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 DEFENDANT ALLSTATE'S MOTION TO WITHDRAW OR AMEND ADMISSIONS**

1. **THIS MATTER** is before the Court on the Motion of Defendant Allstate Insurance Company ("Allstate"), solely as successor in interest to Northbrook Surplus Insurance Company, formerly Northbrook Insurance Company ("Northbrook"), to Withdraw or Amend Admissions (the "Motion") filed December 16, 2019 in the above-captioned case. (ECF No. 637.) Allstate seeks to withdraw or amend admissions that it contends are no longer accurate in light of recently discovered evidence. Plaintiffs Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, "Duke") oppose the Motion. After full briefing by the parties, the Court held a hearing on the Motion on February 6, 2020, at which Duke, Allstate, and certain other defendants were represented by counsel (the "Hearing"). The Court enters this Order to memorialize the Court's oral ruling at the Hearing.

2. The parties' dispute revolves around Allstate's discovery on December 6, 2019 of a policy jacket document that it contends was "attached to, or otherwise located as a single continuous document" with the Allstate insurance policy at issue

in this litigation. (Mem. Supp. Def. Allstate Ins. Co.'s Mot. Withdraw or Amend Admiss. 2–3 [hereinafter "Allstate's Supp. Br."], ECF No. 637.1.) Allstate contends this discovery requires withdrawal or amendment of Allstate's admissions to two requests for admission from Duke that Allstate did not answer and which the parties agree are now deemed admitted under Rule 36(b) of the North Carolina Rules of Civil Procedure ("Rule(s)"). (*See* Allstate's Supp. Br. 1–2.)

3. The claims between Duke and Allstate in this lawsuit are based on an insurance policy Northbrook issued to Duke Energy Carolinas, LLC, f/k/a Duke Power Company, under policy number 63 000 264 ("Northbrook Policy" or the "Policy"). Allstate contends that the Northbrook Policy is made up of (i) a Declarations Page, (ii) four endorsements, (iii) the policy jacket (and its pollution exclusion provision), and (iv) a Nuclear Energy Liability Exclusion Endorsement ("Nuclear Endorsement"). (Allstate's Supp. Br. 1–2.) Duke disputes that the policy jacket and Nuclear Endorsement are part of the Policy.

4. The current dispute has its origins in Allstate's production of documents to Duke on November 30, 2017. At that time, Allstate produced the underwriting file for the Policy and the claim file regarding Duke's current claim and concerning prior environmental claims Duke asserted under the Policy. Allstate did not include in that production a copy of the Policy that included the policy jacket and Nuclear Endorsement that it contends are part of the Policy. (Allstate's Supp. Br. 3–5; Aff. Eric J. Konecke Supp. Def. Allstate Ins. Co.'s Mot. Withdraw or Amend Admiss. ¶¶ 13–14 [hereinafter "Konecke Aff."], ECF No. 637.2.)

5. Subsequently, on May 15, 2018, Allstate produced what it argues is the complete Policy, including the policy jacket and Nuclear Endorsement. (Allstate's Supp. Br. 3; *see also* Konecke Aff. Ex. B, ECF No. 637.4.) Suspecting that the policy jacket and Nuclear Endorsement Allstate produced were not part of a single continuous document, Duke served its Second Set of Requests for Admission ("Second RFA") by e-mail on September 13, 2018. (*See* Konecke Aff. Ex. A, ECF No. 637.3.)

6. Duke's first request for admission ("RFA 1") in its Second RFA requested Allstate to admit that the policy jacket (NB 001109–001110) and the Nuclear Endorsement (NB 001111) were not in a "single continuous document" with the Declarations Page and four endorsements (NB 001112–001116) when Allstate located the document(s) for production. RFA 1 specifically states as follows:

> With respect to the document produced by Allstate with the bates range NB 001109-001116, admit that pages NB 001109–001111 were not attached to, or otherwise located as a single continuous document with, pages NB 001112–001116 within Allstate's files at the time Allstate located the document(s) for production in this case.

(Konecke Aff. Ex. A.)

7. Duke's second request for admission ("RFA 2") in its Second RFA requested Allstate to admit that it had not located in its files a copy of the Policy with the policy jacket and Nuclear Endorsement as a "single continuous document." Specifically, RFA 2 states as follows:

> Admit that Allstate has not located in its files a copy of Policy No. 63 000 264 issued to Duke Power Company that includes the purported policy jacket (NB 001109–001111)[1] attached to, or otherwise located as a single continuous document with, it.

[1] Although RFA 2 only references the policy jacket, NB 001109–001111 includes both the policy jacket and the Nuclear Endorsement.

(Konecke Aff. Ex. A.)

