EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,	)	
Plaintiff, Counter-Defendant,	)	
v.	)	**CIVIL ACTION NO. 3:11-CV-219**
CAROL ANN STUTTE; LAURA JEAN STUTTE,	)	
Defendants, Counter-Plaintiffs,	)	
and	)	
CHASE HOME FINANCE, LLC,	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO ANPAC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE STUTTES' COUNTERCLAIMS FOR BAD FAITH AND VIOLATION OF THE TENNESSEE CONSUMER PROTECTION ACT

Defendants and Counter-Plaintiffs, Carol Ann Stutte and Laura Jean Stutte (collectively, the "Stuttes"), by and through counsel, submit this Memorandum in Opposition to Plaintiff and Counter-Defendant American National Property and Casualty Company's ("ANPAC's") Motion for Partial Summary Judgment on the Stuttes' Counterclaims for Bad Faith and Violation of the Tennessee Consumer Protection Act ("TCPA").

ANPAC's motion asks this Court to enter summary judgment *before* the Stuttes have had an opportunity to take *any* discovery in this case. Under Rule 56(d) of the Federal Rules of Civil Procedure and well-established Sixth Circuit precedent, summary judgment is improper where, as here, the non-movant has not received a full opportunity to conduct discovery. Therefore,

ANPAC's motion is premature and should be DENIED *without prejudice*, with ANPAC having the ability to resubmit its motion following the close of discovery.

Background

On September 4, 2010, the Stuttes' home and its contents were completely destroyed by fire. The property, located at 2715 Highway 360, Vonore, Monroe County, Tennessee, was insured by ANPAC under Special Homeowners Policy No. 41-H-V66-965-7 (the "Policy"). The Stuttes timely noticed an insurance claim under the Policy. ANPAC denied the Stuttes' claim by letter dated May 12, 2011. (Levitt Decl. ¶ 1.)[1] The only bases stated in the letter for ANPAC's refusal to pay were allegations that the Stuttes "intentionally caused" the fire that destroyed their home and "have committed concealment or fraud relating to the claim." (*Id.*) On May 13, 2011, ANPAC filed the present action seeking a declaration that it had no obligation under the Policy to pay the Stuttes' claim. (Dkt. No. 1.) ANPAC failed to cite or plead *any* specific facts in support of the allegations in its denial letter and complaint. (*See id.*; Levitt Decl. ¶ 1.)

Through counsel, the Stuttes responded to ANPAC's denial letter on May 19, 2011, and requested that ANPAC "disclose a complete copy of its investigation file, as well as copies of any and all other information that ANPAC believes supports or relates in any way to the allegations in its denial letter and complaint." (Levitt Decl. ¶ 2.) ANPAC never responded to this request, nor did ANPAC produce its complete investigation file. (*Id.*)

On June 6, 2011, the Stuttes answered ANPAC's complaint and filed counterclaims for breach of contract (Count I), declaratory judgment (Count II), and violation of the TCPA (Count

[1] Pursuant to Fed. R. Civ. P. 56(d), the Stuttes submit the declaration of Scott J. Levitt, one of their attorneys of record in the present action, in support of this memorandum in opposition. (*See* Dkt. No. 31.)

III). (Dkt. No. 6.) The Stuttes later obtained leave to amend and added a counterclaim for bad faith (Count IV). (Dkt. No. 20.) In lieu of filing an answer, ANPAC filed a motion to dismiss the Stuttes' TCPA claim (Count III) on June 24, 2011. (Dkt. Nos. 10-11.) The Stuttes filed an opposition on July 5, 2011. (Dkt. No. 13.) ANPAC did not file a reply. To date, this Court has not ruled on ANPAC's motion to dismiss, and ANPAC has not answered the remaining counts of the Stuttes' amended counterclaim.

