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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO UNIFIED PORT  
DISTRICT,  
  
Plaintiff,  
  
v.  
  
NATIONAL UNION FIRE  
INSURANCE COMPANY OF  
PITTSBURG, PA,  
  
Defendant.

Case No.: 15cv1401-BEN-MDD  
  
**ORDER ON JOINT MOTION  
FOR DETERMINATION OF  
DISCOVERY DISPUTE  
REGARDING  
INTERROGATORIES SET TWO**  
  
**[ECF NO. 54]**

Before this Court is the parties' Joint Motion for Determination of Discovery Dispute filed on August 9, 2017. (ECF No. 54). The Joint Motion presents Defendant's challenges to Plaintiff's responses to six interrogatories. In this case, Plaintiff seeks declaratory relief and damages for bad faith against Defendant. (ECF No. 14). In essence, the case presents a dispute in which Plaintiff challenges Defendant's determination that two insurance policies are exhausted and that an umbrella policy does not cover certain continuing obligations from a total of four exhausted policies. The manner in which Defendant determined to allocate payments such that two of the policies are exhausted is in issue as well as the extent to which the umbrella

1 policy steps into the shoes of the underlying policies. It is against this  
2 backdrop that the discovery dispute must be decided.

3 **LEGAL STANDARD**

4 Rule 26(b)(1), Fed. R. Civ. P., provides that parties may obtain  
5 discovery of “any nonprivileged matter that is relevant **to any party’s claim**  
6 **or defense and proportional to the needs of the case . . .**” Fed. R. Civ.  
7 P. 26(b)(1) (emphasis added). The Rule also provides that “[i]nformation  
8 within the scope of discovery need not be admissible in evidence to be  
9 discoverable.” *Id.*

10 Counsel for Defendant, the venerable Lewis Brisbois Bisgaard & Smith,  
11 LLP appears unaware that the Federal of Rules of Civil Procedure, especially  
12 Rule 26(b)(1), were amended effective December 1, 2015. With more than  
13 1100 lawyers in 41 offices in the United States, the firm should have received  
14 news of the amendments by now. But, twice in the instant Motion,  
15 Defendant misstates the Rule by referring to an earlier version. First, at  
16 page 2 of its Introductory Statement, Defendant states:

17 Furthermore, the right to discovery is very broad, and encompasses any  
18 information or documents that are “reasonably calculated to lead to the  
19 discovery of admissible evidence.” Rule 26(b)(1).

20 (ECF No. 54 at 2). Defendant repeats the error at pages 5-6 in presenting its  
21 view that Plaintiff’s response to Interrogatory 20 is insufficient, stating:

22 Under the FRCP, the parties may obtain discovery regarding any  
23 matter that is (1) ‘not privileged’ and (2) ‘relevant to the subject matter  
24 involved in the pending action.’ FRCP 26(b)(1). . . . Furthermore, ‘[t]he  
25 information sought need not be admissible at the trial if the information  
26 sought appears reasonably calculated to lead to the discovery of  
27 admissible evidence.’ *Id.*

(ECF No. 54 at 5-6).

1 Defendant also relies upon *Oppenheimer Fund, Inc. v. Sanders*, 427  
2 U.S. 340, 351 (1978), in which the Supreme Court determined that discovery  
3 could be obtained of information “bear[ing] on, or that reasonably could lead  
4 to other matters that could bear on, any issue that is or may be in the case.”  
5 In light of the 2015 amendments to Rule 26(b)(1), the *Oppenheimer Fund*  
6 definition, like the version of Rule 26(b)(1) that preceded the amendments, is  
7 now relegated only to historical significance. The instant discovery requests  
8 having been served in July 2017, the Court will apply the current version of  
9 the Federal Rules to this dispute.

