UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

KATHLEEN McHUGH and
DEANNA SCHNEIDER, Individually
and on behalf of all persons similarly
situated ,

Plaintiffs,

v.

MADISON-KIPP CORPORATION,
CONTINENTAL CASUALTY COMPANY,
COLUMBIA CASUALTY COMPANY,
UNITED STATES FIRE INSURANCE
COMPANY and ABC INSURANCE
COMPANIES 1 – 50,

Defendants,

--and--

MADISON-KIPP CORPORATION,

Cross-Claimant,

Case No. 11-cv-724-bbc

v.

CONTINENTAL CASUALTY COMPANY,
COLUMBIA CASUALTY COMPANY and
UNITED STATES FIRE INSURANCE
COMPANY,

Cross-Claim Defendants,

--and--

CONTINENTAL CASUALTY COMPANY and
COLUMBIA CASUALTY COMPANY,

Cross-Claimants/Third-Party Plaintiffs,

v.

MADISON-KIPP CORPORATION,

Cross-Claim Defendant,

and

LUMBERMENS MUTUAL CASUALTY COMPANY, AMERICAN MORTORISTS INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANIES 1-20,

Third-Party Defendants.

DEFENDANT MADISON-KIPP CORPORATION'S MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 26, Defendant Madison-Kipp Corporation ("Madison-Kipp") seeks relief from portions of the Rule 30(b)(6) deposition notice served by Defendants Continental Casualty Company ("Continental"), Columbia Casualty Company ("Columbia"), and United States Fire Insurance Company ("U.S. Fire") (collectively, the "Insurance Companies"). Madison-Kipp requests that the Court enter a protective order that strikes Topics 1, 2, 19, and 20 from the Insurance Companies' Rule 30(b)(6) Notice.

BACKGROUND

On February 14, 2013, the Insurance Companies served a Notice of Rule 30(b)(6) Deposition of Madison-Kipp Corporation (the "Notice") that scheduled the deposition for March 1, 2013. (Declaration of Lee M. Seese ("Seese Decl.") ¶ 2, Ex. A.) To coordinate the schedules of counsel, the parties agreed to schedule the deposition for April 8, 2013. (*Id.* ¶ 3.) On February 26, 2013, at the request of Madison-Kipp's counsel, the Insurance Companies and Madison-Kipp had an initial call to address Madison-Kipp's concerns regarding the scope and content of the topics in the Notice. (*Id.* ¶ 4.)

On March 15, 2013, Madison-Kipp served the Insurance Companies with Madison-Kipp Corporation's Objections and Response to Notice of Rule 30(b)(6) Deposition (the "Objections") (Seese Decl. ¶ 6, Ex. C), and asked to conduct a meet and confer by no later than March 21, 2013 if the Insurance Companies had any issues with Madison-Kipp's Objections. (*Id.* ¶ 5, Ex. B). On March 22, 2013, having received no response from the Insurance Companies regarding Madison Kipp's Objections, Madison-Kipp's counsel emailed counsel because he had heard nothing in response to his March 15, 2013 letter and thus, assumed there were no issues with the Objections, but nevertheless asked to conduct a meet and confer later that day if there were any issues. (*Id.* ¶ 7, Ex. D.)

Counsel met and conferred on the Objections on March 22, 2013. (Seese Decl. ¶ 8.) On March 25, 2013, counsel for Madison-Kipp sent an email to counsel for the Insurance Companies that summarized the meet and confer and identified the parties' positions and the remaining disputes. (*Id.* ¶ 9, Ex. F.) On March 27, 2013, the Insurance Companies responded to Madison-Kipp's March 25, 2013 email. (*Id.* ¶ 10, Ex. F.)

Although the parties have been able to reach a compromise on certain topics in the Notice, Madison-Kipp seeks this Court's resolution of the parties' dispute as to certain other topics in the Notice. In the meantime, the parties intend to proceed with the April 8 deposition on the remaining topics. (Seese Decl. ¶¶ 9-10, Exs. E & F.) In the event the Court does not grant a protective order on all matters that are the subject of this motion, the parties have agreed to coordinate a separate day for the continuation of the deposition on any remaining matters not covered by a protective order. (*Id.*)

ARGUMENT

A Rule 30(b)(6) deposition is a vehicle for streamlining the discovery process. *SmithKline Beecham Corp. v. Apotex Corp.*, No. 98-C-3952, 2000 U.S. Dist. LEXIS 667, at *24 (N.D. Ill. Jan. 21, 2000). Pursuant to Rule 30(b)(6), a party may name an entity as a deponent but must specify with "reasonable particularity" the matters on which that party wishes the entity to testify. *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1058 n.5 (7th Cir. 2000).

