

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

**FILED** *12*  
2023 JUN 27 AM 11:44

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**MOUNTAIN STATE  
PIPELINE & EXCAVATING, LLC,  
a West Virginia Limited Liability Company,**

**Plaintiff/Counterclaim Defendant/Crossclaimant,**

**v.**

**Civil Case No.: 20-C-350  
Presiding: Judge Akers  
Resolution: Judge Farrell**

**SMITH/PACKETT MED-COM, LLC,  
a Virginia Limited Liability Company, and  
Sole Manager-Member of Defendant SP WV, LLC,**

**Defendant/Counterclaimant; and**

**SP WV, LLC  
a Virginia Manager-Managed Limited Liability Company and  
"Pass Through Entity" acting as the Sole Member of  
Defendant WV IL-AL Investors, LLC**

**Defendant/Counterclaimant; and**

**WV IL-AL INVESTORS, LLC,  
a Virginia Member-Managed Limited Liability Company,**

**Defendant/Counterclaimant; and**

**JARRETT CONSTRUCTION SERVICES, INC.  
a West Virginia Limited Liability Company,  
as Construction Manager at Risk,**

**Defendants/Counterclaimant; and**

**CARTER BANK & TRUST,**

**Defendant; and**

**JARRETT CONSTRUCTION SERVICES, INC.,**

**Third-Party Plaintiff,**

**v.**

**ECS MID-ATLANTIC, LLC,**

**Third-Party Defendant/Crossclaim Defendant.**

1171-  
1172

**RECOMMENDED ORDER RELATED TO DOCUMENTS FOR WHICH SP  
DEFENDANTS CLAIM AN EXEMPTION FROM PRODUCTION**

By a previous Order, this Court appointed David K. Hendrickson as the Special Commissioner for the purpose of making recommendations to the Court concerning pending discovery disputes. Pursuant to the Special Commissioner's First Recommended Order, under Paragraph 8, Plaintiff MOUNTAIN STATE PIPELINE & EXCAVATING, LLC ("MSPE") identified by letter to Defendant SMITH PACKET, ET AL. ("SP"), documents from the SP'S REVISED PRIVILEGE LOG TO OWNER'S DOCUMENTS requiring the Special Commissioner's review. The Parties complied with the order and provided the Special Commissioner with the attached REVISED PRIVILEGE LOG TO OWNER'S DOCUMENTS, edited down by Discovery Commissioner to the documents at issue as identified by the Plaintiff. Upon receipt of this Revised Privilege Log, as identified by the Plaintiffs, SP provided the Special Commissioner with the Bates Numbered Documents for his *in camera* review. Following this review, the Special Commissioner offers these findings and recommendations:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Court's Order directed the Special Commissioner to review *in camera* documents that SP claimed were exempt from production and MSPE protested. To that end, the Special Commissioner was provided with unredacted copies of the documents at issue.

2. SP asserts two (2) principal objections: (1) Attorney-Client Privileged communication (*see State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979)); and (2) the work product exception (W. Va. R. Civ. P. 26(b)(3)).

3. To establish attorney-client protection, "three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal [advisor]; (3) the



communication between the attorney and client must be intended to be confidential.” Syl. Pt. 2. *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979).

4. Defendant also asserts that many of the documents are protected as Attorney Work Product. W. Va. R. Civ. P. 26(b)(3) makes clear that “the court shall protect against disclosure against mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.” The West Virginia Supreme Court of Appeals has also made it clear that:

The work product doctrine in West Virginia, which historically protects against disclosure of the fruits of an attorney's labor, is necessary to prevent one attorney from invading the files of another attorney. In addition to Rule 26(b)(3), this Court consistently has recognized that the work product exception may act as a bar to discovery requests.

*State of West Virginia ex rel. United States Fidelity Guaranty Co., et al. v Honorable Herman G. Canady, Jr.*, 194 W. Va. 431 at 444, 460 S.E.2d 677 at 690 (1995) (citations omitted). Rule 26(b)(3) of the West Virginia Rules of Civil Procedure makes a distinction between fact and opinion work product:

Under Rule 26(b)(3), factual work product refers to documents and tangible things that were prepared in anticipation of litigation or for trial (1) by or for a party, or (2) by or for that party's representative, which includes an attorney, consultant .... When factual work product is involved, the party demanding production must show a substantial need for the material and establish that the same material or its equivalent cannot be obtained through other means without undue hardship. Opinion work product consists of mental impressions, conclusions, opinions or legal theories that are contained in factual work product. Where opinion work product is involved, the showing required to obtain discovery is stronger than that for factual work product, because the rule states that the court shall protect against disclosure of mental impressions, conclusions, opinions or legal theories. Opinion work product enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances.

