IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Koppers Performance Chemicals, Inc., f/k/a Osmose Wood Preserving Co. of America, Inc. f/k/a Osmose Wood Preserving, Inc. f/k/a Osmose, Inc., Plaintiff, v. The Travelers Indemnity Company; Argonaut-Midwest Insurance Company d/b/a Argo Group; Insurance Company of North America d/b/a Chubb; Indemnity Insurance Company of North America d/b/a Chubb; Pacific Employers Insurance Company d/b/a Chubb; and Ace American Insurance Company d/b/a Chubb, Defendants.	Civil Action No. 2:20-cv-2017-RMG **ORDER AND OPINION**

Before the Court is Defendant Argonaut-Midwest Insurance Company d/b/a Argo Group ("Defendant Argo")'s motion to compel more complete discovery responses from Plaintiff Koppers Performance Chemicals, Inc. f/k/a Osmose Wood Preserving Co. of America, Inc. f/k/a Osmose Wood Preserving, Inc. f/k/a Osmose, Inc.'s ("Plaintiff"). (Dkt. No. 71). For the reasons stated below, the motion is granted in part, denied in part.

I. Background

This is a declaratory judgment action and breach of contract action filed by Plaintiff against various insurance companies. (Dkt. No. 1). Plaintiff alleges it purchased multiple liability insurance policies that included bodily injury liability caused by Plaintiffs' products from the following insurance companies: Defendant Argo between 1979-1982; Defendant Travelers

between 1978-1979; and Defendant Chubb between 1979-2003. Plaintiff alleges Defendants disclaimed any duty to defend and indemnify Plaintiff in an Underlying Lawsuit that was filed on August 11, 2017 in the Court of Common Pleas, Charleston County, South Carolina. (Dkt. No. 1-1).

The Underlying Lawsuit alleged the Plaintiff in that case was a 38-year-old-male who grew up, lived, and worked in Charleston, South Carolina where he was exposed to wood treatment chemicals over a number of years. As a result of the exposure, Plaintiff contracted cancer and passed away in 2017. (*Id.* at ¶¶ 23-26, 33-40). The Underlying Lawsuit alleges that Koppers, as a foreign corporation doing business in Charleston, South Carolina, manufactured the wood treatment chemicals. (*Id.* at ¶ 11).

On May 27, 2020, Plaintiff Koppers filed a declaratory judgment action, seeking a declaration Defendants' policies apply to the Underlying Lawsuit. (Dkt. No. 1-1 at ¶ 47). Plaintiff alleges Defendants breached the duty to defend and indemnify Plaintiff in the Underlying Lawsuit. (*Id.* at ¶¶54, 61). Defendant Argo filed an Amended Answer and Counterclaim asserting various defenses, affirmative, defenses, and counterclaims. (Dkt. No. 29). Defendant Argo brings counterclaims: (1) Plaintiff is not an insured under the Argo Policies; (2) misrepresentation; (3) reformation of contract based on mutual mistake; (4) reformation of contract based on unilateral mistake.

On October 20, 2021, Defendant Argo filed a motion to compel Plaintiff to provide more sufficient responses to Defendant Argo's Fourth Set Request for Production of Documents (RFPs) Fourth Set and Defendant Argo's Third Set Interrogatories (ROGs). (Dkt. No. 71-1). The motion to compel is ripe for the Court's review.

II. Legal Standard

Federal Rule of Civil Procedure 26 provides that, unless otherwise limited by court order, "[p]arties may obtain discovery regarding any non-privileged 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 of expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P 26(b)(1). Notably, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *Id*. "The scope and conduct of discovery are within the sound discretion of the district court." *Columbus-Am. Discovery Grp. V. Atl. Mut. Ins. Co.*, 56 F.3d 556, 568 n.16 (4th Cir. 1995) (citing *Erdmann v. Preferred Research, Inc. of Ga.*, 852 F.2d 788, 792 (4th Cir. 1988).

The Federal Rules of Civil Procedure provide that a party may "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identify and location of persons who know of any discoverable matters." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Rather, information is relevant and discoverable if it relates to "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). If a party declines to answer an interrogatory or request for production, the serving party "may move for an order compelling an answer, designation, production, or inspection." Fed. R. Civ. P. 37(a)(3)(B). An evasive or incomplete disclosure, answer, or response, "must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(4). District courts have "wide latitude in controlling discovery and [their] rulings will not

be overturned absent a showing of clear abuse of discretion." *Ardrey v. United Parcel Service*, 789 F.2d 679, 683 (4th Cir. 1986); *In re MI Windows & Doors, Inc. Prod. Liab. Litig.*, 2013 WL 268206, at * 1 (D.S.C. Jan. 24, 2013).