Rule 30(b)(6) imposes a duty upon the named entity to prepare its selected deponent to adequately testify. *SmithKline*, 2000 U.S. Dist. LEXIS 667, at *25. Therefore, "[t]he requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned and that are relevant to the issues in dispute." *Kalis*, 231 F.3d at 1058 n.5 (internal quotation and citation omitted). "While Rule 30(b)(6) is not perfect, it can be effective if the parties use it in good faith." *Cat Iron, Inc. v. Bodine Envtl. Servs., Inc.*, No. 10-CV-2102, 2011 U.S. Dist. Lexis 63162, at *23 (C.D. Ill. June 15, 2011).

The scope of a Rule 30(b)(6) deposition is limited by Rule 26. Pursuant to Rule 26(c)(1), the Court may, for good cause, issue an order that protects "a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed. R. Civ. P. 26(c)(1); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36-37 (1984).

A. Madison-Kipp Already Has Provided The Information Demanded In Topics 1, 2, 19, And 20.

Topics 1, 2, 19, and 20 demand Madison-Kipp to prepare a witness to testify on the "terms and conditions" of the policies that Madison-Kipp claims Continental, Columbia (collectively, "CNA"), American Motorist Insurance Company, and Lumbermans Mutual Casualty Company (collectively, "Kemper") issued to Madison-Kipp. CNA already is well aware of the terms of its insurance policies, as they were the subject of stipulations filed with the Court. (*See* Dkt.# 150 & 184.) Indeed, these are CNA's *own documents*, so even without the stipulations they are intimately familiar with the terms and conditions. As to the Kemper policies, Madison-Kipp has directed the Insurance Companies to the actual policies, which is more than sufficient to identify the terms and conditions of these policies.

Rule 26(b)(2) empowers this Court to limit the scope of discovery if "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002). Courts have recognized that Rule 30(b)(6) deposition topics are needlessly duplicative and unduly burdensome where the same information has already been sought through interrogatories. *SmithKline*, 2000 U.S. Dist. LEXIS 667, at *30-*31; *see also TV Interactive Data Corp. v. Sony Corp.*, No. C 10-475, 2012 U.S. Dist. LEXIS 56861, at *12 (N.D. Cal. Apr. 23, 2012) (denying request to compel production of a Rule 30(b)(6) witness where the same information had already been sought through interrogatories). Indeed, a Rule 30(b)(6)

deposition is an inefficient means of obtaining discoverable information where a party could serve, or has already served, interrogatories to obtain the same information. *SmithKline*, 2000 U.S. Dist. LEXIS 667, at *28-31 (noting that a party could obtain information "with infinitely less intrusion upon privilege concerns, in a more workable form, and from the individuals who have actual knowledge of the matters at issue" through interrogatories).

The Court should grant a protective order as to Topics 1, 2, 19, and 20 because Madison-Kipp already has provided the demanded information through stipulations or otherwise identified the terms and conditions of the insurance policies. *See generally Catt v. Affirmative Ins. Co.*, No. 2:08-cv-243, 2009 U.S. Dist. LEXIS 37443 (N.D. Ind. Apr. 30, 2009) (granting protective order covering a number of topics that were duplicative).

B. Topics 1, 2, 19, And 20 Are Limited To The "Terms And Conditions" Of The Insurance Policies.

During the meet and confer, counsel for CNA stated that she intends to ask *how* Madison-Kipp interprets the CNA insurance policies (under the scope of Topics 1 and 2). (Seese Decl. ¶ 11.) She also stated that she intends to ask questions regarding secondary evidence that Madison-Kipp may use to prove the terms of certain lost insurance policies from CNA and Kemper (under the scope of Topics 1, 2, 19, and 20). (*Id.* ¶ 12.) These expanded depositions topics are improper for a number of reasons.

