

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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WOLVERINE WORLD WIDE, INC.,

Plaintiff,

v

Case No. 1:19-cv-00010

THE AMERICAN INSURANCE COMPANY,  
et al,

Judge Janet T. Neff  
Magistrate Judge Sally J. Berens  
Special Master Paula Manderfield

Defendants.

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**OPINION AND ORDER REGARDING WOLVERINE’S MOTION TO COMPEL THE  
DEPOSITION TESTIMONY OF TRAVELERS’ MICHAEL UNGARO**

Pending before the Special Master is Wolverine World Wide Inc.’s (“Wolverine”) Motion to Compel the Deposition Testimony of Travelers Michael Ungaro, ECF No. 2201, and Brief in Support, ECF No. 2202. The Travelers Indemnity Company (“Travelers”) opposed the Motion, ECF No. 2231. Wolverine’s Motion for Leave to File a Reply (ECF No. 2249) is hereby denied for the reason that a reply brief would not assist in a decision. The Special Master has reviewed all the filings and exhibits, and for the reasons stated below, the Motion is GRANTED.

**I. Background**

Wolverine’s Motion requests an order compelling the fact deposition of Travelers’ in house counsel, Michael Ungaro (“Mr. Ungaro”). Wolverine noticed Mr. Ungaro for a deposition on October 16, 2023, Koss Decl., ¶ 1, Ex. A, but on October 25, 2023 counsel for Travelers objected to the deposition and refused to present Mr. Ungaro for the reason that he was in house counsel. Travelers argued that Mr. Ungaro “has been intimately involved in Travelers defense of this

declaratory judgment action.” (Koss Decl., ¶ 6, Ex. B.) After a meet and confer, Travelers still refused to present Mr. Ungaro.

Wolverine argues that it is entitled to depose Mr. Ungaro for three reasons, the first being because Mr. Ungaro has been engaged in the ordinary business of claims handling, working alongside Travelers’ Jane Kelly, for the last five years. Wolverine Brief, p. 4. Wolverine cites to ECF No. 1644 and 1750 where this Special Master previously found that an insurance company’s claim investigation and analysis of coverage does not become privileged merely because an attorney conducted the analysis. Wolverine contends that Mr. Ungaro’s position of overseeing the investigation, handling, analysis, and evaluation of Wolverine’s claim in the ordinary course of Travelers’ insurance business subjects him to sitting for a deposition.

Wolverine further contends that Travelers “intentionally used its in-house counsel, Mr. Ungaro, to act as supervisor to both Traveler’s primary claim handler, Jane Kelly, in the Special Liability Coverage Unit, and Amy Howard and Kathryn Weitz in the Strategic Resolution Group in an attempt to shroud its evaluation and handling of Wolverine’s claim in secrecy.” Wolverine Brief, p. 6. Wolverine attaches emails detailing this involvement, but also argues that Mr. Ungaro handled many of his supervisory responsibilities verbally.

Wolverine contends that “[t]o date, Travelers has only produced a single witness for deposition, has produced a handful of solitary claim notes with zero coverage analysis, and has otherwise produced a mountain of meaningless documents as part of its recent document dump.” Wolverine Brief, p. 1. It is Wolverine’s position that deposing Mr. Ungaro is the only way that Wolverine can obtain this information about his position as a managing claims handler.

Wolverine’s second argument for deposing Mr. Ungaro is based on this Court’s finding that Travelers waived privilege due to its continued failure to comply with this Court’s numerous

orders relying on ECF No. 2124 where the Special Master held that Travelers has waived privilege as a sanction for failing to produce its claim notes, files, and related documents and communications it was compelled to produce in February 2022. Wolverine Brief, p. 10.

Wolverine argues as its third reason for deposing Mr. Ungaro is that the Eight Circuit's test in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir.1987) does not apply here. Wolverine Brief, p. 11. Wolverine argues that Mr. Ungaro is not an "opposing" counsel, but a claims handler who handles activities and communications within the ordinary business functions of a claim handler for Travelers. Wolverine contends that even if the *Shelton* test did apply, all three prongs are satisfied. Further, "(1) there are no other means available to obtain the information other than to depose Mr. Ungaro because Travelers has hidden claims handling documents, not produced any notes, and produced zero documents evidencing that it conducted a coverage evaluation; (2) the information sought about Mr. Ungaro's knowledge of Travelers' claims investigation, its notes, and its claims evaluation is relevant and none of it is privileged; and (3) the information is, as this Court has repeatedly ruled, crucial to the preparation of the case." *Id.* at p. 12.

Travelers oppose Wolverine's Motion for several reasons including that Mr. Ungaro is, and has at all times, been acting as Travelers' in-house counsel, providing legal advice, and overseeing the anticipated and actual coverage litigation with Wolverine. Travelers Brief, p. 6. Accordingly, Travelers argues that Wolverine's attempt to blur the lines between being the primary claim handler and the attorney providing legal advice to the primary claim handler should be rejected.

