Estee Lauder Inc. v One Beacon Ins. Group, LLC

2013 NY Slip Op 30762(U)

April 12, 2013

Sup Ct, New York County

Docket Number: 602379/05

Judge: Carol R. Edmead

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SCANNED ON 4/15/2013 [* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 602379/2005
ESTEE LAUDER INC.
vs.
ONEBEACON INSURANCE GROUP
SEQUENCE NUMBER : 010
COMPEL

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

FILED
APR 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Motion sequence 010, 011 and 012 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that plaintiff Estee Lauder Inc.'s discovery motion (motion seq. no. 010) is granted only to the extent that defendants OneBeacon Insurance Group, LLC, OneBeacon Insurance Company, and OneBeacon America Insurance Company are ordered, in accordance with this decision, to produce documents relating to attorney's fees owed to plaintiff during the period February 2009 and April 2012; and it is further

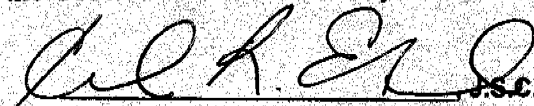
ORDERED that defendants OneBeacon Insurance Group, LLC, OneBeacon Insurance Company, and OneBeacon America Insurance Company's motion for a protective (motion seq. no. 011) is denied; and it is further

ORDERED that plaintiff Estee Lauder's Inc.'s motion (motion seq. no. 012) to unseal papers filed in connection with motion seq. no. 010, dated November 16, 2012, is granted; and it is further

ORDERED that the County Clerk, upon service on him of a copy of this order, is directed to unseal all sealed exhibits to motion seq. no 10; and it is further

ORDERED that counsel for plaintiff shall serve a copy of the Order with Notice of Entry within twenty (20) days of entry on all counsel.

Dated: 4.12.2013


J.S.C.

HON. CAROL EDMEAD

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---X

ESTEE LAUDER INC.,

Plaintiff,

-against-

ONE BEACON INSURANCE GROUP, LLC (successor in-interest to CGU INSURANCE, f/k/a EMPLOYERS GROUP OF INSURANCE COMPANIES, EMPLOYERS COMMERCIAL UNION INSURANCE CO. OF AMERICA and COMMERCIAL UNION INSURANCE COMPANY), and ONEBEACON INSURANCE COMPANY and ONEBEACON AMERICA INSURANCE COMPANY,

Defendants.

---X

Index №.: 602379/05
Motion Seq. Nos.
010, 011, 012

DECISION AND ORDER

FILED
APR 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

CAROL R. EDMEAD, J.S.C.:

In a breach of contract and declaratory judgment action, plaintiff Estee Lauder Inc. (Estee Lauder) moves, pursuant to CPLR 3124 and CPLR 3126, seeking an order compelling defendants OneBeacon Insurance Group, LLC, OneBeacon Insurance Company, and OneBeacon America Insurance Company (collectively, OneBeacon) to produce documents, or, alternatively, for an order for sanctions against OneBeacon for failing to preserve documents (motion seq. no. 010). OneBeacon moves for an order, pursuant to CPLR 3103, precluding eight categories of discovery (motion seq. no. 011). Finally, Estee Lauder moves to unseal papers filed in support of motion seq. no. 010 (motion seq. no. 012). The motions are consolidated for disposition.

BACKGROUND

Estee Lauder brought this action to compel OneBeacon, and its predecessors, to pay for costs and indemnify it for underlying claims brought by the State of New York relating to the

[* 3]

alleged dumping of hazardous materials in two Long Island landfills, one in Blydenburgh and the other in Huntington. Estee Lauder settled the Huntington landfill claims with the State for $2.4 million. With respect to the Blydenburgh landfill, on March 26, 1999, the State and Estee Lauder entered into a "Tolling Agreement," which tolled the statutory period the State had to file its claim. On May 17, 2001, the State filed a complaint in federal court against Hickey's Carting, Inc. (Hickey's Carting), another party allegedly involved in dumping hazardous materials in the Blydenburgh landfill. Hickey's Carting brought a third-party complaint against Estee Lauder, and the State later added Estee Lauder as a primary defendant (*see New York v. Hickey's Carting, Inc.*, 380 F Supp 2d 108 [ED NY, 2005]).

OneBeacon refused to defend or indemnify Estee Lauder for these claims. Estee Lauder filed its complaint on June 30, 2005, alleging four causes of action. The first cause of action alleges that OneBeacon is liable for damages arising from the Huntington landfill under a theory of breach of contract, as OneBeacon failed to perform under the insurance policy it issued to Estee Lauder by refusing to provide a defense, participate in settlement talks, or indemnify Estee Lauder. The second cause of action is for breach of contract relating directly to the Blydenburgh landfill claim, while the third cause of action relates to the Hickey's Carting action. Finally, in the fourth cause of action, Estee Lauder seeks a declaratory judgment that OneBeacon must indemnify it for any remaining claims stemming from the Blydenburgh claim and the Hickey's Carting action, and that OneBeacon owes them for any future attorney's fees accrued in the Hickey's Carting action.