On September 21, 2011, the Stuttes' counsel contacted ANPAC's attorneys and proposed that the parties convene a conference call to discuss a discovery plan under Rule 26(f). (Levitt Decl. ¶ 3.) On September 26, 2011, ANPAC's attorneys contacted the Stuttes' counsel by phone and advised that ANPAC would soon be filing a motion for partial summary judgment on the Stuttes' TCPA and bad faith claims (Counts III and IV, respectively). (*Id.* ¶ 4.) ANPAC's attorneys stated the motion would include affidavits laying out ANPAC's reasons for denying coverage. (*Id.*) Per the suggestion of ANPAC's attorneys, the parties agreed that the Rule 26(f) conference should be deferred until the Stuttes had reviewed ANPAC's motion and supporting documents. (*Id.*)

On October 25, 2011, ANPAC filed a "Motion for Partial Summary Judgment Regarding Plaintiffs' Claims of Bad Faith and Violation of the Tennessee Consumer Protection Act." (Dkt. Nos. 27-29.) ANPAC's motion and supporting memorandum cite and rely on two affidavits and fourteen exhibits, all of which fall wholly outside of the pleadings. (Levitt Decl. ¶ 6.) These documents contain numerous factual allegations that are vigorously disputed by the Stuttes,

many of which the Stuttes have heard for the first time in ANPAC's motion.[2] (*Id.*)

The parties have not commenced *any* discovery in this case. The Stuttes have not had the opportunity to depose the two affiants, the authors of the five reports included among ANPAC's exhibits, the ANPAC employees and investigators involved in the case, or the persons who were interviewed as part of ANPAC's investigation. (*Id.* ¶ 7.) The Stuttes must be afforded an opportunity to discover the basis for the material assertions and conclusions of these persons in order to present facts essential to their opposition to ANPAC's motion. (*Id.*)

Moreover, ANPAC has disclosed only the selected portions of its investigation file that it claims support its Motion for Partial Summary Judgment. (*Id.* ¶ 8.) These documents offer an incomplete picture of ANPAC's investigation and do not establish as a matter of law that ANPAC acted in good faith. (*Id.*) Much of the evidence that is critical to the Stuttes' ability to present facts essential to justify their opposition is within ANPAC's exclusive control, including the scope, quality, and results of ANPAC's investigation, as well as whether its employees and investigators acted diligently and in good faith during the course of the investigation. (*Id.* ¶ 9.) The depositions of these individuals and the production of ANPAC's complete investigation file – including internal communications exclusively within ANPAC's possession – are necessary before the Stuttes can obtain the facts essential to justify their opposition. (*Id.*) This discovery may, in turn, lead to other depositions and sources of information that are similarly essential. (*Id.*)

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[2] Out of an abundance of caution, the Stuttes also submit their Responses to ANPAC's Statement of Undisputed Facts. (*See* Dkt. No. 32.) However, because the Stuttes have not been afforded the opportunity to conduct *any* discovery, they are unable to admit, deny, or otherwise respond to the vast majority of ANPAC's assertions.

Standard of Review

Whether an insurer's refusal to pay a claim was "not in good faith" and warranted the statutory penalty under Tenn. Code Ann. § 56-7-105 is ordinarily a question of fact for the jury. *E.g.*, *Doochin v. U.S. Fidelity & Guar. Co.*, 854 S.W.2d 109, 112 (Tenn. Ct. App. 1993). Likewise, whether an insurer engaged in "unfair or deceptive acts or practices" in violation of the TCPA is a question of fact. *E.g.*, *Morrison v. Allen*, 338 S.W.3d 417, 439 (Tenn. 2011).

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only through discovery can it be determined whether a material factual issue exists which precludes summary judgment." *Vega v. First Fed. Savings & Loan Assoc. of Detroit*, 622 F.2d 918, 926 (6th Cir. 1980). Therefore, the non-moving party "must receive 'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment." *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)). "[S]ummary judgment should not [be] awarded until the [non-movant] [is] allowed some opportunity for discovery." *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231 (6th Cir. 1994). Instead, where the non-movant demonstrates "by affidavit or declaration" that "it cannot present facts essential to justify its opposition, the court may . . . defer considering the motion or deny it." Fed. R. Civ. P. 56(d). If the court enters summary judgment "without permitting [the non-movant] to conduct any discovery at all," such a decision "will constitute an abuse of discretion." *Vance v. United States*, 90 F.3d 1145, 1149 (6th Cir. 1996); *accord CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008); *United States v. Var-Ken, Inc.*, 875 F.2d 868, 1989 WL 42913, at *2 (6th Cir. 1989).

