case, recognized—the City of Myrtle Beach court’s formulation of the at-issue waiver. See, e.g., Graham, 2017 WL 116798, at \*4 (relying on City of Myrtle Beach to hold that defendant “waived the attorney-client privilege by asserting that it ‘did not act unreasonably or in bad-faith’”); State Farm, 2016 WL 4051271, at \*4 (relying on City of Myrtle Beach to hold that the plaintiff’s assertion of its own good faith “waives privilege and work product protections”); Hege, 2011 WL 1791883, at \*5 (relying on City of Myrtle Beach to find that affirmative defenses of good faith and reasonableness waived the privilege); see also First South Bank, 2013 WL 1840089, at \*12 (citing City of Myrtle Beach and recognizing there are some cases, “such as . . . bad faith insurance cases . . . where advice of counsel is squarely at issue . . . or where the subject matter is so entwined with counsel’s advice simply based on the nature of the case itself”). None of

these cases appear to require anything resembling the prima facie showing requirement applied by the magistrate judge. Thus, a strong argument could be made that no such requirement exists.

Nevertheless, this court finds that the force of the magistrate judge's reasoning cannot be ignored. The City of Myrtle Beach decision rejected the per se waiver approach. City of Myrtle Beach, 2010 WL 3420044, at \*5. Even the district court decisions that have omitted the prima facie showing requirement appear to recognize that South Carolina does not provide for a per se waiver rule. Graham, 2017 WL 116798, at \*4 (“Under South Carolina law, there is no per se waiver where there are allegations of bad faith.”). However, if City of Myrtle Beach is applied without a prima facie showing requirement, the defendant-insurer waives the attorney-client privilege the moment it contests the plaintiff's allegations of bad faith. For most cases, this has the same effect as a per se waiver.<sup>8</sup> As the magistrate judge explained, “[t]he prima facie showing requirement serves to constrain this effect and prevent automatic waiver whenever a plaintiff brings a bad faith claim.” R&R at 15. If the City of Myrtle Beach court's rejection of the per se waiver rule has any meaning, that decision must be read to require a prima facie showing of bad faith before the at-issue waiver can be applied.

The question then becomes: what does a showing of bad faith require? The magistrate judge implicitly took the position that the plaintiff must only establish a prima facie showing of the bad faith element of its claim, as opposed to a prima facie showing of every element of the bad faith claim. Thus, the R&R was able to find that City of

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<sup>8</sup> To be sure, a defendant could concede bad faith and contest the claim under another element of the claim, but the court does not believe this consideration is strong enough to disturb its conclusion that, absent a prima facie showing requirement, the City of Myrtle Beach approach effectively turns into a per se waiver.

Myrtle Beach applied without addressing the coverage question underlying this entire dispute. Defendant appears to take the opposite position, arguing that the magistrate judge erred in finding that plaintiffs had made a prima facie showing of bad faith without first determining whether Contravest was actually entitled to coverage under the excess policies. ECF No. 140 at 15.

This is a fair point. The City of Myrtle Beach decision referred to a “prima facie case of bad faith.” City of Myrtle Beach, 2010 WL 3420044, at \*5 (emphasis added). Similarly, the Hearn case required a plaintiff to show that its “case” was meritorious, not simply the allegations of the defendant’s intent. Hearn, 68 F.R.D. at 582 (emphasis added). These references to “the case” could be read to indicate that the court must evaluate every element of the plaintiff’s bad faith claim before finding that the defendant waived the privilege by contesting the allegations of bad faith.

On the other hand, there is reason to think that the magistrate judge was correct to focus on the bad faith element of the claim. For one, the City of Myrtle Beach court’s prima facie analysis did not address every element of the plaintiff’s bad faith claim. The City of Myrtle Beach court, like the magistrate judge, focused exclusively on the bad faith element. See City of Myrtle Beach, 2010 WL 3420044, at \*5–7 (outlining the plaintiff’s evidence of bad faith and concluding that “[f]or the purposes of the motion to compel, the court finds that the City has presented a prima facie case of bad faith”). Defendant’s understanding of the prima facie requirement also produces a strange result in cases such as this one, where the parties dispute the nature of their contractual obligations. Because a bad faith claim requires the plaintiff to prove “a refusal by the insurer to pay benefits due under the contract,” Richard Ruth’s Bar & Grill, 2016 WL

3219538, at \*5, and questions of contractual interpretation are generally resolved as a matter of law,<sup>9</sup> Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co., 736 S.E.2d 863, 865 (S.C. Ct. App. 2012) (“The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.” (quoting Hansen ex rel. Hansen v. United Servs. Auto. Ass’n, 565 S.E.2d 114, 116 (S.C. Ct. App. 2002))), defendant’s reading of the prima facie requirement would effectively convert a discovery dispute into a motion for summary judgment on the coverage issue. This seems an odd way to apply the prima facie concept, which is generally centered on an evaluation of evidence. As one commenter has explained:

“Prima facie” simply means that evidence of a fact has been produced which may ultimately be rebutted. See Mack v. Branch No. 12, Post Exchange, Fort Jackson, 35 S.E.2d 838 (S.C. 1945) (“prima facie” is a Latin phrase and literally means “at first view; on the first appearance”; prima facie evidence may produce a result for the time being, but that result may be repelled). The term “prima facie case” is employed to signify that sufficient evidence has been introduced to warrant submission to the jury of the issue to which the evidence is directed.

§ 9:2. Prima facie case, Trial Handbook for South Carolina Lawyers § 9:2 (emphasis added). Thus, there is a strong argument that City of Myrtle Beach’s prima facie showing requirement only applies to the element of bad faith, not the entire cause of action.

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<sup>9</sup> Even when a policy is ambiguous—a situation when the interpretation of an ordinary contract would go to the jury—South Carolina law requires the court to construe the ambiguity in favor of the insured. Canopus US Ins., Inc. v. Middleton, 202 F. Supp. 3d 540, 543 (D.S.C. 2016) (“[A]n insurance contract which is in any respect ambiguous or capable of two meanings must be construed in favor of the insured.” (quoting Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co., 709 S.E.2d 85, 90 (S.C. Ct. App. 2011))).

Ultimately, however, the court need not decide this issue as defendant waived the argument by failing to raise it before the magistrate judge. “A magistrate’s decision should not be disturbed on the basis of arguments not presented to him.” Keitt v. Ormond, 2008 WL 4964770, at \*1 (S.D.W. Va. Nov. 13, 2008) (quoting Jesselson v. Outlet Associates of Williamsburg, Ltd. P’ship, 784 F. Supp. 1223, 1228 (E.D. Va. 1991)). “[T]he purpose of the Magistrates Act is to allow magistrates to assume some of the burden imposed on the district courts and to relieve courts of unnecessary work.” Id. at \*2 (quoting Jesselson, 784 F. Supp. at 1228–29). “Allowing parties . . . to raise new issues or arguments at any point in the life of a case would” frustrate this purpose and “result in a needless complication of litigation.” Id. Instead, “[p]arties should fully plead their claims, and fully advance their arguments, at all stages of litigation, unless they are prepared to waive them.” Id. Thus, “[t]he [c]ourt is not obligated to consider new arguments raised by a party for the first time in objections to the [m]agistrate’s [r]eport.” Dune v. G4s Regulated Sec. Sols., Inc., No. 0:13-cv-01676, 2015 WL 799523, at \*2 (D.S.C. Feb. 25, 2015). While the court has the power to address such arguments, that power lies within the court’s sound discretion. Id.

The court has reviewed defendant’s briefs and the transcript of the parties’ hearing before the magistrate judge, and has been unable to find any argument suggesting that the court must decide whether vertical or horizontal exhaustion applies as part of its prima facie showing analysis. When defendant was not contesting the legitimacy of the City of Myrtle Beach decision, it spent a fair amount of time arguing that the evidence did not show that it changed its coverage position. ECF No. 110 at 9; ECF No. 117 at 6. Defendant also emphasized evidence in the record indicating that other insurers, and even

Contravest's counsel, recognized that horizontal exhaustion applies. ECF No. 110 at 9–10; ECF No. 117 at 7–8. At most, the defendant made a factual argument that its coverage position was not “unreasonable,” and therefore, plaintiffs could not establish bad faith. ECF No. 142, Hr'g Tr. at 39:4–20 (arguing that defendant's position is not “clearly erroneous”). Therefore, the court finds that defendant waived any argument that the court must first resolve the underlying coverage dispute before finding a prima facie showing of bad faith.<sup>10</sup>

Though the court has discretion to address arguments not presented to the magistrate judge, the court does not think it is appropriate to do so here. This area of the law is rather complex, and appears to be unsettled in South Carolina. The court thinks it best to proceed with the utmost caution as it confronts issues that do not appear to have been addressed by any court under South Carolina law. This is especially so when the entire controversy hinges on the issues at stake. The parties did provide some outline of their respective coverage positions in their briefing, but the court is disinclined to embark on an analysis that will either resolve or significantly alter the case without a full round of briefing when the stakes are clear. Nor is the court inclined to allow defendant to escape the consequences of failing to squarely present its arguments to the magistrate judge. This would only encourage the waste of judicial resources. Nelson v. Town of Mt. Pleasant Police Dep't, No. 2:14-cv-4247-DCN, 2016 WL 5110171, at \*3 (D.S.C. Sept. 21, 2016). Therefore, the court does not decide whether a plaintiff must present a prima

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<sup>10</sup> For the same reasons, the court finds that defendant waived any argument that the court must review the legal merits of defendant's coverage position to determine whether it was objectively unreasonable. As outlined above, the parties presented factual arguments on the prima facie issue. These are the arguments the court will review on objection.

facie showing of the bad faith element of its claim, or a prima facie showing on every element of a bad faith claim. Instead, the court will focus on the factual arguments that were properly presented to the magistrate judge.