By an order dated December 11, 2006, this court granted OneBeacon summary judgment dismissing the complaint and denied Estee Lauder partial summary judgment on its third and

fourth causes of action, finding that OneBeacon properly disclaimed coverage to Estee Lauder on the basis of untimely notice. The Appellate Division, by an order dated February 19, 2009, reversed, denying OneBeacon's summary judgment motion, rejecting its untimely notice argument, and granting OneBeacon partial summary judgment on its third and fourth causes of action (*Estee Lauder Inc. v OneBeacon Ins. Group*, LLC, 62 AD3d 33 [1st Dept 2009]).

Pursuant to its grant of summary judgment on the third cause of action, the Appellate Division held that Estee Lauder is entitled to "all posttender reasonable fees and expenses necessarily incurred in defense of [the Hickey's Carting action], plus prejudgment interest accruing from the date of OneBeacon's repudiation of its duty to defend" (*id.* at 40 n 6). Moreover, the Court noted that its grant of declaratory judgment only applied to future defense costs related to the Blydenburgh claim and the Hickey's Carting action, as Estee Lauder had only moved on that part of its fourth cause of action, and not the part that seeks indemnification for any future settlement or loss (*id.*). For reasons it did not explain to the Court, Estee Lauder had not moved for summary judgment on its first cause of action, for breach of contract relating to the Huntington claim, or the second cause of action, for breach of contract relating to the Blydenburgh claim (*id.*).

On April 8, 2011, Estee Lauder filed a second amended complaint containing new ad damnums for the second and third causes of action, but which did not contain a cause of action for declaratory judgment. By order dated February 23, 2012, this court granted, in part, Estee Lauder's motion for leave to amend, allowing it to file a third amended complaint that added a cause of action for bad faith coverage denial pertaining to the payment of defense costs (2012 NY Slip Op. 30474[U], 2012 WL 757029, 2012 NY Misc LEXIS 902 [Sup Ct, NY County

[* 5]

2012]). While the court denied Estee Lauder leave to bring a bad faith claim with regard to the initial disclaimer of coverage, it held that the delay of approximately 20 months between Estee Lauder providing unredacted attorney invoices and OneBeacon's payment, which was still pending at the time of the decision,[1] was sufficient to grant leave to amend with respect to the second bad faith claim (*id.* at *6). The court held:

> "While OneBeacon may have defenses to Lauder's proposed fifth cause of action, OneBeacon's failure to pay any of Lauder's defense costs, to date, viewed in the context of the Appellate Division's order that reasonable and necessary costs be paid promptly, shows that Lauder's proposed fifth cause of action is not palpably insufficient as a matter of law"

(*id.*).

This bad faith claim is at the center of these three consolidated motions. In its discovery motion, motion seq. no. 010, Estee Lauder seeks documents related to OneBeacon's delay in paying the attorney's fees that are the subject of the bad faith claim, a function that Estee Lauder characterizes as being part of OneBeacon's ordinary business. In its motion for a protective order, motion seq. no. 011, OneBeacon asserts attorney-client privilege to preclude Estee Lauder from obtaining these documents, arguing that all of the documents were prepared as part of its larger litigation strategy. Aside from privilege, OneBeacon seeks protection against four other categories of disclosure: 1) settlement discussion content; 2) other policyholder information; 3) further written discovery; and 4) any depositions of OneBeacon beyond "one additional day." Finally, in motion sequence no. 12, Estee Lauder seeks to unseal the certain documents which both parties rely on in supporting and opposing motion seq. no. 10. OneBeacon has marked the documents in question as "confidential" and the motions were filed under seal pursuant to an

[1] Subsequent to the courts decision, OneBeacon made payment on the invoices.

order issued by the court in 2006.

DISCUSSION

I. Estee Lauder's Motion to Unseal

On the application of both parties, the court entered a protective and sealing order on February 21, 2006 (the Sealing Order). The Sealing Order provides, among other things, that:

> At the time of disclosure, any Party may designate as 'Confidential' any information produced or disclosed in discovery pursuant to the CPLR when the Party reasonably believes the material contains commercially sensitive, proprietary, or trade secret information, or contains other non-public confidential research, development, commercial, personal, or similar business information, including information that a Party is contractually or legally obligated to keep confidential . . . . Any Party may request at any time that a 'Confidential' designation be removed from any document or information and, if another objects, seek relief from the Court by motion. If the propriety of any designation of documents or information as "Confidential" is disputed, the information shall be treated as designated until the dispute is resolved by the court or by agreement of the parties.

(Sealing Order, ¶ 2).

