

SO ORDERED.

SIGNED this 23rd day of September, 2021.



  
LENA MANSORI JAMES  
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION**

In re:	)	
	)	
Miguel Arquimedes Caceres,	)	Case No. 18-80776
	)	Chapter 7
Debtor.	)	
_____	)	
	)	
	)	
James B. Angell,	)	
Chapter 7 Trustee for Miguel Caceres,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 20-09007
	)	
Allstate Property and Casualty	)	
Insurance Company,	)	
	)	
Defendant.	)	
_____	)	

**ORDER**

**GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL,  
AWARDING REASONABLE EXPENSES UNDER RULE 37(a)(5), RESERVING  
DECISION ON ADDITIONAL SANCTIONS, AND CONTINUING HEARING**

This adversary proceeding comes before the Court on the Motion for Discovery Sanctions (Docket No. 93, the "Motion") filed by chapter 7 trustee James B. Angell (the "Plaintiff"), pursuant to Federal Rule of Civil Procedure 37, as made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7037.

Allstate Property and Casualty Insurance Company (the “Defendant” or, where appropriate, “Allstate”) filed its response in opposition to the Motion on September 1, 2021 (Docket No. 99, the “Response”). The Court assumes the reader’s familiarity with the factual background and procedural history of this adversary proceeding and the underlying bankruptcy case.<sup>1</sup>

The Motion was prompted by the recent revelation that the claim history report disclosed by the Defendant in November 2020 (the “November Claim History Report”) did not mirror the electronic claim history report utilized by the Defendant’s Rule 30(b)(6) representative Todd Lonker during his deposition. According to the Plaintiff, the version revealed during that deposition contained additional electronically stored information that should have been produced to the Plaintiff, including links to hundreds of “tasks” and “events” pertaining to specific actions taken by individual employees and managers. At the request of the Plaintiff, the Defendant’s counsel generated an updated claim history report (the “Amended Claim History Report”) that included the previously omitted “tasks” and “events” entries.

In response to this unanticipated disclosure, which occurred at the close of discovery and after most depositions had been conducted, and in light of what the Plaintiff characterizes as the Defendant’s persistent pattern of noncompliance with discovery rules and the Court’s prior orders, the Plaintiff now seeks various forms of alternate and cascading relief: (1) compelling the Defendant to show cause as to why it should not be held in contempt for its willful failure to comply with the Court’s July 26, 2019 Order in the underlying bankruptcy case compelling it to produce certain documents pursuant to Federal Rule of Bankruptcy Procedure 2004 (Case No. 18-80776, Docket No. 112); (2) striking the Defendant’s answer and entering default judgment in favor of the Plaintiff; (3) awarding Plaintiff the reasonable expenses incurred in bringing the Motion, and the full costs of depositions and all discovery to date; (4) prospectively ordering all future costs and

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<sup>1</sup> A more complete factual and procedural background can be found in the Court’s March 17, 2021 Order on the Plaintiff’s Motion to Compel (Docket No. 65).

attorney fees of Plaintiff to be taxed against Allstate that pertain to the noticing and retaking of depositions, working with experts for further evaluation, and all attorney time spent conducting any form of discovery; (5) and compelling the Defendant to produce documents it is still withholding.

In the Response, the Defendant contests the Plaintiff's depiction of its discovery practices and asserts, first, that the November Claim History Report was the same type routinely provided to outside counsel for use in litigation and, second, that any failure to produce the newly revealed expanded electronic claims log can be attributed to inadvertence, rather than an intentional decision to withhold it. The Defendant also reported that it has turned over the Amended Claim History Report, as well as 141 screenshots comprising all the "tasks" links for the year 2014. The Defendant insists that producing screenshots for the entirety of the "tasks" links in the Amended Claim History Report would be overly burdensome and largely unnecessary because the links pertain to issues that are irrelevant to the claims in this proceeding. The Defendant asks the Court to deny the Motion and limit the turnover of any additional screenshots from Allstate's claims handling software, NextGen, to those "relevant, specific items."