10 “An interrogatory may relate to any matter that may be inquired into  
11 under Rule 26(b).” Fed. R. Civ. P. 33(a)(2). “An interrogatory is not  
12 objectionable merely because it asks for an opinion or contention that relates  
13 to fact or the application of law to fact.” *Id.* The responding party must  
14 answer each interrogatory by stating the appropriate objection(s) with  
15 specificity or by “answer[ing] separately and fully in writing under oath.”  
16 Rule 33(b). The responding party has the option in certain circumstances to  
17 answer an interrogatory by specifying responsive records and making those  
18 records available to the interrogating party. Rule 33(d).

## 19 DISCUSSION

### 20 1. Interrogatory No. 20 (ECF 54 at 3-4)

21 This is a “contention” interrogatory. Defendant asks Plaintiff to “[s]tate  
22 all facts that you contend support, evidence, or establish your contention that  
23 the policy limits of [3 identified insurance policies] have not been exhausted.”

24 Plaintiff objects to the extent that that the request call for a legal  
25 conclusion, call for the disclosure of attorney-client or work-product protected  
26 information, is vague and ambiguous as the word “exhausted,” is compound,  
27 overbroad and unduly burdensome. (ECF No. 54 at 4). These objections are

1 boilerplate and frivolous. It is not generally grounds for an objection that an  
2 interrogatory calls for a legal conclusion. *See Thomas v. Cates*, 715  
3 F.Supp.2d 1012, 1029-30 (E.D. Cal. 2010)(collecting cases). Only an  
4 interrogatory that calls for a legal conclusion that extends to legal issues  
5 unrelated to the facts of the case is objectionable on that basis. *Id.* at 1030  
6 (citing *Holland v. GMAC Mortgage*, 2005 WL 1285678 \*3, Civ.A.03–2666–  
7 CM–DJW (D. Kan. 5/27/2005). The remaining boilerplate objections are  
8 **OVERRULED** as such.

9 Despite the objections, Plaintiff responded to the interrogatory as  
10 follows:

11 The facts that support the Port’s contention are the representations  
12 made by [Defendant] to date, including the Declaration of Annemarie  
13 Malekos [made in an identified state case between the parties],  
14 correspondence from [Defendant’s] outside counsel, Jay Christofferson,  
15 dated June 11, 2010, and correspondence from Wanda S. Campbell,  
dated January 30, 2015, under which [Defendant] itself acknowledged  
that [two of the policies] were not exhausted.

16 (ECF No. 54 at 4). Defendant challenges the response as inadequate.

17 Defendant is correct. To answer the interrogatory properly, Plaintiff must  
18 identify facts. To point to unspecified “representations made by [Defendant]”  
19 is insufficient. The representations must be identified. To the extent that  
20 Plaintiff intended to avail itself of the option to provide business records  
21 under Rule 33(d), it is not done so sufficiently. Rule 33(d) provides that:

22 If the answer to an interrogatory may be determined by examining ...  
23 or summarizing a party’s business records ..., and if the burden of  
24 deriving or ascertaining the answer will be substantially the same for  
25 either party, the responding party may answer by ... specifying the  
26 records that must be reviewed, in sufficient detail to enable the  
interrogating party to locate and identify them as readily as the  
responding party could.

1 Rule 33(d)(1), Fed. R. Civ. P. Plaintiff's objections are **OVERRULED**.

2 2. Interrogatory No. 21 (ECF No. 54 at 9)

3 Defendant asks Plaintiff to "identify and describe in detail each claim or  
4 suit brought against [Plaintiff] for bodily injury or property damage during  
5 the period from May 1, 1982 to the present which alleged one or more  
6 occurrences during the time from May 1, 1982 to May 1, 1986." Plaintiff  
7 objects for relevance. The objection is **SUSTAINED**. The Court addressed  
8 the relevance of this line of inquiry in connection with related Requests for  
9 Production of documents and found it irrelevant. (ECF No. 65 at 4-6).

10 Information bearing on whether or not Defendant properly allocated  
11 payments it made under the subject insurance policies to defense (not subject  
12 to exhaustion) or indemnity (subject to exhaustion) is the relevant inquiry in  
13 this case. Defendant does not explain how claims and suits against Plaintiff,  
14 whether or not submitted to or paid by other insurers, has any bearing on  
15 how Defendant allocated payments on claims made to it.

