UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CONTINENTAL CASUALTY COMPANY, et al.,

Plaintiffs,

v.

J.M. HUBER CORPORATION,

Defendant.

Civil Action No. 13-4298 (CCC)

OPINION AND ORDER

CLARK, Magistrate Judge

THIS MATTER comes before the Court on: (1) a motion by non-party Resolute Management, Inc. ("Resolute") to quash the Federal Rule of Civil Procedure 30(b)(6) Subpoena served upon Resolute by Defendant J.M. Huber Corporation ("Defendant") on March 22, 2017 and for the entry of a protective order prohibiting Defendant from inquiring into certain subjects during the future depositions of Resolute employees Connie Gianakis and Maria Menotti in this action [Dkt. No. 83]; and (2) a motion by Plaintiffs Continental Casualty Company and Transportation Insurance Company (collectively "CNA" or "Plaintiffs") for a protective order prohibiting Defendant from inquiring into certain subjects during Defendant's 30(b)(6) deposition of Plaintiffs' corporate representative and the future individual depositions of Ms. Gianakis and Ms. Menotti [Dkt. No. 101]. Defendant opposes both Resolute's motion [Dkt. No. 86] and Plaintiffs' motion [Dkt. No. 116]. For the reasons set forth below, Resolute's motion to quash and

for a protective order [Dkt. No. 83] is **DENIED** and Plaintiffs' motion for a protective order [Dkt. No. 101] is **DENIED**.[1]

I. BACKGROUND

From approximately 1969 to 1994, Plaintiffs issued insurance policies (the "Policies") to their insured, Defendant J.M. Huber Corporation, a specialty engineered materials company. The Policies are subject to "incurred loss retrospective premium plans" pursuant to which Defendant's premium obligations are based upon payments and reserves on claims submitted for coverage under the Policies. Dkt. No. 37, Am. Compl. at ¶ 9. Under the Policies, the retrospective premiums are calculated annually by determining the payments and reserves on claims submitted for coverage under a policy valued as of the first day of December, and continue from year to year until either all claims submitted for coverage under the relevant policy have closed or until the maximum premium is reached. Id. at ¶ 10 These annual calculations of retrospective premiums are referred to as "Rating Plan Adjustments." Id.

Plaintiffs' claims in this matter arise out of unpaid invoices issued to Defendant for retrospective premiums. On or around March 12, 2012, Plaintiffs issued to Defendant invoice number EA 27327 for an additional payment of $33,629 based upon the Rating Plan Adjustment for the Policies calculated with incurred losses valued as of February 1, 2012. On March 6, 2013, Plaintiffs issued to Defendant invoice number EA 27893 for $737,116 for retrospective premiums valued as of February 1, 2013. Defendant did not remit payment for either invoice and on July 12, 2013, Plaintiffs filed their Complaint in this matter seeking payment for the outstanding retrospective premiums. See Dkt. No. 1, Compl. Subsequently, Plaintiffs conducted an additional

[1] Although both motions are denied, many of the contested deposition topics seek information beyond the scope of permissible discovery in this matter and have been narrowed accordingly by the Court as set forth in this Opinion and Order.

annual calculation and determined that as of February 1, 2014, Defendant owed an additional $978,222.[2] Id. at ¶ 28. Based upon the 2014 Rating Plan Adjustment, Plaintiffs filed an Amended Complaint stating claims for breach of contract, unjust enrichment, and account stated arising from Defendant's failure to pay the 2012, 2013, and 2014 invoices.

In response to Plaintiffs' initial Complaint, Defendant filed its Answer and counterclaims on August 8, 2013. See Dkt. No. 5. In response to Plaintiffs' Amended Complaint, Defendant filed its Amended Answer and counterclaims on October 27, 2014. See Dkt. No. 38, Am. Countercl. Defendant's Amended Counterclaim asserts two causes of action for breach of contract and breach of the duty of good faith and fair dealing based upon Plaintiffs' allegedly "improper allocation and/or calculation, through and/or by their agent [Resolute], of the amount of retrospective premiums due under the Policies." Id. at ¶ 1.

According to Defendant, throughout the course of the "mutually professional insurer-insured relationship" between Plaintiffs and Defendant, which spanned over several decades, Defendant would submit claims to Plaintiffs for coverage, and Plaintiffs would respond by either covering those claims or providing "a reasoned basis for either contesting or not covering them." Dkt. No. 86 at p. 1. Under the retrospectively rated policies, Defendant claims that Plaintiffs would send Defendant retrospective premium invoices and loss details in support of such invoices, which Defendant would review and pay, and any questions or disputes regarding the retrospective premium invoices "were dealt with, and resolved, in a professional and cordial manner befitting such a longstanding and mutually beneficial business relationship." Id. at p. 2.

Defendant claims that the longstanding "mutually professional" relationship between itself and Plaintiffs changed in 2010 when Berkshire Hathaway, Inc. ("Berkshire Hathaway")

[2] The March 17, 2014 invoice stated an amount due of $978,222. Prior to the filing of the Amended Complaint, Plaintiffs recalculated the amount owed pursuant to that invoice and changed the amount due to $741,408.

through its affiliates, including Resolute and National Indemnity Company ("NICO") entered into an agreement with Plaintiffs pursuant to which Plaintiffs' legacy asbestos and environmental pollution liabilities were transferred to NICO. Am. Countercl. at ¶ 6-7. Upon NICO's assumption of Plaintiffs' liabilities, Resolute became the third-party administrator of Defendant's asbestos and environmental claims on behalf of Plaintiffs acting as Plaintiffs' "agent and/or representative." Id. at ¶ 8.

As the third-party administrator of Defendant's claims, Resolute, acting as Plaintiffs' agent, issued the invoices at issue in this matter. Upon receipt of the March 12, 2012 invoice for $33,629 in "unsubstantiated retrospective premiums," Defendant contacted Plaintiffs by email requesting certain information aimed at determining the basis for those premiums, including the basis for creating a file in each policy year and an identification of the specific claims used to calculate the retrospective premiums in the invoice. Id. at ¶ 15-17. Defendant contends that Plaintiffs' response to its initial email regarding the March 12, 2012 invoice did not address Defendant's specific concerns and that Defendant's subsequent inquiries regarding the basis of retrospective premiums in the invoice were likewise not satisfactorily addressed by Plaintiffs or Resolute. Id. at ¶ 19. Because Plaintiffs had purportedly failed to provide Defendant with an explanation of the basis for the retrospective premiums, Defendant advised Resolute that it appeared to Defendant that Plaintiffs and/or Resolute had "arbitrarily and capriciously transferred and/or reallocated payments for losses under the Policies from 'closed' to 'open' polices" which resulted in the improper calculation and assessment of additional retrospective premiums. Id. at ¶ 20. Plaintiffs and Resolute again failed to provide a response which satisfied Defendant, and Defendant submitted further inquiries which were also not sufficiently answered.

Despite Plaintiffs' and Resolute's purported failure to provide support for the March 12, 2012 invoice, Defendant received the second invoice at issue in Plaintiffs' Amended Complaint in March 6, 2013 in the amount of $737,116. Id. at ¶ 25. Upon receipt of the March 6, 2013 invoice, Defendant again contacted Resolute requesting an explanation of the reallocation and calculation of retrospective premiums charged. According to Defendant, it did not receive any response to its inquiries regarding the March 6, 2013 invoice. Id. at ¶ 26-27. The third and final invoice at issue in Plaintiffs' Amended Complaint in the amount of $978,222, and dated March 17, 2014, was received by Defendant on March 25, 2014. Id. at ¶ 28.

Defendant's counterclaim for breach of contract alleges that Plaintiffs, in violation of the terms of the Policies, through Resolute, wrongfully reallocated "decades-old payments" made under the Polices and improperly issued the retrospective premium invoices to Defendant for "incorrect and/or unsubstantiated amounts." Id. at ¶ 48. In its counterclaim for breach of the duty of good faith and fair dealing, Defendant claims that Plaintiffs, through Resolute, "arbitrarily and capriciously" reallocated payments made under the Policies, issued incorrect retrospective premium invoices, and failed to cooperate with Defendant in its efforts to determine the basis for the disputed invoices. Id. at ¶ 53.

