UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMTRUST NORTH AMERICA, INC. and
TECHNOLOGY INSURANCE COMPANY, INC.,

Plaintiffs,

-against-

PREFERRED CONTRACTORS INSURANCE
COMPANY RISK RETENTION GROUP, LLC,

Defendant.

No. 16-mc-0340 (CM)
Related Case No. 15-cv-7505

DECISION AND ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL

McMahon, C.J.:

This action was brought by Plaintiffs AmTrust North America, Inc. ("AmTrust") and AmTrust's affiliate, Technology Insurance Company, Inc. ("TIC") (collectively, "Plaintiffs"), against Defendant Preferred Contractors Insurance Company Risk Retention Group, LLC ("PCIC" or "Defendant") seeking an order compelling PCIC to provide information about, and refrain from using, money in PCIC's possession, custody, and control that allegedly belongs to Pacific Re, Inc. ("Pac Re"), a Judgment Debtor in a related action before this Court, *AmTrust North America, Inc. v. Pacific Re, Inc.*, No. 15-cv-7505 (the "Confirmation Action"). I held a hearing on this matter on October 18, 2016. For the reasons set forth below, I grant Plaintiffs' motion to compel and enter the accompanying restraint.

Background and Procedural History

The facts of this case are well known to the parties, so I will only summarize briefly the relevant ones here. This dispute arises from a complex insurance/reinsurance program (the

"Program") involving AmTrust, TIC, Pac Re, Pac Re 5-AT ("Cell 5"), and various non-parties. On September 9, 2015, Plaintiffs secured an interim arbitration award against Pac Re and Cell 5 for approximately $7.8 million, plus interest, in a Montana arbitration action. Petitioners then brought suit in this Court for confirmation of that award (the "Confirmation Action"). I entered a judgment in their favor on March 25, 2016, and entered an amended judgment on May 19, 2016, which totaled the full $7.8 million plus interest. Plaintiffs allege that the judgment remains unpaid.

To recoup assets they are owed, Plaintiffs commenced veil-piercing litigation against non-party Safebuilt Insurance Services, Inc. ("Safebuilt"), *AmTrust North America, Inc. v. Safebuilt Insurance Services, Inc.*, No 14-cv-9494 (the "SDNY Action"). Plaintiffs also sued Safebuilt in pursuit of a turnover order of funds allegedly owed to Pac Re by Safebuilt. *AmTrust North America, Inc. v. Safebuilt Insurance Services, Inc.*, No. 16-cv-6033, (the "Turnover Action").

During discovery in the SDNY Action, Plaintiffs received a copy of a Casualty Quota Share Reinsurance Agreement between PCIC and Pac Re (the "2006 Agreement"). (Schurkman Decl. Ex. 4, Dkt. No. 3). The 2006 Agreement provides that PCIC will "retain 100 percent (100%) of the reinsurance premiums due to [Pac Re] pursuant to this Agreement on a funds withheld basis." (*Id.* § V.A). It further provides that PCIC will "establish on its books as a liability to [Pac Re] a funds withheld account with respect to this Agreement . . . ." (*Id.*).

On August 10, 2016, Plaintiffs conducted a deposition of Philip Salvagio, who testified that he was the President of PCIC. (Schurkman Decl. Ex. 8 at 11:4-18, Dkt. No. 3). Salvagio testified that, pursuant to the 2006 Agreement, PCIC maintains a funds-withheld account (the "Account") containing between $18 million and $25 million. (*Id.* at 34:18-36:20, 45:18-21).

Salvagio testified that the existence of the Account and its balance was "public knowledge." (*Id.* at 44:1-2). In accordance with the Agreement, the Account is kept on PCIC's books "as a liability" owed to Pac Re. (Schurkman Decl. Ex. 4 § V.A).

On September 8, 2016, Plaintiffs duly served PCIC with an Information Subpoena with a Restraining Notice (the "Subpoena"). The Subpoena, which was filed pursuant to Federal Rule of Civil Procedure 69 and CPLR §§ 5221-5224, sought details about the Account and aimed to restrain PCIC from making any sale, assignment, or transfer of the funds within the Account. (*See* Schurkman Decl. Ex. 2). The Subpoena clearly identifies that it is related to this Court's judgment in the Confirmation Action. (*Id.*).