The court finds no clear error in the magistrate judge's finding that plaintiff presented a prima facie showing of bad faith. Defendant's argument on this matter was largely based on its own evidence, not the evidence cited by plaintiffs in support of their prima facie showing. See ECF No. 110 at 9–10 (highlighting evidence that plaintiffs' counsel in the underlying case recognized that other insurers had adopted a horizontal exhaustion position and that this position had been accepted in a majority of jurisdictions); ECF No. 113 at 7–8 (same). As the magistrate court recognized, defendant's evidence is immaterial to the prima facie showing analysis. The fact that a plaintiff's evidence may be rebutted does not mean that it is insufficient to support a prima facie showing. Indeed, the very concept of a prima facie showing recognizes that the evidence may be rebutted by conflicting evidence. Mack, 35 S.E.2d at 844. Thus, to the extent defendant's argument was based on its own evidence, the argument misses the point and can be set aside without further inquiry.<sup>11</sup>

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<sup>11</sup> Notably, the email which defendant places so much reliance on does not explicitly contradict plaintiffs' claim that "Mt. Hawley . . . was the only insurance carrier to suggest that insurance covering previous and future years are somehow responsible for an occurrence in the years of Mt. Hawley's coverage." ECF No. 133 at 4. In the email, plaintiffs' counsel states that one of the other excess insurers is "arguing that all primary [coverage] must be exhausted," but it is unclear whether this means all primary coverage for the same policy year as the excess coverage—i.e., vertical exhaustion—or all primary coverage for any coverage year, whether or not it overlapped with the excess policy in question—i.e., horizontal exhaustion. ECF No. 110-1. Moreover, plaintiffs' counsel could have resolved this confusion in her response to the following prompt: "Are the excess carriers saying none of them kick in until all general liability coverage for every year is exhausted? I think there is some case law out there but not in SC." Id. Instead, plaintiffs' counsel gave an account of her research findings in response to the statement

Defendant did include some arguments that properly sought to undermine the evidence cited to support the plaintiffs' prima facie showing. ECF No. 117 at 6. One of plaintiffs' primary arguments was based on an August 13, 2013 email sent to defendant by coverage counsel in connection with a different Contravest claim (the "Courtney Landing claim"), which stated that defendant would likely be "on the front line for any upcoming Contravest claims since it looks like Zurich and [Axis] are exhausted." Plaintiffs argued, and the magistrate judge agreed, that this email could be read to indicate that defendant took a vertical exhaustion position in prior cases, where there was little risk that defendant's excess policies would be impaired. ECF No. 113 at 2. The court finds no error in the magistrate judge's finding. Defendant contends that the mention of "Zurich" actually implicates horizontal coverage position because "Zurich" is not listed as a scheduled underlying insurer in the excess policies at issue here. Perhaps this is true, but it is not clear from the face of the email because the email does not clarify (1) what policy years were implicated by the Courtney Landing claim, or (2) what policy years were covered by the referenced Zurich policies. Thus, it is not clear whether the referenced Zurich policies overlapped with defendant's time on the risk in the Courtney Landing claim.

Plaintiffs also highlighted a number of reservation of rights letters that defendant sent Contravest in connection with prior claims. These letters each stated that defendant's excess policies would provide coverage after the scheduled underlying coverage was exhausted. See, e.g., ECF No. 105-9 ("The Limits of Liability on each policy are shown to be \$10 million each occurrence, excess of \$1 million each occurrence

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about case law, without actually answering whether other excess carriers had taken the horizontal exhaustion position defendant advocates here. Id. (emphasis added).

under underlying insurance provided by [the Axis policies].”). It is true that these letters did not explicitly commit defendant to a vertical exhaustion position, but the comparison between these letters and the reservation of rights letter in sent response to the Plantation Point claim is significant. In contrast to the letters sent in previous claims, when Contravest made the Planation Point claim, defendant added language stating that Contravest “has substantial primary insurance in effect that is and remains unexhausted, including (but not limited to) [the Axis policies].”<sup>12</sup> ECF No. 105-10. The court does not think it unreasonable to interpret this new language as evidence of a change in position. The horizontal exhaustion argument would have necessarily been stronger in previous claims when all of the primary policies were less impaired. Thus, it is fair to wonder why defendant only highlighted this language after the scheduled underlying policy was nearing exhaustion.

Ultimately, the court recognizes that competing inferences—not to mention competing evidence—may win the day. But this does not preclude the court from finding a prima facie showing of bad faith. “The term ‘prima facie case’ is employed to signify that sufficient evidence has been introduced to warrant submission to the jury of the issue to which the evidence is directed.” § 9:2. Prima facie case, Trial Handbook for South Carolina Lawyers § 9:2. The court sees no error in the magistrate judge’s determination that plaintiffs presented such evidence here.

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<sup>12</sup> Defendant appears to think that the magistrate judge cited the Plantation Point reservation of rights letter as evidence that the defendant previously adopted a vertical exhaustion position. ECF No. 140 at 17. This is incorrect. The R&R clearly cites the Planation Point reservation of rights letter to illustrate defendant’s current coverage position. R&R at 16 (recognizing that defendant now claims “the Axis policies were not the only underlying policies that required exhaustion” and citing the Planation Point reservation of rights letter for support).

Therefore, the court adopts the R&R's analysis and finds that defendant has waived the attorney-client privilege with respect to the attorney-client communications contained in its claim files—at least to the extent they are relevant to the instant action. Consistent with the R&R, the court directs the defendant to submit such communications for in camera review.<sup>13</sup>

### C. Reinsurance Information

Defendant next challenges the magistrate judge's finding that its communications with its reinsurers are relevant and discoverable. ECF No. 140 at 20–21. To the extent this is meant to be a general objection to the magistrate judge's relevance analysis, the court finds the magistrate judge's reasoning to be persuasive and adopts the magistrate judge's position as its own. See R&R at 5–7 (explaining flaws in the rationales used to preclude discovery of reinsurance information and finding defendant's communications with its insurers relevant to explain “why defendant [allegedly] changed certain coverage positions as time passed and it became clear the excess policies would be forced to cover a substantial judgment”).

Defendant also briefly objects to the magistrate judge's failure to explain the relevance of reinsurance-related communications contained in claim files that are not at issue in this case. ECF No. 140 at 21 n.12. These communications are relevant for the same reason the reinsurance-related communications in the Plantation Point claim file are

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<sup>13</sup> Because the at-issue waiver is so related to the relevance of communications at issue, it seems appropriate to take the rather unusual step of conducting an in camera review for relevance, despite having already determined that the privilege has been waived. In ordering such a review, the court is mindful of the need to protect the privilege against undue incursion under the City of Myrtle Beach approach. It is also notable that some of the documents in the claim files already need to be reviewed to determine the applicability of the work-product doctrine. R&R at 13.

relevant. As the R&R explained, communications with reinsurers are “relevant to [an insurer’s] good faith to the extent that [the insurer] explained its reasons for granting or denying portions of plaintiffs’ claims or otherwise described or explained its handling of plaintiffs’ claims.” R&R at 6–7 (quoting Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am., 2009 WL 1247122, at \*4 (E.D. La. May 5, 2009)). Plaintiffs seek to discover reinsurance-related communications arising out of all of the claims Contravest made under the excess policies at issue in this litigation. Because plaintiffs allege that defendant changed its interpretation of these policies once it became apparent that it would be forced to provide coverage, it is useful to know how the defendant handled prior claims made under the same policies. Thus, defendant’s communications with its reinsurers regarding these prior claims are relevant.

Defendant’s main argument is that the magistrate judge erred by recommending that defendant’s communications with its reinsurers were discoverable without first conducting an in camera review.<sup>14</sup> Defendant cites Doster, 284 S.E.2d at 220, for the proposition that “[t]he court must determine the question of privilege without first requiring disclosure of the substance of the communication.” This argument appears misplaced, as the magistrate judge’s analysis was based on relevance, not privilege.

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<sup>14</sup> Defendant expresses some confusion over whether this was actually the magistrate judge’s recommendation, noting that the R&R states that “[i]f an insurer provides information clarifying the content of the disputed reinsurance information, discovery may be inappropriate, but defendant has not done so here. Absent such a showing, the court finds no reason to preclude discovery of the requested information in this case.” R&R at 7. Read in context, the court thinks it is clear that the magistrate judge was simply finding that defendant failed to show that the information was irrelevant, not inviting defendant to provide further information. See Brey Corp. v. LQ Mgmt., L.L.C., 2012 WL 3127023; at \*4 (D. Md. July 26, 2012) (“In order to limit the scope of discovery, the ‘party resisting discovery bears the burden of showing why [the discovery requests] should not be granted.’” (quoting Clere v. GC Servs., L.P., 2011 WL 2181176, at \*2 (S.D.W. Va. June 3, 2011))).

Though defendant has consistently argued that communications with reinsurers are “privileged,” it has just as consistently supported this argument with citations to decisions that have analyzed such communications under a relevance framework. ECF No. 140 at 20; ECF No. 117 at 8–9; ECF No. 140 at 20. There is a difference between privileged information and irrelevant information. While defendant may think the terms are interchangeable, that does not make it so.

To the extent defendant contends that the magistrate judge was required to conduct an in camera review before deciding the issue of relevance, the court disagrees. Courts regularly resolve relevance questions without resorting to an in camera review. If a more thorough description of the contents of the reinsurance-related communications would have proven that such materials were irrelevant, defendant could have provided such a description. Indeed, defendant could have requested an in camera review. Having failed to take any of these steps, defendant cannot now complain that further review of the materials might change the result. Martin v. Bimbo Foods Bakeries Distribution, LLC, 313 F.R.D. 1, 5 (E.D.N.C. 2016) (“The party resisting discovery bears the burden of establishing the legitimacy of its objections.”); Brey, 2012 WL 3127023, at \*4 (“In order to limit the scope of discovery, the ‘party resisting discovery bears the burden of showing why [the discovery requests] should not be granted.’” (quoting Clere, 2011 WL 2181176, at \*2)).