Argument

ANPAC's motion for summary judgment is premature and should be denied *without prejudice*. It is well-established in the Sixth Circuit that the non-moving party must be given a full opportunity to conduct discovery before the district court may enter summary judgment against it. *See, e.g.*, *CenTra*, 538 F.3d at 420; *Vance*, 90 F.3d at 1149; *White's Landing*, 29 F.3d at 231-32. This rule is particularly appropriate where, as here, a summary judgment motion is based on numerous purported facts that are currently within the exclusive possession and control of the movant.

In *CenTra*, the Sixth Circuit reversed a premature grant of summary judgment and held that the district court abused its discretion by refusing to allow the non-moving party to conduct discovery. 538 F.3d at 419-21. The defendants filed a motion for summary judgment "[b]efore any opportunity for discovery." *Id.* at 408. The defendants' motion relied upon "21 exhibits" and "4 affidavits containing numerous factual allegations," all of which fell "outside of the pleadings." *Id.* "[W]ithout the [p]laintiffs having the opportunity to depose the affiants, much less having the benefit of any discovery," the district court granted the motion and entered judgment in favor of the defendant. *Id.* at 408-09. On appeal, the Sixth Circuit reversed, holding that "[b]ecause CenTra was given no opportunity to conduct discovery that would be necessary for CenTra to oppose [the] summary judgment motion . . . the district court abused its discretion in denying CenTra's" request for discovery under Fed. R. Civ. P. 56(d).[3] *Id.* at 420.

[3] The 2010 Amendments to the Federal Rules of Civil Procedure relocated subdivision (f) of Rule 56 to subdivision (d). *See* Notes on 2010 Amendments, Fed. R. Civ. P. 56 ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f))." Thus, cases decided prior to 2010 refer to Rule 56(f).

Similarly, in *White's Landing*, the Sixth Circuit reversed a premature summary judgment grant. 29 F.3d at 231. The defendants moved for summary judgment less than four months after the plaintiffs filed their complaint. *Id.* at 230-31. The district court stayed discovery six days after the plaintiffs served their first discovery request, granted the defendants' summary judgment motion, and rejected the plaintiffs' Rule 56(d) request. *Id.* On appeal, the Sixth Circuit noted that "[t]he plaintiffs must jump a high hurdle in the instant case before they can succeed on their [underlying substantive] claim[.]" *Id.* at 231. Still, the court concluded that "summary judgment should not have been awarded until the plaintiffs were allowed some opportunity for discovery." *Id.* The Sixth Circuit reasoned that, although Rule 56 "provides courts with a useful method by which meritless cases may be discharged[,] [] the benefits of this rule are quickly undermined if it is employed in a manner that offends concepts of fundamental fairness." *Id.* The court found that the district court's grant of summary judgment, "absent *any* opportunity for discovery, [was] such a misuse." *Id.* (emphasis in original).

The Sixth Circuit noted that its "conclusion that some discovery must be afforded the non-movant before summary judgment is granted is supported by the Supreme Court's holdings in both *Anderson* and *Celotex*." *Id.* (citing *Anderson*, 477 U.S. 242 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). In *Anderson*, the Supreme Court held that the non-movant must "present affirmative evidence in order to defeat a properly supported motion for summary judgment . . . even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery*." 477 U.S. at 257 (emphasis added). The Supreme Court in *Celotex* similarly decided that "the plain language of Rule 56[] mandates the entry of summary judgment, *after adequate time for discovery*." 477 U.S. at 322 (emphasis added). "In light of *Anderson* and *Celotex*," the Sixth Circuit could not "sustain th[e] result" in

White's Landing, where "the district court stayed all discovery just six days after the plaintiffs had submitted their first discovery request," and entered summary judgment for the defendants "without *any* discovery taking place." *White's Landing*, 29 F.3d at 232 (emphasis in original).