Travelers also argues that Wolverines arguments should be rejected because the Special Master has already ruled in ECF No. 326 that a party cannot take the deposition of an opposing party's in-house counsel because the deposition of an attorney is prohibited when the information

sought can be obtained from a non-attorney source. Travelers further assert that there are other non-attorney witnesses whom Wolverine can depose and that depositions of several other non-attorney witnesses have been scheduled to take place over the next two months who can testify to the same information as Mr. Ungaro.

Travelers supports its opposition with the argument that *Shelton* held that in-house counsel constitutes “opposing counsel.” Travelers contends that Wolverine cannot meet the first factor of *Shelton* as information regarding Travelers’ investigation, handling, and evaluation of Wolverine’s claim can be obtained from other, non-attorney witnesses, including but not limited to, Jane Kelly and Kathryn Weitz.

Lastly, Travelers argues that it has never hidden any information from Wolverine. Travelers outlines in its response that it has produced all unredacted reinsurance policies; all claim notes, claim web notes, internal claim correspondence, and internal emails maintained by any and all Travelers’ claim handlers who were involved with Wolverine’s claims; all of claim handler Jane Kelly’s claim notes, internal claim correspondence, and internal emails; and all internal claim handling correspondence.

## **II. Legal Standard**

Under Federal Rule of Civil Procedure 26(b), a party is entitled to discovery regarding any matter, not privileged, which is relevant to any party’s claim or defense. Fed. R. Civ. P. 26(b)(1). “Rule 26 is to be liberally construed to permit broad discovery.” *State Farm Mut. Auto Ins. Co. v. Warren Chiropractic & Rehab Clinic, P.C.*, 315 F.R.D. 220, 222 (E.D. Mich. 2016). As such, Rule 26 “encompass[es] any matter that bears on, or that reasonably could lead to other matter that could

bear on, any issue that is or may be in the case.” *Marsico v. Sears Holding Corp.*, 370 F. App’x 658, 664 (6th Cir. 2010).

### **III. Analysis**

#### **I. Mr. Ungaro has been engaged in the ordinary business of claims handling.**

It is clear to this Special Master that Mr. Ungaro has been overseeing the investigation, handling, analysis, and evaluation of Wolverine’s claim in the ordinary course of Travelers’ insurance business. Because Mr. Ungaro was performing a business function and acting as a claims handler, Wolverine is entitled to depose Mr. Ungaro, regardless of his title. This aligns with this Special Master’s ruling in ECF No. 1644: “communications by attorneys acting as insurance claims investigators, rather than as attorneys, are not protected by the attorney client privilege” and ECF No. 1750: “[a]ttorneys assisting with a policyholder’s request for coverage are performing a business function and cannot avail themselves of the protection associated with the attorney-client privilege or the work product doctrine.”

The facts before this Court are more akin to this Court’s prior rulings in ECF Nos. 1664 and 1750, not ECF No. 326. In ECF No. 326, Wolverine moved to prohibit defendants from taking the deposition of Wolverine’s in-house counsel, David Latchana, and that Motion for a Protective Order was granted. Travelers did not file a Motion for a Protective Order pursuant to Rule 26(c), but rather used such arguments in its Response to Wolverine’s Motion to Compel. Accordingly, Travelers’ arguments as they relate to a protective order are misplaced and disregarded by this Special Master as the facts and circumstances in front of the court at this time are very different than those before the court regarding Mr. Latchana.

This Court does not find Travelers’ argument that Mr. Ungaro is an attorney and the in-house counsel overseeing Travelers’ defense against Wolverine’s causes of action to be persuasive.

The lines are not blurred between Mr. Ungaro being the primary claim handler and being the attorney providing legal advice to the primary claim handler. The numerous exhibits attached to the Declaration of Kelly Koss support the conclusion that Travelers' effort to block the deposition of Mr. Ungaro should be rejected. The emails do not support that Mr. Ungaro has been working as in-house counsel, rather it is this Special Master's opinion that the emails demonstrate that Mr. Ungaro is responsible for directing the ordinary business of claims handling, Koss Decl., ¶ 9, Ex. E, and is actively involved in requesting information concerning Wolverine's operations, Wolverine Brief, Koss Decl., ¶ 8, Ex. D. Further, exhibits support the conclusion that Mr. Ungaro has been working side-by-side with Ms. Kelly to investigate Wolverine's claims and analyze coverage under the relevant policies, Koss Decl., ¶ 12 and 13, Ex. H and Ex. I. Based on Mr. Ungaro's conduct outlined above, in addition to attending an in person meeting to discuss Travelers' claim investigation, handling, and evaluation, Koss Decl., ¶ 11, Ex. G, Mr. Ungaro is ordered to sit for a deposition, as deposing Mr. Ungaro is the only way that Wolverine can obtain this information. None of the exhibits produced by Wolverine provide any indication that Mr. Ungaro was discussing potential coverage disputes in anticipation of litigation as in-house counsel. Travelers has not produced any exhibits supporting this conclusion either.