**D. Loss Reserves<sup>15</sup>**

Defendant argues that “[c]ourts across the country have held that reserve information is not discoverable for two reasons: (1) reserves are not relevant to coverage or bad faith; and (2) reserves reflect privileged work product.” ECF No. 140 at 21–22. The court takes each argument in turn.

**1. Relevance**

Apart from an impressively long string-cite, defendant provides little actual argument about whether loss reserve information is relevant, and again, the court adopts the magistrate judge’s analysis as its own. A review of the case law indicates that the relevance issue is not as settled as defendant suggests, and “to the extent [reserve] information reveals defendant’s assessment of the validity of Contravest’s claims for excess coverage,” it is relevant. R&R at 8–9.

Again, defendant’s argument focuses on the magistrate judge’s recommendation that the court compel defendant to produce its reserve information without first conducting an in camera review. ECF No. 140 at 23. It is not clear where defendant is getting the notion that the court must conduct an in camera to confirm whether information is relevant. The burden of proof is on the defendant to prove that the material sought is not discoverable. E.g. Martin, 313 F.R.D. at 5. If the court were required to independently confirm whether every piece of discovery material was relevant before ruling on a motion to compel, there would be little point to having a burden of proof.

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<sup>15</sup> Defendant correctly points out that the R&R did not specifically address “expense reserves.” ECF No. 140 at 21 n.14. Plaintiff does not contest this interpretation.

Defendant argues that it “did not provide information about the content of its reserves as this would be counterproductive to its attempt to protect the information as privileged.” ECF No. 140 at 23. Regardless of defendant’s attempt to preserve its work-product objection,<sup>16</sup> “for a relevance objection to be adequate, it must be plain enough and specific enough so that the court can understand in what way the interrogatories are alleged to be objectionable.” Cappetta v. GC Servs. Ltd. P’ship, 2008 WL 5377934, at \*3 (E.D. Va. Dec. 24, 2008) (internal quotations omitted) (cited by First S. Bank v. Fifth Third Bank, N.A., No. 7:10-cv-2097-MGL, 2012 WL 12898229, at \*2 (D.S.C. Oct. 2, 2012)). Defendant failed to satisfy this requirement. To the extent defendant felt an in camera review was necessary, it could have explained that position in its briefing before the magistrate judge. It did not. Therefore, the court agrees with the magistrate judge’s conclusion that the information is relevant.

## 2. Work-Product Doctrine

Defendant first argues that the magistrate judge’s “analysis fails to take into consideration that inherent in the reserves themselves are the mental impressions of counsel.” ECF No. 140 at 24. The court disagrees. The magistrate judge found that defendant’s reserve information was not subject to work-product protection because defendant failed to show that such information was prepared in anticipation of litigation.<sup>17</sup> R&R at 11. This rationale has nothing to do with whether the reserves contain the mental impressions of counsel. Thus, defendant’s argument fails.

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<sup>16</sup> The court assumes this is the “privilege” defendant is referencing since it does not argue that any other privilege applies.

<sup>17</sup> The R&R recognized that “in the liability insurance context, [] any claim on a liability policy will most likely involve the prospect of litigation against the insured[,]” R&R at 11 (emphasis added), but reasoned that this does not satisfy the anticipation of

Defendant then returns to its now familiar refrain to argue that the magistrate judge erred in finding that the work-product doctrine did not apply without first conducting an in camera review. ECF No. 140 at 23–24. However, defendant bore the burden of proving that the work-product doctrine applied. Gilliard v. Great Lakes Reinsurance (U.K.) PLC, No. 2:12-cv-00867, 2013 WL 1729509, at \*2 (D.S.C. Apr. 22, 2013). The magistrate judge found that defendant failed to carry this burden, and the court agrees. Defendant’s belated request for an in camera review is unavailing.<sup>18</sup>

**E. Timeliness of Plaintiffs’ Objections to the July 6, 2015 Privilege Log**

Defendant argues that plaintiffs waived their objections to the documents listed on the July 6, 2015 privilege log. ECF No. 140 at 25. It is useful to explain the facts underlying this issue. On July 6, 2015, defendant produced a number of documents in response to plaintiffs’ discovery requests along with a corresponding privilege log. ECF No. 117 at 2. On January 13, 2016, defendant supplemented this privilege log to account for certain electronic claims notes in the Plantation Point claim file. Id. On January 25,

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litigation requirement because it is the preparer—in this case, defendant—who must face the prospect of litigation. Id. The court finds this analysis sound.

<sup>18</sup> Ironically, in the section immediately following this request, defendant objects to the magistrate’s ruling that certain other documents in defendant’s claim files should be submitted for in camera review to determine the applicability of the work-product doctrine. ECF No. 140 at 24. The magistrate judge ruled that defendant failed to meet its burden to show that the work-product doctrine applied to such documents, explaining that “[b]ecause an insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insureds, the claims files containing such documents usually cannot be entitled to work product protection.” Gilliard, 2013 WL 1729509, at \*2. Defendant now argues that even though the claims were handled as part of defendant’s ordinary course of business, “situations arise in which counsel is consulted in anticipation of an insurer being sued. Indeed, that is the case here as Mt. Hawley was threatened with litigation and hired outside counsel to protect its interest.” ECF No. 140 at 25. While defendant does not provide a great deal of support for this argument, the court is sure that if defendant is correct, it will be apparent from the in camera review. Therefore, the court sees no reason to disturb the magistrate judge’s recommendation on this issue.

2016, plaintiffs filed a motion to compel, outlining their objections to certain of the entries in the updated privilege log. ECF No. 59. However, some of plaintiffs' objections related to entries that were included in the original July 6, 2015 privilege log. Id. at 3. This motion was later withdrawn without prejudice at a March 23, 2016 hearing to allow plaintiffs to address the issues after receiving all of the privilege logs. ECF No. 134 at 63:25–64:15. On June 29, 2016, plaintiffs filed another motion to compel, renewing their objections to the July 6, 2015 privilege log. ECF No. 105. Thus, defendant argues, plaintiffs' June 29, 2016 motion to compel should be denied in part for failure to comply with Local Civil Rule 37.01, which requires all motions to compel to be filed within 21 days after receipt of the discovery response to which they are directed.

The R&R emphasized the fact that defendant agreed to allow plaintiffs to withdraw the January 25, 2016 motion to compel—i.e., the first motion that addressed the July 6, 2015 privilege log—and allowed plaintiffs to refile that motion at a later date. In light of this agreement, the magistrate judge “[had] little trouble finding that plaintiffs were entitled to postpone filing their objections to the privilege logs until defendant provided the complete set of privilege logs.” ECF No. 137 at 20–21. Defendant argues that the magistrate judge “fail[ed] to appreciate that the [January 25, 2016] motion to compel [] was untimely when made.” ECF No. 140 at 26. The court doubts this very seriously. It is fairly clear that the magistrate judge fully understood the untimeliness argument, but felt that because defendant allowed plaintiffs to refile the motion, it would be unfair to allow defendant to oppose the refiled motion on procedural grounds. Nevertheless, defendant correctly points out that it raised its timeliness objection in its opposition to the January 25, 2016 motion to compel. ECF No. 73 at 2. The court has

reviewed the transcript of the March 23, 2016 hearing where the original motion was withdrawn, and it does not appear that defendant meant to waive its timeliness objections by consenting to the withdrawal. ECF No. 134 at 63:25–64:15. Therefore, the court does not find this to be a reason for allowing the untimely motion.

The court is more persuaded by the magistrate judge’s Federal Rule of Civil Procedure 6(b) analysis. Rule 6 applies to “any time period specified in these rules, in any local rule or court order.” Pursuant to Rule 6(b)(1),

[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

“[F]actors to be considered in determining whether excusable neglect has occurred [include]: ‘[1] danger of prejudice to the [non-movant], [2] the length of delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.’” Cronin v. Henderson, 209 F.R.D. 370, 371 (D. Md. 2002) (first and second alterations added) (quoting Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P’ship, 507 U.S. 380, 395 (1993)).

The magistrate judge determined that because plaintiffs could not compel the production of otherwise privileged materials until they could establish a prima facie showing of bad faith under City of Myrtle Beach, there was a good reason for the plaintiffs’ delay in objecting to the July 6, 2015 privilege log. R&R at 20–21. The magistrate judge also found that there was “no indication the delay will significantly

affect the proceedings and plaintiffs appear to have acted in good faith.” Id. at 21. The court agrees with these findings. The magistrate judge also found that because defendant agreed to let plaintiffs refile their motion to compel, there was no risk of prejudice to the defendant. Id. Because defendant never meant to waive its timeliness objection, the court is somewhat less convinced by this argument, but prejudice to the defendant is only one factor. In any event, defendant has failed to explain why it would be prejudiced in its objections. Thus, the court agrees that plaintiffs have shown excusable neglect.

Defendant points out that plaintiffs did not raise the excusable neglect issue. But the fact that the magistrate judge “grant[ed] [p]laintiffs relief that they never requested,” ECF No. 140 at 26, is no reason to reject the magistrate judge’s recommendation. Courts have the power to construe untimely filed motions as if they include a request for relief under Rule 6(b)(1). Meyers v. Baltimore Cty., Md., 2014 WL 1348007, at \*2 (D. Md. Apr. 3, 2014) (“I will construe plaintiff’s Motion as including a request to file an untimely Motion, and consider whether plaintiffs have demonstrated excusable neglect.”); Axxiom Mfg., Inc. v. McCoy Investments, Inc., 846 F. Supp. 2d 732, 736 (S.D. Tex. 2012) (“The court will construe Axxiom’s response as a motion for leave to file an untimely response, and that motion is granted.”); Hall v. Marshall, 479 F. Supp. 2d 304, 311 (E.D.N.Y. 2007) (“[T]he [Court] construes the amended complaint as a motion for leave to amend.”). This is all the magistrate judge did here. Thus, the magistrate judge’s ruling was not in error.