1. It Is Improper To Require Madison-Kipp To Prepare A Witness To Testify About Its Interpretation Of Each And Every Term And Condition In The CNA Insurance Policies.

First, Topics 1 and 2 are too broad and not described with reasonable particularity and, thus, are unduly burdensome. CNA issued at least thirteen policies to Madison-Kipp during policy years 1980–81 through 1986-87. The terms and conditions of Columbia's umbrella policies total 87 pages. (Dkt. # 150-1–4.) The terms and conditions of the Continental's known primary policies total 130 pages. (Dkt. # 184-1–6.) The terms and conditions of the Continental's excess policies would only add to the page count. The parties have devoted significant briefing on summary judgment (fifteen pages even before CNA files its reply brief) to the Maintenance of Underlying Insurance Provision in Columbia's umbrella policies alone. (Dkt. # 154 at 27–31; Dkt. # 177 at 30–39.) CNA now demands Madison-Kipp to prepare a witness to testify on each and every term and condition in each and every policy. This is an unreasonable – if not impossible – task.

Moreover, a party may not serve a Rule 30(b)(6) notice for the purpose of requiring the opposing party to marshal all of its factual proof and prepare a witness to be able to testify on a particular defense or claim. *Gossar v. Soo Line R.R. Co.*, No. 09-CV-9, 2009 U.S. Dist. LEXIS 100931, at *5-6 (S.D. Ind. Oct. 27, 2009); *Smithkline*, 2000 U.S. Dist. LEXIS 667, at *27. But this is exactly what the Insurance Companies plan to do.

The Insurance Companies intend to ask Madison-Kipp's corporate representative to interpret certain unknown provisions of the insurance policies. The Insurance Companies are fully aware that it is unreasonable to demand Madison-Kipp to prepare

a witness to testify as to each and every provision in a number of difference policies that were drafted by the Insurance Companies. The Insurance Companies apparently hope to lock Madison-Kipp's lay witness into a potentially flawed legal interpretation of the insurance policies or an incomplete recitation of the facts relating to this lawsuit. *First Internet Bank v. Lawyers Title Ins. Co.*, No. 1:07-cv-0869, 2009 U.S. Dist. LEXIS 59673, at *12 (S.D. Ind. July 13, 2009) ("This tactic has little to recommend it as a method for trying to lock an opponent into flawed and incomplete contentions and legal theories. A Rule 30(b)(6) deposition produces evidence, not judicial admissions.").

Indeed, taken to its logical extreme, Topics 1 and 2 possibly could encompass every aspect of this case. This is a breach of contract action and Topics 1 and 2 simply reference the "terms and conditions" of the insurance policies. Under a number of strained interpretations, the Insurance Companies could attempt to fashion an unlimited number of questions to fit under these topics. Simply put, Madison-Kipp is unable to reasonably prepare a witness to testify as to the legal interpretation of each and every term in the insurance policies, as well as another unlimited number of questions that the Insurance Companies may ask relating to the "terms and conditions" of the insurance policies. The Court should grant a protective order as to Topics 1 and 2 because they are not designated with "reasonable particularity." Indeed, Madison-Kipp only knows that counsel intends to ask about Madison-Kipp's interpretation of terms and conditions in various insurance policies – a task so brutal that even Zeus would likely consider it beyond human tolerance (*cf.* punishments to Prometheus, Sisyphus, Ixion) – based on the meet and confer process and not from the written topics.

Second, the Insurance Companies' expanded interpretation of Topics 1 and 2 seeks improper legal conclusions. A Rule 30(b)(6) deposition may not be used to determine legal conclusions. *Medical Assurance Co. v. Weinburger*, No. 06-CV-117, 2011 U.S. Dist. LEXIS 67516, at *38 (N.D. Ind. June 20, 2011); s*ee Bilek v. Am. Home Mortgage Servicing*, No. 07-CV- 4147, 2010 U.S. Dist. LEXIS 80041, at *6 (N.D. Ill. Aug. 9, 2010); *Cat Iron*, 2011 U.S. Dist. LEXIS 63162, at *19. But this is exactly what the Insurance Companies intend to do. "The interpretation of an insurance policy is ordinarily a question of law . . . ." *Liebovich v. Minn. Ins. Co.*, 2008 WI 75, ¶ 17, 310 Wis. 2d 751, 751 N.W.2d 764. Thus, the Insurance Companies expanded interpretation of Topics 1 and 2 is improper on its face.