The Court conducted a hearing on the Motion on September 21, 2021, at which Robert Jessup appeared on behalf of the Plaintiff, who was also present, and Thomas Curvin and Jeffrey Kuykendal appeared on behalf of the Defendant. Michelle Swanson, a Represented Claims Manager for Allstate, appeared and testified as to the capabilities of the NextGen system. Both sides presented arguments on the extent to which the Defendant must produce additional materials from NextGen, the potential need to reopen or conclude depositions based upon that newly disclosed information, and the appropriate sanction to be assessed against the Defendant for failing to disclose the material in its initial responses to the Plaintiff's interrogatories and discovery requests.

#### NEXTGEN SOFTWARE

The present dispute before the Court centers on the capabilities of, and information within, Allstate's claims handling software, known as NextGen. As

other courts have noted, NextGen “is Allstate’s overall claim operating system where all components of the claim, including recorded statements, claim diary notes from any Allstate employees who worked the claim, [and] total loss comments ... are stored.” *Murrell v. Allstate Ins. Co.*, No. 4:12-CV-1707, 2014 WL 3858204, at \*17 n.5 (E.D. Mo. Aug. 6, 2014); *see also Pastin v. Allstate Ins. Co.*, No. 2:17CV1503, 2018 WL 10229727, at \*1 (W.D. Pa. Sept. 18, 2018) (“Allstate’s normal business practice is to store, review and maintain any claim-related documents as attachments uploaded into NextGen[.]”).

At the hearing on the Motion, Ms. Swanson testified on where NextGen stores information, how to locate and generate copies of that information, and the normal procedures Allstate employs to deliver requested material to outside legal counsel. According to Ms. Swanson, Allstate introduced the NextGen software around 2003 or 2004 and has only issued minor updates to the system in the years since. When asked if there is anyone who could provide support for Allstate employees regarding issues with NextGen, Ms. Swanson reported that Allstate did not retain any onsite technicians and that employees would need to contact India-based tech support for any assistance.

Ms. Swanson’s testimony confirmed that NextGen can produce different forms of a claim history report. An electronic claim history report in NextGen contains extensive information about the development and treatment of a claim, the key components of which are (1) file notes, (2) digital attachments, (3) tasks, and (4) events. Ms. Swanson provided the following testimony on the nature of these different aspects of a claim history report:

1. *File Notes* - a manual entry made when an adjuster or performer documents activity within the claim history.
2. *Digital Attachments* – digital attachments, such as correspondence or reports, are frequently linked to file notes but are kept in a separate, but linked software system and later compiled into what the Defendant characterizes as the “digital claim file.” The digital claim file was previously produced to the Plaintiff. When asked how the digital claim file is delivered to counsel, Ms. Swanson explained that “we would ask our processors to compile all of that into a .pdf document and upload it to defense to provide it [to opposing counsel].”

3. *Tasks* – a task “prompts an adjuster to reenter the claim to do some sort of work on the claim.” The task entry shows something that the adjuster was to do and when it was completed. There is also a hyperlink within each task entry, which takes the user to a separate screen that in turn provides a description of the task the adjuster completed, who created and performed the task, the deadline for completion, and when the task was performed. Ms. Swanson confirmed that the only way to generate copies of all task information is to individually click on each task hyperlink and print the resulting screen.
4. *Events* - an event “runs in the background of the software system” and automatically makes an entry when certain activity occurs, i.e., when a payment check is processed or when an automated text is sent out. There are no hyperlinks for events to pull up additional information.

Ms. Swanson demonstrated that, by selecting an option from a pull-down menu at the top of the screen, different versions of a claim history report can be produced that filter out some of the four components referenced above. While Allstate produced the November Claim History Report in the initial stages of discovery, that version only included the file notes and attachments and did not include any of the tasks or events. When asked what form of claim report is typically produced for outside counsel, Ms. Swanson explained that Allstate typically does not include a version with tasks or events and that she has “never been asked for that.”

Although several decisions have discussed evidence originating from NextGen, the Court is unable to identify any instance in which a court considered the question presented here: what type of NextGen claim history report should be produced upon discovery request and what information, if any, may be omitted.