Discovery in this matter has been fraught with issues, and after several failed attempts to resolve the parties' disputes without formal motions, the present motions were filed. The present motions seek to prevent Defendant from exploring certain topics during depositions in this matter and arise from Defendant's efforts to obtain discovery related to Resolute's and Plaintiffs' corporate practices and claims handling procedures and the corporate relationships between Plaintiffs, Resolute, NICO and Berkshire Hathaway. The depositions at issue can be divided into two categories: (1) Federal Rule of Civil Procedure 30(b)(6) depositions of Plaintiffs' and

Resolute's corporate representatives; and (2) depositions of Resolute employees Connie Gianakis and Maria Menotti.

A. 30(b)(6) Depositions

The primary relief sought in the current motions relates to the 30(b)(6) depositions of Plaintiffs' and Resolute's corporate representatives. Defendant served Plaintiffs with a 30(b)(6) deposition notice on March 16, 2017, which seeks testimony on twenty (20) topics and the production of all documents related to those topics. See Dkt. No. 100, Thomas Cert. at Ex. A (the "CNA Notice"). Subsequently, on March 22, 2017, Defendant served Resolute with a 30(b)(6) Subpoena seeking testimony on twenty-three (23) topics and the production of all documents related to those topics. See Dkt. No. 83, Chakraborty Decl. at Ex. A. (the "Resolute Subpoena"). Both Plaintiffs and Resolute responded to Defendant with several objections. The parties were unable reach any sort of consensus regarding the scope of the depositions, which led to Resolute's present motion seeking to quash the Resolute Subpoena in its entirety [Dkt. No. 83] and Plaintiffs' present motion seeking the entry of a protective order barring Defendant from inquiring into certain topics during its deposition of Plaintiffs' corporate representative [Dkt. No. 101].

Although Plaintiffs and Resolute are separate entities and Resolute is not a party to this matter, the arguments set forth in support of their respective motions are largely interchangeable. In support of their motions, Plaintiffs and Resolute argue that Defendant's 30(b)(6) deposition topics are vastly overbroad, would cause Plaintiffs and Resolute to suffer an undue burden, and seek information beyond what is relevant to the issues in this case. Plaintiffs and Resolute assert that discovery in this matter should be limited solely to the calculation of the retrospective premiums which form the basis of Plaintiffs' claims and that Defendant's attempted inquiries into Plaintiffs' and Resolute's general corporate practices and claims handling procedures and their

corporate relationships far exceed the scope of permissible discovery. Additionally, Resolute and Plaintiffs argue that because Defendant seeks similar if not identical information from both Resolute and Plaintiffs, Defendant's discovery efforts are unreasonably duplicative.

In response, Defendant argues that the discovery it seeks from Resolute is targeted at investigating Resolute's coordination with Plaintiffs in administering Defendant's account and Resolute's role in "reallocating historical losses to generate revenue in the form of retrospective premiums" and is directly relevant to its allegations that Resolute's and its affiliates' internal policies encourage improper conduct aimed at increasing profits in connection with claim handling attempts to derive improper benefits from Plaintiffs' insureds. Dkt. No. 86 at p. 9. As to the discovery sought from Plaintiffs, Defendant claims that it is entitled to information regarding Plaintiffs' business relationship with Resolute to the extent that such a relationship affected Plaintiffs' conduct, and that its request for information regarding Plaintiffs' claims handling practices both before and after Plaintiffs entered their agreement with NICO will allow Defendant to investigate whether Plaintiffs' handling of Defendant's claims changed when Resolute took over as third-party administrator.

B. Resolute Employee Depositions

In addition to the relief sought by Plaintiffs and Resolute regarding the 30(b)(6) depositions, Plaintiffs and Resolute seek the entry of a protective order barring Defendant from inquiring into certain topics during its depositions of Resolute employees Connie Gianakis and Maria Menotti.[3] The protective order application by Plaintiffs and Resolute requests that any limitations governing the 30(b)(6) depositions also apply to the depositions of Ms. Gianakis and

[3] Although Ms. Gianakis and Ms. Menotti are currently employed by Resolute, they were previously employed by Plaintiffs.

Ms. Menotti. In support of their requests for a protective order, Plaintiffs and Resolute claim that Defendant should not be permitted to use the depositions of Resolute employees to obtain information which it is barred from seeking during the 30(b)(6) depositions, and that in light of Defendant's depositions of other employees of Plaintiffs and Resolute and its intent to conduct the 30(b)(6) depositions at issue, the depositions of Ms. Gianakis and Ms. Menotti would be unreasonably duplicative.

In opposition to Plaintiffs' and Resolute's requests for a protective order, Defendant claims that Ms. Gianakis and Ms. Menotti are "key witnesses." Dkt. No. 116 at p. 33. According to Defendant, Ms. Menotti "made the initial recommendation to open additional trailer files so that [Defendant's] old asbestos losses could be used to generate retrospective premiums" and Ms. Gianakis was involved in the "meetings between [Plaintiffs] and Resolute when Resolute decided to create money by setting up the trailer files" and was "ultimately responsible for reallocating [Defendant's] old asbestos losses in order to create money through the generation of retrospective premiums." Id. In response to Plaintiffs' and Resolute's duplicity argument, Defendant claims that Ms. Gianakis and Ms. Menotti are key fact witnesses with unique knowledge which does not unduly overlap with that of other witnesses deposed by Defendant.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 26 governs the scope of discovery in federal litigation and provides that:

> Parties 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, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Rule 26 is to be construed liberally in favor of disclosure, as relevance is a broader inquiry at the discovery stage than at the trial stage. Tele–Radio Sys. Ltd. v. De Forest Elecs., Inc., 92 F.R.D. 371, 375 (D.N.J. 1981). While relevant information need not be admissible at trial in order to grant disclosure, the burden remains on the party seeking discovery to "show that the information sought is relevant to the subject matter of the action and may lead to admissible evidence." Caver v. City of Trenton, 192 F.R.D. 154, 159 (D.N.J. 2000). Upon a finding of good cause, a court may order discovery of any matter relevant to a party's claims, defenses or the subject matter involved in the action. "Although the scope of discovery under the Federal Rules is unquestionably broad, this right is not unlimited and may be circumscribed." Bayer AG v. Betachem, Inc., 173 F.3d 188, 191 (3d Cir. 1999).

Pursuant to Rule (26)(b)(2)(C), courts are required to limit discovery where:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Similarly, pursuant to Rule 26(c), "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" In moving for a protective order, the "burden of persuasion [is] on the party seeking the protective order." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). The party seeking a protective order "must show good cause by demonstrating a particular need for protection." Id. Establishing "good cause" requires the movant to "specifically demonstrate [ ] that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific

examples, however, will not suffice." Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) (citing Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994)).

Discovery sought via a subpoena issued pursuant to Rule 45 must fall within the scope of discovery permissible under Rule 26(b). OMS Investments, Inc. v. Lebanon Seaboard Corp., 2008 WL 4952445 (D.N.J. Nov. 18, 2008). In addition, pursuant to Rule 45(d)(1), "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" and the Court has a responsibility to enforce this duty. However, it is the party claiming undue burden that must establish same. Nye v. Ingersoll Rand Company, Civ. No. 08–3481(DRD), 2011 U.S. Dist. LEXIS 7383, *6, 2011 WL 253957 (D.N.J. Jan. 25, 2011); OMS Investments, 2008 U.S. Dist. LEXIS 94165 at *2, 2008 WL 4952445. If a subpoena falls outside the scope of permissible discovery, the Court has authority to Quash or modify it upon a timely motion by the party served. Fed. R. Civ. P. 45(d)(3).

Specifically, four circumstances exist which require the Court to quash or modify a subpoena. Rule 45(d)(3)(A) provides that:

> (A) On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
>
> > (i) fails to allow reasonable time to comply;
> >
> > (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
> >
> > (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
> >
> > (iv) subjects a person to undue burden.

Id. In contrast, a court may quash or modify a subpoena where it requires "disclosing a trade secret or other confidential research, development, or commercial information." Rule 45(d)(3) (B)(i). The burden of the party opposing the subpoena "is particularly heavy to support a motion to quash

as contrasted to some more limited protection such as a protective order In re Domestic Drywall Antitrust Litig., 300 F.R.D. 234, 239 (E.D. Pa. May 15, 2014). (internal quotation marks omitted); see also Malibu Media, LLC v. John Does 1-15, No. 12-2077, 2012 WL 3089383, at *5 (E.D. Pa. July 30, 2012) (moving party bears a "heavy burden" of demonstrating that an enumerated need for quashing the subpoena exists).