**IV. CONCLUSION**

For the foregoing reasons, the court **ADOPTS** the R&R. The court therefore **GRANTS** plaintiffs' motions to compel, consistent with the R&R. The court also **GRANTS** defendant's motion to reconvene.

**AND IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read "D. Norton", written over a horizontal line.

**DAVID C. NORTON**  
**UNITED STATES DISTRICT JUDGE**

**March 31, 2017**  
**Charleston, South Carolina**

**THE STATE OF SOUTH CAROLINA**  
**In the Supreme Court**

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ON CERTIFICATION FROM THE FOURTH CIRCUIT COURT OF APPEALS

Upon *Writ of Mandamus* being held in Abeyance to

The United States District Court

for

The District of South Carolina

The Honorable David C. Norton, District Court Judge

Appellate Case No. 2018-001170

Fourth Circuit Court of Appeals Case No. 18-1401

District Court Case No. 9:15-cv-00304-DNC

In re: MT. HAWLEY INSURANCE COMPANY.....Petitioner,

in which

CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY AND PLANTATION POINT  
HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC.,

as assignees are .....Respondents

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**EXHIBIT 3**

RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND  
THE CERTIFIED QUESTION  
or in the Alternative  
TO RESCIND CERTIFICATION

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF SOUTH CAROLINA  
 BEAUFORT DIVISION

ContraVest, Inc., ContraVest Construction	)	Civil Action No.: 9:15-cv-304-DCN
Company, and Plantation Point Horizontal	)	
Property Regime Owners Association, Inc.	)	
As Assignee	)	
Plaintiffs,	)	
vs.	)	<b>MT. HAWLEY’S MOTION FOR</b>
	)	<b>RECONSIDERATION AND/OR</b>
	)	<b>CERTIFICATION TO THE SOUTH</b>
Mt. Hawley Insurance Company	)	<b>CAROLINA SUPREME COURT OR</b>
	)	<b>THE FOURTH CIRCUIT</b>
Defendant.	)	
	)	

Mt. Hawley Insurance Company (“Mt. Hawley”) moves, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, for reconsideration of this Court’s Order [ECF No. 143] (the “Order”) adopting the Magistrate Judge’s Report and Recommendation [ECF No. 137]. The Court came to its conclusions deliberately and reasoned itself through the competing arguments of the Parties; the Court’s thoughtful approach shapes the scope and nature of this motion. Mt. Hawley also moves the Court to certify certain questions pursuant to Rule 244(a) of the South Carolina Appellate Court Rules (“SCACR”)<sup>1</sup> or, in the alternative, to certify these questions to the Fourth Circuit for immediate appeal pursuant to 28 U.S.C. § 1292(b):<sup>2</sup>

1. Does an insurance company waive its attorney-client privilege, under South Carolina law, by answering a complaint for bad faith and denying liability?
2. Does an insurance company lose its attorney-client privilege, under South Carolina law, if its opponent can make a prima facie showing of “bad faith”?

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<sup>1</sup> This relief was requested by Mt. Hawley on page 11 of its Objections to the Report and Recommendation of the Magistrate Court [ECF No. 140].

<sup>2</sup> Mt. Hawley will contemporaneously submit, under separate cover and under seal, the disputed reserve, reinsurance, and attorney-client privilege documents for review *in camera*.

3. Does South Carolina law apply “horizontal exhaustion” such that all applicable primary insurance must be exhausted before an excess policy owes coverage?
4. Does South Carolina law permit discovery of insurer reserves and reinsurance?

### INTRODUCTION

The March 31, 2017 Order crafts an exception to the attorney-client privilege that would serve to divest insurance companies of the right to rely upon the privilege in securing legal advice in most cases. Other civil litigants, even accused criminals, may rely on the confidentiality of their legal advice, but an insurance company accused of breaching its insurance contract unreasonably may not. No existing South Carolina law supports this differentiation.

The Order reflects an extension of the “at issue” waiver doctrine first recognized in *Hearn v. Rhey*, 68 F.R.D. 574 (E.D. Wash. 1975) (applying federal common law). There are genuine grounds for debate whether the “at issue” exception would be recognized under South Carolina state law, and if so, its parameters. Those are proper questions for the South Carolina Supreme Court. Thus, Mt. Hawley moves for certification.

But where the Order risks deviating even from *Hearn* and its progeny is in applying an “at issue” waiver doctrine against a party that did not affirmatively put its legal advice at issue. Only a party can waive its own privilege, expressly or impliedly. An adverse party cannot take it away by *its* pleadings.<sup>3</sup> This case differs materially from *City of Myrtle Beach*, the subsequent decisions of this District following it, and other cases applying *Hearn*. Mt. Hawley has *not* pled an affirmative defense of advice of counsel or even of “good faith”; it has not voluntarily

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<sup>3</sup> The Court noted that a decision from Ohio had “determined that the privilege is simply inapplicable in bad faith cases.” Order at 7. *Boone v. Vanliner Insurance Co.*, 744 N.E.2d 154, 158 (Ohio 2001). That decision was later superseded by the Ohio legislature, which codified a more qualified statutory process specific to insurers’ privilege claims. O.R.C. 2317.02(A)(2). Mt. Hawley is aware of no state with a rule like *Boone*. South Carolina has no statute like Ohio’s.

injected into the case its legal advice; it simply denied plaintiff's complaint allegations. (See Answer, ECF No. 3.) That cannot waive privilege, even if *Hearn* were the law of South Carolina, else an insurer has no real privilege. Thus, Mt. Hawley moves for reconsideration.

The second issue warranting reconsideration, or alternatively certification, relates to the alleged bad faith of Mt. Hawley's "horizontal exhaustion" position now challenged by Plaintiffs. The question of horizontal versus vertical exhaustion--and the related question of whether the excess "other insurance" clause in Contravest's excess policy with Mt. Hawley would be given effect--are certainly *at least* debatable whatever their outcome.<sup>4</sup> As the Court noted, "This area of the law is rather complex, and appears to be unsettled in South Carolina"; and "it confronts issues that do not appear to have been addressed by any court under South Carolina law." Order at 18. Yet, an insured *cannot* prove a bad faith claim, whether on a prima facie basis or at trial, "If there is a reasonable ground for contesting a claim. . . ." *Myrick v. Prime Insurance Syndicate*, 395 F.3d 485, 493 (4<sup>th</sup> Cir. 2005); *Watson v. Foremost Signature Ins. Co.*, 2014 U.S.

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<sup>4</sup> Many cases across the country support "horizontal exhaustion," which is really nothing more than giving effect to one fundamental difference between primary and excess insurance, upon which the insurance industry operates. See, e.g., *Horace Mann Ins. Co. v. General Star Insurance Co.*, 514 F.3d 327, 335 (4<sup>th</sup> Cir. 2008) (noting general rule that "true excess insurance is always excess over a policy providing primary coverage"; requiring unscheduled primary insurance to apply before excess); *Kajima Construction Services v. St. Paul Fire Insurance Co.*, 856 N.E.2d 452, 457 (Ill. Ct. App. 2006) (affirming horizontal exhaustion rule that "the insured must exhaust all available primary insurance coverage . . . before an excess policy could be invoked"); *Continental Casualty Co. v. St. Paul Surplus Lines Ins. Co.*, 803 F.Supp. 2d 1113, 1120-21 (E.D. Cal. 2011) (noting "fundamental distinction between primary and excess coverage" and holding "all applicable primary policies must accordingly exhaust 'before any excess will have coverage exposure'"); *Amerisure Mutual Insurance CO. v. Summit Contractors*, 2012 WL 716884, \*14 (M.D. Fla. 2012) (noting "majority rule . . . and established practice in the insurance industry. . . . The excess liability insurer is not obligated to participate in the defense until all the primary policy limits of all the primary policies are exhausted") (collecting authority). Equally fundamentally, it gives effect to Mt. Hawley's "true excess" policy and applies the plain language of its "other insurance" clause. See *Horace Mann*, 514 F.3d at 330 ("Other-insurance clauses are generally valid and enforceable").

Dist. LEXIS 5239, \*5 (D.S.C. 2014) (no liability if there is a “good faith dispute about the extent of coverage”). Plaintiffs did not prove the “coverage” element of their bad faith claim, but it is even more apparent that they do not and cannot satisfy the “bad faith” element. The Court indicated it was not comfortable *deciding* the coverage issue in the context of a discovery motion. But simply finding there *exists* a genuine coverage issue (whatever its ultimate outcome) bars a bad faith claim. Why permit the invasion of the privilege to get to the bottom of why Mt. Hawley took an objectively reasonable position?

On the issues of reserves and reinsurance, Mt. Hawley seeks reconsideration to a limited extent, set forth below, to provide for *in camera* review,<sup>5</sup> but otherwise simply seeks certification for Supreme Court review or interlocutory appeal for the reasons discussed below.

Given the importance of privilege issues for all party litigants, and mindful of the considerable effort the Court has already devoted to these motions, Mt. Hawley asks the indulgence of the Court to reconsider and clarify these rulings, or to certify the specified questions to the South Carolina Supreme Court or for interlocutory appeal to the Fourth Circuit.

### LEGAL STANDARDS

Rule 54(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

[A]ny order or other decision, however designated, that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.

Rule 244(a) SCACR regarding certification to the South Carolina Supreme Court states:

The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state,

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<sup>5</sup> Mt. Hawley is also submitting concurrently herewith, under separate cover and under seal, its other disputed documents for *in camera* review. Order, at 22 fn. 13.

when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

28 U.S.C. § 1292(b) regarding interlocutory appeals states, in part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

As explained by the Fourth Circuit:

Strictly construing § 1292(b), we recognize that it may be proper to conduct an interlocutory review of an order presenting a pure question of law, i.e., an abstract legal issue that the court of appeals can decide quickly and cleanly. In other words, § 1292(b) review may be appropriate where the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts.