#### DISCUSSION

The scope of discovery, as interpreted by the Supreme Court, is broadly construed to include “any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (internal citation omitted). In assessing whether nonprivileged information is within the proper scope of discovery, the Federal Rules of Civil Procedure direct a court to consider

“the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

Rule 37 of the Federal Rules of Civil Procedure, made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7037, governs the imposition of sanctions for discovery violations. Rule 37 allows a party to move for an order compelling disclosure or discovery when the opposing party “fails to produce documents ... as requested under Rule 34.” Fed. R. Civ. P. 37(a)(3)(iv). The rule further specifies that “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” Fed. R. Civ. P. 37(a)(4). Courts of the Fourth Circuit “have repeatedly ruled that the party or person resisting discovery, not the party moving to compel discovery, bears the burden of persuasion.” *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010). “Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery.” *Id.* at 244 (citing Fed. R. Civ. P. 37 advisory committee’s note to 1970 amendment). If a court grants a motion to compel, it must require the offending party or its attorney “to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees” unless (i) the movant failed to attempt in good faith to obtain the discovery without court action, (ii) the opposing party’s nondisclosure was substantially justified, or (iii) other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(A)(i)–(iii). An act or omission is substantially justified if “a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” *Hare v. Comcast Cable Commc’ns Mgmt., LLC*, 564 F. App’x 23, 24–25 (4th Cir. 2014) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565–66 n.2 (1988)).

The Plaintiff requested production under Rule 34 of “each and every file that was opened, created, or maintained ... relating in any way whatsoever to

any legal claims arising against the Debtor as a result of the February 12, 2014 car wreck and the claims handling thereof, post-judgment collection activities against the Debtor, the Debtor's bankruptcy, this proceeding, or any other claims or legal proceedings that whatsoever pertain to the Debtor" (Docket No. 93, p. 3). Upon learning of the incomplete nature of the November Claim History Report, the Plaintiff attempted to obtain the omitted portions. While maintaining that the November Claim History Report is the typical version of a claim log provided to outside counsel, the Defendant nevertheless provided the Plaintiff with a copy of the Amended Claim History Report as well as screenshots for all "tasks" hyperlinks for 2014. The Defendant has refused, however, to provide any additional task hyperlinks beyond 2014, contending that any information contained therein is irrelevant to the claims at issue and overly burdensome to produce (Docket No. 99, p. 11). After several attempts at obtaining the additional screenshots, the Plaintiff filed the instant Motion.

Given the testimony provided, the Court finds the Defendant unjustifiably failed to comply with its discovery obligations and withheld information based on its unilateral relevance determination. The additional information now contained in the Amended Claim History Report, as well as the task screenshots thus far provided, undoubtedly have some bearing on, or could reasonably lead to other matters that could bear on, the underlying issues in this proceeding. *Oppenheimer*, 437 U.S. at 351. The additional task and event entries provide further datapoints to the claim timeline and add details on when activities were performed and by whom.

The Defendant failed to offer a compelling reason why Allstate typically provides only a condensed version of the claim history report to outside legal counsel. The Defendant's self-serving assertion that it does not typically provide the version of a claim log with tasks and events,<sup>2</sup> and that the additional

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<sup>2</sup> Counsel for the Defendant maintained, and Ms. Swanson testified, that Allstate does not typically provide outside counsel with a claim history report with "tasks" and "events" included. Ms. Swanson stated that she has "never been asked" to provide such a report. The Court finds this to be a hollow assertion, however, because few people outside of Allstate employees would understand that



information is largely irrelevant to the claims, undercuts the Federal Rules of Civil Procedure and is an affront to the transparent nature by which discovery is to be conducted. “Parties to litigation have the right to challenge the relevance of documents through discovery motion practice, rather than unilateral determinations by individuals in whose interest it is to seek to withhold the production of documents that may lead to the discovery of admissible evidence.” *Beverly Hills Teddy Bear Co. v. Best Brands Consumer Prods., Inc.*, No. 1:19-CV-3766, 2020 WL 7342724, at \*12 (S.D.N.Y. Dec. 11, 2020) (internal citations omitted). Rather than unilaterally determine the relevancy of information within a claim history report, the Defendant should, and was in fact obligated to, bring to this Court challenges to the scope of discovery requests on relevancy or burdensome grounds, or to assert claims of privilege.

