

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
19 CVS 02793

MURPHY-BROWN, LLC and  
SMITHFIELD FOODS, INC.,

Plaintiffs,

v.

ACE AMERICAN INSURANCE  
COMPANY,

Defendant.

**ORDER ON DEFENDANT ACE  
AMERICAN INSURANCE  
COMPANY'S MOTION TO  
AUTHORIZE THE DE BENE ESSE  
DEPOSITION OF TENNILLE  
CHECKOVICH**

1. **THIS MATTER** is before the Court on Defendant ACE American Insurance Company's ("ACE") Motion to Authorize the De Bene Esse Deposition of Tennille Checkovich ("Motion," ECF No. 830). In preparation for trial, ACE requests leave from the Court to take the *de bene esse* deposition of Tennille Checkovich, Plaintiff Smithfield Foods, Inc.'s ("Smithfield") Chief Legal Officer. Moreover, in connection with that deposition, ACE seeks to obtain via a subpoena *duces tecum* unredacted copies of certain documents that were previously produced in redacted form to ACE during discovery.

2. **THE COURT**, having thoroughly considered the Motion, the parties' briefs, the arguments of counsel, and all appropriate matters of record, **CONCLUDES**, in its discretion, that the Motion should be **DENIED** for the reasons set forth below.

## FACTUAL AND PROCEDURAL BACKGROUND

3. This lawsuit was originally filed on 5 March 2019 and is currently set for a jury trial beginning on 28 April 2025. (See ECF Nos. 4, 812.)

4. The broader factual and procedural background of this case—which is quite extensive—is discussed in greater detail in a series of prior opinions from this Court. See *Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2023 NCBC LEXIS 93 (N.C. Super. Ct. Aug. 7, 2023); *Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2023 NCBC LEXIS 94 (N.C. Super. Ct. Aug. 7, 2023); *Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2023 NCBC LEXIS 96 (N.C. Super. Ct. Aug. 7, 2023).

5. As the Court’s prior opinions in this case explain, Plaintiffs Smithfield and Murphy-Brown, LLC (collectively, “Plaintiffs”) originally sued various insurers who provided them with primary and excess insurance coverage for their eastern North Carolina-based farming operations between 2010 and 2015. See *Murphy-Brown, LLC*, 2023 NCBC LEXIS 93, at \*\*3–4. In a nutshell, Plaintiffs contend in their Second Amended Complaint (“SAC,” ECF No. 444.2)—which was filed on 12 January 2021, (see ECF No. 453, at 3) and is currently their operative pleading—that these insurers were obligated to indemnify Plaintiffs for amounts paid to settle certain underlying nuisance actions filed by property owners living near Plaintiffs’ hog farms (the “Underlying Lawsuits”) and to reimburse Plaintiffs for the attorneys’ fees expended by them in defending the Underlying Lawsuits (the “Defense Costs”). (SAC ¶¶ 73–121.)

6. Plaintiffs were represented in the Underlying Lawsuits by several attorneys, including Checkovich, from the McGuireWoods law firm. (ACE Mem. L. Supp. Mot. (“Def.’s Br. Supp.”), at 1, ECF No. 831.)

7. Checkovich practiced law with McGuireWoods until 1 October 2020, when she left the firm to join Smithfield as its Deputy General Counsel—Litigation. She was subsequently promoted to General Counsel in March 2023 and was named Smithfield’s Chief Legal Officer, the position she currently holds, in December 2024. (Pls.’ Resp. Br. Op. ACE Mot. (“Pls.’ Resp. Br.”), at 2, ECF No. 835.) At all relevant times, Checkovich has been a resident of Virginia. (Pls.’ Resp. Br., at 1; Hr’g Tr., at 34, 37–38.)

8. Fact discovery in this matter commenced on 17 July 2019 and continued for approximately eighteen months until 15 January 2021. (*See* ECF Nos. 178, 347.)

9. During the fact discovery period, Plaintiffs produced numerous documents to ACE—a number of which referenced Checkovich’s role in defending the Underlying Lawsuits on Plaintiffs’ behalf. These documents included pleadings, correspondence, memoranda, discovery responses, and transcripts. (Knott Decl. ¶ 3, ECF No. 835.1.)

10. During the discovery period, Plaintiffs also produced a wealth of invoices containing voluminous time entries made by Plaintiffs’ attorneys in the Underlying Lawsuits that form the basis for the Defense Costs that Plaintiffs are currently seeking in the present lawsuit. (Knott Decl. ¶¶ 4–5.)

11. With regard to a portion of these invoices, however, Plaintiffs notified ACE that they were not seeking reimbursement for the fees associated with certain time entries contained therein because they were unrelated to the Underlying Lawsuits. Those invoices (the “Blue Redacted Invoices”) containing time entries falling into this category were produced with blue redactions on the non-reimbursable entries. As a result of the redactions, those time entries themselves were not legible. (Pls.’ Resp. Br., at 3.) To date, ACE has never seen the Blue Redacted Invoices in an unredacted form.

12. Meanwhile, while fact discovery was still ongoing, ACE deposed three attorneys who had previously represented Plaintiffs in the Underlying Lawsuits. (Knott Decl. ¶ 6.) Checkovich was not among the attorneys whom ACE elected to depose.

13. On 23 October 2024—nearly four years after the fact discovery period closed—an attorney for ACE emailed Plaintiffs’ counsel to request that Checkovich be made available to testify as a witness at trial, or, alternatively, to alert Plaintiffs to the possibility that ACE would seek to take Checkovich’s deposition *de bene esse*. (ECF No. 831.1.)

14. On 24 October 2024, Plaintiffs’ counsel responded by inquiring as to the legal basis for ACE’s request. (ECF No. 831.2.)

15. Over the next several days, counsel for the parties exchanged a flurry of additional emails in which they continued to dispute the legal validity of ACE’s claimed entitlement to depose Checkovich. Ultimately, on 28 October 2024, ACE’s

attorney notified Plaintiffs' counsel that ACE intended to "address [the matter] with the [C]ourt." (Knott Decl. Ex. 1.)

16. Several months later, on 16 January 2025, ACE issued a subpoena *duces tecum* for Checkovich, which it thereafter attempted to domesticate in Virginia (her state of residence). The subpoena *duces tecum* (which has never actually been served on her) commanded Checkovich to appear for a deposition and to simultaneously produce "[any] invoices for defense costs incurred for the [Underlying Lawsuits] already produced in this litigation that contain blue redactions, with blue redactions removed." (ECF No. 831.3.)

17. A process server subsequently made several unsuccessful attempts to serve Checkovich with the subpoena *duces tecum* in Virginia. (Kenneth Condrey Aff. ¶¶ 3–8, ECF No. 831.6.) ACE did not provide a copy of the subpoena to Plaintiffs' counsel. (See Knott Decl. ¶ 8.)

18. Upon learning of the issuance of the subpoena and the attempts at service, Plaintiffs' counsel emailed ACE's attorneys to request "a courtesy copy[.]" (ECF No. 831.5, at 4.)

19. On 6 February 2025, one of Plaintiffs' attorneys wrote to ACE's counsel confirming Plaintiffs' opposition to the proposed deposition of Checkovich and stating that "[n]o further efforts at service of a subpoena to [Checkovich] should be attempted." (ECF No. 831.5, at 2.)

20. On 7 February 2025, ACE filed the present Motion, which requests that the Court enter an Order (1) authorizing it to take the *de bene esse* deposition of

Checkovich “at a time and place mutually agreed upon between the parties[,]” (2) precluding Plaintiffs from later calling Checkovich as a witness at trial; and (3) ordering Checkovich to produce copies of the Blue Redacted Invoices in an unredacted form. (Def.’s Br. Supp., at 3, 7.)

21. On 3 March 2025, the Court held a hearing on the Motion via Webex at which counsel for all parties participated..

22. The Motion has been fully briefed and is now ripe for resolution.

### ANALYSIS

23. In the present Motion, ACE contends that it should be entitled to take a *de bene esse* deposition of Checkovich (who cannot be compelled to attend trial because she is a resident of Virginia) in light of her significant role in defending Plaintiffs in the Underlying Lawsuits and her resulting knowledge of issues relating to the reasonableness of the Defense Costs. ACE further asserts that it is entitled to receive unredacted copies of the Blue Redacted Invoices because those currently redacted time entries contained therein will shed light on the reasonableness of other entries for which Plaintiffs do seek reimbursement.

