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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 EMILY ZERVAS,

8 Plaintiff,

9 v.

10 USAA GENERAL INDEMNITY
COMPANY,

11 Defendant.

Case No. 2:18-cv-00051-JAD-GWF

ORDER

**Re: Motion to Stay Discovery (ECF No. 16)
Motion for Protective Order (ECF No. 19)**

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13 This matter is before the Court on Defendant's Motion to Stay Discovery Pending the
14 Outcome of Motion for Summary Judgment (ECF No. 16) and Defendant's Motion for a
15 Protective Order (ECF No. 19), filed on April 2, 2018. Plaintiff filed her Response (ECF No. 28)
16 on April 30, 2018, and Defendant filed its Reply (ECF No. 35) on May 11, 2018. The Court
17 conducted a hearing in this matter on May 16, 2018.

18 **BACKGROUND**

19 Plaintiff Emily Zervas was injured in an accident while riding as a passenger on a
20 motorcycle. The accident was caused by the negligence of an uninsured motorist. Plaintiff
21 alleges that her bodily injury damages exceed \$500,000. The motorcycle was insured under a
22 policy issued by GEICO Insurance Company which provided \$100,000 in uninsured motorist
23 ("UM") coverage. GEICO paid the \$100,000 UM limits to Plaintiff. Ms. Zervas' father is the
24 named insured on an automobile insurance policy issued by State Farm Insurance Company
25 which provides \$100,000 in UM coverage. State Farm has paid the \$100,000 UM limits of its
26 policy to Ms. Zervas. Ms. Zervas' mother is the named insured on an automobile insurance
27 policy issued by Defendant USAA which provides uninsured motorist coverage limits of
28 \$300,000 per person and \$500,000 per occurrence. Plaintiff has brought this action against

1 USAA for declaratory relief and breach of contract to recover the \$300,000 UM limits of the
2 USAA policy. She does not, at present, allege a claim for “insurance bad faith” or violation of
3 the Nevada unfair claims practices act, Nevada Revised Statute (“NRS”) 686A.310.

4 Defendant has filed a motion for summary judgment in which it argues that based on the
5 “other insurance clauses” in the GEICO, State Farm and USAA policies, and the provisions of
6 Nevada’s “anti-stacking” statute, NRS 687B.145(1), it is only obligated to pay its pro rata share
7 of the combined UM limits of the three policies. USAA’s pro rata share of the combined limits
8 is 60 percent, or \$180,000, which it has tendered to the Plaintiff.

9 Plaintiff argues that the UM coverages under the three policies may only be prorated if
10 the insured’s total damages are less than the combined limits of the available coverages and the
11 insured is fully compensated for her damages. She argues that this case is not governed by NRS
12 687.145(1) because the three policies were issued by three different insurance companies.
13 Assuming that NRS 687.145(1) applies, however, Plaintiff argues that Defendant must satisfy all
14 three requirements of the statute which provides as follows:

15 Any policy of insurance or endorsement providing coverage under the
16 provisions of NRS 690B.020 or other policy of casualty insurance may provide
17 that if the insured has coverage available to him under more than one policy or
18 provision of coverage, any recovery or benefits may equal but not exceed the
19 higher of the applicable limits of the respective coverages, and the recovery or
20 benefits must be prorated between the applicable coverages in the proportion
21 that their respective limits bear to the aggregate of their limits. Any provision
22 which limits benefits pursuant to this section must be in clear language and be
23 prominently displayed in the policy, binder or endorsement. Any limiting
24 provision is void if the named insured has purchased separate coverage on the
25 same risk and has paid a premium calculated to full reimbursement under that
26 coverage.

27 The insurer has the burden of proving that it has complied with the requirements of the
28 statute. *Serrett v. Kimber*, 874 P.2d 747, 751 (Nev. 1994). The Court noted that with respect to
the third requirement, the insurer has virtually sole access to the relevant documents and
possesses the expertise needed to explain and justify its premiums. The insurer must produce
actual evidence to support its assertion that the insured was not charged a premium calculated for
full reimbursement under the coverage. *Id.*

1 Defendant argues that NRS 687B.145(1) only operates to void limitations provisions
2 when the “named insured” has purchased separate coverage on the same risk and has paid a
3 premium calculated for full reimbursement under that coverage. Therefore, the third prong of
4 the statute only applies if the insured has purchased separate i.e., more than one UM coverage.
5 Because USAA issued only one UM policy to Plaintiff’s mother, the third prong does not come
6 into play. *Reply* (ECF No. 38), at 2. Defendant also argues that its premiums are approved by
7 the Nevada Department of Insurance. Defendant’s argument regarding NRS 687B.145(1) may
8 be correct. It does not, however, cite any Nevada or federal court decision that so holds.

9 DISCUSSION

10 The test for staying discovery pending resolution of a potentially dispositive motion is
11 well established in this district. A stay of discovery may be granted if the pending motion is (1)
12 potentially dispositive; (2) it can be decided without additional discovery; and (3) the court has
13 taken a “preliminary peek” at the merits of the pending motion and is convinced that the plaintiff
14 will be unable to state a claim for relief. *Kor Media Group, LLC v. Green*, 294 F.R.D. 579, 581
15 (D.Nev. 2013); *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D.Nev. 2011). “The default
16 assumption is that discovery should go forward while a dispositive motion is pending. ‘Absent
17 extraordinary circumstances, litigation should not be delayed simply because a non-frivolous
18 motion has been filed.’” *Allstate Ins. Co. v. Belsky*, 2018 WL 2287142, at *1 (D.Nev. Mar. 23,
19 2018) (quoting *Traska v. International Game Technology*, 2011 WL 1233298 at *3 (D.Nev. Mar.
20 29, 2011)). Although some district courts within the Ninth Circuit have applied a more lenient
21 test for granting a stay of discovery, *see Tradebay*, 278 F.R.D. at 602-603 (discussing decisions),
22 the requirement that the court be convinced that plaintiff will be unable to state a claim for relief
23 is set forth in *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) and *B.R.S. Land Investors v.*
24 *United States*, 596 F.2d 353, 356 (9th Cir. 1979). The test does not include a weighing of the
25 burden and expense of discovery in deciding whether to stay discovery. To the contrary, “[a]
26 showing that discovery may involve some inconvenience and expense does not suffice to
27 establish good cause for a protective order.” *Tradebay*, 278 F.R.D. at 601 (citing *Twin City Fire*
28 *Ins. V. Employers of Wausau*, 124 F.R.D. 652, 653 (D.Nev. 1989)).

1 In this case, Plaintiff has identified at least one issue on which discovery appears proper:
2 Whether the named insured paid a premium calculated for full reimbursement under the UM
3 coverage.¹ Plaintiff is entitled to determine how USAA calculated the premium for uninsured
4 motorist coverage and whether that calculation complies with the requirement of NRS
5 687B.145(1). Such discovery may include requests for production of relevant underwriting
6 documents and a deposition of Defendant's actuary. While Defendant makes a potentially valid
7 argument regarding the UM coverage afforded by the policy, the Court is not convinced that its
8 motion for summary judgment will be granted. Furthermore, discovery on this issue will not be
9 unduly burdensome even if Defendant is ultimately successful on its motion for summary
10 judgment.

11 The other requirements of NRS Section 687B.145(1), whether the provision is stated in
12 "clear language" and is "prominently displayed" in the policy, are issue of law which can be
13 decided without resort to extrinsic evidence. The same is true with respect to the construction of
14 "other insurance" clauses. Discovery on these issues is unnecessary.

15 Plaintiff also alleges that Defendant represented that it reached an agreement with the
16 other insurers, GEICO and State Farm, as to how the UM coverages would be prorated and paid
17 and that she is entitled to conduct discovery regarding that agreement or understanding. The
18 Court disagrees. Any such agreement or understanding is irrelevant to the determination of
19 policy coverage. Plaintiff and Defendant are bound by the terms of the insurance contract and
20 the law applicable thereto. An agreement or understanding between Defendant and other
21 insurers cannot vary the insurer's obligations under the insurance contract and governing law.

22 Likewise, Plaintiff's desire to depose the USAA adjuster regarding his interpretation of
23 the other insurance clause will not be permitted because such testimony is irrelevant. The
24 interpretation of an insurance policy is a question of law for the court. *Century Surety Co. v.*
25 *Casino West, Inc.*, 329 P.3d 614, 616 (Nev. 2014). *See also United Nat'l Ins. Co. v. Frontier Ins.*
26 *Co.*, 99 P.3d 1152 (D.Nev. 2004) and *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 621 (Nev.


27 ¹ Plaintiff also argues that she is entitled to receive a certified copy of the USAA policy which should have been
28 attached as an exhibit to Defendant's motion for summary judgment. Defendant has attached a copy of the policy to
its Reply (ECF No. 38), Exhibit E, but it is not certified as a true and correct copy of the policy.

1 2011). Expert testimony is generally irrelevant on the issue of policy interpretation. *McHugh v.*
2 *United Service Automobile Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999); *Diamond State Ins. Co v.*
3 *Gulli*, 2012 WL 113016, at *1 (D.Nev. Jan. 12, 2012); *Flintkote Co. v. General Acc. Assur. Co.*,
4 410 F.Supp.2d 875, 885 (N.D.Cal. 2006); *Willard v. Foremost Ins. Co.*, 2014 WL 12589331, at
5 *3 (C.D.Cal. May 9, 2014). Clearly, a non-expert insurance adjuster's interpretation of a policy
6 provision is irrelevant.²

7 Based on the foregoing, Plaintiff is entitled to conduct discovery regarding the premiums
8 for the underinsured motorist coverage under the USAA policy in light of the requirements in
9 NRS 687.145(1). Plaintiff is also entitled to obtain a certified copy of the policy from
10 Defendant. Plaintiff is not entitled to conduct other discovery which is irrelevant to the
11 determination of the UM coverage limits applicable to her claim. Accordingly,

12 **IT IS HEREBY ORDERED** that Defendant's Motion to Stay Discovery Pending the
13 Outcome of Motion for Summary Judgment (ECF No. 16) and Defendant's Motion for
14 Protective Order (ECF No. 19) are **denied**, in accordance with the provisions of this order. Any
15 discovery conducted in this case shall be confined as discussed above.

16 DATED this 7th day of June, 2018.

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19 GEORGE FOLEY, JR.
UNITED STATES MAGISTRATE JUDGE

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28 ² The adjuster's interpretation of the policy may be relevant, however, on a claim for insurance bad faith or
for violation of the unfair claims practices act.