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Case No. N10C-07-241 MMJ

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MINE SAFETY APPLIANCES COMPANY,	)	
Plaintiff,	)	
v.	)	C.A. No. N10C-07-241 MMJ
AIU INSURANCE COMPANY, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 7, 2014
Date Decided: March 10, 2014

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Boyer, Special Discovery Master:

On December 12, 2013, plaintiff Mine Safety Appliances Company ("MSA") filed a motion to compel a second Rule 30(b)(6) deposition of three defendants affiliated with AIG (collectively, "AIG").[1] MSA contends that a second deposition is warranted because AIG improperly interfered with the first deposition in two ways. First, AIG allegedly "repeatedly engaged in disruptive and obstructionist tactics violative of Rule 30(d)" by making "excessive,

[1] In its motion, MSA defines defendants AIU Insurance Company, American Home Assurance Company, and National Union Fire Insurance Company of Pittsburgh, Pa. as "Chartis." Counsel for these three entities refers to them collectively as "the AIG Insurers," so I will use AIG (instead of Chartis) to refer to the defendants that are the subject of this motion.

unnecessary, and inappropriate speaking objections that impeded the flow of the questioning and prevented the witness from providing substantive responses." MSA Opening Brief ("OB") at 1. Second, the witness allegedly was either unwilling or unable to give substantive answers to fact-based questions relating to AIG's contentions (*e.g.*, that MSA had failed to exhaust the umbrella and first and second tier excess policies underlying its policies with one of the AIG companies, American Home). *Id.* at 2. MSA seeks to redepose a "properly prepared" corporate designee and to recover fees and costs associated with this motion and the first deposition. *Id.*

AIG vigorously disputes these allegations. In its view, the objections were due to MSA's "unclear questions that created substantial confusion, distorted the record, sought a legal conclusion and/or expert testimony, were based on documents that the witness had never seen and have not been authenticated, were outside the scope of the topics for which the witness was designated, or were simply improper." AIG Answering Brief ("AB") at 1. AIG also contends that, despite the objections, it did not instruct the witness not to answer. With respect to the witness's testimony on the factual bases for AIG's exhaustion contention, AIG argues, *inter alia*, that (i) none of the relevant documents in MSA's claims files were produced by MSA until after the suit was filed, (ii) none of these documents "have been reviewed by the AIG Insurers, as experts have been retained for that purpose," and that (iii) AIG is entitled to rely on its experts to provide the factual basis for American Home's exhaustion defense. AB at 2. AIG asks the Court to deny the motion and to award AIG the fees and costs that it incurred in responding to it. AB at 5.

For the reasons discussed below, MSA's motion is granted to the extent that it seeks to re-depose AIG's Rule 30(b)(6) designee, but all requests for fees and costs are denied.

FACTUAL BACKGROUND

A. The Parties' Underlying Dispute Regarding AIG's Exhaustion Defense

This motion arises from a long-standing, fundamental disagreement between MSA and AIG over the scope of testimony required of a Rule 30(b)(6) witness in the context of this complex insurance coverage litigation. On May 6, 2013, MSA filed its first notice of deposition seeking, *inter alia*, the factual bases for AIG's affirmative defense of lack of exhaustion. Walker Aff. dated Jan. 7, 2014 ("Walker Aff.") at ¶¶ 6-8. In the following months, counsel for AIG and MSA communicated several times regarding AIG's objections to the scope of the notice. *Id.* AIG took the position that "no fact witness would or could be produced to provide the factual basis for American Home's exhaustion defense" for a number of reasons. *Id.* at ¶ 7. On September 13, 2013, MSA filed amended deposition notices of AIG, and AIG again objected on the same grounds. *Id.* at Ex. G.

On October 15, 2013, MSA filed a Motion to Compel Chartis to Provide Discovery Regarding its Affirmative Defense Relating to Exhaustion of Underlying Policies. Trans. ID No. 54387973. At oral argument on November 5, 2013, it became clear that AIG would produce a Rule 30(b)(6) witness on November 13, 2013, and that MSA would seek exhaustion information through that witness at that time. The motion was denied without prejudice so that the parties could create a record as to the scope of the testimony permitted on AIG's exhaustion defense. MSA was invited to renew its motion if it believed that it was "unfairly blocked from getting the testimony that [it was] entitled to." Transcript of Telephonic Hearing on Motion to Compel, dated November 5, 2013, at 30:3-32:18.

B. The Testimony of AIG's Rule 30(b)(6) Witness on Exhaustion

On November 13, 2013, MSA took the deposition of AIG through its Rule 30(b)(6) designee, Heather Korsgaard. As "complex director" within AIG's mass tort claims department, Ms. Korsgaard "receive[s] claims, acknowledge[s] them and investigate[s] information relative to those claims, request[s] information from the insured relative to those claims to evaluate the claims and investigate coverage." Transcript of Deposition of Heather Korsgaard, dated November 13, 2013 ("Tr.") at 21:15-22:5. AIG designated Ms. Korsgaard to testify as to several topics, including the extent to which the insurance policies underlying MSA's policies with American Home have been impaired or exhausted, the bases for AIG's affirmative defenses, and AIG's evaluations of bodily injury claims generally and/or bodily injury claims at issue in this case. Tr. at 26:3-27:3.

At the deposition, MSA questioned AIG's designee about documents that MSA had produced to demonstrate the exhaustion of the policies underlying the American Home policies, including "loss runs" and claims documentation. It became clear that the witness had not been shown these documents and therefore could not comment on them:

> MSA: [D]oes AIG contend that the umbrella level policies issued by CNA, by Continental, for the years underlying the two American Home policies that we have been talking about that those policies are not exhausted?
>
> AIG: Object to the form of the question. Calls for expert testimony. Calls for a legal conclusion. Subject to those objections, you can answer.
>
> WITNESS: If you are asking me with respect to AIG 40 [a loss run issued by Continental], and AIG 41 [a Continental spreadsheet supporting exhaustion], as I said, I don't know what these documents are. I haven't seen them, and so I wasn't prepared to testify with respect to these documents so I can't answer with respect to these two documents what

information, if any, they provide relative to your question.

Tr. at 224:15-225:6. Similarly, the witness testified that she had not seen any of the documentation for the claims that were allocated to the policies underlying American Home. Tr. at 240:16-245:10. Finally, the witness appeared to be unaware of AIG's position, if any, regarding which of the policies underlying the American home policies are not exhausted. Tr. at 225:8-226:3. But she added, "[w]e have asked for an accounting audit expert to review that data and assist us in making that determination, and it is my understanding that the expert has concluded that based on the documentation provided to date there is insufficient information to confirm that there has been proper exhaustion under our policies." Tr. at 226:8-15.