Pursuant to the Sealing Order, Estee Lauder's discovery motion (motion seq. no. 10) was filed under seal, as Estee Lauder submitted in support discovery materials that OneBeacon designated as confidential. Specifically, One Beacon has marked as confidential: 1) the deposition of Thomas Ryan (Ryan), president of non-party, Resolute Management (Resolute), OneBeacon's agent and claims administrator; 2) all exhibits to Ryan's deposition; 3) the deposition of Stuart McKay (Mckay), an officer of OneBeacon; 4) all exhibits to McKay's deposition; 5) Estee Lauder's letter to the court dated September 5, 2012; and 6) OneBeacon's letter to the Court dated September 7, 2012.

Estee Lauder argues that OneBeacon designated these materials as confidential for

[* 7]

tactical purposes. Moreover, Estee Lauder contends, citing *Danco Labs. v Chemical Works of Gedeon Richter* (274 AD2d 1 [1st Dept 2000]), that, in order for court documents to be sealed, they must rise to the level of a trade secret. *Danco* actually holds that, under 22 NYCRR 216.1 (a), "a sealing order should rest on a sound basis or legitimate need to take judicial action," and that protecting genuine trade secrets constitutes a sound basis (274 AD2d at 8). However, *Danco* does make clear that the burden to establish good cause is on the party arguing in favor of sealing documents (*id.*).

As to its argument that OneBeacon's designations were made for tactical reasons, Estee Lauder argues that OneBeacon seeks to create the impression that its readjustment of Estee Lauder's claim was not made arbitrarily, but through a sophisticated and complex process that needs to be protected from public view.

In opposition, OneBeacon concedes that portions of the Ryan and McKay depositions do not involve confidential material, despite the fact that they marked as confidential each page of both depositions. OneBeacon argues that, as both Ryan and McKay testified as to matters dealing with OneBeacon's reinsurance, that it has a legitimate interest in protecting this information. Moreover, OneBeacon claims that it is contractually obligated to protect this information, citing its Administrative Services Agreement, which it submitted with its motion for a protective order. It does not, however, elaborate as to how, precisely, unsealing the documents would cause it to violate the agreement. OneBeacon also cites to *Karta Indus. v Insurance Co. of State of Pa.* (258 AD2d 375 [1999]), a case that actually undermines its position. *Karta Indus.* held that "[t]he payment or rejection of claims is a part of the regular business of an insurance company" (*id.* at 376 [internal quotation marks and citation omitted]).

[* 8]

The court has reviewed the portions of Ryan and McKay's depositions and none of it rises to the level of good cause required to justify a sealing order under 22 NYCRR 216.1 (a). OneBeacon argues that sections of Ryan's deposition were properly designated as confidential, as he discussed Resolute's use of a third-party information technology vendor (Ryan Deposition, at 41), interaction between the vendor and counsel (*id.* at 81-91), a general discussion of the information stored by the vendor (Ryan Deposition, at 91), a discussion of how Resolute inputs data relating to payments OneBeacon makes to its insureds such as Estee Lauder (*id.* at 93-96). OneBeacon has made no showing why the publication of any of this information is commercially sensitive, or a trade secret. Moreover, OneBeacon fails to show how publication of this information would violate the Administrative Services Agreement that it does not submit in opposition to this motion.

Finally, OneBeacon argues, citing *Pansy v Borough of Stroudsburg* (23 F3d 772 [3d Cir 1994]),[2] that it relied on the Sealing Order in providing discovery. However, OneBeacon has not been injured if, relying on the misapprehension that non-confidential material would be covered by the Sealing Order, it provided discovery it was required to provide under the CPLR 3101. As such, its argument as to reliance on the Sealing Order is unavailing. As OneBeacon has failed to provide a basis justifying the confidentiality designations for the subject discovery, Estee Lauder's motion to unseal is granted.

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[2] *Pansy*, in discussing the standard for considering motions to modify confidentiality orders under the Federal Rules of Civil Procedure, held that

> "one of the factors the court should consider in determining whether to modify the order is the reliance by the original parties on the confidentiality order. The parties' reliance on an order, however, should not be outcome determinative, and should only be one factor that a court considers when determining whether to modify an order of confidentiality"

(23 F3d 772 at 790).

II. Estee Lauder's Motion for Sanctions

Esteee Lauder seeks "readjustment" documents from the Appellate Divisions's decision in February 2009 until OneBeacon made payments to Estee Lauder in April 2012, contending that these documents are relevant to its claim for post-filing bad faith. Estee Lauder uses "readjustment documents" to refer to all documents concerning the availability of coverage, and those concerning the process of readjusting Estee Lauder's claim during the period relevant to the bad faith claim, that is, between the Appellate Division's decision in February 2009 and OneBeacon's payment to Estee Lauder in April 2012.

The crux of Estee Lauder's bad faith claim is that OneBeacon failed to timely pay the reasonable attorney's fees it owed to Estee Lauder on the Blydenburgh claim and the Hickey's Carting action, as it instead tried to reach a global settlement, including on the claims related to the Huntington landfill, which Resolute had determined that it owed coverage on under the logic of the Appellate Division decision. Estee Lauder characterizes the failure to promptly pay attorney's fees, while it pursued a global resolution, as Onebeacon attaching impermissible strings to payments it was clearly obligated to make. The documents that are the subject of motion seq. no. 10 are related to OneBeacon's decisions regarding payment of attorney's fees in the period between February 2009 and April 2012.

