STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 5594
DUKE ENERGY CAROLINAS, LLC and DUKE ENERGY PROGRESS, LLC, Plaintiffs, v. AG INSURANCE SA/NV (f/k/a L'Etoile S.A. Belge d'Assurances); et al., Defendants.	**ORDER ON DEFENDANTS ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED, BERKSHIRE HATHAWAY DIRECT INSURANCE COMPANY (F/K/A AMERICAN CENTENNIAL INSURANCE COMPANY), AND TIG INSURANCE COMPANY'S (AS SUCCESSOR TO RANGER INSURANCE COMPANY) FIRST MOTION TO COMPEL**

1. **THIS MATTER** is before the Court on Defendants Associated Electric & Gas Insurance Services Limited ("AEGIS"), Berkshire Hathaway Direct Insurance Company (f/k/a American Centennial Insurance Company) ("ACI"), and TIG Insurance Company's (as successor to Ranger Insurance Company ("Ranger")) (collectively, the "AEGIS Defendants") First Motion to Compel (the "First Motion to Compel" or the "Motion") filed on October 18, 2019 in the above-captioned case. (ECF No. 508.)

PROCEDURAL BACKGROUND

2. Rule 30(b)(6) of the North Carolina Rules of Civil Procedure ("Rules") governs deposition practice in the North Carolina state courts and provides in pertinent part that "[a] party may in his notice . . . name as the deponent a public or

private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested." N.C. R. Civ. P. 30(b)(6). In response, "the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify." *Id.* Those persons so designated "shall testify as to matters known or reasonably available to the organization." *Id.*

3. On October 4, 2019, the Court held a telephone conference (the "Conference") on the AEGIS Defendants' Business Court Rule ("BCR") 10.9 dispute summary submitted to the Court via e-mail on September 19, 2019 seeking to compel Plaintiffs Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, "Duke") to designate one or more corporate representatives to testify on topics 5–17, 19–20, 22, 28–40, 42–43, and 45 ("Designated Topics") as identified in the AEGIS Defendants' First Notice of Rule 30(b)(6) Deposition to Plaintiffs, (ECF No. 509.3), (the "30(b)(6) Dispute"). The Designated Topics relate to the parties' discussions between 1996 and 2003 concerning the potential settlement of unasserted claims related to coal ash at certain of Duke's coal-powered plants.

4. Following the Conference, the Court issued a Scheduling Order allowing and scheduling full motion and briefing on the 30(b)(6) Dispute. (ECF No. 507.)

5. Consistent with the Scheduling Order, the AEGIS Defendants filed their First Motion to Compel[1] on October 18, 2019, contending that Duke should be ordered to designate one or more corporate representatives to testify under Rule 30(b)(6) concerning the Designated Topics because those topics are relevant to the AEGIS Defendants' defenses based on statute of limitations and an alleged failure to mitigate damages.

6. Duke filed its opposition brief on November 4, 2019, (ECF No. 524), arguing that the AEGIS Defendants' First Motion to Compel seeks discovery that is barred by private agreements, unreasonably cumulative, and unduly burdensome. (Duke's Br. Opp'n to Defs.' Mot. to Compel 3, 9.)

7. Upon motion of the AEGIS Defendants, (ECF No. 534), and by order dated November 8, 2019 (the "November 8, 2019 Order"), (ECF No. 535), the Court permitted the AEGIS Defendants to file a reply brief and Duke to file a sur-reply brief in connection with the First Motion to Compel. Consistent with the November 8, 2019 Order, the AEGIS Defendants and Duke submitted these briefs on November 11, 2019, (ECF No. 536), and November 14, 2019, (ECF No. 541), respectively.

8. On November 18, 2019, the Court held a telephone hearing (the "Hearing") on the First Motion to Compel and on the AEGIS Defendants' Motion to File Under

[1] The AEGIS Defendants filed their supporting brief under seal. (ECF No. 509.) For purposes of this order, the Court refers to the redacted, public version of the AEGIS Defendants' brief in support. (ECF Nos. 509.1, 518.3.)