On September 13, 2016, PCIC moved to quash the Subpoena and for a protective order in the District of Montana, its state of incorporation. *See Preferred Contractors Insurance Company Risk Retention Group LLC v. Amtrust North America, Inc.*, No. 16-mc-00010-SPW-CSO ("Quash Action"), currently pending before Magistrate Judge Carolyn S. Ostby. PCIC argues in its motion to quash that the subpoena (1) is invalid under Montana procedural rules, (2) is overbroad, (3) seeks confidential financial information, (4) does not request relevant information, and (5) includes a restraining notice that would obstruct PCIC's day-to-day operations. (Quash Action Dkt. No. 1). On September 27, 2016, Plaintiffs filed responsive briefing, and on October 11, 2016, Defendant filed a reply. (Quash Action Dkt. Nos. 6, 10).

On September 23, 2016, Plaintiffs filed the instant action, seeking to compel compliance with the Subpoena. PCIC filed responsive briefing, arguing that Pac Re has no right to receive the funds held in the Account, and therefore PCIC has no obligation to comply with the Subpoena. (Dkt. No. 14 at 8). PCIC alleges that the 2006 Agreement was superseded by a new Casualty Quota Share Reinsurance Agreement (the "2008 Agreement"). (Holycross Aff. Ex. A,

Dkt. No. 13). PCIC claims that the 2008 Agreement clarifies that the Account "exists exclusively to protect PCIC's financial interests," and therefore cannot be subject to a restraining notice. (Dkt. 14 at 6). PCIC does not, however, controvert the fact that the funds in the Account are premium payments PCIC owes to Pac Re, withheld pursuant to the terms of the Agreement. On October 17, 2016, Plaintiffs filed their reply. (Dkt. 18).

Legal Standard

Broad post-judgment discovery in aid of execution "is the norm in federal and New York state courts." *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207 (2d Cir. 2012). Rule 69 of the Federal Rules of Civil Procedure provides that, "In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from *any* person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2) (emphasis added).

In post-judgment discovery, Rule 45, which permits a party's attorney to issue document subpoenas like the one at issue here, applies. "A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). Rule 45 requires a court to quash or modify a subpoena in certain circumstances, Fed. R. Civ. P. 45(d)(3)(A), and permits a court to do so in other circumstances, Fed. R. Civ. P. 45(d)(3)(B). "Motions to compel and motions to quash a subpoena are both 'entrusted to the sound discretion of the district court.'" *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003) (quoting *United States v. Sanders*, 211 F.3d 711, 720 (2d Cir. 2000)).

Analysis

A. Subject Matter Jurisdiction

Although PCIC does not raise an objection to subject matter jurisdiction, I feel compelled to confirm its existence in this case if only because Plaintiffs anticipated that the issue might arise and so devote most of their brief to it. First, a federal court always has ancillary jurisdiction over subsequent proceedings to enforce its own judgments. *Peacock v. Thomas*, 516 U.S. 349, 356 (1996). Second, diversity jurisdiction exists under 28 U.S.C. § 1332. As PCIC repeatedly notes in its papers in the Quash Action, it is a citizen of Montana, and Plaintiffs are citizens of Delaware and New Hampshire. (Dkt. No. 2 at 9). Since the amount in controversy clearly exceeds the threshold set forth in § 1332, there can be no question that the Court has subject matter jurisdiction over this controversy.

B. Personal Jurisdiction

PCIC has not objected to this Court's exercise of personal jurisdiction over it, either here or in the Quash Action. Moreover, PCIC has appeared in person for a hearing on this matter, without first making a special appearance to contest jurisdiction. It has therefore waived any objection regarding personal jurisdiction. Fed. R. Civ. P. 12(h).