III. DISCUSSION

A. Resolute's Motion to Quash and for a Protective Order [Dkt. No. 83]

In its present motion, Resolute requests that the Court quash the Resolute Subpoena and enter a protective order prohibiting Defendant from inquiring into certain topics (identified below as Group 2 and Group 4 Topics) during the depositions of Ms. Gianakis and Ms. Menotti. Although Resolute objects broadly to the Resolute Subpoena claiming that it is overbroad, unduly burdensome, unreasonably cumulative, and seeks irrelevant information, Resolute has failed to state its objections with specificity or articulate any specific harm that might arise from its compliance with the Resolute Subpoena. Accordingly, Resolute's motion to quash is **DENIED**.

As to Resolute's motion for a protective order barring Defendant from inquiring into Group 2 and Group 4 Topics during the depositions of Ms. Gianakis and Ms. Menotti, the Court finds that Resolute has failed to demonstrate that Defendant's inquiries into the Group 2 and Group 4 Topics would cause Resolute to suffer a clearly defined and serious injury. Accordingly, because Resolute has failed to demonstrate the existence of good cause for the issuance of a protective order, Resolute's motion for a protective order is **DENIED**. However, while the Court declines to quash the Resolute Subpoena or enter a protective order precluding Defendant's inquiries into the disputed Topics altogether, the Court finds that some of Defendant's inquiries exceed the scope of permissible discovery. Therefore, as set forth fully below, the Court will place

limitations on the scope of the discovery sought by the Resolute Subpoena pursuant to Rule 26(b)(2)(C).[4] Additionally, the same limitations placed on the Resolute Subpoena specified below shall apply to the depositions of Ms. Gianakis and Ms. Menotti.

Group 1 Topics

In this category, Defendant seeks information related to Resolute's role in preparing Plaintiffs' Complaint and discovery responses in this action. In support of its motion, Resolute claims that any such information is largely privileged by virtue of the likelihood that any litigation related tasks would have been performed at the direction of outside counsel, and that in the event that information is not privileged, Defendant has failed to clearly articulate the documents or testimony it seeks, and that any non-privileged information in this regard may be sought directly from Plaintiffs. With respect to Resolute's claims based upon privilege, Defendant contends that it does not seek privileged documents and that if its inquiries implicate any privilege, Resolute may properly assert that privilege as a basis for declining to answer. As to Resolute's argument that any information regarding its involvement in this litigation should be sought directly from Plaintiffs, Defendant claims that it has had difficulty obtaining such information from Plaintiffs and that it is "entitled to know from Resolute what its role has been in this litigation." Dkt. No. 86 at p. 18.

The Court finds Resolute's arguments to be unavailing. To the extent that Defendant seeks privileged documents or deposition testimony, Resolute may simply and properly object to providing or discussing such information on that basis. Although Resolute claims that Defendant's request for non-privileged information in this area of inquiry is unreasonable because Defendant has failed to "articulate with any clarity what documents or testimony it is seeking,"

[4] The Court addresses each "Group" of Topics as defined by Resolute in its motion. Any limitation imposed by the Court is indicated at the conclusion of the discussion of each Group/Topic.

the Court finds that Defendant has stated its requests with the requisite level of clarity and has adequately explained the information sought. Furthermore, it appears to the Court, as stated by Resolute, that a large portion of such information is likely to be privileged by virtue of its preparation at the direction of counsel, which will significantly limit the number of responsive documents which must be produced or reviewed by Resolute's witness(es), thereby minimizing any burden on Resolute. Finally, as to Resolute's argument that such information should be sought directly from Plaintiffs, it appears to the Court that questions regarding Resolute's role in this action are better posited directly to Resolute. Accordingly, Defendant may inquire into any non-privileged information in response to the Group 1 Topics.

Group 2 Topics

In the Group 2 Topics, Defendant seeks information related to lawsuits involving Resolute's administration of claims on behalf of Plaintiffs and on behalf of other insurers. Prior to the filing of the present motions, Defendant filed a motion to compel from Plaintiffs the production of information related to prior litigation involving retrospective premiums since January 1, 2005. See Dkt. No. 51. In addressing Defendant's motion to compel, the Court found that information regarding prior lawsuits involving retrospective premiums was relevant to Defendant's claims and defenses because such information would allow "Defendant to understand Plaintiffs' prior practices in managing its insurance claims" and demonstrate that Plaintiffs have taken positions in this litigation which are inconsistent with their positions in prior litigation. Dkt. No. 60 at p. 5. However, while the Court agreed that such information was relevant to Defendant's claims and defenses, the Court found that Defendant's request was overbroad and would unduly burden Plaintiffs. Id. at p. 6. Accordingly, and as agreed to by Defendant, the Court limited Defendant's request to prior lawsuits filed on or after January 1, 2010 against Plaintiffs

claiming bad faith in connection with Plaintiffs' calculation, allocation (or re-allocation) and billing of retrospective premiums and ordered Plaintiff to produce such information.[5] Id.

The Court first addresses Defendant's request for information related to prior lawsuits involving the administration of claims on behalf of Plaintiffs. Resolute claims that because Defendant was unable to obtain the broad scope of information it originally sought from Plaintiffs, Defendant is now attempting to circumvent the Court's previous ruling and obtain that same information from Resolute. In response, Defendant claims that the limitation placed on its request to Plaintiffs was not imposed by the Court but rather imposed voluntarily by Defendant itself in drafting its request to Plaintiffs. Accordingly, Defendant claims that it is not bound by that limitation in seeking information from other parties. The Court finds Defendant's arguments in this regard to be unconvincing and agrees that Defendant's request for information from Resolute, a non-party, which it was not permitted to obtain from Plaintiffs appears to be an attempt to circumvent the Court's previous ruling. Although the limitation in Defendant's previous request to Plaintiffs of prior litigation involving retrospective premiums was self-imposed, that limitation was an integral component in the Court's decision to permit Defendant to obtain such discovery and Defendant's request to Resolute without such a limitation is burdensome and overbroad. Therefore, while Defendant may seek information regarding prior lawsuits involving Resolute's administration of claims on behalf of Plaintiffs, Defendant's inquiries shall be subject to the same limitations as set forth in the Court's June 27, 2016 Opinion and Order.

Next, the Court turns to Defendant's request for information related to prior lawsuits involving Resolute's administration of claims on behalf of insurers other than Plaintiffs. Resolute claims that such information is irrelevant because it is completely unrelated to Plaintiffs or

[5] The exact language of the limited request can be found in Plaintiffs' January 21, 2016 letter to Defendant. Dkt. No. 54-14.

Defendant. Although Resolute is mentioned in Defendant's counterclaims, those claims are asserted only against Plaintiffs based upon their conduct and the conduct of Resolute in the administration of Defendant's account. Resolute is a non-party and based upon Defendant's allegations, the only relevant conduct of Resolute are the actions undertaken in the administration of Defendant's claims. Accordingly, because Defendant has asserted claims only against Plaintiffs, information regarding lawsuits against Resolute involving its administration of claims on behalf of insurers other than Plaintiffs is irrelevant. Accordingly, Defendant's inquiries shall be limited to Resolute's administration of claims on behalf of Plaintiffs and shall not extend to other insurers.

Group 3 Topics

In the Group 3 Topics, Defendant seeks information related to itself and/or the claims and defenses presented in this action. First, the Court addresses Defendant's requests for documents under these Topics. Resolute claims that all responsive documents in its possession have been produced to Plaintiffs, and then produced to Defendant by Plaintiffs. Accordingly, Resolute asserts that Defendant is already in possession of all documents in response to its requests and Resolute has no further responsive information. Defendant contends that if all documents have already been produced, Resolute should simply recompile all such information and produce it to Defendant. The Court can discern no logical reason why Resolute should be required to provide Defendant with a document production which Resolute asserts has already been provided in whole to Defendant through Plaintiffs. Resolute has stated that all responsive documents have already been produced to Defendant through Plaintiffs, and to order Resolute to undertake a renewed identical production would be "unreasonably cumulative or duplicative" in violation of Federal Rule of Civil Procedure 26(b)(2)(C)(i). Accordingly, the Court finds that Defendant's

Group 3 document demands are unreasonably cumulative and Resolute shall not be required to respond.