Seal (the "Motion to Seal"),[2] (ECF No. 512). The First Motion to Compel is now ripe for resolution.

LEGAL STANDARD

9. Rule 26 establishes a liberal scope of discovery, allowing parties to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," even if the information sought will be inadmissible at trial or the examining party already has knowledge of the information sought. N.C. R. Civ. P. 26(b)(1). "The primary purpose of the discovery rules is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 805 S.E.2d 664, 667 (N.C. 2017) (emphasis omitted) (quoting *Bumgarner v. Reneau*, 332 N.C. 624, 628, 422 S.E.2d 686, 688–89 (1992)).

10. "To be relevant for purposes of discovery, the information [sought] need only be 'reasonably calculated' to lead to the discovery of admissible evidence." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 314, 248 S.E.2d 103, 106 (1978); *see also* N.C. R. Civ. P. 26(b)(1); *Lowd v. Reynolds*, 205 N.C. App. 208, 214, 695 S.E.2d 479, 483 (2010). If this test is met, a party may not object to a discovery request merely because "the information sought will be inadmissible at the trial[.]" N.C. R. Civ. P. 26(b)(1).

11. The Court may, on its own initiative, limit discovery if it finds that:

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[2] The Court has addressed the AEGIS Defendants' Motion to Seal by separate order. (ECF No. 555.)

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stakes in the litigation.

N.C. R. Civ. P. 26(b)(1a).

12. Under Rule 26, "[o]ne party's need for information must be balanced against the likelihood of an undue burden imposed upon the other." *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976); *see also Bradshaw v. Maiden*, 2017 NCBC LEXIS 30, at *9 (N.C. Super. Ct. Mar. 31, 2017) (balancing factors set forth in Rule 26); *NextAdvisor Continued, Inc. v. LendingTree Inc.*, 2016 NCBC LEXIS 72, at *13 (N.C. Super. Ct. Sept. 16, 2016) (same).

13. In considering a motion to compel discovery, "[t]he party resisting discovery bears the burden of showing why the motion to compel should not be granted." *Nat'l Fin. Partners Corp. v. Ray*, 2014 NCBC LEXIS 50, at *26 (N.C. Super. Ct. Oct. 13, 2014) (quoting *Smithfield Bus. Park, LLC v. SLR Int'l Corp.*, No. 5:12-CV-282-F, 2014 U.S. Dist. LEXIS 110535, at *7 (E.D.N.C. Aug. 11, 2014)). "Specifically, the party seeking protection from the court from responding to discovery must make a particularized showing of why discovery should be denied, and conclusory or generalized statements fail to satisfy this burden as a matter of law." *Smithfield Bus. Park, LLC*, 2014 U.S. Dist. LEXIS 110535, at *7. "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Phelps-Dickson*

Builders, L.L.C. v. Amerimann Partners, 172 N.C. App. 427, 433, 617 S.E.2d 664, 668 (2005) (citation omitted).

ANALYSIS

14. As Duke has the burden to show that the requested discovery should not be had, the Court focuses its analysis on Duke's grounds for objection. Duke does not challenge the First Motion to Compel on relevance grounds. Rather, Duke's objections are based on its contentions that (i) provisions contained in the prior settlement agreements (the "Settlement Agreements") between AEGIS and each of Duke Power Company ("Duke Power") and Carolina Power & Light Company ("CP&L") (together, "Duke's Predecessors") contain confidentiality provisions (paragraph 31 (Duke Power), paragraph 30 (CP&L)) that bar the discovery sought because discussion of coal ash sites was part of the negotiation of the Settlement Agreements, (ECF Nos. 510.3, 510.4); (ii) in Duke's view, paragraph 12 of certain standstill agreements between AEGIS and Duke's Predecessors (the "Standstill Agreements"), (ECF Nos. 510.1, 510.2), (together with the Settlement Agreements, the "Agreements") "prohibit disclosure of the substance of any discussion or other oral or written communications that took place during the negotiations[,]" barring the discovery sought; and (iii) Rule 30(b)(6) testimony on the Designated Topics would be cumulative, duplicative, and burdensome because Duke is unable to offer new or additional information on the Designated Topics and has, through already-deposed and to-be-deposed fact witnesses, "completely exhausted [its] available knowledge

regarding the parties' settlement negotiations[,]" (Duke's Br. Opp'n to Defs.' Mot. to Compel 4–12).