In any event, this Court would likely have personal jurisdiction over PCIC under CPLR § 301. The uncontroverted facts asserted in Plaintiffs' brief are that PCIC has a wide range of contacts with New York. PCIC advertises, through its agent Safebuilt, insurance programs in New York and collects millions of dollars in premiums from New York insureds. (Dkt. No. 2 at 10). PCIC is a registered risk retention group under New York insurance law. (*Id.*). It has designated the Department of Financial Services as its agent for service of process. (*Id.*). It has previously participated in litigation before this Court without asserting a personal jurisdiction

defense. (*See, e.g.*, *Am. Empire Surplus Lines Ins. Co. v. Preferred Contractors Ins. Co., Risk Retention Grp., LLC*, No. 1:13-cv-4630, Dkt. No. 7).

These contacts are sufficiently "continuous and systematic" as to render PCIC essentially at home in New York. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Goodyear Dunlop Tires Operations S.S.A. v. Brown*, 564 U.S. 915, 919 (2011)). PCIC has availed itself of this Court's jurisdiction on previous occasions without objection and has again done so here.

C. Choice of Law

Rule 69(a)(2) provides that, in aid of the judgment or execution, a judgment creditor may obtain discovery from the judgment debtor as provided in the federal rules or by "the procedure of the state where the court is located." Accordingly, when a judgment creditor seeks to enforce a money judgment in federal court, the court applies the procedure of the state where the court is located, unless a federal statute applies. Fed. R. Civ. P. 69(a)(1).

PCIC's briefs in the Quash Action raise several arguments about the applicability of Montana procedural law to the Subpoena, but it does not repeat those arguments here. (*See* Dkt. No. 14 at 3-4 (admitting that PCIC "does [not] challenge that New York [CPLR §§] 5221, 5222, and 5224 govern the procedure for enforcement of a judgment creditor through the use of a restraining notice.")). Again, Plaintiffs are seeking discovery related to the enforcement of a judgment that I entered here in New York on May 19, 2016. Rule 69 is explicit that "the procedure of the state where the court is located" applies to the execution of a court's judgments. New York procedure unambiguously applies here.

D. Discovery in Aid of Judgment

New York law allows a judgment creditor to serve three different types of subpoenas—deposition subpoenas, subpoenas *duces tecum*, and information subpoenas—not just on judgment debtors but on potential *garnishees* as well. *See* CPLR § 5224(a)(1)-(4). Under both federal and

state law, post-judgment discovery in aid of execution implies a broad power. *EM Ltd*, 695 F.3d at 207. This means both that the judgment creditor has "the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor," *see GMA Accessories, Inc. v. Elec. Wonderland, Inc.*, No. 07-cv-3219, 2012 WL 1933558 at *4 (S.D.N.Y. May 22, 2012), and the "district court has broad latitude to determine the scope of discovery and to manage the discovery process," *EM Ltd.*, 695 F.3d at 207. However, a court must limit discovery to the extent that it would be "unreasonably cumulative or duplicative," or would involve an undue burden. Fed. R. Civ. P. 26(b)(2)(C).

Because the scope of discovery includes any information reasonably calculated to lead to the discovery of a judgment debtor's assets, *see* CPLR § 5223; Fed. R. Civ. P. 69(a)(2), a subpoena may necessarily be aimed at third parties who have information, including financial records, related to those assets. "It is not uncommon to seek asset discovery from third parties, including banks that possess information pertaining to the judgment debtor's assets." *EM Ltd.*, 695 F.3d at 207 (citing cases); *see also Young v. Torelli*, 135 A.D.2d 813 (2d Dep't 1987).

If the judgment debtor or third party does not respond to discovery demands, a plaintiff is entitled to move for an order compelling a response, as permitted under Rules 5(b), 30(a), and 37, after a good faith attempt to confer with the party failing to comply. *See* Fed. R. Civ. P. 37(a)(1). Plaintiffs have done exactly that here.

Plaintiffs' subpoena requests basic information about the Account that is necessary to determine whether it could be used to satisfy the judgment at issue, including the Account's location, number, and amount of funds on deposit. (Schurkman Decl. Ex. 2). It also seeks the same information about any other funds being held on PCIC's books as a liability to Pac Re,

which could also be used to satisfy the judgment. In all, the list of demands is less than one page long.