*State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 218 W. Va. 593, 599, 625 S.E.2d 355, 361 (2005) (Davis, J., concurring). The burden of enjoying the work product exception is on the party

asserting it. Cleckley, Davis, & Palmer, *Litigation Handbook* § 26(b)(3), at 721.

5. The Findings set forth above have guided my Recommendations in this matter.

### **RECOMMENDATIONS**

6. Upon consideration of the Motion and the relevant principles set forth, this Special Commissioner **RECOMMENDS** the rulings set forth with respect to each document/email in the Revised Privilege Log provided by SP and identified by MSPE as follows:

- Documents Bates Nos. 0009998-0010000; 0045768-0045769: 0109607-0109608; 0109706; 0119810-0119812; 0121491 and 0132382 ARE NOT PRIVILEGED and are HEREBY ORDERED TO BE PROVIDED TO THE PLAINTIFF.
- All other Documents Bates Nos. ARE PRIVILEGED and require no production.

7. These Recommendations in no way apply to any other documents or parties in this dispute. The Special Commissioner specifically finds that SP's production of the aforementioned documents does not serve as the basis for a waiver of the attorney-client privilege or the work product exception as to any other documents.

Pursuant to the Order Appointing Special Commissioner, the undersigned finds that neither party substantially prevailed and recommends that the costs associated with this matter be borne equally by the parties.

**WHEREFORE**, this Special Commissioner recommends that the above Recommendations be implemented. A copy of this "RECOMMENDED ORDER RELATED TO DOCUMENTS FOR WHICH SP DEFENDANTS CLAIM AN EXEMPTION FROM PRODUCTION" is being forwarded to all counsel by email and U.S. regular mail.

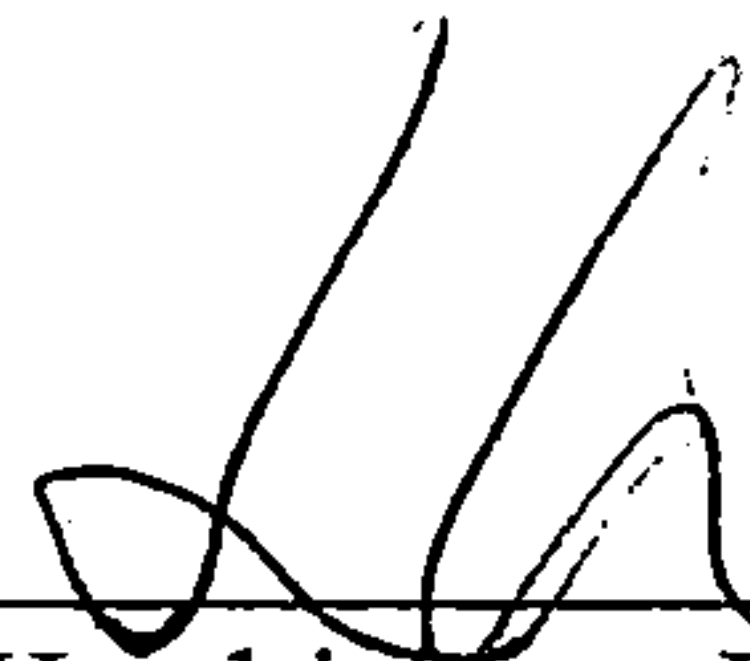
IT IS SO ORDERED, this \_\_\_\_\_ day of June, 2023.



ACCEPTED BY:

  
HON. MARYCLAIRE AKERS, JUDGE

Prepared by:

  
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Discovery Commissioner  
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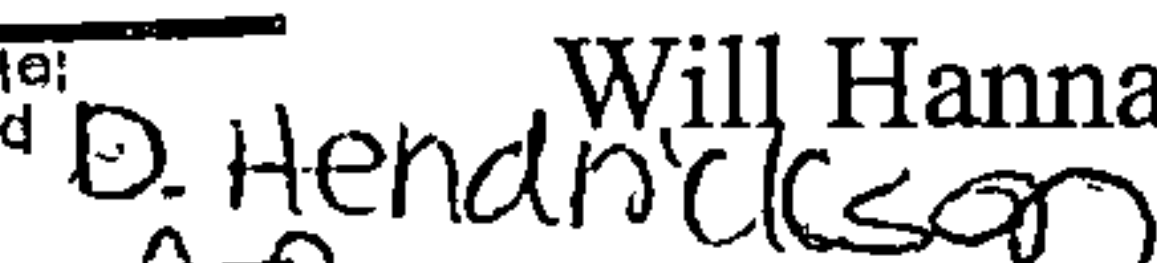
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FILED

# COMMISSIONER'S VERSION

## REVISED PRIVILEGE LOG TO OWNER'S DOCUMENTS

 CAITHY S. GATSON, CLERK  
 PANAMA COUNTY CIRCUIT COURT

Bates	Type of Document	Subject Matter	Privilege
0009992-0010000	Correspondence 08/28/2020	Crossings at Southridge (the "Project")	Work Product
0030742 – 0030747 (redacted)	Email Chain 12/16/2019 8:43 a.m.	Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0030955-0030966 (redacted)	Email Chain 09/12/2019 9:16 a.m.	EIT's Contract	Attorney/Client Privileged Communication
0031344	Email 02/01/2019 3:09 p.m.	RE: CROSSINGS AT SOUTHRIDGE –Terradon 1-29-19, CIVIL SITE REVIEW	Attorney/Client Privileged Communication
0031500-0031501 (redacted)	Email 03/28/2018 3:30 p.m.	Revisions to contract documents	Attorney/Client Privileged Communication
0031625-0031626 (redacted)	Email Chain 03/27/2018 8:13 a.m.	RE: Crossings @ Southridge – Add and Deduct Spreadsheet for Contract [STB-WORKSITE.FID28 3617]	Attorney/Client Privileged Communication
0033009	Email Chain 02/01/2019 3:17 p.m.	RE: CROSSINGS AT SOUTHRIDGE-Terradon 1-29-19, CIVIL SITE REVIEW	Attorney/Client Privileged Communication
0033520-0033527 (redacted)	Email Chain 12/16/2019 8:50 a.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0035493-0035495 (redacted)	Email 03/28/2018 10:38 a.m.	RE: Bid Clarifications mod for winter conditions	Attorney/Client Privileged Communication



0038080-0038083 (redacted)	Email 10/30/2019 12:57 a.m.	Potential Defense Consultant/Expert	Attorney/Client Privileged Communication
0041190-0041196 (redacted)	Email Chain 07/17/2017 11:04 a.m.	RE: Epermitting Login change request	Relevancy
0044914-0044917 (redacted)	Email Chain 11/14/2019 3:40 p.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0044926-0044927 (redacted)	Email Chain 03/01/2018 1:14 p.m.	RE: WV IL AL Capital Call	Attorney/Client Privileged Communication
0045768-0045769	Correspondence 12/09/2019	The Crossings Southridge Pay Application #2 – Tornado – Rev. 2 11/14/19	Work Product
0045833-0045837	Email Chain 10/29/2019 10:43 a.m.	RE: Crossings at Southridge – Charleston, WV AIA	Attorney/Client Privileged Communication
0045978-0045982 (redacted)	Email Chain 4/24/2019 9:02 a.m.	RE: Crossings at Southridge – Charleston, WV AIA and Change Orders	Attorney/Client Privileged Communication
0046221-0046223 (redacted)	Email Chain 11/11/2019 3:46 p.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0046346-0046348 (redacted)	Email Chain 03/27/2018 8:10 a.m.	RE: Crossings @ Southridge – Add and Deduct Spreadsheet for Contract [STN- WORK SITE.FID283617]	Attorney/Client Privileged Communication