Next, the Court turns to the parties' arguments regarding the exploration of the Group 3 Topics through deposition testimony. In support of its motion, Resolute argues that the Resolute Subpoena is improper under Federal Rule of Civil Procedure 26(b)(2) because the discovery sought therein is "unreasonably cumulative and duplicative" of discovery being sought through the CNA Notice and other deposition testimony from current and former Resolute employees. Resolute's arguments in this respect, in connection with Plaintiffs' present motion as discussed above, illustrates the impasse the parties have reached which has led to the current disputes. While Resolute claims that the Resolute Subpoena should be quashed because the information sought is duplicative of the information sought by the CNA Notice, Plaintiffs' present motion seeks to prevent Defendant from inquiring into the same purportedly duplicative topics partially on the basis that the information sought is duplicative of the information sought in the Resolute Subpoena. If the Court quashes the Resolute Subpoena finding that it is duplicative of the information sought from Plaintiffs, and then Plaintiffs' 30(b)(6) representative claims a lack of knowledge as to information regarding Resolute, or if Plaintiffs succeed on their motion arguing that any information regarding Resolute and its actions or business practices should be sought from Resolute, then Defendant and the Court will be right back at the starting point.

Furthermore, the mere fact that Defendant has submitted similarly phrased inquiries to both Resolute and Plaintiffs does not render the discovery sought unreasonably duplicative. Taking as an example one of the purportedly cumulative set of inquiries identified by Resolute in support of its motion in which Defendant seeks from Resolute in Topic 11 "Resolute's knowledge and understanding of Losses under [the Policies]", and seeks from Plaintiffs in Topic 6 "Losses

under [the Policies]" it is clear that although the two inquiries are similarly phrased, they are targeting different information. Dkt. No. 83 at p. 11. Topic 6 seeks information from Plaintiffs regarding Plaintiffs' losses under certain policies and Topic 11 seeks information from Resolute regarding its knowledge and understanding of those losses, which are entirely different inquiries and therefore not unreasonably cumulative or duplicative.

The Court is likewise unconvinced by Resolute's assertion that the Resolute Subpoena should be quashed because all of "Resolute's knowledge will be accessible through [Plaintiffs'] deponent." Dkt. No. 83 at p. 12. As stated by Plaintiffs in their present motion, "[w]hile Resolute is admittedly Plaintiffs' agent with respect to certain aspects of claims handling, Plaintiffs do not control the actions of Resolute or its employees [and] expecting Plaintiffs to prepare a corporate designee of the actions of Resolute and or its employees is burdensome and improper." Dkt. No. 100 at p. 20. Accordingly, because Resolute and Plaintiffs are in fact separate parties and because information regarding Resolute's knowledge and understanding of facts and events underlying this action are better sought directly from Resolute, the Court is unmoved by Resolute's assertion that any information sought from its corporate representative should instead be sought from Plaintiffs.

The Court now turns to Resolute's contention that a 30(b)(6) deposition of its corporate representative is unreasonably cumulative because Defendant, in furtherance of its investigation into the corporate relationships and claims handling practices of Plaintiffs and Resolute, has taken or noticed the depositions of several of Resolute's and Plaintiffs' employees, including employees who left their employment with Plaintiffs and are now employed by Resolute, such as Ms. Gianakis and Ms. Menotti. Although Defendant has indeed deposed several employees of Resolute and/or Plaintiffs, according to Defendant and uncontested by Plaintiffs and Resolute, all

of the deposed employees claimed a lack of knowledge or recollection of any information or events relevant to this matter. Furthermore, regardless of the fruitfulness of the employees' depositions, Defendant claims that the depositions of individual witnesses are not a substitute for a 30(b)(6) deposition of Resolute.

Pursuant to Federal Rule of Civil Procedure 30(b)(6), a party may take a deposition of an individual who is designated to testify on behalf of a company, corporation, or government agency, and that individual's testimony is "binding on the entity and goes beyond the individual's personal knowledge." Harris v. New Jersey, 259 F.R.D. 89, 92 (D.N.J. 2007). "A 30(b)(6) deposition more efficiently produces the most appropriate party for questioning, curbs the elusive behavior of corporate agents who, one after another, know nothing about facts clearly available within the organization and suggest someone else has the requested knowledge, and reduces the number of depositions for which an organization's counsel must prepare agents and employees." Bracco Diagnostics Inc. v. Amersham Health Inc., C.A. No. 03-6025(SRC), 2005 U.S. Dist. LEXIS 26854, at *3 (D.N.J. 2005) (citations omitted).

Although Resolute contends that a 30(b)(6) deposition of its corporate representative will be duplicative of depositions that have been taken or will be taken of Resolute employees in their individual capacities, "Courts have soundly rejected ... [the] argument that prior deposition testimony from individual fact witnesses relieves a corporation from designating a corporate spokesperson in response to a Rule 30(b)(6) notice of deposition ... [and] the fact that individually named witnesses have testified concerning a subject is generally no obstacle to a 30(b)(6) deposition on the same subject." Munich Reinsurance Am., Inc. v. Am. Nat. Ins. Co., No. CIV.A. 09-6435 FLW, 2011 WL 1466369, at *26 (D.N.J. Apr. 18, 2011) (quoting Smith v. General Mills, Inc., 2006 U.S. Dist. LEXIS 19093, at *15–16 (S.D.Oh. 2006)). Accordingly, the Court finds that

the depositions of Plaintiffs' and Resolute's employees are not a substitute for a 30(b)(6) deposition of a Resolute corporate representative, nor do such depositions render Defendant's 30(b)(6) notice to Resolute unreasonably cumulative. Accordingly, Defendant may proceed on the Group 3 Topics without further limitation.

Group 4 Topics

The Group 4 Topics consist largely of requests for information related to Resolute's corporate structure, Resolute's relationship with NICO and Berkshire Hathaway, and the operating protocols and business practices of Resolute, NICO and Berkshire Hathaway. In general objection to these areas of inquiry, Resolute claims that: (1) the information sought is not relevant to Defendant's claims and defenses because it goes beyond issues of retrospective premiums; (2) Defendant's requests are overbroad and unduly vague; (3) responding to Defendant's inquiries would be unduly burdensome because of the large amount of claims administered by Resolute; and (4) Defendant seeks information that is not in Resolute's possession, custody or control. In response, Defendant claims that the information it seeks relates directly to the "central role" played by Resolute in Plaintiffs' alleged bad faith conduct in this case and that it has endeavored to reduce any burden of Resolute through the clarification and/or narrowing of these topics.

Before turning to the parties' contentions regarding the specific topics, the Court addresses the general relevance of the information that Defendant seeks into the corporate structure and business practices of Resolute and its affiliates. In Pepsi-Cola Metro. Bottling Co. v. Ins. Co. of N. Am., No. CIV 10-MC-222, 2011 WL 239655, at *1 (E.D. Pa. Jan. 25, 2011), the plaintiff brought a bad faith claim against its insurers and sought discovery from the insurers' claims handler, non-party Resolute Management, Inc. by way of a 30(b)(6) subpoena. The 30(b)(6) subpoena sought information related to Resolute's corporate relationships and structure and its

operating protocols and business practices. Resolute moved for a protective order and to quash the 30(b)(6) subpoena claiming that the information sought regarding its corporate relationships and business practices was irrelevant to the plaintiff's claims against its insurers for bad faith. The court, in addressing Resolute's assertions that its operating protocols and business practices were irrelevant to the plaintiff's allegations, noted that "[t]o show bad faith, as opposed to mere negligence 'a review of the policies and procedures of the companies in order to determine whether those policies instructed claims handlers to act in bad faith or provided them with an incentive structure that led to bad faith action is necessary,'" Id. at *3 (citing Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 177 (E.D. Pa. 2004). Accordingly, in light of the plaintiff's contention that the reinsurance relationship between the plaintiff's insurers and Resolute and their claims handling practices may have resulted in the bad faith denial of the plaintiff's claims, the court found that the plaintiff had provided sufficient evidence of the relevance of the information sought by the subpoena and allowed the plaintiff to obtain discovery regarding Resolute's corporate relationships and structure and its operating protocols and business practices.