PCIC's only objection to the Subpoena appears to be that the assets in the Account are being held for PCIC's benefit, and not for Pac Re's, to ensure that funds are available to PCIC to reimburse it for losses that it pays out, thereby limiting PCIC's exposure. Whatever the merits of that statement, it is undisputed that the funds are listed on PCIC's balance sheet as a liability owed to Pac Re. PCIC's brief acknowledges this, stating that "A funds withheld account is an account whereby premium payments and/or assets *normally paid over to a reinsurer* are instead withheld by the ceding company . . . ." (Dkt. 14 at 4 (emphasis added)). As PCIC does not contest that the funds in the Account would "ordinarily" belong to Pac Re, there can be no dispute that Plaintiffs are permitted to conduct basic discovery over the Account.

Not presently before the Court is the ultimate issue of the *priority* of Pac Re's claim over the funds in the Account as compared to PCIC's claim. The parties have not briefed that issue, which will come before this Court should Plaintiffs attempt to require PCIC to turn over the funds in the Account in order to satisfy the judgment. It is unnecessary to determine questions of priority for purposes of a preliminary Subpoena seeking basic information about the Account. Those issues will be decided by this Court at the appropriate time.

To the extent that PCIC's Quash Action briefing raises the claim that the Subpoena is overbroad or unduly burdensome, Fed. R. Civ. P. 45(d)(3)(A)(i), (iv), I reject that argument. "An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party." *Copantitla v. Fiskardo Estiatorio, Inc.*, No. 09 CIV. 1608, 2010 WL 1327921, at *10 (S.D.N.Y. Apr. 5, 2010) (quoting *Travelers Indem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005)). This analysis depends upon

factors such as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed. *Id.* The Subpoena's demands are reasonably calculated to lead to the discovery of Pac Re's assets, and the Subpoena's timeframe of seven days response time is not unreasonable given the minimal amount of information requested. The Subpoena describes the information needed with particularity, and there is no question that such information is necessary for Plaintiffs to determine whether PCIC holds assets that may be available for satisfaction of the Confirmation Action judgment.

PCIC's briefs in the Quash Action also assert that the Subpoena must be quashed because it seeks disclosure of confidential, private, and protected financial information. Fed. R. Civ. P. 45(d)(3)(A)(iii). Alternatively, it argues the Subpoena should be quashed because the financial information constitutes a "trade secret or other confidential research, development, or commercial information." Fed. R. Civ. P. 45(d)(3)(B)(i). In support of these arguments, PCIC cites Montana Code § 33-28-108(3), which states that:

> Except as provided in subsection (4), all examination reports, preliminary examination reports or results, working papers, recorded information, documents, and their copies produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination made under this section are confidential, are not subject to subpoena, and may not be made public by the commissioner or an employee or agent of the commissioner without the written consent of the company or upon court order.

While it is already clear that New York procedural law applies to this Subpoena, this provision, if applicable, would not establish a litigation privilege over the financial records. While the statute clearly states that the Montana Insurance Commissioner may not disclose this information, absent the insurance company's consent or a court order, that does not mean that the insurance company itself is protected from litigation discovery by this statute. Courts in this

Circuit have regularly upheld non-party subpoenas seeking financial information where plaintiffs have otherwise shown the information to be relevant and narrow in scope. *See Eastman Kodak Co. v. Camarata*, 238 F.R.D. 372, 377 (W.D.N.Y. 2006); *Coen v. Americare Certified Special Servs.*, Inc., No. 13-CV-5522, 2014 WL 1237258, at *2 (E.D.N.Y. Mar. 25, 2014).

The Subpoena is, therefore, valid. The parties are free to enter into a Confidentiality Agreement to protect against unauthorized disclosure of the information provided by PCIC in response to the Subpoena, subject, of course, to the caveat that this Court will ultimately decide whether information about money belonging to Pac Re in PCICs possession qualifies as "confidential" (a highly dubious proposition).

