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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MIDMOUNTAIN CONTRACTORS,
11 INC.,

12 Plaintiff,

13 v.

14 AMERICAN SAFETY INDEMNITY
15 COMPANY, et al.,

16 Defendants.

CASE NO. C10-1239JLR

ORDER DENYING MOTION
FOR PROTECTIVE ORDER

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I. INTRODUCTION

This matter comes before the court on Defendant National Union Fire Insurance Company of Pittsburgh, P.A.'s ("National Union") motion for a protective order. (Mot. (Dkt. # 123).) Plaintiff MidMountain Contractors, Inc. ("MidMountain") opposes the motion. (Resp. (Dkt. # 130).) Having considered the submissions of the parties, the balance of the record, and the relevant law, and no party having requested oral argument, the court DENIES National Union's motion (Dkt. # 123).

1 **II. BACKGROUND**

2 This is an insurance coverage dispute. MidMountain claims coverage as an
3 additional insured under an insurance policy issued by National Union. On September 7,
4 2011, MidMountain filed an amended complaint against National Union, among others,
5 alleging that National Union agreed to defend but, as of the date of the amended
6 complaint, had not provided a defense or paid any money to defend or indemnify
7 MidMountain. (Am. Compl. (Dkt. # 42) ¶¶ 56, 64.) MidMountain also alleges that
8 National Union’s investigation into its claim was insufficient and untimely. (*Id.* ¶ 52.)
9 MidMountain brought claims against National Union for breach of its duty to defend
10 MidMountain (Count II), breach of its duty to act in good faith (Count IV), insurance bad
11 faith (Count V), and violation of the Insurance Fair Conduct Act (Count VI). (*See*
12 *generally id.*)

13 On July 16, 2012, MidMountain noticed the deposition of National Union’s
14 Federal Rule of Civil Procedure 30(b)(6) designee, which is scheduled to occur on
15 August 22, 2012. (Verfurth Decl. (Dkt. # 127) Ex. 1; Edwards Decl. (Dkt. # 124) ¶ 3.)
16 On August 3, 2012, the parties engaged in a telephone conference pursuant to Federal
17 Rule of Civil Procedure 37(a) and Western District of Washington Local Rule CR
18 37(a)(1)(A) to attempt to resolve National Union’s objections to certain topics identified
19 in the notice of deposition, however they were unable to resolve their discovery issues.
20 (Verfurth Decl. ¶ 3.)

1 On August 9, 2012, National Union filed the motion for a protective order that is
2 currently before the court. (*See generally* Mot.) National Union seeks a protective order
3 with respect to the following topics identified in MidMountain’s notice of deposition:

4 Topic 6. Any and all efforts made by National Union to comply with
5 WAC 284-30-330(12). This topic is limited to National
6 Union’s ongoing refusal to timely reimburse Plaintiff for
7 defense costs incurred in the underlying case.

8 Topic 8. All communications between National Union and Ashbaugh
9 Beal, LLP.

10 Topic 19. The names of all persons who participated in any decision to
11 reimburse less than the full hourly rate of defense invoices of
12 Ashbaugh Beal, LLP.

13 Topic 23. The role(s) and claims handling activity performed by Brenda
14 Blanton in connection with King County’s claims against
15 MidMountain.

16 Topic 24. All communications by and between National Union and
17 American International Surplus Lines Insurance Company
18 (“AISLIC”) concerning National Union’s investigation and
19 evaluation of King County’s claims against MidMountain.

20 Topic 27. A summary of each and every payment made on behalf of
21 National Union toward defense costs incurred by
22 MidMountain in connection with King County’s claims in
King County Cause No. 11-2-08751-4SEA.

Topic 28. A specific description of the procedures used by National
Union in reviewing MidMountain defense costs for payment,
including the individuals involved, the timelines for review,
the analysis of invoices, and decisions made with respect to
such invoices.

Topic 31. The name, job position, and dollar authority level of each
National Union or Chartis employee whose authority was/is
necessary to authorize settlement offers (or rejection of
settlement proposals by King County) up to the full amount

1 of King County's claims against MidMountain in King
2 County Cause No. 11-2-08751-4SEA.

3 Topic 32. The name, job position, and dollar authority level of each
4 National Union or Chartis employee who participated in
5 discharging the responsibilities of National Union under WPI
6 320.05 with respect to King County's claims in King County
7 Cause No. 11-2-08751-4SEA.

8 Topic 34. The substance of National Union's investigation and
9 evaluation of the settlement value of the claims of King
10 County against MidMountain in King County Cause No. 11-
11 2-08751-4SEA.

12 (*Id.* at 4; Verfurth Decl. Ex. 1.) National Union asks the court to prevent MidMountain
13 from deposing National Union regarding Topics 6, 19, 27, and 28, and to limit
14 MidMountain's inquiry into Topics 8, 23, 24, 31, 32, and 34 to alleged activities
15 occurring prior to the filing of MidMountain's amended complaint on September 7, 2011.
16 (Mot. at 6-9.)