III. Discussion

Defendant Argo seeks to compel more sufficient discovery responses from Plaintiff. At issue are Plaintiff's responses to Defendant Argo's Fourth Set RFPs 1-4 and Defendant Argo's Third Set ROGs 1-4. Plaintiff objects to Defendant Argo's Fourth Set RFPs 1-4 and ROGs1-3 on the ground the information sought is not relevant to this action.

A. Defendant Argo's Fourth Set RFPs 1-4 and Third Set ROGs 104

Defendant Argo's Fourth Set RFPs, in summary, request insurance policies issued to Plaintiff from other insurance companies along with documents, communications, and denial letters, from the other insurance companies Plaintiff sought coverage from in relation to the Underlying Action. (Dkt. No. 71-1 at 5-7).[1]

[1] Defendant Argo's Fourth Set RFP 1 requests for every insurance company from which Plaintiff sought coverage in relation to the Underlying Action, correspondence from an insurance carrier reserving any rights denying coverage, or otherwise stating the insurance company's position regarding coverage. (Dkt. No. 71-1 at 5).

RFP 2 requests a copy of the Illinois Union insurance policy listing Griffin Forest Industries as an insured during 1979 or if the policy is not available, evidence regarding the policy and its coverage. (*Id.* at 5).

RFP 3 seeks a copy of the Pacific Insurance Company policy that may have provided coverage for Griffin Forrest Industries, Inc., Hawaii Wood Preserving Co., Osmose Pacific, Inc., and/or Osmose Wood Preserving Co. of America during 1980, or if not available, documents that may provide evidence regarding the policy and its coverage. (*Id.* at 6).

RFP 4 seeks copies of insurance policies that may have provided coverage for Griffin Forrest Industries, Inc., Hawaii Wood Preserving Co., Osmose Pacific, Inc., and/or Osmose Wood Preserving Co. of America during 1977, 1978, 1982, 1983, and 1984, or if there are no responsive policies for any of these years indicate which years and if the policy if not available provide documents that may provide evidence regarding the policy and its coverage. (*Id.* at 7).

Defendant Argo's Third Set ROG 1 asks Plaintiff to identify all insurance policies that could have provided coverage for the claims alleged in the Underlying Lawsuit. (Dkt. No. 71-1 at 7). ROG 2 asks Plaintiff to state whether it carried liability insurance between 2003-2017, to identify the company that provided the insurance, the policy number, and relevant policy period. (*Id.* at 8). ROG 3 asks Plaintiff to identify all insurance companies from which Plaintiff sought coverage in relation to the Underlying Action and whether coverage was denied or accepted or otherwise. (*Id.* at 9).

Plaintiff's responses to RFPs 1-4 and ROGs 1-3 object on the basis the information sought is not relevant to Plaintiff's claims in this case because each insurer's obligation to defend and/or indemnify Plaintiff in the Underlying Action is separate and individual based on the terms of the insurer's policy. (Dkt. Nos. 71-1 at 5-7; 77) (citing *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011); *Sloan Const. Co., Inc. v. Central Nat'l Ins. Co. of Omaha*, 236 S.E.2d 818 (S.C. 1977)). Defendant Argo argues the information is relevant to its counterclaims. Plaintiff's brief solely focuses whether Defendant Argo's discovery requests seek information relevant to Plaintiff's claims alleging breach of the duty to defend and indemnify. Plaintiff does not discuss whether the information would be relevant to any of Defendant Argo's counterclaims. (Dkt. No. 29 at ¶ at p. 9 – 16).

The Court will analyze whether the discovery sought is relevant to any of Defendant Argo's counterclaims. One of Defendant Argo's counterclaims is for fraudulent misrepresentation. (*Id.* at ¶¶ 87-95). In South Carolina, an insurance policy may be voided on the ground that an insured has made a material misrepresentation, such that the insurance policy should be voided, and coverage denied. "In order to vitiate a policy on the ground of fraudulent misrepresentation, it is necessary that the insurer show not only the falsity of the statement challenged, but also that the

falsity was known to the applicant, was material to the risk, made with the intent to defraud the insurer, and relied upon by the insurer in issuing the policy." *Evanston Ins. Co. v. Watts*, 52 F. Supp. 3d 761, 766 (D.S.C. 2014), *as amended* (Oct. 21, 2014), *aff'd sub nom*. *Evanston Ins. Co. v. Agape Sr. Primary Care, Inc.*, 636 F. App'x. 871 (4th Cir. 2016).