C. AIG's Objections at the Deposition

At the November 13 deposition, another issue arose relating to AIG counsel's objections and their effect MSA's ability to conduct a fair examination. AIG objected on numerous grounds, including relevance, form, foundation, vagueness, redundancy (asked and answered), privilege, legal conclusion, expert testimony, lack of authentication, and that questions allegedly sought to "elicit information provided by counsel," exceeded scope of the noticed topics, were misleading, or related to documents that "speak for themselves." In a proceeding that lasted five hours, AIG objected approximately 270 times, not counting the multiple objections set forth within these objections. OB 4-5. Put another way, AIG objected at a pace of nearly once per minute of testimony and more than one objection per transcript page.

AIG's numerous objections consumed a substantial portion of the deposition in relation to the actual testimony of the witness. For example, the transcript of the afternoon session shows that AIG's objections and statements comprised an estimated 711 lines of transcript (almost 30 pages at 24 lines a page), as compared with an estimated 1,113 lines (about 46 pages) of witness testimony. In other words, for every three pages of testimony that MSA was able to elicit, AIG

interjected nearly two pages of objections and commentary. MSA asked AIG to stop its "speaking objections" at least five times, but sought to avoid extended colloquy and to refocus the witness on the question.

AIG defended its objections based on its understanding of Delaware law:

> MSA: [To AIG counsel], please stop making speaking objections. It is against Delaware rules, and if you do not stop, we will seek an order from the court for costs.
>
> AIG: We were advised by our local counsel that under Delaware court rules, you are required to preserve the record to assert objections, that there are no assumed objections as to relevancy or anything else. Therefore, I am within my right to make a record concerning the specific objections we have to your question, and I will continue to do so.

Tr. at 80:19-81:9.[2] AIG's objections, and the parties' arguments with respect to them, are too voluminous to detail here but will be discussed in the context of the following legal analysis.

ANALYSIS

MSA's motion raises three issues relating to the November 13 deposition: (1) whether the witness failed to testify substantively in response to fact-based questions regarding exhaustion and other matters, such that AIG failed to comply with its obligation to produce a properly prepared designee under Rule 30(b)(6); (2) whether AIG's objections, considering their number, length, propriety, and effect, impeded the fair examination of the witness in violation of

[2] Delaware counsel for MSA and AIG did not, and were not required to, attend the deposition, as forwarding counsel had been admitted *pro hac vice*. However, the involvement of Delaware counsel (even if only through a telephone call during a break) might have helped resolve disputes as to Delaware practice. *See, e.g., Avete Inc., et al. v. Bengoa*, 2010 WL 3221823, at *7 (Del. Ch.) (internal citations omitted) ("Because of their focus on our State's law, Delaware lawyers frequently can answer in a telephone call questions about this jurisdiction that a forwarding law firm would spend hours or days researching. . . . Giving a meaningful role to Delaware counsel is reassuring, not troubling."); *see also State Line Ventures, LLC, et al. v. RBS Citizens, N.A.*, 2009 WL 4723372 (Del. Ch.) (addressing role of Delaware counsel).

Rule 30(c) and (d); and (3) whether a second deposition or other remedy is warranted for violation of Rule 30(b)(6) or Rule 30(c) and (d).

I. AIG's Duty to Produce a Properly Prepared Rule 30(b)(6) Witness

A. The Scope of Rule 30(b)(6) Testimony

Rule 30(b)(6) permits a party to take the deposition of an organizational party through a notice that "describe[s] with reasonable particularity the matters on which examination is requested." In response, the organization must "designate one or more officers . . . or other persons who consent to testify on its behalf," who must then "testify as to matters known or reasonably available to the organization." The testimony of the person whom the organization designates is said to be binding on the organization.[3] Rule 30(b)(6) is intended to facilitate discovery by: (i) eliminating the problem of determining whether a deponent for an organization ranks high enough in the organization to bind it; (ii) freeing the discovering party from the burden of guessing which individual within an entity is the most knowledgeable on a given topic; and (iii) avoiding depositions of an unnecessarily large number of an organization's officers and agents by a party uncertain of who in the organization has knowledge.[4]

The dispute here concerns the scope of required Rule 30(b)(6) testimony in relation to well-recognized protections against disclosure of attorney work product and attorney-client communications, as well as the general bar against obtaining, through fact witnesses, formulations of a party's position on purely legal issues or the evidence of its expert witnesses.

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[3] *See, e.g., United States v. Taylor,* 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996), *aff'd,* 166 F.R.D. 367 (M.D.N.C. 1996) ("When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered.").

[4] *See* Federal Rules of Civil Procedure ("FRCP") 30 advisory committee notes on 1970 amendments.

The organization must "ensure . . . that the party taking the deposition receives complete responses, based on the organization's full knowledge and any relevant information readily available to it, to questions related to *all* the matters set forth with particularity" in the notice.[5] That said, it is undisputed that instructions not to answer, such as on grounds of privilege, may be given to Rule 30(b)(6) witnesses as well as any other fact witness. But less clear is the line that separates required Rule 30(b)(6) testimony from intrusion into the opposing party's work product, legal conclusions, and expert testimony.

While Rule 26(b)(3) generally protects against disclosure of work product, some disclosure indirectly occurs through Rule 30(b)(6) testimony about an organization's position on issues. A Rule 30(b)(6) deposition that inquires into the ordering of proof "inevitably discloses the interim thinking of counsel on contentions."[6] Some courts have noted that the "inherent work product concerns" "are easier to manage when the discovery tool is a written question rather than a more free-flowing and 'real time' oral deposition," and that "contention

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5 *Fitzgerald v. Cantor*, 1999 WL 252748, at *2 (Del. Ch.) (emphasis in original).

6 Kent Sinclair and Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 Ala. L. Rev. 651, 714 (Spring 1999). *See also, id.* at 657 ("[W]hen [Rule 30(b)(6)] commands a collective entity to testify to everything that is 'known or reasonably available,' it is, perforce, in all but the simplest of cases, demanding testimony that can only be the result of an arduous process that has already been conducted by the entity's lawyers. It is one thing, of course, to require the organization (or its lawyers) to proffer the identity of witnesses who were involved in matters at issue in a lawsuit. While such an obligation may require the organization to create and reveal something that did not exist prior to the lawyers' involvement (that is, a compilation identifying the relevant witnesses), such an intrusion into work product is relatively de minimus, may be deemed worth the 'price' for what it buys in increased efficiency, and is merely a propaedeutic to further discovery. It is quite another thing to require the organization to prepare one or more witnesses to express its single, final, and definitive position on the ultimate issues on which a case presumably turns.").

interrogatories are not just a viable alternative, but the proper discovery device under the circumstances."[7]

Questions that call for Rule 30(b)(6) testimony relating to a party's contentions present a particularly difficult issue. As noted above, Rule 33(c) authorizes written discovery as to contentions in stating that an interrogatory "is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to a fact or the application of law to fact . . . ." Such interrogatories "can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery"; however, they "may not extend to issues of 'pure law.'"[8] As one leading treatise acknowledges, even in the context of Rule 33(c) interrogatories, the "distinction between permissible interrogatories and those seeking impermissible legal conclusions is uncertain."[9]

Application of the contention interrogatory principle to depositions under Rule 30(b)(6) only complicates the matter. Some courts have held that a Rule 30(b)(6) designee "testifies about the corporation's subjective beliefs and opinions, *and its interpretation of documents and events*."[10] However, this Court and the Court of Chancery have taken a more cautious approach. In *Premcor Refining Group, Inc. v. Matrix Service Industrial Contractors, Inc.*, this Court disapproved of a party using Rule 30(b)(6) depositions "to resolve an issue of law, namely contract interpretation."[11] In so ruling, the Court cited the decision of the Delaware Supreme

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7 *Id.* at 714 (citing case law).

8 FRCP 33 advisory committee notes on 1970 amendments.

9 7 James Wm. Moore et al., Moore's Federal Practice § 33.79 (third ed.).

10 *Ethypharm S.A. France v. Abbott Labs.*, 271 F.R.D. 82, 93 (D. Del. 2010) (emphasis added) (quoting *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 2002 WL 1835439, at *3 (S.D.N.Y.)).

11 2008 WL 2232641, at *8 (Del. Super.).

Court in *Bryant v. Bayhealth Medical Center, Inc.*, which held that requests for admissions "should not be used to . . . demand that the other party admit the truth of a legal conclusion."[12] Similarly, in *Merck & Co., Inc. v. SmithKline Beecham Pharmaceuticals Co.*, the Court of Chancery held that:

> [the defendants'] attempt, in a Rule 30(b)(6) deposition, to inquire into the contentions of Merck as to the meaning and legal effect of the parties' rights under the Option Agreement was improper. *See, e.g., Teigel Mfg. Co. v. Globe–Union, Inc.*, D. Del., C.A. No. 84–483, Stapleton, J. (Oct. 5, 1984), Oral Ruling at 14 ("[A] lay person shouldn't be required to formulate a party's contention in response to deposition questioning.").[13]

Finally, a Rule 36(b)(6) witness may not be compelled to disclose the organization's "full knowledge" with respect to the work done by its experts. Under Rule 26(b)(4), "[d]iscovery of facts known and opinions held by experts, otherwise discoverable under [Rule 26(b)(1)] and acquired or developed in anticipation of litigation or for trial, may be *obtained only as follows*." (emphasis added). Rule 26(b)(4) then sets forth the exclusive mechanisms governing expert discovery.[14]

In sum, a Rule 30(b)(6) designee should be prepared to testify fully as to information available to the organization within the designated topics, including its contentions and the factual bases for them. But such deponent is not required to articulate the organization's position

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[12] 937 A.2d 118, 126 (Del. 2007) (reversing dismissal of case on statute of limitations grounds where dismissal was grounded upon a deemed admitted request for admission that the plaintiff's praecipe dated after the statute expired was the first "legally cognizable" document requesting service upon the defendants).

[13] 1999 WL 669354, at*47 (Del. Ch.) *aff'd sub nom. Smithkline Beecham Pharm. Co. v. Merck & Co., Inc.*, 746 A.2d 277 (Del. 2000) and *aff'd*, 766 A.2d 442 (Del. 2000).

[14] *See, e g., U.S. v Int'l Bus. Machs. Corp.*, 72 F.R.D. 78, 81 (S.D.N.Y 1976) (noting that Rule 26(b)(4) provides an orderly mechanism for discovery of expert information, and further observing that it was evident from the introductory language of the Rule that the procedure set forth was the exclusive method for obtaining such information).

on the meaning and legal effect of documents or prematurely disclose the work of experts. MSA's motion requires the Court to determine where Rule 30(b)(6)'s "gravitational pull" must give way to that of one or more of the limiting principles reflected in the rules governing attorney work product and expert testimony.

B. Questions Relating to AIG's Defense of Lack of Exhaustion

MSA contends that AIG asserted improper speaking objections with respect to the issue of whether the policies of other insurers underlying those provided by American Home have been exhausted. MSA alleges that AIG's witness was "completely unprepared" to provide substantive testimony about either the factual bases for AIG's exhaustion contention generally or, more specifically, the policies underlying AIG's policies that, according to AIG, have not been exhausted. OB 6-7; 19-22.

When MSA asked "which of the underlying policies does AIG contend are not exhausted?", AIG objected on the grounds of vagueness, legal conclusion, expert testimony, and to the extent the question sought information "provided in the course of" counsel's representation of AIG and sought "information protected from disclosure under the attorney-client privilege." Tr. at 208:23-209:9. The witness then testified:

> WITNESS: Again, it is my understanding that the expert will determine or has determined, I should say, and would indicate that there isn't sufficient information provided by Mine Safety . . . to indicate that there was exhaustion under our policies. So I don't think it's necessarily a contention as to which policy underlying us is or is not exhausted. . . .

Tr. at 209:10-15. Shortly thereafter, a similar colloquy occurred:

> MSA: My question is more general about the contention for the umbrella level policies issues by Continental that underlie the American Home policies that we have been talking about and whether AIG contends that those policies are not

exhausted.

AIG: Object to the form of the question. I am also going to refer you back to her prior testimony that when it comes to exhaustion, you also have to consider the other tandem legal issues concerning trigger and allocation. Therefore, the question calls for a legal conclusion. The question also calls for expert testimony.

Subject to those objections, you can answer.

WITNESS: I don't know that AIG has taken a specific position as to whether one or another particular policy underlying AIG policies have exhausted, per se.

Tr. at 225:8-226:3.

AIG's objection that the questions called for expert testimony has some merit. MSA produced almost all of the information needed to analyze the exhaustion issue well after it filed this litigation. AIG did not investigate the claims at issue in the normal course of business, but rather is analyzing them "in a litigation posture." AB 17-18. Whether or not, as AIG contends, no claims handler has the "capacity or technical background necessary to understand many of the documents upon which MSA relies" (AB 17), AIG cannot be faulted for retaining auditing and accounting experts to analyze and synthesize the data. And, AIG's experts will issue their reports, and be subject to deposition by MSA, at which time their analysis of the data, and the complex facts underlying American Home's exhaustion defense will be disclosed. AB 17.