16 3. Interrogatory No. 22 (ECF No. 54 at 12)

17 In this interrogatory, Defendant asks Plaintiff to describe each  
18 settlement reached in suits or claims identified in response to Interrogatory  
19 No. 21. As the Court has ruled that Plaintiff need not respond to  
20 Interrogatory No. 21, no response is required to this request. Plaintiff's  
21 objection as to relevance is **SUSTAINED**.

22 4. Interrogatory No. 23 (ECF No. 54 at 13-14)

23 This interrogatory requests Plaintiff to "identify and describe in detail  
24 each claim or suit brought against [Plaintiff] for bodily injury or property  
25 damage during the period from May 1, 1982 to the present that that  
26 [Plaintiff] reported to [Defendant]." Plaintiff objects on the grounds that the  
27 information is equally available, burdensome, oppressive and harassing, calls

1 for a legal conclusion, privileged, vague and ambiguous, and in Defendant's  
2 possession. (ECF No. 54 at 14). Plaintiff claims that it has produced this  
3 information in its initial disclosures. (ECF No. 54 at 16). If Plaintiff has  
4 produced this information earlier, in its own disclosures, it is difficult to  
5 understand the basis for the litany of objections. As discussed above, if  
6 Plaintiff wants to assert that the answer can be obtained from documents  
7 already produced, it may do so pursuant to Rule 33(d). There may be a valid  
8 basis for a relevance objection regarding claims and suits reported to  
9 Defendant during periods of time where the policies at issue in this suit were  
10 not in force. But having failed entirely to address the Interrogatory, the  
11 Court will **OVERRULE** Plaintiff's objections and require a proper answer.

12 5. Interrogatory No. 24 (ECF No. 54 at 17)

13 In this Interrogatory, Defendant asks Plaintiff to describe each  
14 settlement reached in suits or claims identified in response to Interrogatory  
15 No. 23. As discussed in relation to Interrogatory No. 23, Plaintiff's objections  
16 are **OVERRULED**.

17 6. Interrogatory No. 25 (ECF No. 54 at 18)

18 In this Interrogatory, Defendant asks Plaintiff to state all facts that  
19 Plaintiff contends support its response to any Request for Admission to which  
20 Plaintiff did not provide an unqualified admission. Plaintiff objects on the  
21 usual grounds and also provides a rather meaningless response. This Court  
22 finds the Interrogatory improper – to the extent that Plaintiff qualified an  
23 admission or denial, Plaintiff was required to state the basis for the  
24 qualification in its response. This Interrogatory, therefore, is redundant and  
25 potentially harassing. The objections are **SUSTAINED**.

26 Sanctions

27 Neither party has requested sanctions. Nonetheless, Rule 37(a)(5), Fed.

1 R. Civ. P., requires the Court to consider sanctions whenever it grants a  
2 motion for a protective order or denies a motion to compel. As the instant  
3 motion was presented jointly, as required by this Court's chambers rules, it  
4 presented both Plaintiff's motion for a protective order and Defendant's  
5 motion to compel. The Court also is concerned that counsel for Defendant  
6 either did not know that the relevant Federal Rules had been amended over  
7 1.5 years ago or signed the pleading in this case without reading it. Absent  
8 request, the Court declines to impose sanctions. In addition, neither party is  
9 above reproach in connection with these interrogatories. See Rule  
10 37(a)(5)(A)(iii), Fed. R. Civ. P.

11 **CONCLUSION**

- 12 1. Plaintiff's objections to Interrogatory Nos. 20, 23 and 24 are  
13 **OVERRULED.** Plaintiff must provide adequate responses within  
14 21 days of this Order.  
15 2. Plaintiff's objections to Interrogatory Nos. 21, 22 and 25 are  
16 **SUSTAINED.**

17 **IT IS SO ORDERED.**

18 Dated: September 5, 2017

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20 Hon. Mitchell D. Dembin  
21 United States Magistrate Judge  
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