The same considerations which led the court to its decision in Pepsi-Cola lead this Court to conclude that Defendant has demonstrated the requisite relevance of the information it seeks to its claims in this matter. In this case, Defendant claims that once Resolute became Plaintiffs' third-party administrator, Defendant received improper and unexplained retrospective premium notices from Resolute and a letter from Resolute "abruptly" denying coverage for a claim which Plaintiffs had long been providing coverage. Dkt. No. 86 at p. 2. Because Defendant's bad faith claims against Plaintiffs result from conduct which arose when Resolute began handling Defendant's claims, Defendant claims that the corporate relationships between Plaintiffs, Resolute, NICO and Berkshire Hathaway, and the corporate practices of these entities as they

relate to Resolute's claims handling practices is relevant to Defendant's bad faith claim against Plaintiffs.

The Court agrees and finds that discovery into the corporate relationships between Resolute and Plaintiffs and Resolute as its affiliates, along with Resolute's claims handling practices and operating protocols, is relevant to Defendant's claims and defenses in this matter. However, while the Court will permit discovery into Resolute's corporate relationships and general practices, Defendant's requests must be narrowed to seek such information only as relevant to the claims in this matter. Accordingly, Defendant's inquiries shall be limited as set forth below in the Court's assessment of the individual Topics.

Topic 5 seeks deposition testimony regarding "[t]he corporate structure of Resolute, including the relationships between and among Resolute, NICO and Berkshire Hathaway, and any agreements between and among Resolute, NICO and Berkshire Hathaway." Dkt. No. 86, Appx. I at 6. In response to Resolute's objections, Defendant attempted to clarify this topic as "limited to deposition testimony related to Resolute's corporate structure and affiliations." Id. Resolute objects to this topic on relevancy grounds asserting that its "corporate structure does not relate in any way to [Defendant], to the terms of the [P]olicies, or to [Plaintiffs'] billing of retrospective premiums." Dkt. No. 83 at p. 16-17. In response, Defendant asserts that it seeks this information based upon an agreement between Plaintiffs and NICO produced by Plaintiffs during discovery pursuant to which Resolute became the third-party administrator of the Policies. Dkt. No. 86 at p. 24. The agreement includes a "retrospective premium allocation agreement" addressing the distribution of collected retrospective premiums among Plaintiffs, NICO and Berkshire Hathaway. Id. at p. 25. Defendant also cites to documents which purportedly

demonstrate that Berkshire Hathaway is responsible for setting some of the overarching policies that directed Resolute's claims handling activities at issue in this matter. Id.

Despite Resolute's contentions to the contrary, the Court agrees that information regarding Resolute's corporate structure and affiliations is indeed relevant and Defendant shall be allowed to inquire into the same during its deposition of Resolute's 30(b)(6) witness. Defendant alleges that Plaintiffs' treatment of Defendant changed when Plaintiffs entered into an agreement with NICO pursuant to which Resolute became the third-party administrator of Defendant's account and that Resolute's conduct was driven by corporate policies implemented by Resolute and its affiliates. Thus, discovery aimed at investigating the relationships between Resolute and its affiliates is relevant to Defendant's counterclaims. However, Topic 5 is overbroad and shall be limited. While Defendant may inquire into Resolute's general corporate structure, any inquiries into the relationships or agreements between Resolute, NICO and Berkshire Hathaway shall be limited to only Resolute's relationships and/or agreements with NICO and Berkshire Hathaway and only to the extent that such a relationship and/or agreement dictates a corporate policy of Resolute which governed or affected its handling of Defendant's claims. For example, if an agreement between Resolute and Berkshire Hathaway or NICO dictates that Resolute shall employ a certain procedure in the handling of claims on behalf of Plaintiffs, such an agreement would be discoverable. However, an agreement between NICO and Berkshire Hathaway which does not govern or affect Resolute's handling of claims on behalf of Plaintiffs would not be discoverable.

In Topic 6, Defendant seeks information regarding:

> Any communications or correspondence between and among Resolute, NICO and Berkshire Hathaway regarding the administration of claims, Resolute's, NICO's and Berkshire Hathaway's practices, policies and

> procedures regarding same, and Resolute's, NICO's or Berkshire Hathaway's financial goals related to the administration of claims.

Dkt. No. 86, Appx. I at 6. In response to Resolute's objections, Defendant clarified that its request was limited to:

> Communications or correspondence related to Resolute's general policies, procedures and practices regarding the administration of claims under general liability policies, and Resolute's financial goals related to same as well as communications or correspondence regarding Resolute's administration of [Defendant's] claims under the [Policies] . . . .

Id. In opposition to Topic 6, Resolute claims that Defendant's request seeks information not relevant to the parties' claims or defenses in this matter and does so in a manner that is overbroad and unduly vague. Additionally, Resolute claims that to adequately respond to Defendant's request would cause Resolute to suffer an undue burden because of the vast scope of information sought by Defendant. In response, Defendant claims that communications regarding Resolute's general claims handling practices and its practices regarding Resolute's specific handling of Defendant's account are "plainly relevant to show if and how Resolute's practices with respect to [Defendant] differ from its practices in general." Dkt. No. 86 at p. 25. Defendant further claims this information is relevant insofar as Resolute's use of financial targets and goals relates to its administration of claims.

Although the Court agrees that Resolute's communications regarding the administration of Defendant's claims as well as information related to Resolute's policies and procedures, including any financial goals, which would have affected its handling of Defendant's claims, is relevant to Defendant's claims and defenses in this matter, the Court finds that Defendant's request is overbroad and would unduly burden Resolute. According to Resolute, it "administers claims made against many thousands of general or multi-part liability insurance policies issued by well over 100 insurance companies, spread across 22 present-day insurance company groups

or discrete companies." Dkt. No. 83, Bendig Decl. at ¶ 6. Defendant's request for communications or correspondence related to Resolute's administration of claims under general liability policies on behalf of all the insurers for which it performs such services goes far beyond the scope of what is relevant to the claims in this matter and is not proportional to the needs of this case. Accordingly, Defendant's inquiries on Topic 6 shall be limited to: (1) communications and correspondence regarding Resolute's administration of Defendant's claims; and (2) Resolute's policies, procedures and practices regarding the administration of claims on behalf of Plaintiffs involving retrospective premiums and its financial goals related to the same.

Topic 7 seeks information regarding "Resolute's, NICO's or Berkshire Hathaway's employee incentive programs or practices related to meeting Resolute's, NICO's or Berkshire Hathaway's financial goals related to the administration of claims." Dkt. No. 86, Appx. I at 6. In response to Resolute's objections, Defendant clarified that Topic 7 is seeking "any bonus structures within the Resolute corporate structure that provides incentives to Resolute employees to maximize profits for Resolute or its corporate affiliates in the context of administering insurance claims." Id. In objection to this request, Resolute claims that no such bonus structure exists and therefore there are no documents or deposition testimony in response to Defendant's inquiry. The statement that no such information exists does not provide a basis for quashing the Resolute Subpoena. If no such information exists, then Resolute's 30(b)(6) witness may so respond during their deposition.

The Court further cautions that contrary to Defendant's assertion that it should be "entitled to ask a Resolute corporate designee about any types of incentive structures within the Berkshire Hathaway family of corporations that could have affected Resolute's handling of [Defendant's] claims," Defendant may only inquire into incentive structures within Resolute or which apply to

Resolute employees and relate to the administration of claims involving retrospective premiums. Defendant shall not be permitted to inquire into "incentive structures within the Berkshire Hathaway family of corporations" which do not govern Resolute or its employees and which do not relate to the assessment of retrospective premiums.

Topics 8 and 9 seek investment strategies and financial goals of Resolute and its affiliates. Topic 8 seeks information related to "Berkshire Hathaway's, NICO's or Resolute's investment strategies with respect to assuming the asbestos, environmental or other liabilities of [Plaintiffs] and other insurance companies, including utilizing the 'float' to profit from unpaid claims and any practices or strategies related to litigating claims instead of paying them." Dkt. No. 86, Appx I at 6. Topic 9 seeks "Berkshire Hathaway's, NICO's or Resolute's policies, practices or procedures, whether written or unwritten, regarding balancing the merits of insurance claims with Berkshire Hathaway's, NICO's or Resolute's financial goals." Id. at 7. Defendant has clarified that it is seeking information related to "how Resolute's or its affiliates' financial strategies bear on its administration of claims, both in general and specifically with respect to the administration of [Defendant's] account." Dkt. No. 86 at p. 27.