However, none of these facts should excuse AIG from setting forth, through its Rule 30(b)(6) designee or in response to Rule 33 interrogatories, its present position on the issue of exhaustion and the factual bases for it, including the specific policies (if any) that it claims are not properly exhausted. Rule 30(b)(6) and Rule 26(b)(4) do not require all or nothing scenarios. In *Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, for example, the District of

Delaware found a middle ground.[15] In that case, a patent infringement action, the court granted the plaintiff's motion to compel the defendant's Rule 30(b)(6) designee to testify regarding the factual bases for its legal affirmative defenses, including invalidity and unenforceability, despite the contention that the issues required expert testimony. While granting the motion to compel, the court limited the scope of the Rule 30(b)(6) testimony by requiring the defendant to "identify all the prior art underlying its affirmative defenses and to specifically list the affirmative defenses to which each item of prior art relates."[16] Similarly, here, AIG's designee should have come prepared to address the factual bases underlying AIG's exhaustion defense as presently known, including which underlying policies it contends have not been exhausted.

AIG's arguments do not warrant an approach that would render ineffectual the rules that permit a party to inquire into contentions, and the factual bases for them, in order to narrow and sharpen the issues. For example, AIG contends that the questions were too vague, in part because other parties had taken various positions on issues such as the trigger of coverage and MSA's right to allocate costs to different policies that had not been resolved.[17] But MSA's questions sought *AIG's position* on exhaustion, not the position of MSA or North Star or even the Pennsylvania courts. Also, AIG cannot simply say that the information is not available to it, when it has retained experts and attorneys as its agents to help it prepare its defense. And it is no defense to say that MSA knew that the witness was not going to testify to the factual bases of exhaustion because AIG had told it so. AB 2. AIG's position that its witness should not testify substantively as to the factual bases of AIG's exhaustion defense was only that, and AIG knew

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15 142 F.R.D. 420, 421-22 (D. Del. 1992).

16 *Id.* at 422.

17 *See* AB 13-19 (discussing, *inter alia*, the uncertain state of Pennsylvania law, defendant North River's position on trigger in the related Pennsylvania litigation, and MSA's and North River's contentions with respect to the applicable allocation methodology).

that the Court had given MSA leave to renew its motion to compel if it concluded that AIG unfairly blocked answers to questions regarding the factual bases for that defense.

On the other hand, to the extent that MSA seeks elaborate testimony into the details of AIG's experts' work, MSA's cases do not support such an intrusion into expert testimony. In *Omnicare, Inc. v. Mariner Health Care Management Co.*,[18] the plaintiff moved to compel interrogatory responses relating to the defendants' claim that the plaintiff had committed numerous billing errors, as reflected primarily in documents that were in the defendants' possession. The defendants objected on several grounds, including that the interrogatories sought "information that would be the subject of expert analysis.[19] In ordering the defendants to respond, the Court of Chancery stated that, even though "an expert will assist in understanding the ultimate nature and amount of the alleged billing errors," this did not "serve to protect presently known facts from discovery."[20] Importantly, the Court also noted that granting the motion "does not require Defendants to undertake any additional processing of the data in question."[21]

Omnicare is distinguishable in at least three respects. First, the *Omnicare* plaintiff sought billing information in the defendants' possession presumably prior to the litigation. Here, MSA seeks AIG's analysis of *MSA's* exhaustion information, which MSA produced to AIG almost exclusively in this litigation. Second, the *Omnicare* Court stressed that the responding party would not need to undertake any additional processing. Here, to develop its exhaustion position, AIG has retained experts – auditors and accountants – to analyze the voluminous information

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18 2009 WL 1515609, at *4 (Del. Ch.).

19 *Id.*

20 *Id.*

21 *Id.*

that MSA has provided. Third, *Omnicare* involved contention interrogatories under Rule 33(c), which expressly permits inquiry into contentions and the factual bases for them. Here, MSA is seeking to elicit such information through a Rule 30(b)(6) witness. To push the Rule 30(b)(6) disclosure obligation further than as set forth above would risk forcing AIG to disclose, prior to expert discovery, the analysis, processing, and synthesis of MSA data that is being done by its experts in response to MSA's suit.[22]

Accordingly, AIG must prepare a witness to its contentions regarding exhaustion and the factual bases for it. AIG's Rule 30(b)(6) designee must be prepared to testify as to the basic facts underlying its exhaustion defense, including by identifying the underlying policies which it contends are not exhausted and a summation of the basis for such contention. In other words, AIG must prepare a deponent to testify at least as to the current status of AIG's position on exhaustion, including whether AIG contends that any particular policies underlying the American Home policies are not exhausted. If necessary, the witness should bring a list of the underlying policies that AIG contends are not properly exhausted, and be prepared to testify in summary form as to the factual bases underlying its present position. Such testimony would not require the witness to set forth the detailed analysis being undertaking by AIG's experts.[23]

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22 MSA's reliance on *MP Next Level, LLC v. Codale*, 2012 WL 2368138 (D. Utah) is similarly misplaced. That case involved a Rule 30(b)(6) designee who was unable to testify as to his organization's claimed damages, despite having prepared spreadsheets with the company's CFR with respect to damages calculations. Because the information was within the possession of the responding organization and could be produced without expert "processing," the failure of the Rule 30(b)(6) designee to testify meaningfully about the topic was not excused by the provision of an expert witness. *Id.* at *2. Here, again, the raw information at issue is MSA's, and is sufficiently complex so as to require expert analysis and processing.

23 MSA may seek this information first through contention interrogatories and then determine whether a further deposition would be necessary. *See McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 286-87 (N.D. Cal. 1991), *rev'd on other grounds*, 765 F. Supp. 611 (N.D. Cal. 1991) (stating that a contention interrogatory, not a Rule 30(b)(6) deposition, is more appropriate in very complex and highly technical lawsuits); *see also*

C. Questions Relating to the Definition of "Occurrence"

MSA also contends that AIG blocked it from obtaining substantive testimony on an issue relating to whether the underlying tort claims against MSA would constitute a single "occurrence" or multiple "occurrences" as that is term in defined in certain policies. OB 6, 14. MSA asked the witness to state AIG's position as to whether a claimant who worked at multiple mines had worked at multiple "premises locations," as that term appears in the definition of occurrence. Tr. at 176:5-8.AIG objected "on relevancy grounds because there are no premises claims that are at issue in this case as against American Home." Tr. at 173:23-174:5. After further colloquy, the witness testified that "the language in this definition pertaining to premises location is not implicated by the products claims." *Id.* at 176:17-177:3.