Third, the Insurance Companies also intend to abuse Rule 30(b)(6) by asking improper contention interrogatories and "asking about legal theories and fact supporting the allegations in the complaint." *First Internet Bank*, 2009 U.S. Dist. LEXIS 59673, at *12. The Insurance Companies actually are attempting to depose Madison-Kipp's counsel to determine their legal theories in this case. Or the Insurance Companies demand Madison-Kipp's attorneys to prepare a lay witness to testify as to the legal interpretation of the insurance policies. "In either case, it would reveal the factual and legal theories of the defenses [Madison-Kipp's] attorney intends to raise." *Norco Indus., Inc. v. CPI Binani, Inc.*, No. 2:12 cv 313, 2012 U.S. Dist. LEXIS 176588, at *12-15 (N.D. Ind. Dec. 13, 2012). These topics too closely infringe on the attorney-client privilege and work-product doctrine and should be stricken by the Court. *See id.*

2. It Is Improper To Require Madison-Kipp To Prepare A Witness To Testify About Secondary Evidence Regarding The Terms And Conditions Of "Lost" CNA And Kemper Insurance Policies.

The parties have been unable to locate certain of the actual insurance policies that set forth the terms and conditions of every insurance policy that Madison-Kipp contends provides coverage in this case. As indicated in Madison-Kipp's summary judgment papers, however, expert testimony can be used to establish the terms and conditions of "lost policies." (*See* Dkt.# 182). Instead of deposing Madison-Kipp's expert witness or asking for this information in a contention interrogatory, the Insurance Companies intend to elicit testimony from a Rule 30(b)(6) witness. This is improper.

First, Topics 1, 2, 19, and 20 are limited to identifying the "terms and conditions" of the insurance policies. Madison-Kipp informed the Insurance Companies that some of these policies are lost and will be the subject of expert testimony. The insurers' Topics did not request Madison-Kipp to gather all of its evidence that it may use to establish the terms and conditions. They only asked Madison-Kipp to identify the terms and conditions. Madison-Kipp has done this, and the Court should otherwise strike these Topics to the extent the Insurance Companies seek to discover secondary evidence because it is beyond the scope of these Topics.

Second, Rule 30(b)(6) is designed to discover facts. *See Medical Assurance*, 2011 U.S. Dist. LEXIS 67516, at *38. But the Insurance Companies are attempting to discover expert opinions because the secondary evidence itself is not the terms and conditions of the insurance policies. The secondary evidence certainly will provide proof of the terms

and conditions, but this evidence is not the "terms and conditions" as demanded in these Topics. Thus, these Topics are improper either because they actually seek expert testimony or because they are beyond the scope of the actual Topics. Further, pursuant to the Court's Amended Scheduling Order, the parties are required to disclose their experts on insurance issues by April 29, 2013. (Dkt.# 95.) The Insurance Companies should not be allowed to skirt this Order by demanding Madison-Kipp prepare a Rule 30(b)(6) witness to proffer its expert witness' testimony now.

Third, information regarding the lost policies is more appropriately discovered through a contention interrogatory. Madison-Kipp's counsel has been involved in determining the actual terms of the lost policies and thus these Topics raises concerns with the attorney-client privilege and work-product doctrine. Madison-Kipp's counsel would be required to prepare a witness to testify as to these Topics regarding the information discovered by Madison-Kipp's counsel. It is more appropriate in this situation to ask a contention interrogatory to avoid concerns over the disclosure of protected information. *See, e.g.*, *Norco Indus.*, 2012 U.S. Dist. LEXIS 176588, at *12-15; *SmithKline*, 2000 U.S. Dist. LEXIS 667, at *24 (noting that the defendant "could obtain the same information with infinitely less intrusion upon privilege concerns, in a more workable form, and from the individuals who have actual knowledge of the matters at issue").

CONCLUSION

For the reasons stated herein, Madison-Kipp requests the Court grant a protective order as to Topics 1, 2, 19, and 20.

Dated this 28th day of March, 2013.

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