Resolute objects to these inquiries claiming that such information is not relevant and that any investment strategies of Resolute's affiliates are not in Resolute's possession, custody or control. Resolute further claims that to the extent it is in possession of such information, that information would consist of trade secrets and/or protected commercial information. While Defendant has demonstrated some marginal relevancy of the requested information to the claims and defenses in this matter, the Court finds that requiring Resolute to gather and disclose such information would contravene the proportionality considerations set forth in Rule 26. Defendant's overly broad requests appear to be a fishing expedition seeking wholesale discovery of Resolute's

and its affiliates' investment strategies and do not evidence any attempt by Defendant to narrow its inquiries to the claims and defenses at issue in this case. Accordingly, because the Court finds that the disclosure of such information is not proportional to the needs of this case, and that the burden inflicted upon Resolute by the production of this information would outweigh its benefit, Defendant shall not seek discovery in Topics 8 and 9.[6]

In Topic 13, Defendant seeks information regarding Resolute's document retention and destruction policies. In opposition to Defendant's request, Resolute claims that it does not have any "specific document retention and destruction policy" as relates to Plaintiffs. Dkt. No. 83 at p. 19. Initially, the Court notes that Defendant's request is not limited to Resolute's document retention and destruction policies specifically on behalf of Plaintiffs but seeks Resolute's overall document policies. Beyond stating that no policy exists, Resolute has failed to provide any basis for quashing or limiting Topic 13. If Resolute does not indeed have such a policy, which need not be specific to Plaintiffs, its 30(b)(6) witness may simply state as such during their deposition. If Resolute does have any document policies, its corporate representative shall provide such information to Defendant.

Topic 17 solicits information related to "Resolute's relationship with, and work on behalf of Plaintiffs, and any agreements between and among NICO, Resolute, Berkshire Hathaway and [Plaintiffs]." Dkt. No. 86, Appx. I at 7. Resolute objects to Topic 17 asserting that it seeks information that is not relevant to any of the claims or defenses in this litigation and that the overall relationship between Plaintiffs and NICO and Berkshire Hathaway "has no impact on the language of the insurance policies at issue or the right of [Plaintiffs] to collect retrospective

[6] Although the Court may quash a subpoena which seeks the disclosure of trade secrets or confidential commercial information pursuant to Rule 45(d)(3)(B)(i), Resolute has failed to explain or support its assertion that such information would be implicated by responding to Defendant's requests.

premiums." Dkt. No. 83 at p. 19. In response, Defendant cites to the agreement pursuant to which Resolute became the administrator of Defendant's claims and asserts that it is "entitled to ask Resolute about [that agreement], or any similar agreements, that inform or control how [Resolute] handles [Defendant's] account." Dkt. No. 86 at p. 28.

Defendant's counterclaims against Plaintiffs in this matter are based largely upon the assertion that Plaintiffs, in connection with Resolute, acted in bad faith by charging Defendant improper and unjustified retroactive premiums and continue to act in bad faith by refusing to provide an explanation for the assessment of those premiums. According to Defendant, its issues with Plaintiffs arose when Resolute took over the role of third-party administrator for Plaintiffs' liabilities pursuant to an agreement between NICO and Plaintiffs. In order to support its claims based upon this alleged conduct, Defendant must investigate the relationship between Plaintiffs and Resolute and how that relationship came to be. However, information regarding the relationships and agreements between Plaintiffs and Resolute and its affiliates is only relevant to the extent that such relationships and/or agreements designate the entity responsible for the handling of Defendant's claims and the procedures to be undertaken in so doing. Accordingly, Defendant's inquiries in this area shall be limited to the relationships between Plaintiffs, Resolute, NICO and Berkshire Hathaway only as relates to the administration of Defendant's claims and any agreements between Plaintiffs, Resolute, NICO and Berkshire Hathaway which govern the handling of such claims.

In light of the foregoing, the Court finds that Resolute has failed to carry its heavy burden of establishing that complying with the Resolute Subpoena would be unreasonable and oppressive and its motion to quash the Resolute Subpoena is therefore **DENIED**. Additionally, beyond conclusory statements, the Court finds that Resolute has failed to articulate how allowing

Defendant to inquire into the Group 2 and Group 4 Topics during the future depositions of Ms. Gianakis and Ms. Menotti would cause Resolute to suffer a clearly defined and serious injury and has therefore failed to demonstrate the requisite good cause for the entry of a protective order. Accordingly, Resolute's motion for a protective order is likewise **DENIED**. However, while the Court declines to quash the Resolute Subpoena or preclude Defendant's inquiries into the contested Topics altogether, the Court finds that certain aspects of the Topics at issue exceed the scope of permissible discovery and are therefore limited as set forth above.

B. Plaintiffs' Motion for a Protective Order [Dkt. No. 101]

In their present motion, Plaintiffs request the entry of a protective order prohibiting Defendant from inquiring into certain subjects during Defendant's 30(b)(6) deposition of Plaintiffs' corporate designee and during the depositions of Ms. Menotti and Ms. Gianakas. As set forth below in a discussion of the individual contested deposition topics, Plaintiffs have failed to identify how Defendant's inquiries will cause Plaintiffs to suffer a clearly defined and serious injury. Accordingly, because Plaintiffs has failed to demonstrate the existence of good cause for the issuance of a protective order, Plaintiffs' motion for a protective order is **DENIED**.

However, while the Court declines to enter a protective order barring Defendant from inquiring into the contested Topics altogether, the Court finds that some of the information sought by Defendant exceeds the scope of permissible discovery. Therefore, as set forth fully below in the discussion of each disputed area of inquiry, the Court will place limitations on the scope of the discovery sought by the CNA Notice pursuant to Rule 26(b)(2)(C). Additionally, the same limitations for the CNA Notice specified below shall apply to Defendant's depositions of Ms. Gianakis and Ms. Menotti. The Court now turns to a discussion of each contested topic.

Topic 1

Topic 1 seeks information related to "[t]he policies Plaintiffs issued to Defendant that are at issue in this litigation, and any related agreements supplementing those policies, such as letters of credit, claim service agreements, deductible reimbursement agreements or plan maximum agreements, including the policies' terms and provisions . . . [and] the drafting history and underwriting of the . . . policies as they relate to the issues in dispute." Dkt. No. 116, Appx. at 1. Plaintiffs' objection to Topic 1 is limited to Defendant's request for drafting history and underwriting of the policies. In support of their motion, Plaintiffs assert that Defendant's request is not stated with "reasonable particularity" and that preparing a corporate designee to testify as to the policies at issue, which date back to 1969, would unduly burden Plaintiffs. Dkt. No. 100 at p. 11. In response, Defendant claims that Topic 1 is "expressly limited . . . to the drafting history and underwriting of the [relevant] policies 'as they relate to this dispute' – i.e. with respect to retrospective premiums." Dkt. No. 116 at p. 31.

Plaintiffs do not dispute the relevancy of the drafting history and underwriting of the policies at issue in this matter and it appears to the Court that such information is indeed relevant and discoverable. See Westport Ins. Corp. v. Hippo Fleming & Pertile Law Offices, 319 F.R.D. 214, 218 (W.D. Pa. 2017) (granting motion to compel production of underwriting file as relevant to bad faith claim); Dix v. Total Petrochemicals USA, Inc., No. CIV. 10-3196 JBS/JS, 2011 WL 5513185, at *5 (D.N.J. Nov. 10, 2011) (finding drafting history on insurance policy at issue relevant to show interpretation suggested by insurer in determining coverage was different from the intent of the original drafters).

Despite Plaintiffs' assertion to the contrary, Topic 1 has been stated with reasonable particularity and limited to seek only the drafting history and underwriting of the policies at issue

in this matter and only to the extent that such information relates to retrospective premiums. As to Plaintiffs' assertion of burden, although the Court acknowledges the possible difficulties in providing information regarding decades old policies, Plaintiffs themselves have placed these policies at issue by seeking retrospective premiums under policies for which the earliest effective end date is August 15, 1978 and the most recent effective end date is August 15, 1994. See Am. Compl. at ¶ 7. The age of the policies at issue did not preclude Plaintiffs from performing their retrospective premium calculations and it would be inequitable indeed to preclude Defendant from inquiring into the drafting history and underwriting of these policies based solely upon Plaintiffs' assertions that the age of the policies renders such discovery burdensome.