The witness should not have declined to give a substantive answer based on AIG counsel's suggestion, adopted by the witness, that the information sought was not "relevant" to or "implicated by" MSA's claims. However, under the *Premcor* and *Merck* decisions noted above, MSA was not entitled to require AIG's Rule 30(b)(6) designee to state AIG's legal position on a matter of contract interpretation. While fact-based questions might have been permissible, particularly if directed to the witness in her personal capacity as a claims handler, the question at issue improperly sought to require the witness to formulate AIG's position "as to the meaning and legal effect of the parties' rights" under the policy in question.

Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms, 50 Ala. L. Rev. at 754 n.286 (arguing that Rule 33(c), not Rule 30(b)(6), is designed to allow for answers to contention interrogatories that will reflect input from counsel).

II. Whether AIG's Objections Impeded the Fair Examination of the Witness

A. Rules Governing Deposition Conduct

Rules 30(c) and (d) set forth the basic ground rules governing depositions. Rule 30(c) states that the "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial." While objections "shall be noted by the officer upon the record," the "evidence shall proceed" with testimony being taken subject to the objections. Rule 30(d)(1) requires that the attorney for the deponent neither "consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given" (with limited exceptions), nor "suggest to the deponent the manner in which any question should be answered."[24] Rule 30(d)(1) forbids instructing a witness not to answer unless necessary to "preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion" to the Court. Rule 30(d)(2) provides a remedy for misconduct, stating that, if necessary to ensure "a fair examination of the deponent or if the deponent or another party impedes or delays the examination," the Court may allow additional time. Also, if the Court "finds such an impediment, delay or other conduct that has frustrated the fair examination of the deponent," it may "impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any party as a result thereof." Super. Ct. Civ. R. 30(d)(2).

Rule 32 provides that objections to the use of deposition in court proceedings, based on "errors and irregularities" at the deposition, may be waived if not first raised before or at the deposition. Rule 32(d)(3)(A) creates a qualified safe harbor with respect to objections to "the competency of a witness or to the competency, relevancy, or materiality of testimony," by stating that they are not waived "unless the ground of the objection is one which might have been

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[24] Objections that are suggestive to a witness or argumentative are also called "speaking objections." *Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010).

obviated or removed if presented at that time." Objections based on other errors or irregularities, such as to "the form of the questions . . . and errors of any kind which might be obviated, removed, or cured if promptly presented, *are waived* unless seasonable objection thereto is made at the taking of the deposition." Super. Ct. Civ. R. 32(d)(3)(B) (emphasis added).[25] Thus, the Rule 30 prohibition on disrupting or impeding a deposition must be construed in a way that permits attorneys to preserve objections that otherwise might be waived under Rule 32.

The leading Delaware case on the rules governing deposition practice is the decision of the Delaware Supreme Court in *Paramount Communications Inc. v. QVC Network Inc.*,[26] which addressed "an astonishing lack of professionalism and civility" at a deposition that served as "a lesson of conduct not be to tolerated or repeated."[27] The Court noted that "[s]taunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism," and that "it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process."[28] However, it condemned the "extraordinarily rude, uncivil, and vulgar" behavior set forth in its opinion as "unprofessional . . . outrageous, and unacceptable."[29] In addition, the Court noted that attorneys at the deposition in

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25 *See* 8A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2113 (3d ed. 2013) ("The purpose [of FRCP 32(d)(3)(B)] is to give the erring party an opportunity to correct the mistake, and to prevent waste of time and money by a subsequent claim that a deposition must be suppressed because of some technical error long ago."). One guide lists the following as "generally recognized objections" to the form of a question: leading, ambiguous/vague, argumentative, asked and answered, assumes facts not in evidence, compound, misquotes the witness, narrative (overbroad). David M. Malone et al., The Effective Deposition at 242-45 (Rev. 3d ed. 2007).

26 637 A.2d 34 (Del. 1994).

27 *Id.* at 52.

28 *Id.* at 54.

29 *Id.* at 53.

question had "continually interrupted the questioning, engaged in colloquies and objections which sometimes suggested answers to questions . . . ."[30] Citing with approval an influential federal court decision, the *Paramount* Court pointed out the "impropriety" of "coaching witnesses on and off the record" and of engaging in "objections and colloquy which tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony."[31]

Together, Rules 30, 32, and the *Paramount* decision require that a deposition be conducted as if before a judge at a trial, without speaking objections or colloquy that would disrupt the rhythm of the proceeding or otherwise frustrate the fair examination of the deponent, while allowing for concise objections necessary to avoid waiver.

B. AIG's Objections at the Deposition

As MSA acknowledges, the conduct of AIG at the deposition bears no resemblance to the outrageous conduct that the *Paramount* Court was forced to address.[32] Rather, the transcript

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30 *Id.* at 56.

31 637 A.2d 34, 56 n.37 (citing *Hall v. Clifton Precision*, 150 F.R.D. 525, 530 (E.D. Pa. 1993)). The *Paramount* Court, writing in 1994, noted that Rule 30(d)(1) of the FRCP, as amended in 1993, required objections during depositions to be "stated concisely and in a non-argumentative and non-suggestive manner," and that Delaware courts were evaluating the desirability of adopting certain of the 1993 FRCP amendments. *Id.* at 56 n.36. Rule 30(d), as amended in 1995, adopts the FRCP 30 prohibition on suggestive objections but not the specific language quoted above. Nevertheless, as stated in *Cascella v. GDV, Inc.*, 1981 WL 15129, at *2 (Del. Ch.), which the *Paramount* Court also cited with approval, objections must be limited to "concise and non-argumentative statements of the grounds." *See also* Federal Practice and Procedure § 2156 (noting that while the "stated concisely" provision currently in FRCP 30(c)(2) "is clearly intended to free depositions of needlessly long objections, it should be interpreted to permit sufficient explanation to serve the purposes of Rule 32(d)(3)(B)—that is, sufficient to notify the interrogator of the ground for the objection and thereby to allow revision of the question to avoid the problem.").

32 *See* MSA Reply Brief at 11("MSA has never taken [the] position" that counsel was vulgar or crude or used obscenities). Nor does the conduct at issue in this motion rise to the level that which warranted sanctions in the other cases cited by MSA. In *In re Fuqua Industries, Inc. Shareholder Litig*ation, the court noted "numerous speaking objections and off-the-record consultations employed by [the attorney for the witness] during the course of the deposition," that the attorney suggested that the witness alter her answer to a question, pointed her to the

shows experienced counsel zealously attempting to preserve every objection possible in a high-stakes case. AB at 7.[33] Unfortunately, however, the cumulative weight of AIG's estimated 270 objections, considering their bulk and questionable propriety, had the effect if not the intent of significantly disrupting the rhythm of the proceeding and of suggesting answers to the witness, thereby impeding the fair examination of the witness so as to warrant relief.