0046363- 0046368 (redacted)	Email Chain 03/21/2018 3:10 p.m.	FW: jarrett	Attorney/Client Privileged Communication
0046393- 0046394 (redacted)	Email 02/26/2018 9:46 a.m.	FW: Crossings at Southridge – Contracts	Attorney/Client Privileged Communication
0046592- 0046628 (redacted)	Email Chain 2/19/2018 8:29 a.m.	RE: Charleston Project	Attorney/Client Privileged Communication
0046938- 0046965 (redacted)	Email Chain 09/12/2019 9:17 a.m.	RE: The Crossings at Southridge	Attorney/Client Privileged Communication
0046991- 0046995 (redacted)	Email Chain 03/18/2018 5:44 p.m.	FW: GC General Conditions	Attorney/Client Privileged Communication
0047304- 0047359 (redacted)	Email Chain 02/19/2018 8:43 a.m.	RE: Charleston Project	Attorney/Client Privileged Communication
0055967- 0055968	Email Chain 02/07/2017 3:41 p.m.	RE: Morgantown	Attorney/Client Privileged Communication Relevancy
0057111- 0057115 (redacted)	Email Chain 10/29/2019 10:47 a.m.	RE: Crossings at Southridge – Charleston, WV AIA/Contract	Attorney/Client Privileged Communication
0057127 (redacted)	Email 10/25/2019 3:59 p.m.	Re: Design Roofing partial Executed Contract – Crossings at Southridge, Chas WV	Attorney/Client Privileged Communication
0057291- 0057294 (redacted)	Email Chain 9/12/2019 9:06 a.m.	RE: The Crossings at Southridge	Attorney/Client Privileged Communication
0057296- 0057298 (redacted)	Email Chain 9/12/2019 8:54 a.m.	RE: The Crossings at Southridge	Attorney/Client Privileged Communication
0057956 (redacted)	Email 4/24/2019 8:56 a.m.	RE: Crossings at Southridge – Charleston, WV	Attorney/Client Privileged Communication



		AIA for WB Services	
0057989-0057990 (redacted)	Email Chain 4/18/2019 8:50 a.m.	RE: Charleston, WV P&P Bond and AIA	Attorney/Client Privileged Communication
0058751-0058755 (redacted)	Email Chain 02/04/2019 7:20 a.m.	RE: CROSSINGS AT SOUTHRIDGE-Terradon 1-29-19, CIVIL SITE REVIEW	Attorney/Client Privileged Communication
0060098-0060100 (redacted)	Email Chain 08/29/2018 2:12 p.m.	RE: Lisa Stalnaker shared "Crossing Contracts" with you	Attorney/Client Privileged Communication
0060114 (redacted)	Email 08/27/2018 9:36 a.m.	Southridge Mountain State Pipeline Contract	Attorney/Client Privileged Communication
0061946-0061950 (redacted)	Email 03/28/2018 4:16 p.m.	Contract Sum Spreadsheet, Add and Deduct Spreadsheet for Contract	Attorney/Client Privileged Communication
0062148-0062149 (redacted)	Email 03/27/2018 12:19 p.m.	Crossings @ Southridge - Add and Deduct Spreadsheet for Contract	Attorney/Client Privileged Communication
0062285-0062286 (redacted)	Email Chain 03/21/2018 3:17 p.m.	RE: jarrett	Attorney/Client Privileged Communication
0062304-0062306 (redacted)	Email Chain 03/09/2018 4:03 p.m.	RE: Jarrett	Attorney/Client Privileged Communication
0062309-0062311 (redacted)	Email Chain 03/09/2018 3:26 p.m.	RE: Jarrett	Attorney/Client Privileged Communication
0062421-0062433 (redacted)	Email Chain 02/09/2018 2:33 p.m.	RE: Charleston Project	Attorney/Client Privileged Communication