The Court rejects the Defendant’s assertion that production of the additional task screenshots would be overly burdensome. Initially, the Court finds that the Defendant likely waived any such objection at this stage, given the Defendant was served with and responded to the production request nearly a year ago. *See, e.g., Kinetic Concepts*, 268 F.R.D. at 247 (“By failing to present valid objections to these discovery requests, Plaintiffs waived any legitimate objection they may have had.”) (internal citation omitted); *Cardenas v. Dorel Juv. Grp., Inc.*, 230 F.R.D. 611, 621 (D. Kan. 2005) (“It is also well settled that when a party fails to assert an objection in its initial response to the discovery request and raises it for the first time in response to a motion to compel, the objection is deemed waived.”).

The Court need not rely entirely on waiver, however, because the Defendant has failed to meet its burden to show that providing the additional screenshots would be overly burdensome. *See, e.g., Clean Earth of Md., Inc. v. Total Safety, Inc.*, No. 2:10-CV-119, 2011 WL 4832381, at \*6 (N.D. W. Va. Oct.

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different versions of a claim history report could be generated or that a produced version may be missing certain entries.



12, 2011) (finding the burden is on the party raising the objection); *Capital One Bank (USA) v. Hess Kennedy Chartered, LLC*, No. 3:08CV147, 2008 WL 4467160, at \*3 (E.D. Va. Sept. 30, 2008) (same). The testimony of Ms. Swanson demonstrated that producing a claim history report with tasks and events is no more time-consuming than producing the scaled-back version found in the November Claim History Report. Moreover, each of the task screenshots can be saved to .pdf format in just two or three mouse clicks. The fact that NextGen may be ill-suited to compile and print the task screen shots in bulk is truly a problem of the Defendant's own making. It has chosen to rely upon software of its own design that is nearly twenty years old and, apparently, has benefited from only infrequent and minor updates. The Defendant's claim of burden is further undercut by Ms. Swanson's testimony that Allstate already asks its processors to compile all digital attachments into a single .pdf for use as the digital claim file. Given the Defendant's financial resources, the context around its design and use of NextGen, and the potential utility of the evidence to be obtained, the Court does not find the relative burden of production to outweigh the benefit. Therefore, the Court finds the Defendant must turn over the requested task screenshots and other select material from the NextGen claim file.

Because the Court will grant the Motion, it will award the Plaintiff's reasonable expenses and attorney's fees incurred in making the Motion and attending the hearing. *See* Fed. R. Civ. P. 37(a)(5)(A). The Court does not find the Defendant's proffered rationale for failing to turn over the requested material to be credible or substantially justified. Accordingly, the Court will direct the Plaintiff to submit an affidavit as to its incurred costs and provide a deadline by which the Defendant shall, absent timely objection, pay those costs.

The Court, however, will deny the Plaintiff's request to strike the Defendant's answer and enter default judgment. The Fourth Circuit has been clear that imposing a default sanction, "which is the most severe in the spectrum of sanctions provided by statute or rule[.]" *Wilson v. Volkswagen of*

*Am.*, 561 F.2d 494, 503 (4th Cir. 1977), should be avoided where less severe sanctions may suffice. *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995). Given the ability to remedy the prejudice to the Plaintiff through lesser sanctions, the Court declines to strike the Defendant's answer and enter default judgment.

The Court will also reserve any determination on the remaining sanctions sought by the Plaintiff. These additional or alternative sanctions include reopening depositions, awarding Plaintiff his costs in conducting all discovery to date, and taxing the Plaintiff's future discovery costs to the Defendant. The Court is unable to determine the extent or appropriateness of these available sanctions until the Plaintiff has received the additional NextGen materials and can inform the Court whether expert reports need to be amended or what depositions may need to be reopened. The Court will thus determine what, if any, additional sanctions to impose after the Plaintiff receives the new materials, the parties confer, and the Plaintiff demonstrates his need to reopen depositions or amend expert reports.