1. Speaking objections

On numerous occasions AIG counsel's objections went beyond a succinct identification of grounds and strayed into narrative that disrupted the flow of the deposition and appeared to suggest an answer or otherwise influence the testimony of the witness. A few examples are given below. No one would warrant relief, but the cumulative effect of all the objections and interjections does.

At one point, AIG counsel objected after an exhibit had been marked and before MSA could even state a question:

> I am just going to have a continuing objection to the use of these documents. We don't know whether these documents were created by MSA or CNA. You have provided no information concerning the creation of these documents. You have provided no information concerning how these documents were created, when they were created, whether they are accurate, whether they are inaccurate. Whether these are documents that were provided in the Pennsylvania litigation. I see now that it's Carroll Burdick at the bottom, but it's bearing an MSA Bates stamp. So I don't know the nature and extent to which this information is accurate, but we are going to have a continuing objection.

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desired answer in a document, and "surreptitiously guided" her in answering other questions. 752 A.2d 126, 135-36 (Del. Ch. 1999). And in *State v. Mumford*, this Court granted a motion to revoke the *pro hac vice* admission of forwarding counsel who had demonstrated a lack of civility and professionalism by failing to control or attempt to control the objectionable conduct of his client, and by encouraging the conduct of his client. 731 A.2d 831, 835 (Del. Super. 1999).

[33] *See also* Walker Aff. at ¶ 17 ("I was unwilling to risk a waiver of any of the objections raised by MSA's questions, given the millions of dollars at issue in this case, the complexity of the issues raised[,] and the fact that virtually all of the AIG Insurers' defenses constitute or subsume a legal issue.").

> Also this witness has never seen these documents before. So we are also going to object on that level.

Tr. at 221:15-222:10.

AIG counsel also offered, through an objection, an unsolicited opinion as to what issues must be considered when discussing exhaustion:

> Object to the form of the question. I am also going to refer you back to her prior testimony that when it comes to exhaustion, you also have to consider the other tandem legal issues concerning trigger and allocation. Therefore, the question calls for a legal question. The question also calls for expert testimony.
>
> Subject to those objections, you can answer.

Id. at 225:14-23.

At another point, MSA asked the witness "after a coverage suit began, [AIG] typically wouldn't seek to associate in the defense of claims; is that right?" Tr. at 122:10-12. In response, AIG counsel objected, then elaborated, "[t]o the extent you are asking her to provide information concerning how AIG has handled other DJ's, we are going to object. You and I came to this agreement. If you want to rephrase your question, you can do so. But you and I specifically agreed you would not ask those types of questions." Tr. at 122:13-20. Following counsel's lead, the witness answered, "I'm not prepared today to talk about on behalf of AIG what we generally do in DJ actions. I wasn't asked to prepare for that." Tr. at 123:2-5.

In response to a question about a defense obligation under an American Home policy, AIG counsel again went beyond a concise objection. Instead, she continued, "[o]bject to the phrase 'defense obligation.' Object on the ground that MSA has already answered in sworn interrogatory responses. There is no defense obligation under the American Home policies or any other AIG policies. Object to the extent the question seeks a legal conclusion. You can

answer subject to those objections." Tr. at 134:13-135:1. When MSA counsel attempted to address AIG counsel's objections by representing to the deponent certain facts she could assume before answering, AIG counsel interjected with a speaking objection before MSA was able to state its question. Tr. at 138:6-19 ("I am just going to make an objection right there. All the claims at issue in this case were tendered post-suit. You said certain claims. So I just want to correct the record."). Any such "correction" of the record, if necessary, could and should have been accomplished during cross-examination.

Near the end of the deposition, when MSA asked a hypothetical, AIG counsel responded, "[o]bject to the form of the question. I assume this is a hypothetical. It's a general question. It has nothing to do with the particular claims at issue in this suit. You just want to know what type of information would be relied upon to make that determination." Tr. at 232:10-22.

AIG's speaking objections on numerous occasions resulted in the witness echoing AIG counsel's statement of the ground for the objections. For example, at one point, when MSA attempted to summarize the testimony, AIG counsel objected by stating "[m]isstates the testimony in multiple ways. She did not testify to what you just said." Tr. at 188:6-9. The deponent agreed that MSA did not properly summarize the testimony. Tr. at 188:13-14. MSA then asked the witness to summarize the testimony. Tr. at 188:16-17. Again, AIG counsel opined "[t]hat's an improper direction. It's not a proper question. I am directing the witness if she wants to refer back to her testimony, she can refer back to her testimony." Tr. at 188:18-22. Not surprisingly, the witness answered, "I would refer to my testimony. I can't reiterate word for word here." Tr. at 188:23-24.

At another point, MSA asked the witness about a specific complaint identified on a document in front of the witness. Tr. at 54:2-5. AIG counsel objected to the form and

elaborated, "[a]lso object to the inference that that, in and of itself, would establish that the bordereaux reference to the Dewayne Williams suit is, in fact, this lawsuit that you have marked the complaint for as Exhibit 20." Tr. at 54:6-12. The witness testified, "I can't determine from that alone whether it is, in fact, the exact complaint that is referenced here . . . ." Tr. at 54:2-17.

When MSA asked for a yes or no answer, and following an objection that the question called for a legal conclusion and possibly privileged information, the witness testified, without answering the question, "[r]ight. Again, I would seek and rely upon the advice of my counsel for that." Tr. at 72:1-11. When MSA asked the witness what information an auditor reviews, AIG counsel objected that the question "assumes that all of the documents are there to begin with," following which the witness testified "[i]t depends what information is available . . . ." Tr. at 203:9-20.

On two occasions, AIG counsel's objections were of such length that the deponent appeared to be distracted or confused. *See, e.g.*, Tr. at 86:23-87:14 (following an initial objection, a re-reading of the question, and a second set of lengthier objections, the witness testified "I am sorry. I lost the train of thought. Could you just reread the question?"); *see also*, Tr. at 169:24-170:14 (following a lengthy objection, "I am sorry. It might be, like, post lunch. Can you ask me the question again or read it back?").

2. Other questionable objections

AIG made numerous other objections that were questionable if not improper.

Answering for the witness. On some occasions, AIG counsel used objections to answer the question for the witness. For example, when MSA asked whether a settlement agreement was signed by the plaintiff, AIG counsel injected: "Object to the form of the question. The

witness does not have any knowledge as to whether this, in fact, this is the signature of [the plaintiff]. Subject to that objection, you can answer." Tr. at 128:9-15.