15. The AEGIS Defendants argue that each of Duke's challenges is without merit.

16. As to the Settlement and Standstill Agreements, the AEGIS Defendants argue that these Agreements did not cover the coal ash sites at issue and protect only "Confidential Settlement Documents" and "Settlement Experts," information which the AEGIS Defendants assert is outside the Designated Topics and which Duke has already disclosed. (Redacted Mem. of Law Supp. Defs.' First Mot. to Compel 4–7.) The AEGIS Defendants further contend that even if the Agreements bar discovery into the Designated Topics, Duke has disclosed and sought discovery into the negotiations between AEGIS and Duke's Predecessors and has thus breached the Agreements or, at a minimum, waived its right to assert confidentiality as a bar to discovery into the Designated Topics. (Redacted Mem. of Law Supp. Defs.' First Mot. to Compel 7–9.)

17. In response to Duke's counterargument that Duke only inquired into the earlier settlement negotiations to defend itself following this Court's April 30, 2018 Order, (ECF No. 300), allowing settlement-related discovery over Duke's objection, (Duke's Br. Opp'n to Defs.' Mot. to Compel 8), the AEGIS Defendants argue that Duke's reasons for its inquiry into this subject matter are irrelevant and that it would be fundamentally unfair for Duke and the other parties to the litigation to be permitted to conduct discovery into these negotiations to the exclusion of the AEGIS

Defendants, (Reply Mem. of Law Supp. Defs.' First Mot. to Compel 5–6; Redacted Mem. of Law Supp. Defs.' First Mot. to Compel 9–10).

18. As to cumulativeness and burdensomeness, the AEGIS Defendants argue that a Rule 30(b)(6) corporate representative has a duty to prepare that fundamentally distinguishes a corporate designee from a fact witness and that Duke's burden to identify and prepare one or more such representatives for deposition is far outweighed by the AEGIS Defendants' need for the requested testimony, despite Duke's protestations that it has no new information to provide. (Redacted Mem. of Law Supp. Defs.' First Mot. to Compel 11–13.)

19. The Court has carefully considered the parties' various contentions in briefing and at the Hearing on the Motion. The Court first notes that Duke has made persuasive arguments that the Agreements were intended to prevent disclosure in discovery of the earlier settlement negotiations between AEGIS and Duke's Predecessors. Nevertheless, the Court concludes, in the exercise of its discretion and for good cause shown, that, regardless of whether the confidentiality provisions of the Agreements preclude the requested discovery here, considerations of fairness and equity and a balancing of the burden on Duke against the AEGIS Defendants' need for the requested discovery in the circumstances of this case militate in favor of allowing the AEGIS Defendants' discovery into the Designated Topics as provided below.

20. The Court reaches this conclusion for several reasons.

21. First, while Duke has forecast that it intends to make arguments to exclude all evidence of the prior settlement negotiations at trial, it is significant that the current Motion involves discovery and the broad scope afforded to discovery under the North Carolina Rules of Civil Procedure rather than a consideration of the narrower requirements for the admissibility of evidence at trial under the North Carolina Rules of Evidence.

22. Next, Duke has argued strenuously that it has already provided all the information that it has on the Designated Topics. As a result, it appears to the Court that Duke's interest in protecting new information from disclosure (even if protected by the Agreements) is not substantial and that permitting the requested discovery, with the modifications below, will not work a substantial burden on Duke.