Finally, in *Vance*, the Sixth Circuit reversed a grant of summary judgment and remanded for discovery, even though the non-movant failed to advise the district court of his need for discovery under Rule 56(d) until *after* summary judgment had been entered. 90 F.3d at 1149-50. When the defendant moved for summary judgment, "*no* discovery [had been] conducted." *Id.* at 1149 (emphasis in original). Ten days after the district court entered summary judgment, Vance filed a motion to vacate and requested discovery, to no avail. *Id.* at 1148, 1150. On appeal, the Sixth Circuit explained that "before a summary judgment motion is decided, the non-movant must file an affidavit pursuant to Fed. R. Civ. P. 56[d] which details the discovery needed, or file a motion for additional discovery." *Id.* at 1149. If "the non-movant makes a proper and timely showing of a need for discovery, [then] the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion." *Id.* (citing *White's Landing*, 29 F.3d at 231-32). The Sixth Circuit was "persuaded that the district court should have granted Vance's motion and permitted him to pursue the discovery he sought." *Id.* at 1149. "Most significant to the [court's] conclusion" was "the fact that *no* discovery was conducted before the motion for summary judgment was filed and decided." *Id.* (emphasis in original).

Sixth Circuit precedent on this issue is consistent with case law from other jurisdictions, including actions for bad-faith denial of insurance claims. *See, e.g.*, *Bob Lewis Volkswagen v. Universal Underwriters Group*, 571 F. Supp. 2d 1148, 1156 (N.D. Cal. 2008) (holding that the policyholder "is entitled to a reasonable period of time in which to undertake discovery on the

bad faith issue" before the court can rule on the insurer's summary judgment motion); *Burgess v. Allstate Ins. Co.*, 334 F. Supp. 2d 1351, 1365 (N.D. Ga. 2003) (denying the insurer's motion for summary judgment on bad faith because "[s]ummary judgment is generally inappropriate prior to the resolution of outstanding discovery issues"); *see also, e.g.*, *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1268 (5th Cir. 1991) ("the district court should have allowed Shortstop to complete discovery before proceeding to rule on Rally's' motion" because "[s]ummary judgment is a lethal weapon" and "[w]e must afford prospective victims some protective armor if we expect them to properly defend against it"); *Nat'l Life Ins. Co. v. Solomon*, 529 F.2d 59, 60-61 (2d Cir. 1975) (summary judgment is a "drastic device" and "should not be granted . . . when, as here, one party has yet to exercise its opportunities for pretrial discovery"); *Matthews v. Malkus*, 352 F. Supp. 2d 398, 402 (S.D.N.Y. 2004) ("Because defendants moved for summary judgment prior to discovery but have offered evidence in support of that motion . . . plaintiff is entitled to discovery prior to answering the defendants' Rule 56 summary judgment motion.")

The above-cited cases plainly instruct that ANPAC's motion is premature and should be denied *without prejudice*. In the present case, ANPAC moved for summary judgment *before* the Stuttes had any opportunity to conduct discovery. (Levitt Decl. ¶¶ 5-9.) ANPAC's motion relies on two affidavits and 14 exhibits, including reports from experts and private investigators, all of which fall wholly outside the pleadings. (*Id.* ¶¶ 6-7.) Like the defendants in *CenTra*, ANPAC prematurely asks this Court to enter summary judgment "without the [Stuttes] having the opportunity to depose the affiants," experts, and investigators, "much less having the benefit of any discovery." *CenTra*, 538 F.3d at 408. Granting summary judgment based solely on this subset of evidence, hand-picked by ANPAC to portray itself in the best light possible, and without giving the Stuttes an opportunity to conduct *any* discovery, would be an abuse of

discretion and warrant reversal. *See id.* at 420; *Vance*, 90 F.3d at 1149; *White's Landing*, 29 F.3d at 231-32.

The Stuttes' need for discovery is particularly imperative here because, due to the nature of bad faith and TCPA claims, which focus on the knowledge and state of mind of the insurer, much of the evidence the Stuttes need in order to present facts essential to justify their opposition to ANPAC's motion is within ANPAC's exclusive possession and control. (Levitt Decl. ¶ 9); *see, e.g., Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977) ("where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course"); *In re Vintero Corp.*, 1 B.R. 543, 546 (Bankr. S.D.N.Y. 1979) ("where [] access to proof of material facts by a party opposing summary judgment may not be within such party's 'knowledge or control,' summary judgment should not be granted where, as here, such party has yet to exercise its opportunities for pre-trial discovery"); *Curto's, Inc. v. Krich-New Jersey, Inc.*, 193 F. Supp. 235, 238 (D.N.J. 1961) ("where the proof (if there be any) will be peculiarly within the knowledge or control of the defendants, plaintiff should be granted the opportunity of proceeding with its discovery in accordance with the appropriate rules").