The document "speaks for itself." AIG counsel objected approximately twenty times on the ground that a document "speaks for itself." Such an objection does not fall within either Rule 32(d)(3)(A) or (B). Courts have held that "[i]t is not a valid objection in the deposition of a witness who has or may have some relevant knowledge concerning the document or its subject matter, that the document 'speaks for itself.'"[34]

Calls for a legal conclusion. AIG also objected, approximately 50 times, on the ground that the question called for a "legal conclusion." As discussed above, the deponent may not ask a question of "pure law." But relatively few of the 50 questions that prompted this objection did so. Inasmuch as the witness also was testifying in her personal capacity as a claims handler, "it is ordinarily not a valid objection to a question concerning the witness's understanding of contractual provisions and how they have been interpreted and applied by a party (assuming the witness has relevant knowledge), to assert that the question seeks a "legal conclusion" or that the contract "speaks for itself."[35]

Documents not previously reviewed or authenticated. AIG also asserted dubious objections to questions relating to documents that the witness had not seen before or that AIG contended had not been authenticated. "If the witness does not recall having seen the document before or does not understand the document, the witness may ask the deposing lawyer for some

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[34] *Collins v. Int'l Dairy Queen, Inc.*, 1998 WL 293314, at *2 (M.D. Ga.).

[35] *Id. See also Tighe v. Buschak*, 2013 WL 6440953, at *4 n.1 (W.D. Pa.) ("Even if the questions could be understood as requiring [a deposition witness] to render a "legal conclusion" . . . that would not necessarily render them objectionable."); *Howell v. Standard Motor Products, Inc.*, 2001 WL 456241, at *3 (N.D. Tex.) (explaining that there is no case law or provision in the FRCP that permit an objection to a deposition question "on the grounds that it called for a legal conclusion"); *CellNet Data Sys., Inc. v. Itron, Inc.*, 178 F.R.D. 529, 533 (N.D. Cal. 1998) (concluding that "legal conclusion" objection was meritless).

additional information, or the witness may simply testify to the lack of knowledge or understanding."[36]

Information provided by counsel. AIG also objected numerous times "to the extent" that questions allegedly sought to "elicit information provided by counsel." This objection is contrary to the law, because parties cannot refuse to disclose facts merely because they were conveyed to the witness by an attorney.[37] Presumably, AIG intended to invoke the work product privilege, but as the objection was stated, it was clearly overbroad.

Requests for clarification. AIG counsel also asked for clarification either for herself or for the witness several times.[38] Whether embedded in an objection or not, such interjections are

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[36] *See Hall v. Clifton Precision, Inc.*, 150 F.R.D. 525, 529 (E.D. Pa. 1993).

[37] Federal Practice and Procedure § 2023. ("Before 1970, the courts consistently held that the work product concept furnished no shield against discovery . . . of the facts that the adverse party's lawyer has learned . . . . This has continued to be true under Rule 26(b)(3) . . . ." The courts have consistently held that the work product concept furnishes no shield against discovery . . . of the facts that the adverse party's lawyer has learned"). *See also Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D. Neb. 1989) ("There is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel."). But, depending upon how questions are phrased to the witness, deposition questions may tend to elicit the impression of counsel about the relative significance of the facts; opposing counsel is not entitled to his adversaries' thought processes.").

[38] At one point AIG counsel interrupted the questioning to ask MSA "[e]xactly where are you talking?" and then to ask the witness, "[a]re you following this?" Tr. at 47:4-11. *See also* Tr. at 49:21-24 ("Object to the form of the question. When you say the "MSA accounts," I am not sure I understand that question. So if you understand it, you can answer."); Tr. at 84:19-23 ("Object to the form of the question. I am not sure I understand. You are just saying what type of information would the witness need to make that determination?"); Tr. at 95:7-14 ("I am going to repeat my objection. I'm not sure whether she answered the question based upon what she thought your question was asking. Again, if you don't understand the question, then ask for more information. Subject to that objection you can answer."); Tr. at 136:23-137:6 ("I'm sorry. I don't understand the question. Would you be willing to rephrase it because it sounds like you are asking are -- are you asking the witness whether she is relying upon counsel for facts. That's why I didn't -- maybe it was the way it came out. Could you repeat the question?"); Tr. at 192:2-5 ("I am just going to object to the form. I understand the question, but I am not sure whether the witness understands the question."); Tr. at 194:23-195:3 ("Object to the form of the question. Can you just read that back unless -- am I to understand you are asking what information would a carrier excess of AIG ask AIG to provide?").

improper. First, the witness agreed to ask for clarification if she needed it. Tr. at 19:5-15. Second, Rule 30 permits the attorney for the deponent to make objections and give instructions not to answer, but does not permit commentary, questions, or requests that are inconsistent with the requirement that the examination proceed "as permitted at the trial." Super. Ct. Civ. R. 30(c). Third, case law states that the practice is either improper or to be discouraged.[39] Finally, to the extent such interjections inform a deponent's testimony, such colloquies are prohibited as speaking objections. AIG counsel's requests for clarification nudged the witness at the very least to seek clarification.

"If you know." AIG also instructed the witness on numerous occasions (1) to "answer to the extent you can," Tr. at 57:19-21; (2) to "[n]ote the ambiguity" and then answer "[i]f you can," *id.* at 65:4-6; (3) "[i]f you understand it, you can try and answer it," *id.* at 228:16-17; or (4) "[t]o the extent that you remember and the document refreshes your recollection, you can answer," *id.* at 93:18-21. These and other similar instructions accomplish little other than (1) to disrupt the deposition and (2) to suggest to the deponent that she may not be able to answer, that she might need clarification, or that she might not remember something. Such commentary and instruction is improper.[40]

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[39] *Hall*, 150 F.R.D. at 530 n.10 ("If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition. In addition, counsel are not permitted to state on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer."); *Perez v. State Farm Mutual Auto. Ins. Co.*, 2011 WL 1496326 at *2 (N.D. Cal.) ("Deposing counsel may ask for clarification of the objection if he or she so chooses, and in that event, counsel defending that deposition may respond. Otherwise, counsel defending the deposition shall make no further statement about the pending question, nor ask the deposing attorney for clarification. However, the *deponent* may ask for clarification of any question if in good faith she does not understand any portion of it.").