*United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340–41 (4th Cir. 2017) (quotation marks and citations omitted).

As explained by the U.S. Supreme Court:

The preconditions for § 1292(b) review—“a controlling question of law,” the prompt resolution of which “may materially advance the ultimate termination of the litigation”—are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases.

*Mohawk Industries v. Carpenter*, 558 U.S. 100, 110-11, 130 S.Ct. 599 (2009).

## ARGUMENT

### **I. SOUTH CAROLINA LAW OF ATTORNEY CLIENT PRIVILEGE AND WAIVER WARRANTS RECONSIDERATION OR CERTIFICATION**

The threshold question of whether South Carolina state law recognizes the “at issue” waiver doctrine, following *Hearn* or some variant of it tailored to insurance bad faith litigation,

is plainly the subject of reasoned differences of opinion. *City of Myrtle Beach v. United National Insurance Co.*, 2010 U.S. Dist. LEXIS 89725 (D.S.C. 2010) (applying *Hearn* to insurance bad faith case under South Carolina law); cf *Davis v. Parkview Apartments*, 762 S.E.2d 535, 549-50 (S.C. 2012) (Pleicones, J., conc./diss.) (rejecting *Hearn* and instead looking to a 2008 Second Circuit opinion, holding that “when good faith is asserted as a defense, waiver is implied only when the client relies on privileged advice to establish good faith”).

On the one hand, as the Court correctly noted (Order at 8-9 & fn. 3; 11 fn. 4), there is no South Carolina statute or state court decision, either recognizing or rejecting the *Hearn* approach. Powerful general principals support equal application of the attorney-client privilege to all persons, *Tobaccoville, U.S.A., Inc. v. McMaster*, 692 S.E.2d 526, 529 (S.C. 2010), and any alleged waiver of this bedrock privilege “must be distinct and unequivocal” while “caution must be exercised” in finding any “implied waiver.” *State v. Thompson*, 329 S.C. 72, 76-77 (S.C. 1998). Many jurists from around the country have found that the *Hearn* test cuts too broadly, at least to the extent it can be read to support waiver of privilege without a requirement that the proponent of privilege affirmatively placed at issue the legal advice it is seeking to shield.<sup>6</sup> One state court case addressing a somewhat analogous claim of implied waiver entailed the client

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<sup>6</sup> See, e.g. *Pritchard v. County of Erie*, 546 F.3d 222, 228-29 (2d Cir. 2008) (noting criticism of *Hearn*, and that “a party must *rely* upon the advice of counsel in the assertion of their defense in this action”); *Rhone-Poulenc Rorer v. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994) (privilege waived only where “the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication”); *In re Lott*, 424 F.3d 446, 453 (6<sup>th</sup> Cir. 2005) (implied waiver where the party’s “pleading places at issue the subject matter of a privileged communication in such a way that the party holding the privilege will be forced to draw upon the privileged material at trial in order to prevail”); *Lorenz v. Valley Forge Insurance Co.*, 815 F.2d 1095, 1098 (7<sup>th</sup> Cir. 1987) (“a defendant must do more than merely deny a plaintiff’s allegations”).

repeatedly testifying at trial that he had followed the legal advice *See Floyd v. Floyd*, 615 S.E.2d 465, 484 (S.C. Ct. App. 2005) (applying “open door doctrine”).

On the other hand, many courts have certainly applied *Hearn* or an adaptation of it to devise an “at issue” waiver test, including *City of Myrtle Beach* and the subsequent decisions within this District adopting its approach for certain insurance cases. Yet each of those cases entails an affirmative pleading by the defendant insurer placing at issue its good faith. *See City of Myrtle Beach*, 2010 WL 3420044, at \*7 (“Defenses asserted include, but are not limited to, that “United National and its representatives have acted reasonably and in good faith at all times herein . . . .”); *Graham v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, No. 0:16-cv-01153-MBS, 2017 WL 116798, at \*4-5 (D.S.C. Jan. 12, 2017) (“Defendant asserts as an affirmative defense that it ‘did not act unreasonably or in bad-faith.’ . . . “The court finds that Defendant implicitly waived attorney-client privileged by asserting the affirmative defense [that it did not act unreasonably or in bad faith].”); *State Farm Fire & Cas. Co. v. Admiral Ins. Co.*, No. 4:15-cv-2745-RMG, 2016 WL 4051271, at \*4 (D.S.C. July 25, 2016) (“The Plaintiffs admit so much of the allegations of paragraph 56 as it states that State Farm Fire and Casualty Company owed a duty to act in good faith and reasonably in handling the claim . . . and *asserts that it did so* . . . The italicized language waives privilege and work product protections concerning documents responsive to RFP 6.”); *Wade v. Chase Bank USA, N.A.*, 2013 WL 12154996, No. 2:12-cv-3565-RMG, at \*2 (“[C]ourts applying South Carolina law have held that, where an insurer in a bad faith claim asserts as an affirmative defense that it acted in good faith, the insurer puts at issue the evidence it had before it at the time it denied the claim, including communications with counsel relevant to its state of mind.”); *Hege v. Aegon USA, LLC*, No. 1:10-cv-1635-GRA, 2011 WL 1791883, at \*5 (D.S.C. May 10, 2011) (“Like the insurer in *City of Myrtle Beach*,

Transamerica asserts, as affirmative defenses, that it acted in good faith . . . .”). To the extent some of the more recent insurance cases from outside South Carolina apply *Hearn* standards, those courts too have looked to whether *the insurer* affirmatively raised a claim or defense that relied upon the privileged communication.<sup>7</sup> For “at issue” is a waiver doctrine. Waivers must be self-inflicted.

In this case, Mt. Hawley has not pled an affirmative defense of good faith or reasonableness. [ECF No. 3]. Thus, the first element of the at-issue waiver doctrine established in *Hearn* and adopted in the *City of Myrtle Beach* is not met. Knowing that it could not satisfy the first element of the at-issue waiver doctrine as a matter of law, Plaintiffs instead argued, essentially, that there was a *per se* waiver of attorney-client privilege in insurance bad faith lawsuits. [ECF No. 105]. As pointed out by Mt. Hawley in the briefing, even *City of Myrtle Beach* rejected a *per se* waiver of attorney-client in bad faith cases. *City of Myrtle Beach*, 2010 U.S. Dist. LEXIS 89725, 14 (“The undersigned finds there is no *per se* waiver of the attorney-client privilege simply by a plaintiff making allegations of bad faith.”).

In light of these principles, Mt. Hawley asks this Court to reconsider its March 31, 2017 Order. Mt. Hawley also moves for certification of the question to the South Carolina Supreme Court, under the standards set forth below, or for interlocutory appeal to the Fourth Circuit. *Century Indemnity Co. v. Stoltz*, 248 F.3d 253, 259 (4<sup>th</sup> Cir. 2001) (granting certification of

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<sup>7</sup> See, e.g. *Allstate Insurance Company v. Clancy*, 936 N.E.2d 272, 278 (Ind. Ct. App. 2010) (“an insurer does not waive its attorney-client privilege by the mere denial of an allegation that it acted in bad faith”); *Bertelsen v. Allstate Insurance Co.*, 796 N.W.2d 685, 703 (S.D. 2011) (applying a modified *Hearn* test: “A denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege”); *Bacchi v. Mass. Mut. Life Ins. Co.*, 110 F.Supp.3d 270 (D. Mass. 2015) (at issue waiver “occurs when a party injects certain claims or defenses into the case which implicate, i.e., put ‘at issue’ the communications of counsel”); see also *Empire W. Title Agency, LLC v. Talamante*, 323 P.3d 1148 (Ariz. 2014) (“merely filing an action or denying an allegation does not waive the privilege”).

question where “No controlling precedent from the South Carolina Supreme Court or the South Carolina Court of Appeals exists to resolve the issues”); *Mohawk Industries* 558 U.S. at 111 (when a privilege ruling “involves a new legal question or is of special consequence, [] district courts should not hesitate to certify an interlocutory appeal in such cases”).

**II. PLAINTIFFS CANNOT MAKE A PRIMA FACIE CASE FOR BAD FAITH, BUT EVEN IF THEY COULD, THAT WOULD NOT MEAN MT. HAWLEY ACTED TO WAIVE ITS ATTORNEY-CLIENT PRIVILEGE**

To find an “at issue” waiver, *Hearn* required *both* an affirmative pleading placing at issue the privileged communications, 68 F.R.D. 581, *and* “a substantial showing of merit to plaintiff’s case.” *Id.* at 582. Neither alone sufficed. Having a viable case against a defendant does not entitle a plaintiff to take away its privileges. Nor does a defendant waive privileges just because someone has a plausible claim against it. Rather, *Hearn* imposed that secondary, merits evaluation as “a major limitation on this exception” even where the waiver was otherwise found. Likewise, *City of Myrtle Beach* and other cases applying *Hearn* have looked to both factors: was the privileged communication placed at issue by the party claiming privilege, and is the case against that party sufficiently meritorious to justify invading privilege? In the insurance bad faith context, that second, merits inquiry looks to whether the insured has presented “a prima facie case of bad faith.” *City of Myrtle Beach*, 2010 U.S. Dist. LEXIS 89725, \*15. It does not eliminate or replace the first requirement (the waiver by affirmative act).

The Court’s March 31, 2017 Order found that the “prima facie” requirement served as the only limitation on what would otherwise be a “per se waiver” standard applicable to insurance companies. Order at 14 & fn. 8. Thus, the determinative factor as to whether an insurance company defendant has impliedly waived its attorney-client privilege would be the perceived potential strength of the plaintiff’s merits case against it.