Specifically, Estee Lauder contends that they are entitled to all of the following documents, or categories of document, which, it further contends, existed at one time, according to the testimony of OneBeacon and Resolute, OneBeacon's claims administrator: 1) the written recommendations as to the disposition of the readjustment process; 2) the large payment requests as submitted to OneBeacon; 3) constituent documents comprising the compilation document

which was available for reference during the readjustment process; 4) the agendas and notes taken at OneBeacon meetings referring to Estee Lauder's claim; 5) adjustment period correspondence concerning justifications for delaying payment to Estee Lauder, excluding any correspondence with litigation counsel solely respecting litigation strategy and tactics; 6) communications purporting to express the approval of counsel of any aspects of the readjustment process to the extent OneBeacon's claims handlers relied on such approval; 7) the result of any review conducted by counsel of Estee Lauder defense invoices to the extent that such results were considered by OneBeacon's claims handlers in their post-filing investigation; 8) documents concerning OneBeacon's first investigation, before the involvement of Resolute, of the facts OneBeacon contends it needs to revisit as part of its readjustment investigation; 9) the progress notes generated during the readjustment period.

With respect to the first category of documents, written recommendations as to the disposition of the readjustment process, Estee Lauder submits deposition testimony from Resolute's Ryan that Ed Albanese (Albanese), the account manager involved in Estee Lauder's claim, sent him correspondence and documents containing such recommendations (Ryan Deposition, at 60). As to the second, the large payment request form, Estee Lauder submits portions of Ryan's deposition in which he discusses the existence of such a form generally, as a part in the process of OneBeacon making a payment on a claim, such as the one OneBeacon made to Estee Lauder in April 2012 (*id.* at 96-97; 101-104).

To substantiate the third category, documents comprising the compilation document, Estee Lauder again submits portions of Ryan's deposition, in which Ryan testified that he thought, but was not sure, that the compilation document provided guidelines for evaluating

[* 11]

claims, although he was not sure that the document was bound together and specifically denominated as a "compilation document" (*id.* at 82-83, 96-97, 233-234, 240-241). As to the fourth category, the agendas and notes taken at OneBeacon meetings referring to Estee Lauder's claim, Estee Lauder submits deposition testimony from Ryan, in which he states that agenda from quarterly meetings were distributed electronically (*id.* at 14-15), and from OneBeacon's McKay, who testified that he scanned his notes from these meetings in order to preserve an electronic record of his impressions (McKay's Deposition, at 27-28, 41-45).

As to the fifth category, for adjustment period correspondence concerning justifications for delaying payment to Estee Lauder, Estee Lauder submits a portion of McKay's deposition in which he testified that OneBeacon's Albanese had emailed him (*id.* at 15), and a portion from Albanese's deposition in which he talks about the possible culpability of Whitman Packaging Corp. (Whitman), a subsidiary of Estee Lauder, that was allegedly involved in dumping materials in the Blydenburgh landfill (Albanese Deposition, at 125). The court notes that, clearly, this testimony does not establish the existence of correspondence concerning justifications for delaying payment to Estee Lauder. While Esteee Lauder also cites another portion of McKay's deposition, this portion, page 187, is not submitted with the motion. As to the sixth category, communications purporting to express the approval of counsel of any aspects of the readjustment process to the extent OneBeacon's claims handlers relied on such approval, Estee Lauder submits the deposition testimony of McKay, who states that he discussed Estee Lauder's claim with outside counsel, as well as various employees at Resolute and OneBeacon, some of whom are attorneys (McKay Deposition, 23-26).

As to the seventh category, the result of any review conducted by counsel of Estee Lauder

defense invoices to the extent that such results were considered by OneBeacon's claims handlers in their post-filing investigation, Estee Lauder submits Albanese's deposition testimony in which Albanese states that OneBeacon's former counsel was the first to review unredacted invoices provided by Estee Lauder (Albanese Deposition, at 430). As to the eighth category, documents concerning OneBeacon's first investigation of the facts OneBeacon contends it needs to revisit as part of its readjustment investigation, Estee Lauder submits OneBeacon's September 7, 2012 letter to the court referring to three issues related to payment after the Appellate Division's decision in February 2009 other than whether certain legal fees were reasonable and necessary[3] (OneBeacon's September 7, 2012 Letter, at 3). Finally, as to the ninth category, the progress notes generated during the readjustment process, Estee Lauder submits Ryan's deposition, in which he talks about Resolute's database and the progress notes on a given claim stored there (Ryan Deposition, at 117, 120-122).

A. Sanctions

"A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence" *VOOM HD Holdings LLC v*

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[3] These issues are: 1) whether or not Estee Lauder was entitled to recovery of defense costs relating to the Huntington Landfill; 2) whether or not Estee Lauder was entitled to recovery of amounts spent in the defense of Whitman, Estee Lauder's subsidiary, which was not insured under the OneBeacon's policy; 3) the allocation of defense costs to time periods of alleged damage both before and after the OneBeacon policy period (OneBeacon September 7, 2012 Letter).

