

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

DANIELE INTERNATIONAL, :
INC. :
 :
v. : C.A. No. 12-709S
 :
PENN-STAR INSURANCE :
CO. :

MEMORANDUM AND ORDER

This is a direct action brought pursuant to R.I. Gen. Laws § 27-7-2 by Plaintiff Daniele International, Inc. against Penn-Star Insurance Company as the insurer of Wholesome Spice and Seasonings, Inc. On March 30, 2010, Plaintiff, a producer of cured meat products, sued Wholesome Spice and Mincing Trading Corporation alleging that both companies sold salmonella-contaminated pepper products to it and seeking damages and indemnification from both suppliers. Daniele v. Wholesome, C.A. No. 10-155S (D.R.I.) (“the 2010 lawsuit”). Daniele alleged that the tainted pepper was linked to a 2009 salmonella outbreak and that, as a result, Daniele ultimately recalled a substantial amount of its product and suffered economic losses.

Mincing answered the 2010 lawsuit and resolved its claim with Daniele in 2012. Wholesome did not answer, and it was defaulted on August 23, 2010. Penn-Star received notice of the 2010 lawsuit on or about June 16, 2010 and, on July 29, 2010, Penn-Star disclaimed coverage for several reasons and notified Wholesome that it would “neither defend nor indemnify you in the pending suit.” (Document No. 20-2 at p. 24). Wholesome did not defend itself and, on October 2, 2012, the Court entered default judgment against it in the amount of \$33,181,174.00 which was Daniele’s total loss opined by its economic expert including actual and future lost

profits as well as the direct expenses attributable to the product recall. Daniele now seeks to recover on its default judgment to the extent of Penn-Star's \$1,000,000.00 coverage of Wholesome.

While the fact and extent of Wholesome's liability to Daniele is established by the default judgment in the 2010 action, Daniele now stands in Wholesome's shoes as the insured in this direct action and is thus subject to any coverage defenses that Penn-Star has against Wholesome. See Clauson v. New England Ins. Co., 254 F.3d 331, 336 (1st Cir. 2001). The parties do not generally dispute the legal posture of this action. However, they do dispute the appropriate scope of discovery which has generated the following discovery motions:

(1) Daniele's Motion to Compel Penn-Star Insurance Company to Produce Privilege Log (Document No. 19);

(2) Penn-Star's Motion to Compel Production of Documents and a Privilege Log for Documents Withheld (Document No. 21);

(3) Penn-Star's Motion to Extend Discovery Deadlines (Document No. 23); and

(4) Daniele's Motion to Compel Defendant to Attend Rule 30(b)(6) Deposition and to Produce Certain Documents Listed on Privilege Log (Document No. 24).

Discussion

After reviewing the parties' submissions and considering the arguments made at the July 15, 2013 hearing, these Motions are resolved as follows:

1. Daniele's Motion to Compel Penn-Star Insurance Company to Produce a Privilege Log (Document No. 19) is DENIED as moot.

2. Penn-Star's Motion to Compel Production of Documents and a Privilege Log for Documents Withheld (Document No. 21) is GRANTED in part and DENIED in part as specified

below. Daniele shall, within twenty-one days, produce any additional responsive documents ordered produced herein and produce a privilege log as to any such responsive documents withheld on privilege grounds.

A. Request No. 1. GRANTED as to responsive documents exchanged between the parties in this action and between Daniele and Wholesome. DENIED to the extent the Request seeks such documents exchanged between Daniele and Mincing. Penn-Star has not met its burden of showing how such documents might be relevant to this distinct coverage litigation. In addition, even if any documents related to Mincing were relevant, Penn-Star's Request makes no effort to tailor its Request to potentially relevant documents and thus it is overbroad.

B. Request No. 2. DENIED. Daniele's Settlement Agreement with Mincing contains a confidentiality provision, and the 2010 lawsuit was terminated as to Mincing pursuant to a Dismissal Stipulation. Penn-Star has not shown any potential relevance of the Mincing Settlement Agreement to this coverage litigation that would cause the Court to compel its production. As to Orders and Pleadings in the 2010 lawsuit, they are public and accessible to Penn-Star. As to discovery materials, since Wholesome did not appear and defend the claim against it, there was no discovery in the 2010 lawsuit as to Wholesome. As to discovery regarding the Mincing claim, Penn-Star's Production Request for all such discovery from Daniele without any effort to narrow or tailor the Request to information relevant to claims or defenses in this coverage action is overbroad.