Topics 2, 6, 7, 9 and 10

Topics 2, 6, 7, 9 and 10 all seek information regarding Plaintiffs' practices and procedures in connection with claims handling and retrospective billing.[7] Plaintiffs object to these topics on virtually identical grounds, arguing that discovery into its general business practices is improper

[7] In Topic 2, Defendant seeks information regarding "[t]he practices and procedures of Plaintiffs and their employees, agents and representatives (including [Resolute]) regarding the handling of asbestos and environmental claims under general liability policies, and Plaintiffs handing of Defendant's asbestos and environmental claims under the [Policies]." Dkt. No. 116, Appx. at 2-3.

In Topic 6, Defendant seeks information regarding "[t]he 2012 and subsequent rating plan adjustments Plaintiffs issued to Defendant, and other periodic rating plan adjustments Plaintiffs issues to Defendant that have been produced in discovery in this litigation, and the practices and procedures of Plaintiffs, their employees, agents and representatives, regarding generating and issuing periodic rating plan adjustments." Id. at 7.

Topic 7 seeks information regarding "[t]e 2012 and subsequent retrospective premium invoices Plaintiffs (or their agents or representatives) issued to Defendant, and any other retrospective premium invoices Plaintiffs (or their agents or representatives) issued to Defendant that have been produced in discovery in this litigation, and Plaintiffs' (or their agents or representatives) practices and procedures regarding calculating, generating and issuing retrospective premium invoices." Id. at 8.

Topic 9 seeks information regarding "[t]he practices, policies and procedures of Plaintiffs or their employees, agents or representatives regarding the establishment of master claim files and trailer files." Id. at 10.

In Topic 10, Defendant seeks information regarding "[t]he practices, policies and procedures of Plaintiffs or their employees, agents or representatives regarding periodic rating plan adjustments, retrospective rating calculations, and retrospective premiums, including practices, policies and procedures regarding the allocation and/or reallocation of losses to particular policies or policy years, criteria for determining a policy or policy year is closed or open to retrospective premiums, and moving losses from such closed policies and/or closed years to open policies and/or open years." Id. at 11.

and beyond the scope of permissible discovery, and accordingly, that Defendant's inquiries should be limited to Plaintiffs' handling of Defendant's claims. Specifically, Plaintiffs claim that Defendant is attempting to "improperly explore the relationship between Plaintiffs, Resolute, and/or insureds other than Defendant" and that Defendant's inquiries should be limited specifically to retrospective premiums as opposed to the general handling and administering of claims by Plaintiffs. Dkt. No. 100 at p. 12. Plaintiffs further assert that the limitations set forth in the Court's June 27, 2016 Order, which limited Defendant's requests for prior litigation information to lawsuits against Plaintiff claiming bad faith in connection with Plaintiffs' assessment of retrospective premiums, should apply to the presently sought discovery. Because these topics seek similar information and have elicited similar objections from Plaintiffs, the Court will address them together.

For the same reasons set forth in the Court's discussion of Resolute's motion to quash the Group 4 Topics, the Court finds that Defendant is entitled to seek the information requested in Topics 2, 6, 7, 9 and 10, and that Plaintiffs have failed to demonstrate any basis for a protective order barring Defendant's inquiries in these areas. Defendant has provided adequate support that the information sought is relevant to its allegation that Plaintiffs' and Resolute's handling of Defendant's claims resulted from actions undertaken in bad faith which may have arisen from the relationship between Plaintiffs and Resolute, NICO and Berkshire Hathaway and internal policies dictating such conduct. In order to investigate this claim, Defendant is entitled to seek information regarding not only Plaintiffs' handling of Defendant's claims, but also Plaintiffs' general practices both before and after it began working with Resolute to determine whether there were inconsistencies in the treatment of Defendant's claims. As to information related to claims handling and retrospective premium calculations of other insureds, this information will allow

Defendant to determine the manner in which Plaintiffs ordinarily proceed and whether Defendant's account was administered in an atypical fashion.

However, although the Court finds that information regarding Plaintiffs' and Resolute's claims handling practices is relevant, the Court will limit Defendant's inquiries into Plaintiffs' and Resolute's claims handling practices and procedures to policies involving retrospective premiums. This shall be the only limitation applied to Topics 2, 6, 7, 9 and 10.

Topics 11, 12, 13, 14, and 16

In addition to their objections to Defendant's inquiries into Plaintiffs' general business practices, Plaintiffs object to Topics 11, 12, 13, 14 and 16, which seek information regarding the relationship between Plaintiffs and Resolute/NICO. In opposition to Defendant's inquiries, Plaintiffs claim that the relationships between Plaintiffs and their affiliates are not at issue in this matter and are not relevant to Defendant's claims and defenses. In response to Plaintiffs' objections, Defendant cites to the agreement pursuant to which Resolute became the administrator of Defendant's claims and asserts that it is entitled to ask Resolute about that agreement, or any similar agreements, that inform or control how Plaintiffs handle Defendant's account and that define or describe the relationship between Plaintiffs and Resolute or NICO. Dkt. No. 116 at p. 28. Furthermore, Defendant points to the interconnected nature of the relationship between Plaintiffs and Resolute, as evidenced by the several relevant employee witnesses who have gone between Resolute and Plaintiffs and Plaintiffs' discovery requests for Defendant's communications with Resolute, as proof of the clear relevance of the relationship between Plaintiffs and Resolute to this matter.

Although the Court will address each remaining request individually, the Court finds that the relationship between Plaintiffs and its affiliates, insomuch as those relationships dictated or

affected Plaintiffs' handling of Defendant's claims, is plainly relevant to the issues in this case. Plaintiffs' discovery requests, responses to discovery, as well as Plaintiffs' conduct throughout the course of this litigation, clearly demonstrate the relevance of its relationships with its affiliates, particularly its relationship with Resolute, to Defendant's claims and defenses in this matter. Multiple individuals identified as having made decisions regarding the handling of the claims at issue are Resolute employees, some of whom were previously employed by Plaintiffs, and Plaintiffs do not dispute Resolute's involvement in the administration of the Policies or the assessment of the retrospective premiums from which this matter arises. However, while the Court finds that Plaintiffs have failed to demonstrate the requisite good cause for the entry of a protective order barring Defendant's inquiries into these Topics, as set forth below, some of Defendant's requests will be limited so as to seek only information within the proper scope of discovery.

Topic 11 seeks information regarding Plaintiffs' relationship with Resolute and NICO, including any agreements reflecting such a relationship, and Resolute and/or NICO's work on behalf of Plaintiffs. While the Court agrees with Defendant that information regarding the relationships between Plaintiffs and its affiliates is relevant to this matter, such information is only relevant to the extent that that it affected Plaintiffs' handling of Defendant's claims at issue in this case. Accordingly, Defendant's inquiries in Topic 11 shall be limited to seek only information regarding the relationships between Plaintiffs and Resolute/NICO to the extent that such relationships relate to the handling of Defendant's claims, the agreement or agreements pursuant to which Resolute became the administrator of Defendant's account with Plaintiffs, and any other agreements between Plaintiffs and NICO/Resolute which dictated or affected the handling of Defendant's claims.

In Topic 12, Defendant seeks communications by and/or between Plaintiffs and Resolute and/or NICO regarding the Policies, payments made to the Policies, allocations or reallocations of losses to particular policies or policy years, periodic retrospective premium adjustments and/or retrospective premiums under the Policies, and claims under the Policies giving rise to such retrospective premiums. In addition to Plaintiffs' objection to any inquiry into the relationship between Plaintiffs and Resolute/NICO, Plaintiffs contend that this inquiry is overbroad in seeking communications beyond those directly related to the retrospective premiums sought by Plaintiffs in this action. Plaintiffs contend that because the relationship between Plaintiffs and Defendant dates back to 1965, there are "thousands, if not tens of thousands, of communications between Plaintiffs and Defendants wholly unrelated to the retrospective premiums at issue here." Dkt. No. 100 at p. 19.