23. Further, while it appears that the witnesses with the most information concerning the Designated Topics have been or will be deposed, the record before the Court suggests that a number of the Designated Topics—in particular, those that seek Duke's or CP&L's position, intent, or reasons for certain decisions and actions—have not been the subject of specific inquiry and answer at the individual depositions in the case thus far. None of those depositions was taken under Rule 30(b)(6) with its attendant preparation requirements, and the record does not reflect that corporate positions, intentions, and reasons, rather than the actions and understandings of individual corporate employees, were topics of inquiry at the depositions taken to date.

24. Finally, through no fault of Duke's own, the earlier settlement negotiations between AEGIS and Duke's Predecessors have been the subject of discovery by all parties to this litigation, including Duke. Despite Duke's initial efforts to avoid such discovery, the Court agrees with the AEGIS Defendants that in these circumstances, it is fundamentally unfair for the AEGIS Defendants—unlike the Agreements' counterparty successor, Duke, and alone among all the parties in the litigation—to be denied discovery into the subject matter of the Designated Topics, as modified below.

25. The Court further concludes that there are several Designated Topics that are not proper topics for Rule 30(b)(6) examination on the current record.

26. First, Designated Topic Nos. 11, 12, and 34 seek testimony concerning specific meetings, the participants in which the record indicates have already been deposed. (*See* Defs.' First Notice of Rule 30(b)(6) Dep. to Pls. 5, 7.) In these circumstances, further discovery into these meetings would be cumulative, duplicative, and unduly burdensome.

27. Next, Designated Topic Nos. 15 and 38 seek testimony concerning any statement made to Duke's Predecessors by AEGIS "that contributed in any way to [Duke Predecessors'] decision[s] not to seek any extension of the . . . 1996 Standstill past January 2001." (Defs.' First Notice of Rule 30(b)(6) Dep. to Pls. 5, 7.) It appears to the Court that this topic is subsumed within Designated Topic Nos. 14 and 37, which likewise inquire into the reasons Duke's Predecessors did not seek to extend the 1996 Standstill Agreements. (*See* Defs.' First Notice of Rule 30(b)(6) Dep. to Pls.

5, 7.) In addition, it appears from the current record that the AEGIS Defendants have deposed all witnesses with knowledge of statements made by AEGIS concerning the 1996 Standstill Agreements. For these reasons, the Court concludes that discovery into Topic Nos. 15 and 38 would be cumulative, duplicative, and unduly burdensome.

28. Finally, Designated Topic No. 45 seeks testimony concerning "[c]onversations between any representative of CP&L and AEGIS in which the possibility of CP&L suing AEGIS was mentioned." (Defs.' First Notice of Rule 30(b)(6) Dep. to Pls. 8.) It appears to the Court that the AEGIS Defendants have deposed all representatives of CP&L that have knowledge of any such conversations between CP&L and AEGIS. Thus, the Court concludes that discovery into this Topic would also be cumulative, duplicative, and unduly burdensome.

29. The Court concludes, however, that inquiry into the remaining Designated Topics (Nos. 5–10, 13–14, 16–17, 19–20, 22, 28–33, 35–37, 39–40, and 42–43) is appropriate, is not unreasonably cumulative, duplicative or burdensome, and should be permitted for the reasons set forth above.

30. **WHEREFORE**, the Court, in the exercise of its discretion and for good cause shown, hereby **GRANTS in part** and **DENIES in part** the AEGIS Defendants' First Motion to Compel as set forth above and hereby **ORDERS** that Duke provide one or more corporate representatives to testify concerning Designated Topic Nos. 5–10, 13–14, 16–17, 19–20, 22, 28–33, 35–37, 39–40, and 42–43 in the AEGIS Defendants' First Notice of Rule 30(b)(6) Deposition to Plaintiffs. The AEGIS

Defendants and Duke shall work cooperatively to schedule the Rule 30(b)(6) deposition permitted herein so that it shall be completed prior to the close of fact discovery on December 16, 2019, unless otherwise agreed upon the parties and approved by the Court.

SO ORDERED, this the 22nd day of November, 2019.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge