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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 16**
H.P.S. MANAGEMENT COMPANY, Inc., and HENRY GRUBEL,	**NASSAU COUNTY**
Plaintiffs,	**Index No: 019847-10**
	Motion Seq. No. 11
-against-	**Submission Date: 3/22/12**
ST. PAUL SURPLUS LINES INSURANCE COMPANY; SEABURY & SMITH, Inc., MARSH & McLENNAN COMPANIES, Inc.; MARSH AFFINITY GROUP SERVICES; WILTON REASSURANCE LIFE COMPANY OF NEW YORK; THE TRAVELERS COMPANIES, Inc.; BABCHIK & YOUNG, LLP; JACK BABCHIK, individually, and as a principal of BABCHIK & YOUNG LLP,	
Defendants.	
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Papers Read on these Motions:

Notice of Motion, Affidavit in Support, Attachment and Exhibit.....x
Amended Notice of Motion, Amended Affidavit in Support, Attachment and Exhibits.....x
Plaintiffs' Memorandum of Law in Support.....x
Affirmation in Opposition, Affidavit in Opposition and Exhibit.....x
Reply Affidavit and Attachment.....x

This matter is before the court on the motions by Plaintiffs H.P.S. Management Company, Inc. ("HPS") and Henry Grubel ("Grubel") ("Plaintiffs"), filed on February 22, 2012 and submitted on March 22, 2012, respectively. For the reasons set forth below, the Court 1) grants Plaintiffs' motion for a Judicial Subpoena Duces Tecum directing non-party Michael A. Mark, Examiner, New York State Department of Financial Services, 25 Beaver Street, New York, New York 10004 to produce the documents requested in the proposed Judicial Subpoena

& Judicial Subpoena Duces Tecum, annexed as an exhibit to Plaintiffs' Reply Affidavit, to Plaintiffs' counsel in the manner set forth herein, on or before May 25, 2012; and 2) denies Plaintiffs' motion for an Order directing non-party Michael A. Mark to appear for a deposition. **In light of the representation of counsel for non-parties Michael A. Mark and the New York State Department of Financial Services regarding their willingness to produce the requested documents, the Court is directing that the documents be produced without the need for the Court to sign the proposed Subpoena and for Plaintiffs to serve it on those non-parties.**

BACKGROUND

A. Relief Sought

Plaintiffs move, pursuant to CPLR § 2307, for the issuance of a Judicial Subpoena Duces Tecum by the Court for 1) the production of discovery and inspection of the documentation related to Consumer Services Bureau ("CSB")-503831, CSB-498016, CSB-771056, all of which arose from a November 28, 2006 letter from Jean Thomas, and 2) the deposition of Michael A. Mark regarding the requested documentation.

The Office of Eric T. Schneiderman, Attorney General of the State of New York, counsel for non-parties New York State Department of Financial Services ("DFS") and its employee Michael Mark ("Mark"), opposes the motion.[1]

B. The Parties' History

The parties' history is set forth in numerous prior decisions of the Court, and the Court incorporates those prior decisions by reference as if set forth in full herein. As noted in the prior decisions, the Amended Complaint ("Complaint") described the nature of this action as follows:[2]

> These actions sounding in breach of contract, legal malpractice, fraud and other related torts all arose out of Plaintiffs' annuity sales activities and the bad faith administration of Plaintiffs' Insurance Agents Errors and Omissions insurance policy. The willful actions of the Defendants to silence Plaintiffs were a cause of the essential

[1] Counsel for DFS and Mr. Mark affirms that, while the instant motion also seeks the deposition of former employee Bernard D. Isser ("Isser"), upon information and belief, Plaintiff has not served Mr. Isser with the Amended Notice of Motion. Counsel also affirms that, as Mr. Isser is a former employee, DFS has no control over him and cannot accept service of any deposition subpoena served on him at his former place of business

[2] DFS and Mark have provided 2 copies of the Amended Complaint filed February 3, 2011 (Ex. A to Logue Aff. in Opp.). As noted in the Court's prior decisions dated October 26, 2011 and March 15, 2012, Plaintiffs filed a Second Amended Complaint, which is not attached as an exhibit to the motion papers. The allegations in the two complaints are similar, however, and the variations in the Second Amended Complaint relate to the allegations against Defendants B & Y.

demise of Plaintiffs' once thriving annuity sales business. Plaintiffs seek a declaratory judgment as to coverage, with issuance of a current Errors and Omissions Policy together with money damages against Defendants in an amount to be proven at trial, but believed to be in excess of $50 million in compensatory damages, plus if allowed, punitive damages, costs, interest, and attorney fees.