8. Allstate did not respond to the Second RFA, and, as a result, the Second RFA, including RFAs 1 and 2, were deemed admitted, effective October 13, 2018. *See Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 284, 616 S.E.2d 349, 352 (2005) ("If the party to whom the request is directed fails to respond within the time allowed the matter is deemed admitted." (citing N.C. R. Civ. P. 36(a))). Over one year later and a week before the fact discovery deadline, while preparing to defend Allstate's Rule 30(b)(6) deposition scheduled for December 11, 2019, Allstate discovered additional documents relating to Duke's prior environmental claims, including, it contends, a copy of the Policy with the policy jacket as a single continuous document. Allstate promptly e-mailed the newly discovered documents to Duke's counsel the same day, (Allstate's Supp. Br. 5; Konecke Aff. Ex. C, ECF No. 637.5), and ten days later, on December 16, 2019, filed the current Motion.[2]

9. "Litigants in this state are required to respond to pleadings, interrogatories and requests for admission with timely, good faith answers." *WXQR Marine Broad. Corp. v. JAI, Inc.*, 83 N.C. App. 520, 521, 350 S.E.2d 912, 913 (1986). Rule 36(b)states that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. R. Civ. P. 36(b). The Rule further provides that a court may permit withdrawal or

[2] Allstate did not locate a copy of the Nuclear Endorsement in a "single continuous document" with the Policy as part of its deposition preparation and does not seek to amend RFA 2 concerning the Nuclear Endorsement. (Allstate's Supp. Br. 4; Konecke Aff. Ex. E, ECF No. 637.7.)

amendment when (1) "the presentation of the merits of the action will be subserved thereby" and (2) "the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." *Id.*; *see also Pritchard v. Dow Agro Scis.*, 255 F.R.D. 164, 172 (W.D. Pa. 2009) (stating Federal Rule of Civil Procedure 36(b)'s nearly identical two-part test).[3] A trial court's decision to permit withdrawal or amendment is discretionary and "will not be overturned absent a showing that the decision was so arbitrary that it could not have been the result of a reasoned decision." *Excel Staffing Serv.*, 172 N.C. App. at 285, 616 S.E.2d at 353 (citing *Eury v. N.C. Employment Sec. Comm.*, 115 N.C. App. 590, 603, 446 S.E.2d 383, 391 (1994)).

10. Duke opposes withdrawal or amendment of either RFA 1 or RFA 2 on grounds that Allstate has unduly delayed in searching its relevant files and seeking its relief, amendment would cause Duke unfair prejudice, and, as to RFA 1, withdrawal or amendment is unnecessary. (Duke's Br. Opp'n Def. Allstate Ins. Co.'s Mot. Withdraw or Amend Admiss. 2–6 [hereinafter "Duke's Br. Opp'n"], ECF No. 652.) Duke further contends that should the Court order withdrawal or amendment, Duke should be permitted 120 days to conduct discovery related to the newly denied request for admission. (Duke's Br. Opp'n 6–7.)

11. The Court turns first to RFA 1 and agrees with Duke that the newly discovered documents do not necessitate a change to Allstate's current deemed

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[3] Our Supreme Court has long recognized that "[d]ecisions under the federal rules [of civil procedure] are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules [of civil procedure]." *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citing *Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E.2d 161, 165 (1970)).

admission. RFA 1 asks whether Allstate had located the policy jacket and the Nuclear Endorsement in a single continuous document with the Declarations Page and four endorsements "*at the time Allstate located the document(s) for production*[.]" (Konecke Aff. Ex. A (emphasis added).) Allstate had not located those documents in a single continuous document at the time it produced the referenced documents on May 15, 2018 and that fact is not changed by Allstate's recent discovery. Accordingly, the Court shall, in the exercise of its discretion, deny the Motion as to RFA 1.

12. Unlike RFA 1, however, RFA 2 is not confined to a specific moment in time. Rather, that request asks Allstate to admit it has not located the policy jacket in its files "attached to, or otherwise located as a single continuous document with, [the Policy]." (Konecke Aff. Ex. A.) Allstate's recent discovery of the policy jacket in a single continuous document makes Allstate's current admission of RFA 2 inaccurate. The Court thus turns to the two-pronged test under Rule 36(b) to determine whether withdrawal or amendment of Allstate's admission should be permitted.