Plaintiffs did not and cannot make a prima facie case for bad faith here. They can establish neither an entitlement to coverage nor a bad faith denial. To establish coverage under Mt. Hawley's excess policy, they need to prove the exhaustion of all primary policies that were applicable to this loss (which they must concede never happened or was even within contemplation). To establish "bad faith," Plaintiffs will have to show that Mt. Hawley's assertion of the "horizontal exhaustion" requirement was not just wrong, but unreasonable. *Myrick*, 395 F.3d at 493; *Crossley v. State Farm Mut. Auto Ins. Co.*, 307 S.C. 354, 360 (1992). Given the clear, well-reasoned case law across the country<sup>8</sup> applying horizontal exhaustion, the clear language of Mt. Hawley's policies as "true excess" coverage, and that the issues "do not appear to have been addressed by any court under South Carolina law," Order at 18, Plaintiffs have no case for coverage or for unreasonableness--the "bad faith element"--and never will.

The Court nevertheless found the "prima facie" case element could be excused, by finding Mt. Hawley had waived any argument before the Magistrate Judge to the effect that the Court must consider whether "vertical or horizontal exhaustion applies as part of its prima facie showing analysis." [Order at 17-18.] But it was Plaintiffs' burden to prove their prima facie

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<sup>8</sup> See Footnote 3, *supra*. That majority position includes case law from Florida--the state where Contravest was based and did most of its work, the subject insurance policies were issued, and the prior *Crest* and *Courtney Landing* cases were brought. Contravest has implied that Mt. Hawley argued for vertical exhaustion in Florida and only changed its position to horizontal exhaustion later, for this claim. But Contravest must know that is inaccurate--demonstrably so. Mt. Hawley answered Contravest's complaint in Florida, on November 9, 2011, and formally, explicitly invoked horizontal exhaustion, in writing, at least four times. M.D. Fla. Case no. 6:11-cv-00320, Mt. Hawley Answer, ECF No. 113, at ¶¶ 23, 39, Sixth Defense, Eighth Defense ("There is no coverage under the Mt. Hawley excess insurance contracts unless and until all underlying, primary and other insurance has been exhausted by payment of the limits of liability of such insurance"). Contravest's entire bad faith theory is built on a confused or mistaken premise. Its proffered inferences are not reasonable if they contradict the hard facts.

case, which involves all the elements of the claim. Mt. Hawley did not and could not waive something it never had the burden to establish. Rather than proving coverage or that the “horizontal exhaustion” position was unreasonable (and thus bad faith), Plaintiffs introduced a couple of letters and quibbled with their wording. Mt. Hawley responded to what Plaintiffs argued [ECF No. 110, at 8-11; ECF No. 117, at 7-8], but certainly never excused Plaintiffs of their burden (and their failure) to prove all elements of their prima facie case. It is Plaintiffs that failed to prove what they must.

Nor is there any question that the Magistrate was quite familiar with both sides’ exhaustion positions at the time of these motions. Exhaustion was initially argued in the context of Mt. Hawley’s motion to compel production [ECF No. 41] as well as Plaintiffs’ motions to quash and for protective order [ECF No. 46]. The issue was raised again at the March 23, 2016 hearing on Mt. Hawley’s renewed motions to compel [ECF Nos. 55 and 56], as well as the Plaintiffs’ initial motion to compel Mt. Hawley’s privileged documents, based on the *City of Myrtle Beach* at issue waiver of the privilege. [ECF No. 73] [responding to ECF No. 59]. After the March 23 hearing, the Parties complied with the Magistrate’s instruction to brief the exhaustion issue further.<sup>9</sup> [ECF Nos. 83, 85]. After reviewing the briefing, the Magistrate found that the answer to the question was not clear, stating during a telephonic hearing that “I read all of [the briefing regarding exhaustion], and I still haven't made up my mind, so that's why I'm kind of curious about y'all's positions.” [May 10, 2016 Transcript, 23:2–4].<sup>10</sup> These motions were briefed immediately thereafter, in the summer of 2016.

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<sup>9</sup> Mt. Hawley respectfully disagrees with this Court’s ruling that it waived the issue of whether exhaustion is a necessary part of a prima facie case of bad faith, as it had devoted much time to briefing issues of exhaustion for that very reason.

<sup>10</sup> As noted above, the issue previously arose in the context of motions by Defendant to compel production of insurance policies in multiple policy years [ECF No. 41], to which

Plaintiffs offered no proof to establish coverage was owed or to demonstrate that Mt. Hawley's horizontal exhaustion position was objectively unreasonable. Having failed to satisfy two elements of a prima facie case for bad faith, they failed to meet the meritorious case standard required under *Hearn* and *City of Myrtle Beach*. For this reason, Mt. Hawley requests that the Court reconsider its Order of March 31, 2017.

Certification to the Supreme Court is also appropriate as to these related questions, under the standards discussed below. First, does an insurance company lose its attorney-client privilege if the plaintiff is able to make a prima facie case of "bad faith"? Second, Does South Carolina law apply "horizontal exhaustion" such that all applicable primary insurance must be exhausted before an excess policy owes coverage? On both issues, there is no controlling state court appellate authority. *Century Indemnity*, 248 F.3d at 259.

Finally, certification of an interlocutory appeal to the Fourth Circuit would be appropriate on each of those two questions, as well. *Mohawk*, 558 U.S. at 110-11 (where privilege ruling involves a new legal question or is of special consequence, "the district courts should not hesitate to certify an interlocutory appeal").

### III. RESERVES AND REINSURANCE

With regard to this Court's Order concerning reserves and reinsurance, Mt. Hawley requests that the Court reconsider the relief ordered and modify the Court's order to provide for an *in camera* review of the documents. To this end, and reserving its claim that the Court's order of March 31, 2007, is in error, provided herewith, *in camera*, are logs of challenged documents

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Plaintiffs objected on relevance grounds. Defendant argued the policies were relevant with regard to exhaustion of the underlying coverage, and the parties briefed the issue of horizontal vs. vertical exhaustion before Magistrate Judge Baker. It was Judge Baker who held that it was unnecessary to decide the merits issue at this time as this was a discovery issue and not ripe for decision. The Plaintiffs were required to produce the policies.

related to reserves and reinsurance and the documents identified on the logs.<sup>11</sup> Moreover, as set forth below, certification of this question to the South Carolina Supreme Court or for interlocutory appeal to the Fourth Circuit is requested.

#### **IV. THE STANDARDS FOR CERTIFICATION ARE SATISFIED**

##### **A. To The Supreme Court of South Carolina**

The South Carolina Supreme Court may accept a certified question where there are “questions of law of this state which may be determinative of the cause then pending in the certifying court” and “it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.” SCACR Rule 244(a). See *Century Indemnity*, 248 F.3d at 259 (certifying insurance question); *Skipper v. ACE Prop. & Cas. Co.*, 2014 U.S. Dist LEXIS 131595 (D.S.C. 2014) (certifying question re assignability of claim). The “cause pending” can include important, unsettled state law questions of discovery and privilege. In *Hartsock v. Goodyear Dunlop Tires of N. Am.*, 2016 WL 6958446, \*1, --- F. App’x --- (4th Cir. 2016), Judge Duffy had adopted the report and recommendation of Magistrate Judge Baker requiring that Goodyear produce material withheld as trade secrets. Goodyear moved for reconsideration, claiming that South Carolina law should apply (the court had applied federal law) and that no controlling South Carolina authority existed to resolve the issue. Judge Duffy denied the motion to reconsider, but certified an interlocutory appeal to the Fourth Circuit. The Fourth Circuit in turn

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<sup>11</sup> In addition to the attenuated relevance, at best, of reinsurance communications, Mt. Hawley notes that Plaintiffs seem to be seeking to expand upon this discovery further by seeking to subpoena documents directly from those reinsurers—including those related to the claims other than Plantation Point. Certain of those efforts are also the subject of pending motions. [ECF No. 122]. [How attenuated is the discovery going to become in pursuit of these extraneous issues, depositions in unrelated matters?]

certified the question to the South Carolina Supreme Court, finding there was no controlling authority<sup>12</sup> *id.* at \*1, and the South Carolina Supreme Court accepted the certification.

The United States Supreme Court has encouraged certification of novel questions of state law noting that it “save[s] time, energy, and resources, and helps build cooperative judicial federalism.” *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974); *see also* 16 S.C. JUR. APPEAL AND ERROR § 164. Additionally, “questions that recur frequently are more likely candidates for certification.” *Certification to State Court*, Wright & Miller, 17A FED. PRAC. & PROC. JURIS. § 4248 (3d ed.).

Each of the questions identified in this motion would be appropriate for certification under these standards.

#### **1. Horizontal vs. Vertical Exhaustion**

Whether South Carolina law recognizes and enforces the requirement of horizontal exhaustion of all primary insurance before excess insurance coverage may be reached, presents one such question. The Court has already noted, at Page 18 of the Order, that there is no controlling South Carolina authority, “This area of the law is quite complex, and appears to be unsettled in South Carolina”; and also that the issue may be outcome determinative (acknowledging issue potentially “will either resolve or significantly alter the case”). Certification of this question falls squarely within the scope of SCACR Rule 244(a).

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<sup>12</sup> As there was only one issue on appeal which was certified to the South Carolina Supreme Court, the answer to the certified question was certainly “determinative of the cause then pending in the certifying court.” Rule 244(a) SCACR.