Plaintiffs H.P.S. and Grubel, the sole shareholder and officer of HPS, are licensed by the New York State Insurance Department ("NYSID") to sell Life Insurance and Annuities. Grubel is also an attorney licensed to practice law in New York.

Plaintiffs allege as follows:

From on or before 1990 until 2000, Plaintiffs had sold approximately 1,000 annuities for Royal Life Insurance Co. of N.Y. ("Royal"). In 2000, North American Life Co. of N.Y. ("NANY") purchased RLNY and assumed its obligations. NANY refused to permit Plaintiffs to service their annuity accounts, and assigned Plaintiffs' customers to other agents. In or about 2004, NANY went into "RUN-OFF", which means that the company no longer underwrites new business, but continues to handle and pay claims. On or about December 30, 2004, Best downgraded the financial strength rating of NANY from A to A-, in part because NANY was going into RUN-OFF.

In or about 2004, Wilton Re Holdings Ltd. ("Wilton Ltd.") and its subsidiary Wilton Re U.S. Holdings, Inc. ("Wilton Inc.") were formed ("Wilton Re Start-Ups"). MMC Capital, Inc. via Trident III, LP, a subsidiary of Marsh & Mac, was one of the largest investors in the Wilton Re Start-Ups. In 2005, Marsh & Mac entered into a settlement agreement with New York State in connection with Marsh & Mac's alleged acceptance of payoffs from insurance companies in exchange for steering business to them, submission of false quotes and conflicts of interest.

In January of 2006, Standard & Poor's ("S&P") downgraded NANY's financial strength from "AA" to "BBB." In June of 2006, Wilton Ltd. acquired NANY from its owner, Sammons Enterprises, Inc. Citigroup provided financial advice to NANY in connection with this acquisition. Citigroup and Travelers were co-defendants in an action in the Eastern District of New York ("Federal Action") in which Grubel represented the plaintiff. During the Federal Action, it was revealed that Travelers unlawfully paid sales commissions to an unlicensed entity.

On or about August 15, 2006, Plaintiffs sent a letter to their annuity customers ("Plaintiffs' Letter"), advising those customers of issues regarding letters they may have received from NANY. Specifically, Plaintiffs' Letter advised customers that there was a "big

problem" with the NANY letter's language which stated that if the customers failed to return a signed and dated copy of the NANY letter, their annuity contract would mature and be "paid out according to the provisions stated in the contract." NANY, which was now owned by Wilton Ltd., responded via a letter dated August 28, 2006. In that letter ("NANY Letter"), NANY advised Plaintiffs, *inter alia*, that 1) Plaintiffs' Letter was inaccurate with respect to its corporate designations, and likely to confuse policyholders about the distinction between NANY and North American Company for Life and Health Insurance ("North American"), NANY's parent company; 2) several statements in Plaintiffs' Letter were "demonstrably false" and "apparently...intended to induce policyholders to replace their NANY policies regardless of their individual circumstances;" and 3) directed Plaintiffs to "immediately cease and desist any further publication or dissemination of any false or misleading information concerning NANY or North American including, but not limited to, the attached letter and the matters referenced therein." Plaintiffs sent the NANY Letter, which Plaintiffs characterize as "threatening," to its Errors and Omissions ("E&O") Carrier, St. Paul, as required by the E&O Policy.

On or about September 20, 2006, S&P withdrew its "BBB" rating and issued an "NR" (Not Rated) financial strength rating for NANY. The transfer of NANY by Wilton Ltd. to Wilton Inc. occurred, effective September 27, 2006. As a result, Wilton Re assumed NANY's existing obligations, which included the RLNY annuities, as successor corporation to NANY. Weiss Ratings gave Wilton Re a "D-" rating and described it as one of the twenty (20) worst annuity companies in the United States.

By letter dated November 28, 2006 to the NYSID ("Customer Letter"), a customer of Plaintiffs requested the status of "North American Company for Life and Health Insurance, (NANY)" and said that she was "very concerned" as a result of a letter she received from Grubel advising her that she "should consider a tax-free rollover/transfer of my account balance out of NANY." The Customer also advised the NYSID that she had contacted NANY which assured her that it is still doing business in New York and she had "nothing to worry about."

By notice to HPS dated December 21, 2006, Marsh Affinity advised Plaintiffs that St. Paul would not renew Plaintiffs' policy, policy number 560JB4798 ("E&O Policy") which was scheduled to expire on January 1, 2007. St. Paul did agree to extend coverage under the E&O Policy until March 7, 2007 for an additional premium.

By letter dated February 20, 2007 ("NYSID Letter"), the NYSID advised Grubel that it

had received the Customer Letter, which it characterized as a "complaint," and asked Grubel to provide the NYSID with a detailed statement of facts as to his position in the matter. The NYSID also asked Grubel 1) how many other individuals were provided with the Letter, as well as press releases and an S&P Insurer Profile, by Plaintiffs; and 2) which insurance companies Plaintiffs were considering as replacements.

Plaintiffs sent the NYSID Letter to Travelers, at the direction of St. Paul. In or about February of 2007, Travelers/St. Paul retained Defendant Babchik & Young, LLP. ("B&Y"), a law firm of which Defendant Jack Babchik ("Babchik"), an attorney, is a principal. B&Y and Babchik are referred to collectively as the B&Y Lawyers. Travelers sent to Plaintiffs a Reservation of Rights Letter ("ROR Letter") dated March 6, 2007, which reflected that the subject of the ROR Letter was the Customer and NANY. Travelers, on behalf of St. Paul, advised Plaintiff that the ROR Letter "sets forth our position as to coverage and advises you of various provisions of the Policy that may impact the scope of coverage available for this matter." The Complaint alleges that the ROR "construed Plaintiffs' claims to be a 'disciplinary proceeding', which reduced Plaintiffs' defense costs to a maximum of $10,000, from $1 million. The ROR Letter does not expressly state that Travelers construed the complaints to be a disciplinary proceeding. The ROR Letter does cite to relevant provisions in the Disciplinary Proceedings Coverage section of the policy, makes reference to the Customer's letter to the NYSID and states that St. Paul reserves its rights under the cited policy provision. On October 25, 2007, Babchik advised Plaintiffs that he would ask Travelers to assign new counsel to Plaintiffs. Plaintiffs subsequently retained new counsel at their own expense. Plaintiffs allege that, following the Marsh notification that Plaintiffs' E&O Policy would not be renewed, Plaintiffs have been unable to obtain "affordable and appropriate" E&O insurance, except for one year, and they cannot sustain their business without such insurance.

In support of the instant motion, Grubel affirms that Plaintiffs seek discovery and inspection of documents related to the Customer Letter (Ex. Q to Grubel Aff. in Supp.), as well as the non-party depositions of CSB Examiners Mark and Isser. Grubel affirms that the NYSID and State of New York Banking Department were recently combined into one agency titled the New York State Department of Financial Services (DFS). The relevant correspondence reflects that Mark was the Examiner who oversaw the processing of two relevant claims (CSB-503831 and CSB-771056), and Isser was the Examiner who oversaw the processing of a third relevant

claim (CSB-498016), all of which arose out of the Customer Letter. Grubel affirms that Plaintiffs seek this documentation on the grounds that it will help resolve questions of fact relating to the Customer Letter. Plaintiffs provide copies of relevant NYSID correspondence (Exs. A-R), which reflects that Mark was the signatory on most of the letters received by Plaintiffs or their counsel. Plaintiffs submit that the requested depositions and documentation, which is in the custody of the DFS, are necessary "to help resolve numerous questions of fact regarding [the Customer Letter] and the three [CSB] inquiries that her letter spawned, all of which are implicated in this litigation" (Grubel Aff. in Supp. at ¶ 12).

In opposition to the motion, Mark affirms that he is employed by DFS as an Insurance Examiner in the Consumer Assistance Unit of DFS' New York City office. In that position, he investigates consumer complaints received against licensees of DFS which include, *inter alia*, insurance companies, insurance agents, brokers and adjusters. Mark avers that he was the examiner assigned to the inquiry prompted by the Customer Letter, and opened an investigation under file CSB-503831. File CSB-498016, regarding the same Customer Letter, was opened by an employee who is no longer employed by DFS. Mark also opened file CSB-771056 in connection with Grubel's license renewal application.