Wolverine's argument regarding Travelers' General Liability Knowledge Guide's internal policy of marking coverage analyses and evaluations as "sensitive" to "block access" to relevant and non-privileged information from production is compelling and must be produced under Federal Rule of Civil Procedure 26. Accordingly, Wolverine is entitled to take Mr. Ungaro's deposition as Travelers has no basis to claim privilege over his performance of ordinary business

tasks, and his testimony is certainly relevant to Traveler's analysis of Wolverine's right to coverage. Travelers has not provided any persuasive case law to the contrary.

**II. As a sanction, this Court has found that Travelers waived privilege due to its continued failure to comply with this Court's orders.**

As this Court previously ruled, Travelers has waived privilege as a sanction for failing to produce its claim notes, files, and related documents and communications it was compelled to produce in February 2022, ECF No. 2124. A stay of this ruling has been denied by Judge Neff and the Sixth Circuit denied Travelers' writ of mandamus. Travelers has provided no case law to the contrary, other than arguing that the *Shelton* test applies, which is inapplicable for reasons discussed in the next section.

**III. The *Shelton* test is inapplicable to Mr. Ungaro who is not an opposing counsel, and even if it did apply, all three prongs are satisfied.**

In *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir.1987),<sup>1</sup> the Eighth Circuit set out a three-part test designed to limit the circumstances in which opposing counsel must submit to a deposition. The proponent of the deposition must satisfy each prong of the test before the deposition of "opposing counsel" can be taken. First, there must be no other means available to obtain the information other than to depose opposing counsel. *Id.* Second, the information sought must be relevant and non-privileged. *Id.* Finally, the information must be crucial to the preparation of the case. *Id.*

As discussed above, Mr. Ungaro is not "opposing counsel," rather he is more akin to a claims handler who went to law school and now routinely handles and evaluates claims within the ordinary business functions of a claim handler for Travelers. On that basis alone, Wolverine is

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<sup>1</sup> The Sixth Circuit adopted the *Shelton* test in *Nationwide Mutual Insurance Co. v. Home Insurance Company*, 278 F.3d 621 (6th Cir. 2002).

entitled to depose Mr. Ungaro to understand the scope of his personal knowledge related to Travelers investigation, handling, analysis, and evaluation of Wolverine's claim. This information is relevant and discoverable under Rule 26.

With respect to the first prong of the *Sheldon* test, despite Travelers arguments otherwise, there are no other means available to obtain the information it is seeking concerning Travelers' investigation, handling, and evaluation of Wolverine's claim. This information cannot be obtained from other, non-attorney witnesses (i.e., Jane Kelly and Kathryn Weitz) or from the individual designated to sit for the 30(b)(6) deposition of Travelers. Further, the involvement of Ms. Kelly, Ms. Weitz, or the 30(b)(6) representative, is on a much smaller scale than Mr. Ungaro's involvement and Mr. Ungaro has knowledge beyond that of any other witnesses. Based on Travelers' past conduct of hiding its claims handling documents and not producing notes and documents evidencing a coverage evaluation (despite court orders to do so), Mr. Ungaro must be produced for a deposition. This order is despite Travelers recent production of over 26,000 unresponsive documents.

As to the second and third prongs of the *Sheldon* test, the information sought about Mr. Ungaro's knowledge of Travelers' claims investigation, its notes, its guidelines for handling claims, and its claims evaluation is relevant and not privileged and the information is crucial to Wolverine's preparation of the case. The attorney-client privilege does not extend to claims handling files and materials because claims handling and investigation is a function performed in the ordinary course of an insurance company's business. *Flagstar Bank v. Fed. Ins. Co.*, No. 05-CV-70950-DT, 2006 WL 6651780, at \*5 (E.D. Mich. Aug. 21, 2006) (“[a] factual investigation of an insurance claim by an insurance company is within the ordinary course of an insurance company's business”). An insurer cannot create a “shroud of secrecy” by simply designating an

attorney to conduct an otherwise ordinary claim investigation.” *Michigan First Credit Union v. Cumis Insurance Co.*, 2006 WL 185018 at \*2 (E.D. Mich. July 5, 2006). Travelers’ arguments that in-house counsel constitutes “opposing counsel” as discussed in *Alomari v. Ohio Dep’t of Pub. Safety*, 626 F. App’x 558, 573-74 (6th Cir. 2015) and *Jaguar Land Rover Ltd. v. Bombardier Recreational Prod., Inc.*, No. 16-CV-13386, 2018 WL 2276640, at \*2 (E.D. Mich. May 18, 2018) can easily be dismissed as Mr. Ungaro, despite having a law degree, did not act as counsel here, rather he acted as a supervising claims handler. The fact that a person is a lawyer does not make all communications with that person privileged.” *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002) (citing *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)).

**IV. Conclusion and Order**

IT IS HEREBY ORDERED that Plaintiff’s Motion to Compel the Deposition Testimony of Travelers’ Michael Ungaro is GRANTED. Further, Mr. Urango is ordered to testify in full, and without assertion of privilege, about the handling of Wolverine’s claims, coverage analysis, Travelers’ process for and guidelines concerning the handling of claims, how Travelers takes and maintains claim notes, and other relevant topics.

PAULA J. MANDERFIELD

Dated: December 1, 2023

By: /s/ Paula J. Manderfield  
Special Master