E. Restraining Notice

PCIC also objects to the Restraining Notice attached to the Subpoena, arguing that it does not hold funds that belong to Pac Re. Section 5222 of the CPLR sets forth the use of restraining notices and provides, in pertinent part:

> A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court . . . . It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor.

Restraining notices issued pursuant to § 5222 are effective against assets in which the judgment debtor has an "interest," and they "only reach property and debts with such a connection to the judgment debtor." *AG Worldwide v. Red Cube Mgmt. AG*, No. 01-cv-1228, 2002 WL 417251, at *8 (S.D.N.Y. Mar. 15, 2002). Thus, if third parties "do not have property or debts in which the judgment debtor has an interest, the restraining notices are not effective." *Id.* To the extent a restraining notice purports to affect any property other than that of the judgment

debtor, they are improper under CPLR § 5222. *See JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366, 393 (S.D.N.Y. 2003).

New York courts have analyzed the extent of a judgment debtor's "interest" in various contexts. To be effective, the "[j]udgment debtor's 'interest' in property must be understood to mean a direct interest in the property itself which, while it may require a court determination, is leviable and not an indirect interest in the proceeds of the property . . . ." *Sumitomo Shoji New York, Inc. v. Chem. Bank New York Trust Co.*, 47 Misc. 2d 741, 746 (N.Y. Sup. 1965). In both *Bingham v. Zolt*, 231 A.D.2d 479 (1st Dep't 1996), and *ERA Mgmt., Inc. v. Morrison Cohen Singer & Weinstein*, 199 A.D.2d 179 (1st Dep't 1993), the First Department found that restraining notices were properly issued against bank accounts held in the name of third parties, where the plaintiffs had provided evidence that the accounts held the assets of the judgment debtor. A restraining notice may be employed against contingent property interests, including trusts that are managed by independent trustees with full control over disbursements to the judgment debtor. *Kates v. Marine Midland Bank, N.A.*, 143 Misc. 2d 721, 723 (Sup. Ct. 1989).

While it is important to define what a restraining notice is, it is equally helpful here to determine what a restraining notice is *not*. A restraining notice "establishes neither a lien against the debt or property to which it is directed or priority over any other judgment creditor or lienor, who may subsequently pursue that same debt or property." 4A N.Y. Practice § 58:18 (4th ed.). Rather, a restraining notice "simply enjoins the debtor or third party from transferring the debt or property to which the restraint attaches." *Id.*

Here, even under the 2008 Agreement, it is clear that PCIC holds the Account as a "liability" to Pac Re. (Holycross Aff. Ex. A § V.A). PCIC has acknowledged that the Account contains premium payments that PCIC would "ordinarily" pay to Pac Re as part of their

reinsurance agreement. Whatever reasons why the account exists, and whatever restrictions the 2008 Agreement places on Pac Re's ability to withdraw or control the Account's funds, they do not change the fact that Pac Re has a direct ownership interest in the money in the Account.

Moreover, the restraining notice in no way compromises PCIC's position vis-à-vis its obligations under the 2008 Agreement. The restraining notice does not establish a lien against the Account, nor does it affect the priority of interests over the funds in the Account. Indeed, it does nothing except prevent PCIC from transferring the funds away or causing the funds to be transferred. As noted above, neither party has briefed the issue of whether Pac Re's claim over the Account takes priority over PCIC's claim. Accordingly, the issue of priority is not currently before me, and my decision today does nothing to change whatever legal interest PCIC may be able to assert over the Account at a future proceeding.

Plaintiffs' Subpoena, including the Restraining Notice, is valid, and PCIC is hereby ordered to comply with its terms.

Conclusion

For the foregoing reasons, Plaintiffs' motion to compel per Rule 69(a) is GRANTED. In accordance with the Subpoena's terms, Defendant has seven days to respond, until October 25, 2016. The restraining notice is effective immediately. Per Rule 69 and CPLR § 5222, failure to comply with the Subpoena or the restraining notice will be considered contempt of court.

The Clerk of the Court is directed to remove Docket #1 from the Court's list of pending motions.

Dated: October 18, 2016

U.S.D.J.

BY ECF TO ALL COUNSEL