#### CONCLUSION

For the reasons stated above, IT IS HEREBY ORDERED that the Plaintiff's Motion to Compel is granted in part and denied in part. The Defendant is directed to turnover, no later than 5:00 p.m. on October 1, 2021, the following materials:

1. Screenshots for all "task" hyperlink pages in the Amended Claim History Report.
2. Screenshots for the following pages of NextGen (as discussed at the hearing on the Motion):
  - a. "Financials" page (with redactions of any payments to counsel)
  - b. "Grant Authority" page (with redactions of any payments to counsel)
  - c. "Performers on Claim" page
  - d. "Physical File" screen
  - e. "IIB History Details" page for each of the listed participants
  - f. "Alerts and FYI" page
  - g. "Claim Summary" pages, including the following subparts:

- i. “Summary”
  - ii. “Involved Assets”
  - iii. “Coverages”
  - iv. “Loss Payments”
  - v. “Participants”
- 3. To the extent that the materials exist and have not otherwise been provided to the Plaintiff, and subject to sanctions under Federal Rule of Civil Procedure 37(b)(2) in the event of noncompliance, any copies of the Home Office Referral or the Time Limit Demand letter.<sup>3</sup>
- 4. To extent that materials exist that have not otherwise been provided to the Plaintiff, and subject to sanctions under Federal Rule of Civil Procedure 37(b)(2) in the event of noncompliance, any additional documents responsive to the Plaintiff’s following discovery requests:<sup>4</sup>
  - a. Request for Production No. 1
  - b. Request for Production No. 8
  - c. Request for Production No. 41
  - d. Request for Production No. 46
  - e. Request for Production No. 47
  - f. Request for Production No. 48
  - g. Request for Production No. 57

IT IS FURTHER ORDERED that the Plaintiff shall have until Friday October 15, 2021, to review the produced materials and determine whether and which depositions need to be reopened and whether any expert reports require amendment. The Plaintiff and the Defendant shall then meet and confer, and report to the Court, no later than October 25, 2021, the additional discovery steps and deadlines to be applied and whether the Court must determine any disputes regarding the need to reopen certain depositions or amend expert reports.

IT IS FURTHER ORDERED that the Court reserves any determination on whether to reopen depositions, allow additional discovery, or award

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<sup>3</sup> In the Motion, the Plaintiff asserts that entries in the Amended Claim History Report point to the existence of the Home Office Referral, which the Defendant has not produced and which it claims may not exist (Docket No. 99, pp. 14–15). The Plaintiff also challenges the Defendant’s failure to produce the faxed, hand-delivered, or file-stamped copies of the October 13, 2014 time-limited demand (Docket No. 93, p. 2). The Defendant maintains that it has produced the only version of the time-limited demand it has and “can’t produce what it doesn’t have[.]” (Docket No. 99, p. 12).

<sup>4</sup> For reference, the cited portions of the Plaintiff’s Requests for Production are transcribed in full within the Motion (Docket No. 93, pp. 3–5).

additional sanctions, and continues this matter to October 28, 2021, at 9:30 a.m. in Courtroom 3 of the United States Bankruptcy Court, 101 S. Edgeworth St., Greensboro, North Carolina.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 37(a)(5)(A), the Defendant shall pay the Plaintiff's reasonable expenses incurred in filing and prosecuting this Motion and the following deadlines shall apply:

- a. Within 7 days of this Order, the Plaintiff is directed to file an affidavit setting forth the amount of such fees.
- b. Within 7 days after receiving the Plaintiff's affidavit, the Defendant shall file any objection thereto. Any objections that are not timely filed shall be waived. Any hearing or arguments on the fee affidavit and any objection will be scheduled at the discretion of the Court on an expedited basis.
- c. Within 7 days of the objection deadline or the Court's order determining any objection, the Defendant shall pay the Plaintiff's fees as set forth in the affidavit or, in the event of an objection, the Court's order.

**END OF DOCUMENT**

PARTIES TO BE SERVED

Angell v. Allstate

AP case # 20-9007

James B. Angell  
*via cm/ecf*

Robert H Jessup  
*via cm/ecf*

Thomas E. Curvin  
*via cm/ecf*

Jeffrey B. Kuykendal  
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