17 **III. ANALYSIS**

18 Federal Rule of Civil Procedure 26(c) provides the court discretion to "issue an
19 order to protect a party or person from annoyance, embarrassment, oppression, or undue
20 burden or expense" for "good cause." Fed. R. Civ. P. 26(c). "For good cause to exist,
21 the party seeking protection bears the burden of showing specific prejudice or harm will
22 result if no protective order is granted." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). The showing must be particularized. *Id.* "[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

1 First, National Union argues that the amended complaint does not include any
2 allegations regarding payment of defense costs, and therefore Topics 6, 19, 27, and 28
3 seek information that is beyond the scope of MidMountain’s claims and is therefore
4 irrelevant. (Mot. at 7.) Second, National Union asserts that the court should limit inquiry
5 into Topics 8, 23, 24, 31, and 34 to prevent MidMountain from requesting information
6 that occurred after it filed its amended complaint because “[p]ost coverage litigation
7 activities are simply not part of the claims in the pending lawsuit” and are therefore
8 irrelevant. (*Id.* at 8.) With respect to all Topics, National Union contends that
9 responding is oppressive and unduly burdensome because the Topics are irrelevant. (*Id.*
10 at 7-8; *see also* Edwards Decl. ¶ 5 (“Allowing discovery of irrelevant alleged post
11 coverage litigation activities is oppressive and unduly burdensome to National Union,
12 because to prepare for responding to a request for irrelevant information would take an
13 inordinate amount of time and waste the resources of National Union.”).)

14 MidMountain responds that the Topics identified by National Union are relevant
15 to the claims and defenses raised in the lawsuit for three reasons. (Resp. at 7.) First,
16 MidMountain argues that National Union’s duty of good faith and fair dealing continues
17 notwithstanding the filing of its amended complaint, and therefore discovery related to
18 National Union’s post-litigation activities are relevant. (*Id.* at 7-8.) Second,
19 MidMountain contends that regardless of the specific allegations in its complaint, its
20 claims are for breach of the duty to defend and bad faith, which the Topics are designed
21 to address, and the liberal rules of notice pleading allow for a variance of proof. (*Id.* at 8-
22 9.) Finally, MidMountain asserts that information regarding payment of defense costs is

1 relevant to National Union’s defenses, and is therefore discoverable. (*Id.* at 9-10 (citing
2 Fed. R. Civ. P. 26(b)(1)).)

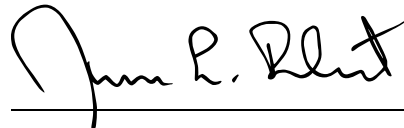
3 The court concludes that National Union has failed to show good cause for a
4 protective order. An insurer’s duty to defend and duty of good faith do not cease with the
5 filing of a lawsuit. *See, e.g., Nat’l Sur. Corp. v. Immunex Corp.*, 256 P.3d 439, 446
6 (Wash. Ct. App. 2011) (affirming trial court’s holding that insurer had duty to defend
7 until the trial court declared that the duty did not exist). Because these duties are
8 ongoing, the court finds that the most efficient use of judicial and party resources is to
9 allow discovery into issues relevant to these claims and any party’s defenses thereto, even
10 if the facts arose after the filing of the lawsuit. Indeed, if the court were to limit
11 discovery to only pre-litigation activities, MidMountain would be forced to file a second
12 lawsuit related to any additional violations of these duties that occurred while the instant
13 lawsuit was pending. Accordingly, the court concludes that National Union’s actions
14 after the filing of the instant lawsuit that relate to MidMountain’s claims for breach of
15 National Union’s duties to defend and act in good faith are relevant under the standard set
16 forth in Federal Rule of Civil Procedure 26(b)(1). *See* Fed. R. Civ. P. 26(b)(1) (“Parties
17 may obtain discovery regarding any nonprivileged matter that is relevant to any party’s
18 claim or defense . . .”). Topics 6, 8, 19, 27, and 28 relate to National Union’s duty to
19 defend and are therefore relevant. Topics 23, 24, 31, 32, and 34 relate to National
20 Union’s duty of good faith, and are also relevant. Because National Union has offered no
21 “good cause” other than the purported irrelevance of MidMountain’s requests, the court
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1 concludes that it has not satisfied its burden of showing specific prejudice or harm. As
2 such, the court denies National Union's motion for a protective order.¹

3 **IV. CONCLUSION**

4 For the foregoing reasons, the court DENIES National Union's motion for a
5 protective order (Dkt. # 123).²

6 Dated this 21st day of August, 2012.

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10 JAMES L. ROBART
United States District Judge

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¹ The only case National Union relies on, *Caldwell v. Morpho*, No. 4:10CV01537, 2011
17 WL 2784100 (E.D. Mo. Jul. 5, 2011), does not change the court's analysis. There, the plaintiff
18 brought a products liability lawsuit related to an airport luggage scanner. *Id.* at *1. The plaintiff
19 was injured while loading a piece of luggage into the scanner and claimed that her injury could
20 have been prevented if guardrails were placed along the scanner's infeed ramp. *Id.* The plaintiff
21 then requested discovery related to the *output* of the scanner. *Id.* The court granted the
22 defendant's request for a protective order because design of the output was not relevant to the
plaintiff's claims. *Id.* at *3. Unlike the plaintiff's discovery request in *Caldwell*, MidMountain's
discovery requests here are "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1).

² The court notes that National Union has filed a motion in limine (Dkt. # 125) on the
same topics raised in the instant motion for a protective order. Although the court has not
specifically considered the merits of the motion in limine (nor is that motion ripe), the court
encourages National Union to consider whether the motion in limine is necessary in light of the
court's ruling in this order and to withdraw the motion if appropriate.