## 2. “At Issue” Waiver of Attorney-Client Privilege

Similarly, no controlling authority exists as to the applicability and scope of the “at issue” waiver doctrine under South Carolina law, as stated in this Court’s Order: there are “multiple decisions—albeit, no controlling decisions—addressing the [‘at issue’ waiver] under South Carolina law.” Order, at 11 n. 5. Both of the proposed certified questions pertaining to privilege waiver are unsettled, and no “precedent from the South Carolina Supreme Court or the South Carolina Court of Appeals exists to resolve the issues created by these conflicting contentions of the parties.” *See Century Indemnity*, 248 F.3d at 253. The existence and scope of the “at issue” waiver are issues upon which courts around the country have reached differing conclusions. The question is properly certified to the South Carolina Supreme Court to determine these matters under South Carolina law.

## 3. Reserves and Reinsurance Discovery

The same is true with regard to the existence and scope of the privilege relating to communications regarding reserves and reinsurance information. Such a privilege has been recognized in other jurisdiction—*see, e.g., Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401–02 (8th Cir. 1987) (“individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim” and are protected opinions via work product); *Minn. Sch. Bds. Ass’n Ins. Trust v. Emp’rs Ins. Co. of Wausau*, 183 F.R.D. 627, 631–32 (N.D. Ill. 1999) (holding that an insurer did not waive any privilege by sending confidential documents to its reinsurer and reinsurance broker because the insurer “always intended and expected that their communications would remain confidential and protected from common adversaries”); *see also* Objection to the Report And Recommendation of the Magistrate Court

[ECF No. 140] at 20, 22 (citing cases)—but South Carolina courts have not considered the question or issued any precedent to guide resolution of these questions.<sup>13</sup>

With regard to the privilege issues raised, the certified questions would be determinative of the cause presented, and the Supreme Court would operate well within its discretion were it to accept the question. *See Hartsock*, 2016 WL 6958446 (certifying question of trade secret protection under state law). Moreover, even matters that are not necessarily outcome determinative may “nonetheless be considered if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation.” *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 564 S.E.2d 94, 98 (S.C. 2002) (quoting *Hite v. Thomas & Howard Co.*, 409 S.E.2d 340, 341 (S.C. 1991)). In the same vein, the Supreme Court may allow a certified question of sufficient significance, even if that question is not outcome determinative, if it accompanies a properly certified question. Given the foundational importance of the attorney

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<sup>13</sup> Additionally, Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure expressly provides that “a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (*including the other party’s...insurer...*). (Emphasis added). A reinsurer is an insurer or indemnitor of an insurance company. The reinsurance communications were prepared for Mt. Hawley’s insurers, and thus fall within the scope of this protection.

client privilege within the legal system,<sup>14</sup> the issues raised are of “sufficient significance” to justify the South Carolina Supreme Court’s acceptance of the certified questions.<sup>15</sup>

**B. For Interlocutory Appeal to the Fourth Circuit**

28 U.S.C. Section 1292(b) provides that a District Judge may certify an interlocutory order for an immediate appeal to the United States Court of Appeal, if the District Court finds that “such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

Those standards are also met with respect to each of the questions presented with this motion.

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<sup>14</sup> As noted by the United States Court of Appeals for the Sixth Circuit, “the privilege encourages clients to make full disclosure to their lawyers, and a fully informed lawyer can more effectively serve his client.” *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998). “If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to delineate the scope of the privilege in ways that are predictable and certain.” *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005) (emphasis added). Coupled with the absence of controlling law on the issues presented in this motion, insurance litigants in South Carolina (and their attorneys) would benefit from clarification. *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (noting that “the narrow scope given the attorney-client privilege by the court below . . . makes it difficult for corporate attorneys to formulate sound advice”).

<sup>15</sup> Indeed, “few principles of law are as well-settled as the attorney-client privilege; it is a bedrock principle of the adversary system.” *United States v. Lentz*, 419 F. Supp. 2d 820, 826 (E.D. Va. 2005) (citing *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1454 (1985)). The attorney-client privilege is regarded as the oldest of the privileges, “recognized since the reign of Queen Elizabeth.” *In re Lott*, 424 F.3d at 450, and its purpose is to encourage “full and frank communication between attorneys and their clients” in order to “promote[] broader public interests in the observance of law and the administration of justice.” *Upjohn*, 449 U.S. at 389. “It is not hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice.” *In re Lott*, 424 F.3d at 450.

## 1. Horizontal vs. Vertical Exhaustion

This Court's Order found that the question of whether horizontal or vertical exhaustion applies may determine the outcome of the entire case. Order, at 18. It presents a legal question, and one the Fourth Circuit could rule on "without having to delve beyond the surface of the record in order to determine the facts." *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 341 (4th Cir. 2017) (quotation marks and citation omitted).

That grounds exist for difference of opinion regarding whether horizontal or vertical exhaustion applies is evidenced by the parties' briefing of the subject before Judge Baker, [ECF Nos. 83, 85; May 10, 2016 Transcript], as well as the substantial case law from around the country that has considered the question. *See, e.g.*, cases cited at footnote 3, *supra*. Although Mt. Hawley contends the "horizontal exhaustion" position is the better reasoned and majority approach, *see, e.g., Amerisure Mut. Ins. Co*, 2012 WL 716884, at \*14 ("The Court notes that majority rule . . . is that where an insured maintains both primary and excess policies, the excess liability insurer is not obligated to participate in the defense until the primary policy limits of all primary policies are exhausted"), other courts have applied vertical exhaustion; and the Court has noted that there presently is no definitive statement of South Carolina on these questions. Order at 18 ("issues . . . do not appear to have been addressed by any court under South Carolina law").

A ruling on the question of exhaustion would also materially advance the termination of the litigation. Again, the Court has noted the likelihood, within its Order, that analysis of this question "will either resolve or significantly alter the case." Order at 18.

## 2. "At Issue" Waiver of the Attorney-Client Privilege

As discussed *supra*, the issues of attorney-client privilege and waiver raised in this motion also present questions of law. The national authority following, modifying and/or

rejecting *Hearn*, and indeed even the differing conclusions reached by the District Court judges and by Justice Pleicones within South Carolina, confirm that these issues have been subject to “substantial grounds for difference of opinion.” See Discussion and Cases cited above, at Pages 5-7 & fns. 5-6. Prompt resolution of contested privilege issues may materially advance the termination of the litigation; indeed, conversely, waiting to appeal from an erroneous privilege ruling or disclosure order may well mandate a costly re-trial following remand.<sup>16</sup> Thus, the Supreme Court noted in *Mohawk Industries*, review of important privilege rulings via interlocutory appeal is squarely within the intent and purpose of Section 1292(b).

First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The preconditions for § 1292(b) review—“a controlling question of law,” the prompt resolution of which “may materially advance the termination of the litigation”—are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases.

*Mohawk*, 558 U.S. at 110-11.

### 3. Reserves and Reinsurance Discovery

Likewise, the discoverability of insurer loss reserves presents a question of law, upon which courts in different jurisdictions have reached varying conclusions. Compare *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401–02 (8th Cir. 1987) (“individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim” and

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<sup>16</sup> Once privileged material is produced, one cannot truly “unring the bell.” The United States Supreme Court has found that remedial measures can be taken following remand to try to cure an erroneous disclosure order, but not efficiently so. Indeed, the Court found that an erroneous evidentiary ruling requiring improper disclosure of privileged material could be cured by vacating the adverse judgment and remanding the case for “a new trial in which the protected material and its fruits are excluded from evidence.” *Mohawk*, 588 U.S. at 109. Mt. Hawley submits that certification of the question would be a rather more expeditious method of resolving the attorney-client, reserve, and reinsurance privilege issues.

are protected opinions via work product), *with Nat'l Union Fire Ins. Co. v. Cont'l Ill. Group*, Nos. 85-C-7080, 85-C-7081, 1988 WL 79513, at \*2 (N.D. Ill. 1988) (permitting discovery of reserves information and rejecting insurer's contention that reserve information constituted attorney work product). The same holds true with regard to reinsurance information, even within the same jurisdiction. *Compare Gulf Ins. Co. v. Transatl. Reins. Co.*, 788 N.Y.S.2d 44, 45–46 (App. Div. 2004) (“Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges.”), *with Mass. Bay Ins. Co. v. Stamm*, 700 N.Y.S.2d 707, 707 (App. Div. 2000) (“[T]he insurers waived any attorney-client privilege with respect to documents transmitted to the reinsurers.”); *see also Minn. Sch. Bds. Ass'n Ins. Trust v. Emp'rs Ins. Co. of Wausau*, 183 F.R.D. 627, 631-32 (N.D. Ill. 1999) (holding that an insurer did not waive any privilege by sending confidential documents to its reinsurer and reinsurance broker because the insurer “always intended and expected that their communications would remain confidential and protected from common adversaries”). Prompt resolution and guidance on these questions will likewise materially advance the ultimate termination of the litigation.

### CONCLUSION

Mt. Hawley requests<sup>17</sup> that the Court:

- reconsider its Order [ECF No. 143];
- reconsider production of reserve and reinsurance communications and first review the documents *in camera*;
- certify the issues addressed herein to the South Carolina Supreme Court or, in the alternative, certify an interlocutory appeal to the Fourth Circuit pursuant to 28 U.S.C. § 1292(b).

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<sup>17</sup> The end of fact discovery in this case is slated for June 30. The Court may feel it would be best to defer decision on these issues until after discovery is concluded and hold in abeyance the release of any documents that are the subject of the Court's Order and this briefing.

Mt. Hawley will contemporaneously submit, under separate cover and under seal, the disputed reserve, reinsurance, and attorney-client privilege documents for review *in camera*.

Respectfully Submitted,

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On this 26th day of April, 2017  
Charleston, South Carolina

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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ON CERTIFICATION FROM THE FOURTH CIRCUIT COURT OF APPEALS  
Upon *Writ of Mandamus* being held in Abeyance to  
The United States District Court  
for  
The District of South Carolina

The Honorable David C. Norton, District Court Judge

Appellate Case No. 2018-001170

Fourth Circuit Court of Appeals Case No. 18-1401  
District Court Case No. 9:15-cv-00304-DNC

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In re: MT. HAWLEY INSURANCE COMPANY.....Petitioner,

in which

CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY AND PLANTATION POINT  
HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC.,  
as assignees are .....Respondents

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**EXHIBIT 4**

RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND  
THE CERTIFIED QUESTION  
or in the Alternative  
TO RESCIND CERTIFICATION

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FILED: June 19, 2018  
AMENDED: June 28, 2018

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 18-1401  
(9:15-cv-00304-DCN)

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In re: MT. HAWLEY INSURANCE COMPANY,

Petitioner.