To succeed on their bad faith claim, the Stuttes must prove by a preponderance of the evidence that ANPAC's refusal to pay "was not in good faith." Tenn. Code Ann. § 56-7-105. As the Tennessee Supreme Court has long held, "[t]he words 'not in good faith' imply a lack of good or moral intent as the motive for the refusal to pay a loss." *Silliman v. Int'l Life Ins. Co.*, 188 S.W. 273, 273 (Tenn. 1916); *accord King v. Tenn. Farmers Ins. Co.*, No. W2003-00168-COA-R3-CV, 2004 WL 1592814, at *4 (Tenn. Ct. App. July 15, 2004). "They describe the state of mind which underlies and causes the act of refusing to pay. It is the existence of this state of

mind as the cause of the act, and the resulting damage to the victim of the act, which the statute penalizes[.]" *Silliman*, 188 S.W. at 273. Bad faith cases in Tennessee often turn on whether the insurer "acted out of any improper motive," *e.g.*, *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 556 S.W.2d 750, 752 (Tenn. 1977), or whether the insurer's "handling [of] a claim [] demonstrates an indifference towards the interests of its insured and subordinates the same to its own interests," *e.g.*, *Coppage v. Fireman's Fund Ins. Co.*, 379 F.2d 621, 623 (Tenn. Ct. App. 1967).

Similarly, the Stuttes' TCPA claim alleges that ANPAC committed "unfair or deceptive" acts by denying coverage *based on information it knew to be false*. (Amended Countercl. ¶¶ 35-36, Dkt. No. 20); *see Rothberg v. Cincinnati Ins. Co.*, No. 1:06-CV-111, 2008 WL 833201, at *8 (E.D. Tenn. Mar. 27, 2008) ("[w]hen an insurance company denies a claim based on information it knows to be false, that supports a claim under the TCPA"); *accord Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. Small Smiles Holding Co.*, No. 3:10-00742, 2011 WL 662687, at *5 (M.D. Tenn. Feb. 14, 2011); *Cowie v. State Farm Fire & Cas. Co.*, No. 1:07-CV-63, 2007 WL 2238272, at *7 (E.D. Tenn. Aug. 1, 2007); *Sparks v. Allstate Ins. Co.*, 98 F. Supp. 2d 933, 938 (W.D. Tenn. 2000).

The Stuttes "cannot present facts essential to justify [their] opposition" under Rule 56 on issues concerning ANPAC's knowledge and state of mind unless, and until, the Stuttes have an opportunity to conduct full discovery of ANPAC's *entire* investigation – not just the materials that ANPAC hand-picked to support its premature summary judgment motion. Indeed, ANPAC has failed to cite a single case in which a Tennessee court held, *before the policyholder was able to conduct discovery*, that an insurer was entitled to summary judgment on claims for bad faith and violation of the TCPA. ANPAC's motion, therefore, invites this Court to "misuse" Rule 56 "in a manner that offends concepts of fundamental fairness." *White's Landing*, 29 F.3d at 231.

Based on Rule 56(d) and well-established Sixth Circuit precedent, the Court should decline this invitation and permit the parties to engage in discovery.

Conclusion

For the foregoing reasons, ANPAC's motion for summary judgment is premature and should be DENIED *without prejudice*.

Dated: November 15, 2011

Respectfully submitted,

/s/ Seth A. Tucker

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2011, a copy of the foregoing **Memorandum in Opposition to ANPAC's Motion for Partial Summary Judgment** was filed electronically using the Court's Electronic Filing System. Notice of this filing will be served through the Electronic Filing System to parties or counsel who are Filing Users, and by first-class mail to any party or counsel who is not served through the Electronic Filing System.

/s/ Jonathan G. Hardin

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