13. First, there is little doubt that the presentation of the merits of Duke's claims against Allstate will be served by permitting amendment to reflect what Allstate contends is the truth concerning its effort to locate the policy jacket as a single continuous document with the Policy. *See, e.g.*, *Acosta v. Mezcal, Inc.*, Civ. No. JKB-17-0931, 2018 U.S. Dist. LEXIS 149506, at *9 (D. Md. Aug. 31, 2018) (permitting amendment when the presentation of the merits is "likely to be promoted 'if the record demonstrates that the "admitted" facts are contrary to the actual facts.' " (citation omitted)); *Ropfogel v. United States*, 138 F.R.D. 579, 583 (D. Kan. 1991) ("The court

may allow amendment or withdrawal of an admission when an admission is no longer true because of changed circumstances[.]"); *see also Excel Staffing Serv.*, 172 N.C. App. at 285, 616 S.E.2d at 352 ("[W]hen construing the Rules of Civil Procedure 'technicalities and form are to be disregarded in favor of the merits of the case[,]' and . . . 'liberality is the canon of construction.' " (quoting *Lemons v. Old Hickory Council, Boy Scouts, Inc.*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988))).

14. Similarly, the Court cannot conclude that Duke will be prejudiced in maintaining its action against Allstate should amendment be allowed. Under Rule 36(b), prejudice "is not simply that the party who initially obtained the admission will . . . have to convince the fact finder of its truth." *Bouzaglou v. Synchrony Fin.*, Case No. 19-CV-60118-BLOOM/VALLE, 2019 U.S. Dist. LEXIS 140193, at *9 (S.D. Fla. Aug. 15, 2019) (quoting *Perez v. Miami-Dade Cty.*, 297 F.3d 1255, 1266 (11th Cir. 2002)). Rather, "[t]he prejudice contemplated by Rule 36(b) 'relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.' " *Pritchard*, 255 F.R.D. at 174 (quoting *Brook Vill. N. Assocs. v. Gen. Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982)). Allstate's delay in seeking amendment cannot, standing alone, overcome the strong judicial preference for merits-based determinations. *See, e.g.*, *Allen v. Hardrock HDD, Inc.*, Case No. 16-13869, 2018 U.S. Dist. LEXIS 87181, at *13 (E.D. Mich. May 24, 2018), ("Delay and aggravation alone does not rise to the Sixth Circuit's standard of 'special difficulties[.]' "); *Adventis, Inc. v. Big Lots Stores, Inc.*, No. 7:02CV00611, 2006 U.S. Dist. LEXIS

68332, at *9 (W.D. Va. Sep. 11, 2006) (" 'Mere inconvenience' does not constitute 'prejudice.' " (quoting *Raiser v. Utah Cty.*, 409 F.3d 1243, 1246 (10th Cir. 2005))).

15. Here, the prejudice Duke might suffer from Allstate's late denial of RFA 2 may be largely mitigated by permitting Duke discovery into the facts previously deemed admitted concerning Allstate's efforts to locate the policy jacket. *See, e.g.*, *Acosta*, 2018 U.S. Dist. LEXIS 149506, at *15–18 ("Re-opening discovery, although inconvenient and causing additional delay, can mitigate [the prejudice caused by late amendment] considerably.") Allstate has already agreed to continue its December 11, 2019 Rule 30(b)(6) deposition of Mark Legan, in part to permit inquiry into Allstate's changed admission, (Duke's Br. Opp'n n.3; Allstate Ins. Co.'s Mem. Reply Duke's Br. Opp'n Def. Allstate Ins. Co.'s Mot. Withdraw or Amend Admiss. 5–6, ECF No. 659), and permitting Duke a 120-day period for further targeted fact discovery will not delay dispositive motions practice or the final disposition of this action. Accordingly, the Court concludes, in the exercise of its discretion, that the Motion should be granted as to RFA 2 and that Duke should be permitted to conduct targeted discovery into the facts Allstate previously admitted in RFA 2 for a period of no more than 120 days.

16. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

a. Allstate's Motion as to RFA 1 is **DENIED**.

b. Allstate's Motion as to RFA 2 is **GRANTED**, and Allstate shall be permitted to amend its response to RFA 2 in the form set forth in Exhibit

E to the December 16, 2019 Affidavit of Eric J. Konecke filed in support of the Motion. (ECF No. 637.7.)

c. Duke shall be permitted to conduct targeted discovery into the facts Allstate previously admitted in RFA 2, including through a continuation of the previously commenced Rule 30(b)(6) deposition of Mark Legan, through and including June 8, 2020. The Court will not extend this deadline absent compelling good cause.

d. The Court will not permit Allstate to conduct further fact discovery in this action absent good cause shown.

e. Except as otherwise ordered herein, the Case Management Order, (ECF No. 177), as amended on May 15, 2019, (ECF No. 480), and as further amended on August 28, 2019, (ECF No. 486), September 11, 2019, (ECF No. 492), December 10, 2019, (ECF No. 626), and December 20, 2019, (ECF No. 644), is not affected by the entry of this Order.

SO ORDERED, this the 10th day of February, 2020.

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