

FILED

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2021 FEB 16 AM 8:52

**AXIALL CORPORATION and
WESTLAKE CHEMICAL
CORPORATION,**

JOSEPH M. RUCKI

Plaintiffs,

vs.

**Civil Action No.: 19-C-59
Presiding Judge Wilkes
Resolution Judges Carl and Nines**

**NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA., *et al.*,**

Defendants.

**ORDER GRANTING DEFENDANTS' MOTION TO COMPEL COMPLETE
DISCOVERY ANSWERS FROM PLAINTIFFS AND TO STRIKE PLAINTIFFS'
"UNDULY BURDENSOME" OBJECTIONS TO DEFENDANTS' DISCOVERY
REQUESTS**

This matter came before the Court this 12th day of February 2021. The Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company, by counsel, have filed Defendants' Motion to Compel Complete Discovery Answers From Plaintiffs and to Strike Plaintiffs' "Unduly Burdensome" Objections to Defendants' Discovery Requests. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs"), by counsel, David R. Osipovich, Esq., and Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great

Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company (hereinafter “Defendants” or “Insurers”), by counsel, James A. Varner, Sr., Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds an insurance coverage dispute involving Defendants’ alleged failure to cover Plaintiff Westlake Chemical Corporation for property damage at its Marshall County, West Virginia plant caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl; *see also* Defs’ Mem., p. 4. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts, and also engaged in bad-faith claims handling. *See* Pl’s Resp. to Def’s Mot. for Ltd. Clarification, p. 2.

2. On a prior day, Defendants filed the instant Defendants’ Motion to Compel Complete Discovery Answers From Plaintiffs and to Strike Plaintiffs’ “Unduly Burdensome” Objections to Defendants’ Discovery Requests, arguing that the Court should enter an Order compelling Plaintiffs to fully respond to Interrogatory No. 15 regarding alleged damage to equipment, compelling Plaintiff to fully respond to Interrogatory No. 11 regarding specific provisions of the instant Policy Plaintiffs contend are ambiguous, compelling Plaintiffs to “completely respond to each request in Defendants’ Second Set of Requests for Production and Things with specific bates number references to responsive documents for each request”, and

compelling Plaintiffs to establish the unduly burdensome nature of their “unduly burdensome” objections to certain requests or, in the alternative, striking said objections. *See* Def’s Mem., p. 4-7, 10, 11.

3. On a prior day, Plaintiffs filed Plaintiffs’ Brief in Opposition to Defendants’ Motion to Compel, arguing the instant motion should be denied because for each of Defendants’ purported deficiencies, Plaintiffs have either already produced the relevant information or has agreed to as soon as such information becomes available, with the only exception being requests that are incompatible with West Virginia law. *See* Pls’ Resp., p. 2.

4. On a prior day, Defendants filed their Reply, reiterating its arguments.

5. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

Generally,

Civil discovery is governed by the West Virginia Rules of Civil Procedure, Rules 26 through 37. The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue.

Syl. Pt. 1, in part, *Evans v. Mutual Min.*, 199 W.Va. 526, 485 S.E.2d 695 (1997) (internal quotations and citations omitted).

Generally speaking, the discovery process allows litigants to obtain materials that are *critical to the proof of their case*. As such, materials that are relevant and probative to the asserted claim, or any defenses thereto, usually are discoverable.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It

is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

W. Va. R. Civ. P. 26(b)(1). *cited by State of W. Virginia ex rel. Allstate Ins. Co. v. Madden*, 215 W. Va. 705, 712–13, 601 S.E.2d 25, 32–33 (2004).

Further, Rule 33 provides, in pertinent part, that “any party may serve upon any other party written interrogatories ... to be answered by the party served”. W.Va. R. Civ. P. 33 (a). The Rule goes on to require that “[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. Requests for Production are governed by Rule 34 of the West Virginia Rules of Civil Procedure which provides, *inter alia*, “[a]ny party may serve on any other party a request (1) to produce ... any designated documents...” This Rule requires parties to respond to this type of request within certain time frames and to “organize and label them to correspond with the categories in the request.” W.Va. R. Civ. P. 34 (b).

In the instant motion, Defendants have moved the Court to compel certain categories of discovery. Specifically, Defendants argued that the Court should enter an Order compelling Plaintiffs to fully respond to Interrogatory No. 15 regarding alleged damage to equipment, compelling Plaintiff to fully respond to Interrogatory No. 11 regarding specific provisions of the instant Policy Plaintiffs contend are ambiguous, compelling Plaintiffs to “completely respond to each request in Defendants’ Second Set of Requests for Production and Things with specific Bates number references to responsive documents for each request”, and compelling Plaintiffs to establish the unduly burdensome nature of their “unduly burdensome” objections to certain

requests or, in the alternative, striking said objections. *See* Def's Mem., p. 4-7, 10, 11. The Court will take up the issues in turn.

Interrogatory No. 15

First, the Court examines Defendants argument that that Plaintiffs have failed to provide fundamental details regarding their calculation and assessment of alleged damages to physical property (each piece of physical property) at the Natrium Plant. *See* Defs' Mem., p. 4. This argument and discovery request surrounds Interrogatory No. 15. Interrogatory No. 15 requests the following:

"Identify with specificity each item of Equipment at the Plant that was damaged and/or failed to function or operate which Plaintiffs attribute to the Release, including within the response the date of the failure, the location of the failed Equipment in the Plant, the failure mode, the damage to the Equipment causing the failure, the date of the original manufacture, purchase, and installation of the Failed Equipment, and the date each item of failed Equipment was repaired/replaced."

See Reply, p. 4; *see also* Defs' Mot, Ex. 2, p. 33.

In response, Plaintiffs claim they have provided "itemized, detailed lists setting forth different categories of damaged property, and ha[ve] committed to continue providing updated information regarding this damage as new information develops". *See* Pls' Resp., p. 2, 5. However, Defendants allege in the Reply that the "itemized lists" lack much of the information requested in the discovery request. *See* Reply, p. 2.

The Court finds and concludes this request should be granted. Defendants are plainly entitled to have a detailed analysis of damage claims, sufficient to allow them an opportunity to evaluate the loss. Defendants have proffered to the Court that they need this information to properly evaluate whether the allegedly damaged equipment and corresponding repair was necessitated by the release, and also to "evaluate the represented quantum of the repairs". *See*

Reply, p. 5. Further, the Court finds this evidence is very relevant and important to Plaintiffs' bad faith argument, and Defendants' ability to defend the same. Accordingly, the Court finds and concludes this request is ordered to be granted, and Plaintiffs are ordered to produce the same.

Interrogatory No. 11

First, the Court examines Defendants argument that that Plaintiffs have not sufficiently answered the discovery request asking them to identify Policy provisions they contend are ambiguous or unclear. *See* Defs' Mem., p. 6. Further, Defendants argue Plaintiffs have improperly responded many times with the same boilerplate objection, including an objection alleging the request is unduly burdensome. *Id.* This argument and discovery request surrounds Interrogatory No. 11. Interrogatory No. 11 requests the following:

"Identify any terms and/or provisions of the Policy, if any, that Plaintiffs contend are ambiguous or unclear, explaining in detail the basis for the contention that the provision is ambiguous or unclear and how the alleged ambiguity supports the claim for coverage under the Policy."

See Defs' Mem., p. 6; *see also* Defs' Mot, Ex. 2, p. 29-30.

In response, Plaintiffs claim they have already provided potentially ambiguous Policy provisions, to the extent it can do so at this stage in the litigation. *See* Pls' Resp., p. 6-7.

The Court agrees that this Interrogatory plainly seeks basic information concerning whether and how Plaintiffs intend to utilize any alleged Policy ambiguity to support their claim for coverage. *See* Reply, p. 5. This makes such discovery extremely relevant to one of the most central issues of this case – coverage. The Court has recognized that coverage may be a matter of law to be determined on dispositive motions by the Court, and which provisions, if any, Plaintiffs contend are ambiguous would certainly be important to any such determination. This

is true even if Plaintiffs argue a certain provision is ambiguous, and Defendants argue it is unambiguous. *See* Pls' Resp., p. 7. The Court also notes that it required Defendants to respond to Interrogatory No. 10 regarding their coverage positions, and the Court will require Plaintiffs do the same. *See* Reply, p. 6.

Further, this Court recognizes that repeated boilerplate objections, without details and specificity must be denied.

"Where objections are made to discovery requests, most courts required a specific showing as to how each discovery request is burdensome, oppressive, or embarrassing unless such can be determined from the sheer volume of the request in light of the case issues."

Truman v. F & M Bank, 180 W. Va. 133, 375 S.E.2d 765 (1988).