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ORDER

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Pursuant to Rule 244 of the South Carolina Appellate Court Rules, we respectfully certify the following question of law to the Supreme Court of South Carolina:

Does South Carolina law support application of the “at issue” exception to the attorney-client privilege such that a party may waive the privilege by denying liability in its answer?

As we explain, we believe that there is no controlling precedent answering this question in the decisions of the Supreme Court of South Carolina. Moreover, the answer may be determinative of whether petitioner Mount Hawley Insurance Company (“Mount Hawley”) is entitled to a writ of mandamus vacating the district court’s order to compel the production of files that Mount Hawley asserts are protected by the attorney-client privilege under South Carolina law.



## I.

Mount Hawley provided ContraVest Construction Company (“Contravest”) with excess commercial liability insurance from July 21, 2003, to July 21, 2007. During that period, Contravest constructed the Plantation Point development in Beaufort County, South Carolina. In 2011 the Plantation Point Horizontal Property Regime Owners Association (“the Owners Association”) sued Contravest for alleged defective construction of Plantation Point. Mount Hawley refused Contravest’s demands to defend or indemnify Contravest in the suit, as Contravest contended was required by its insurance policies, and Contravest ultimately settled the case.

Contravest and the Owners Association subsequently sued Mount Hawley in South Carolina court, alleging bad faith failure to defend or indemnify, breach of contract, and unjust enrichment. Mount Hawley removed the case to the United States District Court for the District of South Carolina pursuant to 28 U.S.C. § 1441 (2012), and federal subject matter jurisdiction exists under 28 U.S.C. § 1332 (2012) based upon complete diversity of citizenship between the parties and damages alleged to be greater than \$75,000.

During discovery, the plaintiffs sought production of, first, Mount Hawley’s file on Contravest’s claim for excess coverage relating to the Plantation Point suit, and later, Mount Hawley’s files relating to all of Contravest’s claims under its excess liability policies. *See* Fed. R. Civ. P. 26(b)(1), 34(a)(1)(A). Mount Hawley contended that these files contained material protected by the attorney-client privilege, and produced the files in redacted form with accompanying privilege logs. *See* Fed. R. Civ. P. 26(b)(5)(A).

The plaintiffs filed multiple motions to compel, arguing that Mount Hawley waived the attorney-client privilege as to these files. *See* Fed. R. Civ. P. 37(a)(3)(B)(iv). The district court adopted the recommendation of the magistrate judge, granted the motions to compel, and ordered Mount Hawley to produce the files for in camera inspection. *ContraVest Inc. v. Mt. Hawley Ins. Co.*, 273 F. Supp. 3d 607, 622-23 (D.S.C. 2017). The district court subsequently denied Mount Hawley's motion for reconsideration.<sup>1</sup> Mount Hawley then sought a writ of mandamus from this court to vacate the district court's order granting the motions to compel.

## II.

In its petition for a writ of mandamus, Mount Hawley challenges the district court's holding that the relevant files were not protected by the attorney-client privilege because Mount Hawley put them "at issue" in the case by denying liability for bad faith failure to defend or indemnify. Because this is a diversity action involving claims for which South Carolina law provides the rule of decision, South Carolina's law of attorney-client privilege applies. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 285 n.5 (4th Cir. 2000); Fed. R. Evid. 501. In South Carolina the attorney-client privilege is defined as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance

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<sup>1</sup> In its motion for reconsideration Mount Hawley asked the district court to certify four questions of law to the Supreme Court of South Carolina, but the district court declined to do so.

permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 530 (2010). “In general, the burden of establishing the privilege rests upon the party asserting it.” *Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008).

In finding that the relevant files were not protected by South Carolina’s attorney-client privilege, the district court relied on *City of Myrtle Beach v. United Nat. Ins. Co.*, No. 4:08-1183-TLW-SVH, 2010 WL 3420044 (D.S.C. Aug. 27, 2010) (unpublished). *City of Myrtle Beach* also involved a bad faith insurance suit under South Carolina law in which the insured sought to compel the insurer to produce the relevant claims file, and the insurer argued that the file contained material protected by the attorney-client privilege. *Id.* at \*1-2. The district court adopted the approach articulated in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), as “consistent with established South Carolina law.” *Id.* at \*5. Applying *Hearn*, the district court found that

there is no per se waiver of the attorney client privilege simply by a plaintiff making allegations of bad faith. However, if a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer voluntarily waives, explicitly or impliedly, the attorney-client privilege. Thus “voluntarily injecting” the issue is not limited to asserting the advice of counsel as an affirmative defense. A party’s assertion of a new position of law or fact may be the basis of waiver.

*Id.* (citation omitted).

Applying this definition of waiver, the court in *City of Myrtle Beach* found that “[f]or the purposes of the motion to compel, . . . the [insured] has presented a prima facie case of bad faith,” and the insurer failed to meet its burden of establishing the absence of

waiver of the attorney-client privilege on account of the defenses asserted in its answer, including that the insurer acted reasonably and in good faith. *Id.* at \*7. The court noted that “[w]hile this ruling amounts to a virtual per se waiver of the privilege in this case, this result is based on the facts and issues presented by [the insurer] in its Answer and its failure to meet its burden as to the applicability of the privilege with this in mind.” *Id.*

In the present case, the district court rejected Mount Hawley’s argument that *City of Myrtle Beach* was inconsistent with South Carolina law in light of the fact that one member of the Supreme Court of South Carolina criticized the *Hearn* decision in a separate opinion concurring in part and dissenting in part. *See Davis v. Parkview Apartments*, 409 S.C. 266, 291-96, 762 S.E.2d 535, 549-51 (2014) (Pleicones, J., concurring in part and dissenting in part). The district court found “that the numerous decisions that have applied *City of Myrtle Beach* in this district provide stronger evidence [than the separate opinion in *Davis*] that the Supreme Court of South Carolina would adopt such an approach.” *ContraVest*, 273 F. Supp. 3d at 616. The district court also concluded that this approach strikes the best balance between the “important policy goals of the attorney-client privilege . . . against the substantive interests underlying an insured bad faith claim.” *Id.* (citation omitted).

Following the approach articulated in *City of Myrtle Beach*, the district court concluded that because the plaintiffs had established a prima facie case of bad faith failure to insure, and Mount Hawley in its answer denied bad faith liability, Mount Hawley waived the attorney-client privilege with respect to the attorney-client communications in the claim files, to the extent such communications are relevant under

Fed. R. Civ. P. 26.<sup>2</sup> *Id.* at 611-23. The court thus ordered Mount Hawley to produce the files for in camera review. *Id.* at 623.

Mount Hawley contends, and we agree, that if South Carolina law does not support the “at issue” exception applied in *City of Myrtle Beach*, the district court’s order granting the motions to compel was erroneous. We have not found any South Carolina authority that appears to definitely answer this question, and believe the issue to be sufficiently debatable to warrant certification of the question to the Supreme Court of South Carolina.

### III.

Based on the foregoing, we respectfully request that the Supreme Court of South Carolina accept and answer the foregoing certified question, thereby providing the parties, the courts, future litigants, and the public with definitive guidance regarding the attorney-client privilege in South Carolina.

We direct the Clerk of Court to forward a copy of this order under official seal to the Supreme Court of South Carolina.

Entered at the direction of Judge Niemeyer with the concurrence of Judge Agee and Senior Judge Hamilton.

### *QUESTION CERTIFIED*

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<sup>2</sup> The district court noted that *City of Myrtle Beach* does not explicitly hold that a plaintiff in a bad faith insurance case must establish a prima facie case before being entitled to discover relevant attorney-client communications. *ContraVest*, 273 F. Supp. 3d at 618-19. The court explained, however, that unless *City of Myrtle Beach* is read to require such a prima facie showing, the rejection of the “per se waiver” rule would be meaningless. *Id.* at 619.

**RECEIVED**

AUG 27 2018

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

ON CERTIFICATION FROM THE FOURTH CIRCUIT COURT OF APPEALS  
Upon *Writ of Mandamus* being held in Abeyance to  
The United States District Court  
for  
The District of South Carolina

The Honorable David C. Norton, District Court Judge

Appellate Case No. 2018-001170

Fourth Circuit Court of Appeals Case No. 18-1401  
District Court Case No. 9:15-cv-00304-DNC

In re: MT. HAWLEY INSURANCE COMPANY.....Petitioner,

in which

CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY AND PLANTATION  
POINT HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC.,  
as assignees are .....Respondents

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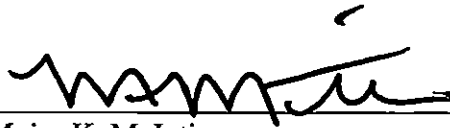
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I, Moira K. McIntire, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have on this date, served a true and correct copy of the Respondent's Motion to Reconsider, Alter, or Amend or in the alternative to Rescind Certification via US Mail and electronic mail to the following counselors of record:

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A handwritten signature in black ink, appearing to read 'Moira K. McIntire', written over a horizontal line.

Moira K. McIntire  
Paralegal to Michael A. Timbes & Thomas J. Rode

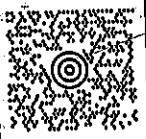
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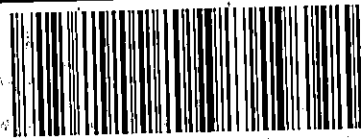


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