C. Request No. 11. GRANTED. Plaintiff shall produce all responsive documents in its possession, custody or control.

D. Request No. 16. DENIED. Penn-Star misquotes Daniele's response to this Request and fails to articulate any clear argument as to why Daniele's production of documents as to this Request is deficient.

E. Request No. 17. GRANTED with exception of any withheld and responsive privileged documents which shall be identified in a privilege log as provided in Fed. R. Civ. P. 26(b)(5).

F. Request No. 1 (Second Request). GRANTED in limited part. In its Motion, Penn-Star indicates that Daniele has agreed to produce the relevant insurance policies and argues that it is also entitled to production of all documents reviewed and relied upon by Mr. Almonte, one of Daniele's experts in the 2010 lawsuit. (Document No. 22 at p. 10). The only potentially responsive document reviewed and relied upon by Mr. Almonte was an "Acadia Payment Log" which shall be produced by Daniele. There is no

indication that Mr. Almonte reviewed Acadia's claim files, and Penn-Star did not specifically argue for the production of the claim files in its Motion and thus does not offer any basis for this Court to conclude that such files contain relevant, discoverable information or are within Daniele's possession, custody or control.

3. Penn-Star's Motion to Extend Discovery Deadlines (Document No. 23).

Penn-Star seeks to extend the discovery deadline to November 15, 2013. Daniele objects and accuses Penn-Star of stalling. In view of the additional discovery tasks ordered herein, the parties' unsuccessful but good faith mediation efforts last spring and the fact that this is a first extension request, Penn-Star's Motion is GRANTED in part over Daniele's Objection as follows:

All factual discovery will be closed by **October 31, 2013**.

Dispositive motions shall be filed by **November 30, 2013**, objection and cross-motion shall be filed by **December 15, 2013**; response to the cross-motion shall be filed by **December 31, 2013**; and reply shall be filed by **January 15, 2014**.

4. Daniele's Motion to Compel Defendant to Attend Rule 30(b)(6) Deposition and to Produce Certain Documents Listed on Privilege Log (Document No. 24).

Daniele's Motion to Compel deposition attendance is DENIED as moot in view of Penn-Star's representation in its opposition that it "has already agreed to attend such deposition at an adjourned date." (Document No. 28 at p. 1). As to the privilege log, Daniele moves to compel production of all documents withheld on the basis of "investigation into coverage" on the grounds that Penn-Star has not articulated a valid privilege. Penn-Star objects and contends that such documents were properly withheld as privileged under the work-product doctrine as prepared in anticipation of litigation.

Pursuant to Fed. R. Civ. P. 26(b)(5)(A), a party who withholds discoverable information based on a claim of privilege "must expressly make the claim" and describe the withheld items

“in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Penn-Star’s privilege log (Document No. 20-1) is deficient in that it does not expressly identify the applicable privilege. While I presume that “investigation into coverage” was intended to mean work product, that is not entirely clear from the log since “work product” is identified as the basis for withholding one of the logged documents. Also, the log does not provide sufficient information regarding the nature of the withheld documents and the job titles of the authors and recipients to allow a reasonable assessment of whether the work-product privilege might apply. Although technically deficient, the log is not so deficient that it should be deemed a waiver of privilege. However, Penn-Star is ORDERED to revise its privilege log within fourteen days to address these deficiencies and also to conduct a further review of the logged documents to ensure that there is a good-faith basis to claim work-product protection applying the analysis set forth in Milder v. Farm Family Cas. Ins. Co., No. 08-310S, 2008 WL 4671003 (D.R.I. Oct. 21, 2008).¹ If Plaintiff thereafter wishes to challenge the applicability of any claimed privileges, it may do so in a motion to compel after conferring in good faith with Penn-Star’s counsel as required by Fed. R. Civ. P. 37(a)(1).

Conclusion

As specified herein, Daniele’s Motion to Compel (Document No. 19) is DENIED as moot; Penn-Star’s Motion to Compel (Document No. 21) is GRANTED in part and DENIED in part;

¹ Penn-Star should particularly revisit those documents dated before it received notice of the 2010 lawsuit and those that identify Plaintiff’s counsel (Attorneys Millsom and Wollin) as the recipients.

Penn-Star's Motion to Extend (Document No. 23) is GRANTED in part; and Daniele's Motion to Compel (Document No. 24) is GRANTED in part and DENIED in part.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
August 23, 2013