24. Plaintiffs, conversely, argue that with fact discovery having ended over four years ago and a jury trial scheduled to begin a few weeks from now, ACE’s request is merely a disguised attempt to conduct untimely discovery that is not permitted under North Carolina law.

25. “[T]he purpose of a *de bene esse* deposition is to preserve testimony for trial.” *Patterson v. W. Carolina Univ.*, 2013 U.S. Dist. LEXIS 53825, at \*2 (W.D.N.C.

Apr. 16, 2014) (cleaned up). Conversely, “[t]he purpose of a *discovery* deposition is to discover information.” *Id.* (emphasis added) (cleaned up).

26. North Carolina’s Rules of Civil Procedure do not specifically mention *de bene esse* depositions, and there is a dearth of case law from our courts on that subject. The limited guidance that does exist from our appellate courts simply notes that “trial depositions of unavailable witnesses are permitted and perhaps even advisable in some circumstances.” *759 Ventures, LLC v. GCP Apartment Inv.’s, LLC*, 2019 NCBC LEXIS 74, at \*4 (N.C. Super. Ct. Nov. 4, 2019) (citing *In re Will of Yelverton*, 178 N.C. App. 267, 274 (2006); *Gemini Drilling & Found., LLC v. Nat’l Fire Ins. Co.*, 192 N.C. App. 376, 387 (2008)).

27. The most thorough discussion from a North Carolina court regarding *de bene esse* depositions is contained in *759 Ventures*. In that case, this Court addressed a dispute concerning whether for-trial depositions of certain witnesses could be taken after the discovery deadline had already passed.

28. In ruling that some but not all of the post-discovery *de bene esse* depositions were permissible under the facts of that case, this Court stated that “it would be arbitrary to refuse a trial deposition solely because a party requests it after the close of discovery” because “the point of a trial deposition is to preserve the testimony of a witness who is or may become unavailable to testify at trial” and “[a] witness’s availability may not be known until trial draws near, which is usually well after discovery has closed.” *759 Ventures*, 2019 NCBC LEXIS 74, at \*5–6. Therefore,

“[a] bright-line rule prohibiting post-discovery trial depositions would bar them when they are needed most.” *Id.* at \*6.

29. Although we observed that decisions “whether and when to allow [post-discovery] trial depositions [are] highly case-specific question[s,]” *id.* at \*4, we also set forth a series of factors to be analyzed in such circumstances, *see id.* at \*6–8. These factors include (1) “when the party seeking the deposition became aware that the witness would be unavailable”; (2) “whether the party knows what the substance of the witness’s testimony will be[.]” since “[a] party has little reason to spend time and money during discovery to learn what it already knows”; (3) whether the witness is “friendly” or “hostile,” since depositions of hostile witnesses “are more likely to be discovery depositions attempting to pose as trial depositions”; and (4) whether allowing a *de bene esse* deposition would be unfairly prejudicial to the opposing party. *Id.* (cleaned up).

30. With these factors in mind, the Court will first address ACE’s ability to obtain copies of the Blue Redacted Invoices in unredacted form through its subpoena *duces tecum* and will then discuss ACE’s ability to conduct a *de bene esse* deposition of Checkovich.

### **I. Blue Redacted Invoices**

31. ACE first received the Blue Redacted Invoices during discovery on 14 January 2020.

32. As an initial matter, it is still not entirely clear why ACE is seeking to obtain the unredacted copies of the Blue Redacted Invoices since Plaintiffs have



repeatedly represented that they are not seeking recovery of fees corresponding with the redacted time entries contained on those invoices.

33. In any event, it appears to be undisputed that during the nearly eighteen-month discovery period in this case, ACE never demanded that Plaintiffs produce unredacted copies of the Blue Redacted Invoices. Moreover, at no time did ACE seek judicial intervention based on their failure to do so.