Mark affirms that the investigation consisted of a series of correspondence with Grubel and an insurance company, which included requests for various documents. During the investigation, Mark reviewed the documents and spoke to counsel for Grubel. Mark avers that he did not interview any witnesses and, other than the information included in the documents he received, has no personal knowledge of the relevant facts. Mark affirms that he never spoke to Grubel or the Customer, and the investigation was closed without any disciplinary action being taken. Mark affirms that, due to its large workload, it is DFS' policy to "resist[] involvement in private litigation to which [DFS] is not a party, and specifically opposes providing staff to testify in such litigation" (Mark Aff. in Opp. at ¶ 3). Mark affirms that DFS does, however, comply with requests for production of DFS records, whether through the Freedom of Information Law ("FOIL") or court-ordered subpoena.

Counsel for DFS and Mark ("Counsel") affirms that DFS "questions" whether the documents sought are relevant to the instant litigation (Logue Aff. in Opp. at ¶ 4). Counsel affirms, however, that DFS has no objection to producing, for inspection, documentation related to the DFS files that Plaintiffs have requested. Counsel also affirms, upon information and

belief, that DFS previously advised Plaintiffs that they could obtain the requested documentation by making a FOIL request.

Counsel affirms, further, that DFS objects to producing Mark, an Insurance Examiner with DFS, for a non-party deposition. Counsel submits that Plaintiffs have failed to demonstrate what information they can obtain through that deposition, particularly in light of Mark's sworn statement that he never spoke to or interviewed witnesses, including Grubel. Counsel submits, further, that requiring the deposition of Mark, a non-party, would unduly burden DFS in light of its significant workload.

In reply, Grubel affirms that he has provided a new proposed Judicial Subpoena & Judicial Subpoena Duces Tecum ("Subpoena") which 1) deletes the name of Isser, who is no longer employed by DFS; 2) adds a statement of the reasons for the Subpoena; and 3) states that Electronically Stored Information regarding the three CSB inquiries is also being sought. Grubel affirms that, in light of the fact that Isser is no longer employed by DFS, Plaintiffs will subpoena Isser directly, if at all.

Grubel also disputes Counsel's assertion that Mark "only collected documentation" during the investigation (*see* Logue Aff. in Opp. at ¶ 5). Grubel submits that a review of the correspondence provided reveals that Mark also made numerous demands, and notes that Mark does not affirm that he "only collected documentation." Grubel also contends that the reasons provided by DFS in opposition to Plaintiffs' motion "are neither relevant nor material" (Grubel Reply Aff. at ¶ 10), and submits that the information sought from Mark is unavailable from any other source.

C. The Parties' Positions

Plaintiffs submit that the Court should grant the instant motion on the grounds that the disclosure sought by Plaintiffs is unavailable from any party, or from any other independent source, and is relevant to the issues involved in this litigation.

DFS and Mark do not object to producing the requested documentation, but object to Plaintiffs' application to depose Mark, a non-party, in light of Mark's affidavit in which he affirms that his investigation was limited to collecting documentation, and in consideration of the burden on DFS if Mark is required to appear for a deposition.

RULING OF THE COURT

CPLR § 2307 provides as follows:

> A subpoena duces tecum to be served upon a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things, shall be issued by a justice of the supreme court in the district in which the book, paper or other thing is located or by a judge of the court in which an action for which it is required is triable. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the library, department, bureau or officer having custody of the book, document or other thing and the adverse party. Such subpoena must be served upon such library, or such department or bureau of such municipal corporation or of the state or an officer having custody of the book, document or other thing and the adverse party at least twenty-four hours before the time fixed for the production of such records unless in the case of an emergency the court shall by order dispense with such notice otherwise required. Compliance with a subpoena duces tecum may be made by producing a full-sized legible reproduction of the item or items required to be produced certified as complete and accurate by the person in charge of such library, department or bureau, or a designee of such person, and no personal appearance to certify such item or items shall be required of such person or designee, unless the court shall order otherwise pursuant to subdivision (d) of rule 2214 of this chapter. Where a stipulation would serve the same purpose as production of the book, document or other thing and the subpoena is required because the parties will not stipulate, the judge may impose terms on any party, including the cost of production of the book or document, and require such cost to be paid as an additional fee to the library, department or officer.

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *See Allen v. Cromwell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968); *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Quevedo v. Eichner*, 29 A.D.3d 554 (2d Dept. 2006). The Court of Appeals in *Allen, supra*, held that "[t]he words 'material and necessary' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Id. See also Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 746 (2000); *Spectrum Systems International Corporation v. Chemical Bank*, *supra*; *Parise v. Good Samaritan Hosp.*, 36 A.D.3d 678 (2d Dept. 2007). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. *Spectrum Systems*, *supra*, at 376, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. paragraphs 3101.01-3101.03.