[40] *See, e.g., Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, at *5 (D. Kan.) ("Instructions to a witness that they may answer a question "if they know" or "if they understand the question"

Objections as to relevance. AIG objected unnecessarily at least twice on grounds of relevancy. AIG counsel's impression that Delaware law requires relevancy objections to be made was mistaken. *See* Tr. at 80:4-81:9 ("We were advised by our local counsel that under Delaware court rules, you are required to preserve the record to assert objections, that there are no assumed objections as to relevancy or anything else."). "Obviously, relevance is a matter which cannot be cured by further questioning or by rephrasing the question; it may be disclosed, but it is not cured. It depends solely upon the relationship between the facts sought and the issues in the case."[41] "Because most objections, such as those grounded on relevance or materiality, are preserved for trial, they need not be made at the deposition, although the caution and combativeness typically found in lawyers has made elimination of surplus objections a difficult task."[42]

Surely many of the attorneys who are involved in this case have asserted one of more of the types of objections addressed above. But where, as here, MSA counsel objected at least five times to AIG's speaking objections, AIG's insistence on proceeding as it did was not prudent. As one court observed:

> the proper objective of any deposition is to obtain and record the clear, truthful answers of the witness to questions which address matters within the scope of discovery. While counsel must act to protect the interests of their clients, that obligation is not inconsistent with working together to achieve that object as fairly and efficiently as possible. There are times when comments and actions of counsel defending a deposition, although technically inconsistent with the strict principles expressed here, can be helpful in achieving that object. However, when deposing counsel complains that such conduct is obstructing the deposition,

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are raw, unmitigated coaching, and are *never* appropriate. This conduct, if it persists after the deposing attorney requests that it stop, is misconduct and sanctionable.") (emphasis in original).

41 The Effective Deposition at 233.

42 Moore's Federal Practice § 30.43.

> defending counsel are obliged to retreat to the boundaries of the rules.[43]

Here, the cumulative effect of AIG's estimated 270 objections, including numerous speaking and other questionable objections and interjections, impeded the fair examination of the witness.

III. The Appropriate Remedy

In light of the rulings above, the parties' requested relief will be granted in part and denied in part, as follows:

A. Re-Deposition of AIG's Corporate Designee

MSA may elect to take a second deposition of AIG's corporate representative because (1) AIG's witness was not properly prepared to testify as required to questions fairly posed to a Rule 30(b)(6) deponent and (2) AIG's objections impeded the fair examination of the witness. If MSA avails itself of the opportunity to re-depose AIG's designee, and in all future depositions in this matter, the following guidelines shall govern unless the parties agree otherwise in writing:[44]

1. **Defending Counsel:** Defending counsel's conduct during the deposition shall be limited to:

   a. **Instructions Not to Answer:** Consistent with Rule 30(d)(1), defending counsel may instruct the deponent not to answer in limited situations to "preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion" to the Court.

   b. **Objections:** All objections pursuant to Rule 32(d)(3)(A) to the competency of a witness or to the competency, relevancy, or materiality of

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[43] *Cincinnati Ins. Co., v. Serrano*, 2012 WL 28071, at *6 (D. Kan.).

[44] *See Cascella*, 1981 WL 15129, at *2 (setting forth deposition guidelines and adding: "If the parties are in agreement to deviate from this procedure, they may do so without application to the Court. If they do agree to so deviate, such understanding should be first reflected in writing or else stated of record in the presence of the court reporter taking the deposition.").

testimony are conclusively deemed preserved and shall not be made at deposition. Objections pursuant to Rule 32(d)(3)(B) are not deemed preserved and shall be waived if not raised. When making objections pursuant to Rule 32(d)(3)(B), objections to the form of the question shall be limited to "objection, form," and all other objections shall be limited to "objection."[45] Additional grounds for the objection shall be provided only if the deposing counsel requests identification of the grounds for the objection. Such grounds shall be stated concisely, in a non-argumentative, non-suggestive manner. If deposing counsel does not request identification of the grounds, all grounds shall be preserved.

c. **Other interruptions:** Additional interruptions by defending counsel, including requests for clarification and instructions to the deponent to answer if she knows or is able, are prohibited. If the record appears unclear or incorrect, defending counsel may use cross-examination to seek clarification or attempt correction.

2. **Involvement of the Special Master:** Any party may request the attendance of the Special Master, either in person or telephonically, at any future deposition.[46] Costs shall be apportioned consistent with the Order of Reference to Special Master. *See* § 11(b) ("The compensation, costs, and expenses of the Special Master shall, unless otherwise ordered by the Special Master, be allocated equally between the moving party (or parties) and the responding party (or parties).").

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45 *See Tuerkes-Beckers, Inc. v. New Castle Assocs.*, 158 F.R.D. 573, 575 (D. Del. 1993) (requiring that objections be limited to "objection, form" and other objections limited to "objection" followed by a brief identification of the basis that preferably did not eclipse three words).

46 *See Paramount*, 637 A.2d at 55 (including "the appointment of a master to preside at the deposition" as one possible remedy for deposition conduct inconsistent with the Rules).

B. Supplemental Interrogatory Responses

As noted above, MSA may determine that contention interrogatories under Rule 33(c) are the more efficient and effective means of obtaining the information that it is entitled to obtain through this ruling. Therefore, MSA may elect to renew any contention interrogatories relating to the topics in the notice of deposition of AIG, and review the responses thereto, before deciding whether to take the second deposition permitted by this ruling. Any decision by MSA to seek supplemental interrogatory answers consistent with this ruling will not constitute a waiver of its right to take a second deposition. AIG should file its answers to any contention interrogatories within twenty days of service.

C. Fees and Costs

Both parties' requests for fees and costs are denied. Consistent with the American Rule, the parties are responsible for their own attorneys' fees and costs.[47] The vexatious, wanton, or oppressive conduct required for the bad faith exception to the American Rule is absent.[48] The parties have advanced good faith arguments over an extended period leading up to and after the November 13 deposition. That conduct does not rise to the level of bad faith, particularly in an area of law that has required extensive briefing and a lengthy ruling. Nor does it warrant a sanction under Rule 30(d)(2) or Rule 37(a)(4)(A). Rather, it suggests this is a "case replete with complex and difficult legal issues" which has been "pursued – by highly competent counsel for both parties – with appropriate vigor."[49]

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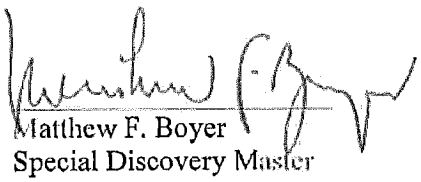
47 *See E.I. DuPont de Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 1792824, at *2 (Del. Super. Mar. 15, 2013) (Johnston, J.) (denying award of fees and costs).

48 *Id.* at *4.

49 *Id.* at *4-5.



Matthew F. Boyer
Special Discovery Master

cc: All Counsel of Record (via FileAndServeXpress)