[* 13]

EchoStar Satellite L.L.C., 93 AD3d 33, 45 [1st Dept 2012]).

Estee Lauder, relying on *VOOM HD Holdings LLC,* argues that it is entitled to a negative inference at trial, and attorney's fees, because relevant evidence has been destroyed pursuant to OneBeacon's failure to issue a litigation hold. The argument is based on Estee Lauder's contention that OneBeacon failed to issue a litigation hold and that, as a result, an unknown quantity of relevant documents were destroyed.

Adopting the federal standard for spoliation in the context of electronic documents, the *Voom HD Holdings* held that "[o]nce a party reasonably anticipates litigation, it must suspend routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents" (93 AD3d at 36, quoting *Zubulake v UBS Warburg LLC*, 220 FRD 212, 218 [SDNY 2003]). *Voom HD Holdings* held further that this obligation requires affirmative action, such as instituting a litigation hold:

> In the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process. Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data

(*id.* at 41 [internal quotation marks and citation omitted]).

OneBeacon argues that it did not destroy any documents,[4] as Resolute, its claim administrator, does not have an automatic deletion feature for its emails, and instead has a policy

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[4] OneBeacon also argues that the documents sought are not discoverable, as they are irrelevant and subject to a category exclusion for attorney-client privilege, but, as these arguments are not necessary to resolve the sanctions branch of the motion in OneBeacon's favor, the court will defer them to the discussion of the branch that seeks to compel, as the OneBeacon makes the same arguments in that context.

of maintaining all documents and correspondences related to a particular claim, including Estee Lauder's. In support, OneBeacon submits an affidavit from Brian Bendig (Bendig), Resolute's vice president and general counsel. With respect to the litigation holds, Bendig stated:

> "Resolute's routine document retention/destruction policy is to retain all information relevant to the claims and litigation and therefore a directive to refrain from purging documents is unnecessary and unwarranted. In actuality, the issuance of a hold directive on a file would risk confusion regarding the policy and practice to preserve all documents in all formats for all files"

(Bendig December 7, 2012 Affidavit, ¶ 8).

Specific to Estee Lauder, Bendig states:

> "As noted above, Resolute continually verifies that e-mails and other electronic documents are retained on an active server. Nevertheless, upon learning earlier this year that Estee Lauder was asserting that electronically stored information relating to this action had not been properly preserved, Resolute directed a re-review of all computer, database, and e-mail systems to verify that electronic information, documents and communications from 2005 forward relating to this litigation had in fact been preserved . . . . With respect to the searches for e-mails and other electronic documents, the review encompassed the Resolute servers, desktop computers, and Outlook accounts of all current and former employees of Resolute [] who had responsibilities with respect to the account. Through this re-review, all entries and documents in the RAPID database and other electronic documents were isolated. In addition, thousands of e-mails from February 2009 through April 2012 were isolated (although, due to the breadth of the re-review, the e-mails isolated may include duplicative e-mails and e-mails with no relation to Estee Lauder). All of these materials are currently in the custody of both Resolute and its current litigation counsel, Hardin, Kundla, McKeon & Poletto, P.A."

(Bendig Affidavit, ¶ 14).

Here, Estee Lauder has failed to show that any documents were destroyed. Resolute, which handled the readjustment of the claim Estee Lauder alleges was carried out in bad faith, has demonstrated that it had a policy in place that is the functional equivalent of a litigation hold. If there is no automatic deletion, there is nothing to hold. As Estee Lauder cannot satisfy the

second part of the *Voom HD Holdings* test for spoliation sanctions, that documents were destroyed were destroyed in bad faith, it is not entitled to sanctions. As such, the branch of Estee Lauder's motion seeking sanctions for spoliation of evidence is denied.

B. Preclusion

As there is no evidence that OneBeacon spoliated evidence, Estee Lauder is not entitled to an order of preclusion.

C. Compelling Discovery

As to the question of whether the documents are discoverable, Estee Lauder argues that readjustment of claims is part of the ordinary course of an insurance company's business. As such, it is irrelevant that many of people involved in readjusting its claims are licensed attorneys. Thus, Estee Lauder contends further that the documents they seek are discoverable under the standard set out by the Appellate Division in *Brooklyn Union Gas Co. v American Home Assur. Co.* (23 AD3d 190 [1st Dept 2005]):

> Reports of insurance investigators or adjusters, prepared during the processing of a claim, are discoverable as made in the regular course of the insurance company's business. Furthermore, attorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy. Documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged, and, therefore, discoverable. In addition, such documents do not become privileged merely because an investigation was conducted by an attorney. Moreover, in order for attorney-client communications to be privileged, the document must be primarily or predominantly a communication of a legal character

(*id.* at 190-191 [internal quotation marks and citations omitted]).

In opposition, OneBeacon argues that Estee Lauder has no need for the documents it

seeks. That is, OneBeacon contends that because Estee Lauder has access to discovery regarding OneBeacon's explanations for the delay, and the bases for those positions, Estee Lauder has no substantial need to inquire about its deliberations following the Appellate Division ruling. OneBeacon lists five factors that, it contends, appropriately delayed payment, as well as citations to case law and the CPLR supporting the legitimacy of the factors.

Specifically, OneBeacon maintains that evaluation of the following factors delayed payment: 1) Estee Lauder's defense costs were subject to allocation for the facilities where operations post-dated its policy and for the entire period of time from commencement of operations until the date of the underlying claim settlement; 2) costs Estee Lauder incurred by Whitman were not reasonable and necessary to the defense of Estee Lauder; 3) OneBeacon was only responsible for expenses reasonable and necessary to the defense of Estee Lauder's claim; 4) Estee Lauder was not entitled to recovery of interest on defense costs during the time period where Estee Lauder failed to produce unredacted defense cost invoices; 5) OneBeacon decided to focus its efforts on a global resolution rather than ascertaining if a very small percentage of the claimed defense costs could be considered undisputed.

While these positions may be more appropriate to a summary judgment motion testing the validity of Estee Lauder's bad faith claim, they do not support OneBeacon's assertion that they show that Estee Lauder has no need of documents revealing the nature of deliberations related to OneBeacon's payment of reasonable attorney's fees under the Appellate Division decision. Instead, these positions show the relevancy of these documents, as Estee Lauder, to support its bad faith claim, will have to show, at least, that the fifth factor dominated, and the other purported reasons for delay were pretextual, and that the global settlement was pursued with

extraordinary dishonesty (*see generally Dawn Frosted Meats v Insurance Co. of N. Am.*, 99 AD2d 448, 448 [1st Dept 1984] ["(p)roof of an insurer's bad faith requires an extraordinary showing of disingenuous or dishonest failure to carry out a contract"] [internal quotation marks and citation omitted]). Thus, a view into the actual deliberations concerning payment are relevant and substantially necessary. As such, Estee Lauder has overcome the threshold question of whether, barring the applicability of a privilege, the documents sought are discoverable.

Alternatively, OneBeacon contends that the documents Estee Lauder seeks should be subject to a categorical protection. OneBeacon makes two arguments for such protection, and in both it characterizes the subject documents as litigation and trial preparation communications, rather than documents relating to claim readjustment.

The first is a timing argument. OneBeacon argues that an insurance company's deliberations after an insured has filed an action against it is protected. Citing *Millen Indus. v American Mut. Liab. Ins. Co.* (37 AD2d 817 [1st Dept 1971]), OneBeacon argues that the subject documents are categorically protected from discovery, as attorney's work product and trial preparation under CPLR 3101 (c) and CPLR 3101 (d). *Millen Indus.* held that "once [an insurer] has rejected the claim, reports made to it to aid in the resistance of the claim are made for the purposes of litigation and are protected by CPLR 3101 (subds. [c], [d])" (*id.* at 817).

OneBeacon contends that this protection is not altered by plaintiff's claim for bad faith related to OneBeacon's payment of reasonable attorney's fees on the the Blydenburgh/Hickey's Carting claims. OneBeacon cites to a case from Montana, *Palmer by Diacon v Farmers Ins. Exchange* (261 Mont. 91 [1993]), which reversed a judgment for punitive damages for bad faith against an insurer. In *Palmer*, the Court held that the insurer's litigation tactics were not relevant

[* 18]

to the plaintiff's bad faith claim, or not relevant enough to override a privilege, noting that:

> "In general, an insurer's litigation tactics and strategy in defending a claim are not relevant to the insurer's decision to deny coverage. Indeed, if the insured must rely on evidence of the insurer's post-filing conduct to prove bad faith in denial of coverage, questions arise as to the validity of the insured's initial claim of bad faith. One court has gone so far as to hold that once litigation has commenced, the actions taken in its defense are not, in our view, probative of whether defendant in bad faith denied the contractual lawsuit"
>
> (*id.* at 123).

The critical distinction between *Palmer* and the present case is that the bad faith claim in *Palmer* related to the initial denial of coverage. Here, the court, by order filed February 29, 2012, denied Estee Lauder's attempt to amend the complaint to add such a claim. By the same order, of course, the court granted leave to amend to include a bad faith claim relating to the failure to pay attorney's fees pursuant to the February 2009 Appellate Division decision. Here, in contrast to *Palmer*, the post-filing deliberations relating to the payment of those attorney's fees are clearly relevant. As such, OneBeacon is not entitled to a categorical protection because the documents sought were created after Estee Lauder filed its complaint.

The second argument for categorical protection is a reiteration of OneBeacon's attempt to characterize deliberations as to the payment of attorney's fees as deliberations on litigation, which, OneBeacon argues, inherently involve attorney-client communications and attorney work product. OneBeacon cites to *Ring v Commercial Union Ins. Co.* (159 FRD 653 [MD NC 1995]) for the proposition that a bad faith claim does not subject an insurer's attorney-client communication and attorney work product to discovery. In *Ring,* the district court held that "plaintiff fails to marshal enough evidence demonstrating a *prima facie* case of bad faith to be permitted to rummage through defendants' claims file" (*id.* at 653).

[* 19]

As to policy, OneBeacon argues that allowing Estee Lauder to discover privileged documents of the bad faith claim, would "create an unwarranted exception to the attorney-client privilege and result in discovery of privileged communications and workproduct in virtually every insurance coverage dispute" (*National Industri Tranformers, Inc. v Atlantic Mutual Insurance Company*, 1993 US Dist LEXIS 6149 [US Dist Ct, SD NY, 91 Civ 7192, *13 (JFK) (KAR) 1993]).

Here, OneBeacon is not entitled to a categorical privilege as it is not clear, as they maintain, that all of the documents sought are privileged. The payment of attorney's fees to a covered client is an ordinary part of an insurers business (*Karta Indus.*, 258 AD2d at 376). Thus, these documents cannot be considered attorney work product simply because they were created during midstream of a litigation. Typically, during a litigation, the obligation to pay is unclear and the question to be decided through the litigation, but here, the Appellate Division resolved the question of whether OneBeacon had to pay a subset of Estee Lauder's claim. Thus, the logic of maintaining a categorical post-litigation bar is removed.

As to attorney-client communications, the test is whether a document is "predominantly a communication of a legal character" (*Brooklyn Union Gas Co.*, 23 AD3d at 191). OneBeacon has not made a showing that any of documents Estee Lauder seeks is of a predominantly legal character. As such, OneBeacon fails to meet its burden, as the party asserting privilege, to make "a detailed explanation sufficient to establish why the information sought is privileged" (*id.*).

To the extent that any of the documents it requests may be privileged, Estee Lauder claims that OneBeacon has waived the privilege for three independent reasons. First, Estee Lauder claims that OneBeacon has put its counsel's advice at issue, as it seeks to justify the delay

[* 20]

in payment by claiming to have relied on the advice of counsel. In order to substantiate this alleged intention of OneBeacon, Estee Lauder cites to Ryan's deposition, in which he attributes the delay in payment resulting from his efforts to determine whether or not reduce OneBeacon's payment to Estee Lauder based on allocation of costs accrued in defending Whitman, Estee Lauder's subsidiary that is not insured by OneBeacon (Ryan's Deposition, at 177-178).

Estee Lauder cites to *G.D. Searle & Co. v Pennie & Edmonds* (308 AD2d 404, 404 [1st Dept 2003] [denying university, which was a defendant in the first of two related actions, and a plaintiff in the second, an order of protection, as it "had waived its attorney-client privilege as to the communications and work product at issue" under the "at issue doctrine"]) and *Century Indem. Co. v Brooklyn Union Gas Co.* (22 Misc 3d 1109[A], *8 [Sup Ct, NY County 2008, Stallman, J.] [holding that where one party "places the subject matter of a normally privileged communication or document at issue, or, where invasion of the privilege is required to determine the validity of the claim or defense and the application of the privilege would deprive the adversary of vital information, fairness requires the finding of waiver"]).

OneBeacon argues that it has not attempted to justify their delay by reliance on the advice of counsel, or placed any protected documents at issue. The court agrees. Estee Lauder has failed to make a showing that, at least at this stage of litigation, OneBeacon has put any attorney work product or attorney-client communications at issue.

Second, Estee Lauder argues, citing *Orco Bank v Proteinas Del Pacifico* (179 AD2d 390 [1st Dept 1992]), that if a party discloses privileged information on any matter relevant to the litigation, even if the matter was put at issue by its adversary, the party waives the privilege as to any other information on the same subject. In *Orco*, a case involving claims of fraudulent

inducement of a loan, the Court held that the plaintiff, whose president testified that counsel had advised him as to the legitimacy of security offered,

> "had waived the attorney-client privilege by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice. Further, this record discloses a substantial need for said defendant to have access to materials which may allow it to contest plaintiff's claims that its attorneys advised it at all with respect to the authority of the relevant employee of said defendant"

(*id.* at 390-391).

Estee Lauder claims that OneBeacon waived any claim of privilege, through the testimony of Albanese, as to the strategy of pursuing a global settlement before paying reasonable attorney's fees on the Blydenburgh/Hickey's Carting claims, and Ryan, as to his impressions of New York law as is it relates to OneBeacon's obligation to pay for any legal fees for the defense of Whitman, Estee Lauder's subsidiary.

OneBeacon argues that neither Albanese nor Ryan has disclosed, or placed at issue any privileged materials. Further, OneBeacon notes that Ryan, although he is an attorney, was functionally a client, as the president of Resolute, rather than attorney. Citing to *Brooklyn Gas Co.*, OneBeacon notes that legal advice only applies to counsel acting as such (23 AD3d at 191). The court agrees with OneBeacon that it has not waived any privilege through the testimony of Albanese or Ryan, as Estee Lauder has failed to show that either witness disclosed attorney work product or attorney-client communications.

Third, Estee Lauder argues, citing *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [1st Dept 2006]), that OneBeacon waived the privilege by refusing to produce a privilege log itemizing the documents for which it is claiming privilege. In *High School for Envtl. Studies,* defendants violated three court orders to provide documents for an in camera review, and the

Court held that defendants failed to comply with the provisions of CPLR article 31, and that, consequently, defendants waived any objections to disclosure (*id.* at 359). Moreover, the Court held that "defendants' failure to supply a privilege log or indeed, any timely substantive responses to the court's numerous orders amounts to a waiver of any claim of privilege for the documents sought" (*id.*).

High School for Envtl. Studies is clearly distinguishable, as there the court ordered documents for an in camera review three times, whereas here the court has not yet ordered OneBeacon to prepare a privilege log for the readjustment documents that Estee Lauder seeks. Thus, OneBeacon has not waived privilege by failing to submit one. As such, just as OneBeacon is not entitled to a categorical protection that exempts otherwise relevant and necessary documents, Estee Lauder is not entitled to individual documents that are actually privileged.

Accordingly, the branch of Estee Lauder's motion seeking an order compelling document production is granted. OneBeacon must turn over nine categories of document detailed above related to the payment of Estee Lauder's attorney's fees for the relevant period between February 2009 and April 2012. To the extent that any individual documents are privileged, OneBeacon is to create privilege log pursuant to CPLR 3122 (b).

III. OneBeacon's Motion for a Protective Order

With respect to privilege, OneBeacon makes substantially the same arguments for a protective order that it made in opposition to Estee Lauder's discovery motion. For the reasons discussed above, OneBeacon's motion for a protective order on the basis or privileges for attorney work product and attorney-client communications is denied.

OneBeacon also seeks a protective order for four categories of disclosure: 1) settlement

discussion content; 2) other policyholder information; 3) further written discovery; and 4) any depositions of OneBeacon beyond "one additional day." The only category that OneBeacon elaborates on in its moving papers is the second, other policyholder information. OneBeacon notes that Estee Lauder has demanded that defendants disclose information and documents regarding decisions it made in other matters, and argues that these materials are not discoverable, as, even if they were marginally probative, the prejudice of disclosure would far outweigh any probative value.

In opposition, Estee Lauder argues that the question of whether OneBeacon is entitled to a protective order regarding this category of disclosure is premature because OneBeacon has not complied with this court's rules in that it failed to seek a conference with Estee Lauder on this issue prior to resorting to motion practice. OneBeacon does not respond to this argument in its reply, instead concentrating on issues of privilege. While the court may be sympathetic to OneBeacon's argument as to the information of other policyholders, it has abandoned its application for a protective order regarding it by failing to address Estee Lauder's argument in opposition (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]).

As to the content of settlement discussions, Estee Lauder argues that it is not seeking any information regarding settlement discussions. As to further written discovery, Estee Lauder notes that OneBeacon has provided no basis for barring further written discovery. Finally, as to limiting further depositions of OneBeacon to one day, Estee Lauder argues that such a limitation would be premature, as OneBeacon has not raised this issue at a conference, and as two days may be required if readjustment documents are produced. OneBeacon fails to address these categories of discovery, thus abandoning its application for a protective order regarding them (*see Gary*, 60

AD3d at 413).

CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiff Estee Lauder Inc.'s discovery motion (motion seq. no. 010) is granted only to the extent that defendants OneBeacon Insurance Group, LLC, OneBeacon Insurance Company, and OneBeacon America Insurance Company are ordered, in accordance with this decision, to produce documents relating to attorney's fees owed to plaintiff during the period February 2009 and April 2012; and it is further

ORDERED that defendants OneBeacon Insurance Group, LLC, OneBeacon Insurance Company, and OneBeacon America Insurance Company's motion for a protective (motion seq. no. 011) is denied; and it is further

ORDERED that plaintiff Estee Lauder's Inc.'s motion (motion seq. no. 012) to unseal papers filed in connection with motion seq. no. 010, dated November 16, 2012, is granted; and it is further

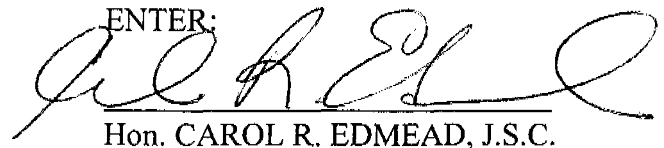
ORDERED that the County Clerk, upon service on him of a copy of this order, is directed to unseal all sealed exhibits to motion seq. no 10; and it is further

ORDERED that counsel for plaintiff shall serve a copy of the Order with Notice of Entry within twenty (20) days of entry on all counsel.

FILED
APR 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 12, 2013

ENTER:



Hon. CAROL R. EDMEAD, J.S.C.