CPLR § 3103(a) provides that "a court may make a protective order conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts." The CPLR also establishes three categories of protected materials, also supported by policy considerations: 1) privileged matter, which is immune from discovery pursuant to § CPLR 3101(b), 2) attorney's work product, which is also immune from discovery pursuant to CPLR § 3101(c), and 3) trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means, pursuant to CPLR § 3101(d)(2). *Spectrum Systems,* 78 N.Y.2d at 376-377. The burden of establishing any right to protection is on the party asserting it, the protection claimed must be narrowly construed and its application must be consistent with the purposes underlying the immunity. *Spectrum Systems* at 377.

The purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. *Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 112 (1st Dept. 2006). The court should grant a motion to quash a subpoena duces tecum only when the materials sought are utterly irrelevant to any proper inquiry. *Id.*; *New Hampshire Ins. Co. v. Varda, Inc.*, 261 A.D.2d 135 (1st Dept. 1999); *Matter of Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 341 (1st Dept. 1997). The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed. *Gertz v. Richards*, 233 A.D.2d 366 (2d Dept. 1996).

While CPLR § 3120 was amended effective September 1, 2003 to dispense with the requirement of a motion and require only the service of a subpoena duces tecum on a non-party witness for production of documents, the subpoena must specify the time, place and manner of making the inspection, copy, test or photograph, and set forth individually or by category the items to be inspected and describing each item and category with reasonable particularity. *Velez*, 29 A.D.3d at 109. The amendment did not change the requirement of CPLR § 3101(a)(4) that, where disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. *Id.* at 111.

In *Kooper v. Kooper*, 74 A.D.3d 6 (2d Dept. 2010), the Second Department discussed the issue of whether it is appropriate to continue to require a showing of special circumstances with

respect to nonparty discovery. The Second Department concluded that, in light of its elimination from CPLR § 3101(a)(4), further application of the special circumstances standard is disapproved, except with respect to discovery from expert witnesses, for which applicable statutory language remains (*see* CPLR § 3101(d)(1)(iii)). *Id.* at 16. Thus, on a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be "special circumstances." *Id.*

The Court in *Kooper* declined to set forth a comprehensive list of circumstances or reasons that would be deemed sufficient to warrant nonparty discovery in every case, noting that circumstances vary from case to case. 74 A.D.3d at 17. The supervision of discovery, settling of reasonable terms and conditions for disclosure, and determination of whether a particular discovery demand is appropriate are all matters within the discretion of the trial court, which must balance competing interests. *Id.*, citing, *inter alia*, *Wander v. St. John's Univ.*, 67 A.D.3d 904, 905 (2d Dept. 2009).

The Court grants Plaintiffs' motion for a Judicial Subpoena directing Michael A. Mark, Examiner, New York State Department of Financial Services, 25 Beaver Street, New York, New York 10004 to provide documentation relevant to the CSB files discussed herein, as set forth in the proposed Subpoena attached to Plaintiffs' reply papers. The Court concludes that the documentation, which relates to the Customer Letter that is central to this litigation, is relevant and cannot be obtained from another source. The Court, however, denies Plaintiffs' motion for a subpoena directing Mark to testify at a deposition, in light of Mark's affidavit regarding the nature of his involvement in the investigation at issue, including his sworn assertion that he did not interview witnesses.

Pursuant to CPLR § 2307, compliance with the Subpoena Duces Tecum may be made by producing a full-sized legible reproduction of the item or items required to be produced certified as complete and accurate by the person in charge of such library, department or bureau, or a designee of such person, and no personal appearance to certify such item or items shall be required of such person or designee. Mark is directed to produce the requested documents to Plaintiffs' counsel on or before May 25, 2012. In light of the affirmation of Counsel expressing DFS' willingness to produce the requested documents, the Court has issued this direction in lieu of signing the Subpoena and anticipates compliance with the Subpoena as directed herein. If

Mark/DFS does not comply with the Subpoena by the designated date, Plaintiffs' counsel is directed to so notify the Court by letter.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on May 31, 2012 at 9:30 a.m.

DATED: Mineola, NY
May 9, 2012

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.