34. Instead, having waited over five years after being provided with these redacted invoices, and with mere weeks remaining until trial, ACE now seeks an order from the Court requiring their production in unredacted form.

35. It is difficult—if not impossible—to view this request as anything other than a back-door attempt to obtain evidence that could—and should—have been sought during discovery in the event that ACE deemed it relevant.

36. At the 3 March hearing, ACE's counsel argued that a recent analysis of the Blue Redacted Invoices casts new doubts on whether significant portions of the time entries for which Plaintiffs *are* seeking reimbursement were actually incurred in the defense of the Underlying Lawsuits. The Court is unconvinced.

37. ACE has been in possession of all of Plaintiffs' invoices in this case (both the redacted and the unredacted ones) for approximately five years and had nearly eighteen months of discovery in which to thoroughly evaluate them and take steps to resolve any questions about them. However, no such steps were taken. Moreover, ACE has failed to put forth a compelling reason why the recent analysis that

purportedly now shows the relevance of the redacted time entries was not performed during the discovery period.

38. Accordingly, the Court **CONCLUDES**, in its discretion, that ACE is not entitled to obtain the unredacted copies of the Blue Redacted Invoices at this late date.

## II. *De Bene Esse* Deposition of Checkovich

39. In the alternative, ACE requests that it be allowed to go forward with a *de bene esse* deposition of Checkovich even if the Court refuses to require the production of the Blue Redacted Invoices in unredacted form.

40. In applying the factors set out in *759 Ventures*, however, virtually every one of them supports the denial of ACE's request.

41. First, Checkovich is clearly not a friendly witness and is, instead, a company officer of Smithfield. As such, ACE does not presently know the substance of what her testimony would be. Therefore, this is not a case in which a party is simply seeking to memorialize the known testimony of a favorable witness who will be unavailable for trial.

42. Second, it is a significant understatement to say that ACE's request cannot be considered timely. The record is clear that ACE has known about Checkovich and her role in the litigation of the Underlying Lawsuits for over five years.

43. Nevertheless, despite this knowledge, ACE made no effort to depose her during discovery and did not raise the possibility of taking her deposition until

several months ago. Notably, ACE took the discovery depositions of several other attorneys involved in litigating the Underlying Lawsuits on behalf of Plaintiffs and was free to depose Checkovich at that time as well. Instead, it made a strategic decision not to do so.<sup>1</sup>

44. Third, this is not a case in which the proposed deponent's unavailability is a surprise or unforeseen occurrence.

45. Checkovich has continually lived in Virginia at all relevant times during the pendency of this lawsuit. Therefore, ACE has always been on notice that she could not be compelled to attend a trial in North Carolina.

46. Fourth, the Court finds that Plaintiffs would be prejudiced by an order requiring them to make Checkovich available for a *de bene esse* deposition. As previously discussed, Checkovich currently serves as the Chief Legal Officer of Smithfield. The trial of this matter is scheduled to take place in a matter of weeks, and the parties have already exchanged witness and exhibit lists. It would simply be unfair to require a litigant to make one of its high-level officers available for a *de bene esse* deposition on the eve of trial under these circumstances.

47. Accordingly, the Court concludes that ACE has failed to offer any persuasive reason why it should be permitted to depose Checkovich at this late date.

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<sup>1</sup> The Court also observes that ACE first raised the issue of deposing Checkovich in October of 2024 and was informed then that Plaintiffs opposed any attempt to take her deposition. Nevertheless, ACE did not file the present Motion until 7 February 2025.

## CONCLUSION

48. For all of these reasons, the Court, in the exercise of its discretion, **CONCLUDES** that ACE's Motion is **DENIED**.<sup>2</sup>

**SO ORDERED**, this the 12th day of March, 2025.

/s/ Mark A. Davis  
Mark A. Davis  
Special Superior Court Judge  
for Complex Business Cases

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<sup>2</sup> In light of the Court's ruling as set forth herein, the Court need not address Plaintiffs' additional argument that the attempted service of the subpoena violated both North Carolina and Virginia law.