0104686-0104691 (redacted)	Email Chain 12/30/2019 4:41 p.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0104692-0104704 (redacted)	Email Chain 08/27/2018 10:13 a.m.	RE: Southridge Mountain State Pipeline contract	Attorney/Client Privileged Communication
0105660-0105671 (redacted)	Email Chain 12/26/2019 1:29 p.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0109607-0109608	Correspondence 10/26/2018	Jarrett Construction Notice of Claim for Material Price Increases; The Crossings at Southridge, South Charleston, WV	Work Product
0109706	Email 03/28/2018 3:04 p.m.	Crossings – A101 and A201[STB-WORKSITE.FID28 3617]	Work Product
0110501	Email 03/29/2018 7:10 p.m.	Crossings – Final Multi-Prime Contractor Forms (A 132 and A232)	Work Product
0110644 (redacted)	Email 03/27/2018 12:19 p.m.	RE: Crossings @ Southridge – Add and Deduct Spreadsheet for Contract	Attorney/Client Privileged Communication
0111341-0111344 (redacted)	Email Chain 10/03/2019 8:25 a.m.	Fwd: Southridge August pay app info	Attorney/Client Privileged Communication
0111907-0111914 (redacted)	Email Chain 12/13/2019 5:13 p.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication



0113040-0113044 (redacted)	Email Chain 10/29/2019 10:43 a.m.	RE: Crossings at Southridge – Charleston, WV AIA/Contract	Attorney/Client Privileged Communication
0113370	Email Chain 10/29/2019 10:47 a.m.	RE: Crossings at Southridge – Charleston, WV AIA/Contract	Attorney/Client Privileged Communication
0114100-0114102 (redacted)	Email Chain 09/12/2019 9:16 a.m.	RE: The Crossings at Southridge	Attorney/Client Privileged Communication
0115972-0115976 (redacted)	Email Chain 10/03/2019 8:25 a.m.	RE: Southridge August pay app info	Attorney/Client Privileged Communication
0116455	Email Chain 02/01/2019 3:17 p.m.	Re: CROSSINGS AT SOUTHRIDGE-Terradon 1-29-19, CIVIL SITE REVIEW	Attorney/Client Privileged Communication
0116459	Email 12/09/2019 1:57 p.m.	MSPE/Jarrett Letter	Attorney/Client Privileged Communication
0116463-0116464	Email 11/25/2019 9:46 a.m.	MSPE/Jarrett Letter	Attorney/Client Privileged Communication
0116476-0116477	Email Chain 11/18/2019 9:24 a.m.	MSPE Letters	Attorney/Client Privileged Communication
0116536	Email Chain 11/04/2019 9:22 a.m.	MSPE Letters created by Allyson Perdue	Attorney/Client Privileged Communication
0116543	Email 10/30/2019 9:09 a.m.	RE: MSPE Letters	Attorney/Client Privileged Communication
0119162-0119163 (redacted)	Email 09/24/2019 8:21 a.m.	RE: MSPE and Efincia letters for review	Attorney/Client Privileged Communication
0119328 (redacted)	Email Chain 08/19/2019 4:14 p.m.	RE: Southridge Slope Test Pit	Attorney/Client Privileged Communication



0119810-0119812	Correspondence 09/10/2019	The Crossings at Southridge; Slope Failure Issues and Correspondence from MSPE	Work Product
0119847-0119859 (redacted)	Email Chain 09/12/2019 9:17 a.m.	RE: The Crossings at Southridge	Attorney/Client Privileged Communication
0119874-0119875 (redacted)	Email Chain 08/19/2019 4:30 p.m.	RE: Southridge Slope Test Pit	Attorney/Client Privileged Communication
0120311-0120315 (redacted)	Email Chain 09/12/2019 9:06 a.m.	RE: The Crossings at Southridge	Attorney/Client Privileged Communication
0120331	Email Chain 02/01/2019 3:11 p.m.	RE: CROSSINGS AT SOUTHRIDGE-Terradon 1-29-19, CIVIL SITE REVIEW	Attorney/Client Privileged
0120516-0120518 (redacted)	Email Chain 08/14/2019 9:08 a.m.	Southridge soccer field FW: BCC GRADE CHANGE	Attorney/Client Privileged Communication
0120646-0120650 (redacted)	Email 08/13/2019 5:05 p.m.	Southridge soccer field FW: BCC GRADE CHANGE	Attorney/Client Privileged Communication
0120731-0120734 (redacted)	Email 12/06/2019 4:43 p.m.	Crossings at Southridge-Charleston, WV Background on project	Attorney/Client Privileged Communication
0121327	Email Chain 12/04/2019 11:59 a.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication

0121485-0121490 (redacted)	Email Chain 10/17/2019 3:19 p.m.	FW: Crossings- Pile Wall Design- John James	Attorney/Client Privileged Communication
0123525-0123532	Email Chain 09/04/2019 6:21 p.m.	FW: Southridge Test Pit Report Terradon (Draft Response)	Attorney/Client Privileged Communication
0123547	Email 11/01/2019 10:19 a.m.	RE: The Crossings at Charleston	Attorney/Client Privileged Communication
0123556	Email 10/31/2019 11:53 a.m.	RE: The Crossings at Charleston	Attorney/Client Privileged Communication
0123678-0123685 (redacted)	Email 08/19/2019 8:38 a.m.	WV IL-AL Investors, LLC d/ba The Crossings at Southridge sustained wind damage from a tonrnado	Attorney/Client Privileged Communication
0123717-0123741 (redacted)	Email 10/31/2019 11:24 a.m.	The Crossings at Charleston	Attorney/Client Privileged Communication
0123797-0123803 (redacted)	Email Chain 10/18/2019 8:57 a.m.	RE: Crossings- Pile Wall Design- John James	Attorney/Client Privileged Communication
0123807	Email Chain 12/19/2019 3:36 p.m.	Re: Charleston: Wall	Attorney/Client Privileged Communication
0124239-0124253 (redacted)	Email Chain 07/11/2019 3:38 p.m.	RE: Southridge Shower Replacement	Attorney/Client Privileged Communication
0124350-0124360 (redacted)	Email Chain 07/11/2019 3:59 p.m.	Southridge Shower Replacement	Attorney/Client Privileged Communication
0124397-0124401 (redacted)	Email Chain 06/27/2019 9:55 a.m.	RE: Crossings Damage	Attorney/Client Privileged Communication



0124407- 0124410 (redacted)	Email Chain 06/20/2019 9:20 a.m.	Water Damage at Charleston, WV (WV IL-AL Investors, LLC)	Attorney/Client Privileged Communication
0124413- 0124429 (redacted)	Email Chain 12/26/2019 1:07 p.m.	Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0124437- 0124448 (redacted)	Email Chain 09/24/2019 1:39 p.m.	Tornado Damages	Attorney/Client Privileged Communication
0124594- 0124608 (redacted)	Email Chain 07/11/2019 3:48 p.m.	RE: Southridge Shower Replacement	Attorney/Client Privileged Communication
0124954- 0124959 (redacted)	Email Chain 12/30/2019 4:43 p.m.	Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0125901- 0125902 (redacted)	Email Chain 09/24/2019 1:39 p.m.	Crossings Tornado	Attorney/Client Privileged Communication
0125907- 0125912 (redacted)	Email Chain 09/24/2019 1:39 p.m.	Crossings Tornado	Attorney/Client Privileged Communication
0126644- 0126659 (redacted)	Email Chain 07/11/2019 3:38 p.m.	Southridge Shower Replacement	Attorney/Client Privileged Communication
0126933- 0126942 (redacted)	Email Chain 06/27/2019 12:04 p.m.	Crossings Damage	Attorney/Client Privileged Communication
0127218- 0127221 (redacted)	Email Chain 06/27/2019 2:09 p.m.	RE: Crossings Damage	Attorney/Client Privileged Communication
0131131- 0131133 (redacted)	Email 01/04/2021 1:09 p.m.	Confidentiality Agreement – Crossings Smith- Packett	Attorney/Client Privileged Communication
0132382	Email Chain 11/03/2017 1:26 p.m.	RE: Response to Title Objections- Charleston, WV	Attorney/Client Privileged Communication

0135098-0135101 (redacted)	Email Chain 06/27/2019 8:37 a.m.	Builder's Risk Quota Share Policies for WV IL-AL Investors, LLC	Attorney/Client Privileged Communication
0160187-0160189 (redacted)	Email Chain 07/17/2017 11:04 a.m.	E-permitting login change request	Attorney/Client Privileged Communication
0167657	Email Chain 11/21/2019 11:38 a.m.	RE: Crossings at Southridge Tornado Pay Application #2	Attorney/Client Privileged Communication
0168012	Email Chain 09/25/2019 11:17 a.m.	RE: RE Terradon Contract Termination Provisions	Attorney/Client Privileged Communication