Defendant Argo's fraudulent misrepresentation counterclaim alleges the Argo Policies were issued to "Osmose Wood Preserving Co. of America, Inc., and Griffin Forrest Industries, Inc., DBA Hawaii Wood Preserving Co., and DBA Osmose Pacific, Inc., a Subsidiary, 2819 Pukoloa Street, Honolulu, Hawaii 96819", between the years 1979-1982. (Dkt. No.29 at ¶¶ 10, 83, 88). Defendant Argo alleges the policies include a schedule of General Liability Hazards for which the policies were intended to cover, which reference specific locations and hazards as located in Hawaii only and do not identify any other locations. (*Id.* at ¶¶67-69). Defendant Argo alleges the "statements made, addresses provided, and hazards identified to [Defendant] Argo are materially false, misleading, and/or fraudulent, which was known to the Plaintiffs, and the information provided to [Defendant] Argo was intentionally concealed or misrepresented." (Dkt. *Id.* at ¶ 93). Defendant Argo's Answer and Counterclaim alleges Koppers tendered claims for indemnity and defense arising out of allegations contained in the Underlying Action that allege claims against Koppers as doing business in Charleston, South Carolina and as the manufacturer of wood treated chemicals. In addition, Defendant Argo alleges the Underlying Lawsuit alleges the plaintiff in that case handled wood treated chemicals while in Charleston. (Dkt. No. 29 at ¶¶ 72-79).

The Court finds Defendant Argo's RFPs 1-4 and ROGs 1-3 seek discovery that is reasonably calculated to lead to admissible evidence as to Defendant's counterclaim. For the purposes of discovery, "relevant information need not be admissible at trial," but rather must only "appear

reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). The discovery rules should be given a broad and liberal treatment to provide parties to the litigation with knowledge of the relevant facts. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 983 (4th Cir. 1992). In this case, the discovery sought could lead to other relevant information regarding Plaintiff's practices in obtaining insurance and whether Plaintiff made a false statement to Defendant Argo with the intent to defraud the insurer.

Plaintiff generally argues the discovery sought is not proportional to the needs of the case because Defendant Argo seeks 43 years' worth of insurance policies. (Dkt. No. 77 at 8). Plaintiff argues that "identifying, collecting, and/or producing those materials would be a substantial outlay of time, money and resources . . . ." (*Id).* The Court will weigh if the information sought is proportional to the needs of the case by 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 purported discovery outweighs its likely benefits." Fed. R. Civ. P. 26(b)(1). Because Plaintiff likely has access to relevant information and the issues at stake involve Defendants' counterclaims in this action, the Court finds the effort required to produce it is not disproportionate to the needs of the case such that it should not be discoverable under Rule 26.

The Court grants Defendant Argo's motion to compel as to RFPs 1-4 and ROGs 1-3. Plaintiff is instructed to supplement its discovery responses consistent with the Court's Order and produce all responsive documents to these requests within ten (10) days.

Defendant Argo's Fourth Set ROG 4 asks if Plaintiff did not tender defense or indemnity in relation to the underlying action to any insurance carrier providing or potentially providing coverage during any period between 2003-2017, state why Plaintiff did not make a tender. Plaintiff

objects on the ground the request seeks information protected by the attorney-client privilege, work product and/or other applicable privilege. (Dkt. No. 71-1 at 9). Defendant Argo requests that Plaintiff provide all non-privileged information, a privilege log, and an affirmative statement that Plaintiff has produced all non-privileged responsive documents.

Defendant Argo's motion to compel is granted as to ROG 4. Within ten (10) days, Plaintiff is instructed to serve Defendant Argo with a privilege log that complies with all the requirements of Fed. R. Civ. P. 26(b)(5). Plaintiff is also instructed to serve supplemental responses to affirmatively state whether all responsive non-privileged documents have been produced.

B. Defendant Argo's Request for Reasonable Expenses and Attorneys' Fees

Defendant Argo requests an award of reasonable expenses and attorneys' fees incurred in bringing this motion, pursuant to Fed. R. Civ. P. 37. (Dkt. No. 71 at 1). Plaintiff does not address this request. Rule 37(a)(5)(A) provides that if a motion to compel is granted, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." However, "the court must not order this payment if: . . . (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A). "A legal position is 'substantially justified' if there is a 'genuine dispute' as to proper resolution or if 'a reasonable person could think it correct, that is, if it has a reasonable basis in law and fat.'" *Decision Insights, Inc. v. Sentia Grp., Inc.*, 311 Fed. Appx. 586, 599 (4th Cir. 2009) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565-66, n. 2 (1988)). The Court finds that Plaintiff's legal position was substantially justified, and therefore declines to award Defendant Argo any expenses incurred in bringing the motion.

IV. Conclusion

For the reasons stated above, the Court **GRANTS IN PART**, **DENIES IN PART** Defendant Argo's motion to compel. (Dkt. No. 71).

Defendant Argo's motion to compel is **GRANTED** as to Defendant Argo's RFPs 1-4; Defendant Argo's ROGs 1-4. Plaintiff is instructed to supplement its discovery responses consistent with the Court's Order and serve Defendant Argo with a privilege log within ten (10) days.

Defendant Argo's motion to compel is **DENIED** as to Defendant Argo's request for Rule 37(a) expenses and reasonable attorney's fees.

AND IT IS SO ORDERED.

s/ Richard M. Gergel
Richard M. Gergel
United States District Judge

November 17, 2021
Charleston, South Carolina