The Court agrees with Plaintiffs that Topic 12 is overbroad. Defendant's request for communications regarding the Policies without limitation to the issues in this case does not fall within the permissible scope of discovery and would require Plaintiffs to expend significant resources to review and produce a large amount of documents, a vast quantity of which would likely bear very little relation to the disputes in this matter. Accordingly, Topic 12 shall be limited to seek only such communications which relate to the calculation and assessment of the retrospective premiums at issue in this matter. This shall include, as related to the policies under which the relevant retrospective premiums were charged and the claims which lead to the assessment of those premiums, communications which discuss allocations or reallocations of losses to particular policies or policy years, periodic retrospective premium adjustments and/or retrospective premiums under the relevant policies, and claims under the relevant policies giving rise to such retrospective premiums.

Topic 13 seeks the same categories of communications but targets communications "by and/or between Plaintiffs, their employees, agents or representatives and Defendant and/or Defendant's brokers or agents . . . ." Dkt. No. 116, Appx. at 14. Plaintiffs set forth the same arguments in opposition to Topic 13 as asserted in connection with Topic 12. The limitation of Topic 13 shall mirror that of Topic 12 for the same reasons as set forth above.

In Topic 14, Defendant seeks information regarding "Resolute's or NICO's role in performing any function with respect to [the Policies], or Defendant's insurance account with Plaintiffs." Id. at 15. Plaintiffs object to Topic 14 to the extent it seeks to explore the relationship between Plaintiffs, Resolute and NICO. Because the Court finds that such information is relevant, and because Plaintiffs have provided no additional objections to Topic 14 based upon its scope, Plaintiffs shall provide responsive information and testimony to Topic 14 without any further limitation.

Topic 16 seeks information regarding "[a]ctions by Plaintiffs or their employees, agents or representatives, in response to Defendant's requests for information regarding retrospective premium invoices Plaintiffs issued to Defendant." Id. at 17. Plaintiffs object to Topic 16 to the extent that it seeks testimony regarding the actions of individuals not employed or controlled by Plaintiffs. In response, Defendant contends, and Plaintiffs do not dispute, that at least as relates to "certain aspects of claims handling," Resolute is an agent of Plaintiffs. Dkt. No. 100 at p. 20. While the Court does not disagree with Defendant's assertion that Resolute is Plaintiffs' agent and therefore testimony regarding the actions of Resolute may be properly obtained from Plaintiffs' corporate representative, in light of Defendant's request for the same information in the Resolute Subpoena, the Court finds that requiring Plaintiffs to testify as to Resolute's actions when Defendant may instead submit its inquiries directly to Resolute would be unreasonably

cumulative. Accordingly, Defendant shall seek information regarding Resolute's responsive actions from Resolute and information regarding Plaintiffs' responsive actions from Plaintiffs.

Topic 3

Topic 3 seeks information regarding "[t]he 1993 and 1998 environmental settlement agreements between Plaintiff Continental Casualty Company and Defendant," the settlement agreement between Plaintiffs and Defendant arising out of an action filed in Louisiana state court captioned Joseph Dupont, et al. v. J.M. Huber Corp., et al. (the "Dupont Action"), and any other settlements between Plaintiffs and Defendant relating to Defendant's environmental or asbestos liabilities. Dkt. No. 116, Appx. at 4. The Dupont Action involved environmental remediation claims against Defendant. Dkt. No. 86 at p. 7. According to Defendant, Plaintiffs agreed to provide coverage for the Dupont action in 2001 and had been defending Defendant in that action until December 2012 when Resolute took over the administration of Defendant's claims. Id. When Resolute began administering Defendant's claims on behalf of Plaintiffs, Resolute notified Defendant that it was denying coverage for the Dupont Action based upon alleged "new information" which was not explained to Defendant. Id.

Plaintiffs object to this inquiry on two grounds. First, Plaintiffs state that they are "unaware of any other settlements between the parties to this action, and as such, cannot prepare a corporate representative" to testify as to agreements which have not been identified. Dkt. No. 100 at p. 15. Plaintiffs do not specify any harm they will suffer as a result of responding to Defendant's questions and requests in this area and Plaintiffs' argument that they are entitled to a protective order based upon the assertion that they are "unaware" of any other settlements between the parties is unavailing. Defendant's inquiry is limited to "settlements between Plaintiffs and Defendant relating to Defendant's environmental or asbestos liabilities" and it appears to the

Court that Plaintiffs should be able to determine with minimal effort whether there are any additional responsive settlements.

Plaintiffs' second objection to Topic 3 is based upon Plaintiffs' concern that Defendant "intends to use the Dupont settlement agreement for anything other than ensuring that the settlement agreement was properly accounted for, if necessary, in the retrospective premiums charged to Defendant." Dkt. No. 100 at p. 15. According to Plaintiffs, Defendant cannot use the Dupont settlement agreement to bolster its bad faith claim because the agreement releases all claims against Plaintiffs and Resolute. Plaintiffs further assert that they have established good cause for a protective order because "the injury of a breach of the settlement agreement would undoubtedly occur if Defendant's claims are permitted to continue." Id. at p. 16.

Plaintiffs do not dispute that the information sought is relevant to Defendant's claims, and while Plaintiffs are apprehensive about the manner in which Defendant may use such discovery to support its claims, the present disputes and motions relate to the scope of discovery and are not the proper mechanism by which to limit Defendant's potential claims. Although Plaintiffs may eventually prevail on their contention that the releases in the Dupont settlement agreement bar any claims by Defendant against Plaintiffs and Resolute arising out of that agreement, that issue is not properly before the Court at this juncture or in connection with the present motions. As to Plaintiffs' assertion that allowing such discovery will result in a breach of the settlement agreement, Plaintiffs have provided no explanation as to how Defendant's exploration of a settlement agreement of which Defendant is already in possession will somehow result in a breach of that agreement, especially in light of the Discovery Confidentiality Order entered in this matter. See Dkt. No. 17. Accordingly, the Court finds no reason to place any limitations on Topic 3.

Topic 8

In Topic 8, Defendant seeks information regarding Plaintiffs' document retention and destruction policies. Plaintiffs object to Topic 8 only to the extent that Defendant seeks testimony related to Plaintiffs' document retention and destruction policies as to other insureds, claiming that any questions beyond the specific policies at issue in this matter would place an undue burden on Plaintiffs. Plaintiffs offer no support for their contention that Defendant should be prevented from inquiring into Plaintiffs' general document retention and destruction policies and fail to articulate how they will be burdened by responding to Defendant's inquiries into a presumably standard policy. If the document retention and destruction policy applied by Plaintiffs in the handling of Defendant's claims is the same policy applied to all of its policy holders, Plaintiffs will incur no additional burden in responding to questions regarding that policy. To the extent that Plaintiffs utilized a policy in connection with the handling of Defendant's claims that somehow differed from their general policy, such information would indeed be relevant.

Based upon the foregoing, the Court finds that beyond conclusory statements, Plaintiffs have failed to articulate any clearly defined or serious injury which would result from Plaintiffs responding the disputed subjects in the CNA Notice or from such inquiries in the future depositions of Ms. Gianakis and Ms. Menotti. Accordingly, Plaintiffs' motion for a protective order is **DENIED**. However, while the Court declines to preclude Defendant's exploration of the subjects at issue altogether, the Court finds that certain aspects of the disputed Topics exceed the scope of permissible discovery and are therefore limited as set forth above.

III. CONCLUSION AND ORDER

The Court having considered the papers submitted pursuant to Fed. R. Civ. P. 78, and for the reasons set forth above;

IT IS on this 19th day of December, 2017,

ORDERED that non-party Resolute Management, Inc.'s motion to quash and for a protective order [Dkt. No. 83] is **DENIED**; and it is further

ORDERED that Plaintiffs' motion for a protective order [Dkt. No. 101] is **DENIED**; and it is further

ORDERED that Defendant's 30(b)(6) depositions of Plaintiffs' and Resolute's corporate representatives shall be limited as set forth in this Opinion and Order; and it is further

ORDERED that Defendant's depositions of Connie Gianakis and Maria Menotti shall be limited as set forth in this Opinion and Order; and it is further

ORDERED that this Opinion and Order shall remain under seal for fourteen days (14) during which time the parties may file a Motion or Motions to seal portions of this Opinion and Order pursuant to Local Civil Rule 5.3.

s/ James B. Clark, III
JAMES B. CLARK, III
United States Magistrate Judge