Where a claim is made that a discovery request is unduly burdensome under Rule 26(b)(1)(iii) of the West Virginia Rules of Civil Procedure, the trial court should consider several factors. First, a court should weigh the requesting party's need to obtain the information against the burden that producing the information places on the opposing party. This requires an analysis of the issues in the case, the amount in controversy, and the resources of the parties. Secondly, the opposing party has the obligation to show why the discovery is burdensome unless, in light of the issues, the discovery request is oppressive on its face. Finally, the court must consider the relevancy and materiality of the information sought. Syl. Pt. 3, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 624, 425 S.E.2d 577, 579 (1992).

As shown above, Plaintiffs have the obligation to show why discovery is burdensome. Here, there has not been sufficient specificity for the Court to rule on the unduly burdensome objection. The Court requires more than a mere blanket assertion objection to discovery. (*See* Syl. Pt. 1, *AT & T Commc'ns of W. Virginia, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 188 W.

Va. 250, 251, 423 S.E.2d 859, 860 (1992)(“Issuance of a broad protective order, based upon the assertion of a blanket privilege against discovery, without scrutiny of each proposed area of inquiry and without giving full consideration to a more narrowly drawn order constitutes abuse of discretion under West Virginia Rule of Civil Procedure 26(c).”).

The Court notes that it has considered Plaintiffs’ argument that it has “asserted the burden objection in order to protect itself to the extent the Insurers seek to impose discovery obligations on Westlake in excess of permissible obligations under West Virginia law”, and does not find such an argument to be persuasive. *See* Pls’ Resp., p. 11.

Defendants proffered that Plaintiffs have provided a boilerplate “unduly burdensome” objection to over thirty-one (31) discovery requests. *See* Defs’ Mem., p. 10. The Court notes that if there are specifics, Plaintiffs can object to specific requests or request a protective order. For all of these reasons, the Court finds this request must be granted.

Plaintiffs are ordered to respond to Interrogatory No. 11, responding with specificity as to which provisions of the instant Policy they believe are ambiguous. Along the same line, Plaintiffs are ordered to establish any remaining unduly burdensome nature of any objection to certain provisions that would be too burdensome for it to identify.

Bates Number Request

Finally, the Court analyzes the motion’s argument that this Court should compel Plaintiffs to “completely respond to each request in Defendants’ Second Set of Requests for Production and Things with specific bates number references to responsive documents for each request”. *See* Defs’ Mem., p. 9-10.

As established above, Requests for Production are governed by Rule 34 of the West Virginia Rules of Civil Procedure which provides, inter alia, “[a]ny party may serve on any other

party a request (1) to produce ... any designated documents..." This Rule requires parties to respond to this type of request within certain time frames and to "organize and label them to correspond with the categories in the request." W.Va. R. Civ. P. 34 (b).

As an initial matter, the Court recognizes the parties' assertions that discovery in this matter is voluminous. *See* Defs' Mem., p. 8-9. However, the Court concludes that Defendants in this matter have established a need for such a reference. For instance, Defendants have proffered that the answer to many discovery requests was the same and included that Plaintiffs "will produce" or "have already produced" the requested documents, leading Defendants to have to guess at whether the documents were produced. *See* Defs' Mem., p. 7-8. Bates number references would solve this problem, as well as increase organization and efficiency in the voluminous amount of documents involved in this matter. Further, Defendants proffered and identified specific types of documents in discovery in this matter that would benefit from Bates number referencing, including "random" spreadsheets, as well as diagrams, blueprints, and equipment manuals, all of which were not specifically requested by Defendants. *Id.* at 9. The Court finds that, here, Bates number references to specific discovery requests would make clear which documents are responsive to which requests, as well as which requests may not be fully responded to, if any.

The Court notes Plaintiffs' averment in the Response that many documents correspond with more than one discovery request, and if that is the case, the Court finds the Bates number should reference each and every discovery request the particular document corresponds to. The Court, therefore, grants this request and requires and orders Plaintiffs to provide Bates number references to all responsive documents.

In conclusion, the Court GRANTS the instant Motion.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Motion to Compel Complete Discovery Answers From Plaintiffs and to Strike Plaintiffs' "Unduly Burdensome" Objections to Defendants' Discovery Requests is hereby GRANTED.

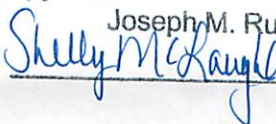
It is further ADJUDGED and ORDERED that Plaintiffs shall fully answer the discovery requests discussed in this Order by serving responses upon Defendants within thirty (30) days of the entry of this Order. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



JUDGE CHRISTOPHER C. WILKES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

A Copy Teste:

By  Joseph M. Rucki, Clerk
Deputy