

FILED

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

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AXIALL CORPORATION and
WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

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,

Defendants.

Civil Action No. 19-C-59

Judge Christopher C. Wilkes

**ORDER GRANTING DEFENDANTS' MOTION TO COMPEL
COMPLETE DISCOVERY RESPONSES FROM PLAINTIFFS**

This matter came on before the Discovery Commissioner this 12th day of April, 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; and Plaintiffs Axiall Corporation and Westlake Chemical Corporation (collectively, the “Parties”), appeared by and through their respective counsel, and presented the Court with their respective arguments on Defendants’ Motion to Compel Complete Discovery Answers from Plaintiffs. The Discovery Commissioner, having fully considered the arguments of the Parties, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This matter is an insurance coverage dispute arising out of a chlorine release at Plaintiffs’ Natrium Plant on August 27, 2016. Plaintiffs’ Natrium Plant is insured under thirteen separate property insurance policies (collectively the “Policy”) issued by Defendants for the period of November 15, 2015 to November 15, 2016.

2. More than two and a half years after the August 27, 2016 chlorine release, Plaintiffs submitted a claim under the Policy in the amount of \$278,505,078. This claim is primarily for corrosion at the Natrium Plant. Defendants denied coverage for Plaintiffs’ claim for reasons detailed in their Answers and Defenses to Plaintiffs’ Complaint, and as further set forth in Defendants’ Response to Plaintiffs’ Interrogatory No. 10.

3. Defendants propounded their First Set of Interrogatories to Plaintiffs on February 27, 2020. Defendants’ Interrogatories include multiple requests regarding details of Plaintiffs’ claim for coverage under the Policy and the basis for Plaintiffs’ contentions that the Policy provides coverage for certain items excluded or otherwise not covered under the Policy. Specifically, Defendants propounded the following Interrogatories to Plaintiffs:

INTERROGATORY NO. 23: How did Plaintiffs differentiate between preexisting corrosion or contamination in the Plant and/or Equipment from that which Plaintiffs now attribute to the Release?

INTERROGATORY NO. 25: Do Plaintiffs contend that Defendants owe coverage under the Policy for physical damage to Equipment in the Plant attributable to and/or caused by chlorine contamination? If so, provide the complete factual and legal basis for this contention.

INTERROGATORY NO. 29: Is chlorine recognized as a contaminant by Plaintiffs and/or in Plaintiffs' industry and/or by applicable government authorities?

4. Plaintiffs have failed to provide direct, substantive responses to these Interrogatories. Defendants conferred in good faith with Plaintiffs to resolve this dispute, but Plaintiffs have continued to stand by their deficient responses. *See* Defendants' Brief in Support of their Motion to Compel Complete Discovery Answers from Plaintiffs, at pp. 2-4.

5. Defendants filed their Motion to Compel Complete Discovery Responses from Plaintiffs, along with a Brief in Support of their Motion (collectively "Motion"), on February 10, 2021. Defendants argued therein that Interrogatory Nos. 23, 25, 29 seek fundamental information concerning the details of Plaintiffs' claim and whether they contend the Policy should respond to their claim despite the applicable exclusions. *Id.* at p. 4. Further, Defendants offered a sampling of photographs demonstrating extensive corrosion at the Natrium Plant that pre-dates the August 27, 2016 chlorine release. *Id.* at pp. 5-6. Defendants argued that Plaintiffs should be required to explain how, if at all, Plaintiffs distinguished between pre-existing corrosion from that which they allege was caused by the August 27, 2016 chlorine release. *Id.* at pp. 5-9. Defendants noted that Plaintiffs offered evasive, non-substantive responses to Interrogatory Nos. 23, 25, and 29 and that the Court should compel complete, substantive responses to each Interrogatory. *See generally id.* at pp. 5-11.

6. Plaintiffs filed their Response in Opposition to the Motion on March 4, 2021. Therein, Plaintiffs essentially reiterated again their initial responses to each Interrogatory and argued that each response was sufficient. *See* Plaintiffs' Response in Opposition, at pp. 3-4, 8-9, 12. Plaintiffs further argued that the photographs submitted by Defendants were "highly

misleading” and that Plaintiffs were not claiming coverage for any of the corroded property depicted in the photographs of the Natrium Plant. *See id.* at p. 5.

7. Defendants filed their Rebuttal in Support of their Motion on March 15, 2021. Defendants noted that Plaintiffs’ discovery responses and document productions demonstrate that extensive corrosion existed at the Natrium Plant prior to the August 27, 2016 chlorine release, specifically including areas of the Natrium Plant encompassed in Plaintiffs’ claims. *See* Defendants’ Rebuttal in Support of their Motion, at pp. 2. Defendants therefore argued that Plaintiffs should be required to respond to Interrogatory No. 23 with details explaining how Plaintiffs segregated out pre-existing corrosion or contamination issues. *See id.* Defendants further noted that Plaintiffs’ reliance on their initial responses to Interrogatory Nos. 25 and 29 was misplaced, and that the Court should compel complete responses to each Interrogatory. *See id.* at pp. 5-7.

8. The issues in Defendants’ Motion have been fully argued and are now ripe for consideration by the Discovery Commission.

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.

In their Motion, Defendants argued that the Court should enter an Order compelling Plaintiffs to fully respond to Interrogatory Nos. 23, 25, and 29 regarding details of Plaintiffs' claim for coverage under the Policy and the basis for Plaintiffs' contentions that the Policy provides coverage for certain items excluded or otherwise not covered under the Policy. Each of the disputed requests are addressed separately below.

Interrogatory No. 23

Defendants' Motion to Compel Plaintiffs to provide a complete and detailed response to Interrogatory No. 23 is **GRANTED**. The information requested in Interrogatory No. 23 is fundamental to the core coverage dispute between the parties, and Defendants are entitled to know how, if at all, Plaintiffs differentiated between pre-existing corrosion at the Natrium Plant from that which Plaintiffs allege resulted from the August 27, 2016 chlorine release. Defendants note

...the same.

that Plaintiffs' discovery responses and document productions demonstrate that extensive corrosion existed at the Natrium Plant prior to the August 27, 2016 chlorine release, specifically including areas of the Natrium Plant encompassed in Plaintiffs' claims. *See* Defendants' Rebuttal in Support of their Motion, at p. 2. Defendants are plainly entitled to have a complete understanding of how, if at all, how Plaintiffs segregated out pre-existing corrosion or contamination issues at the Natrium Plant. This information is relevant to Plaintiffs' burden to establish coverage under the Policy and to Defendants' burden to establish the application of relevant Policy exclusions. This evidence is further relevant to Plaintiffs' bad faith argument, and Defendants' ability to defend the same.

Plaintiffs shall therefore provide a complete written response to Defendants' Interrogatory No. 23 within thirty (30) days of the entry of this Order.

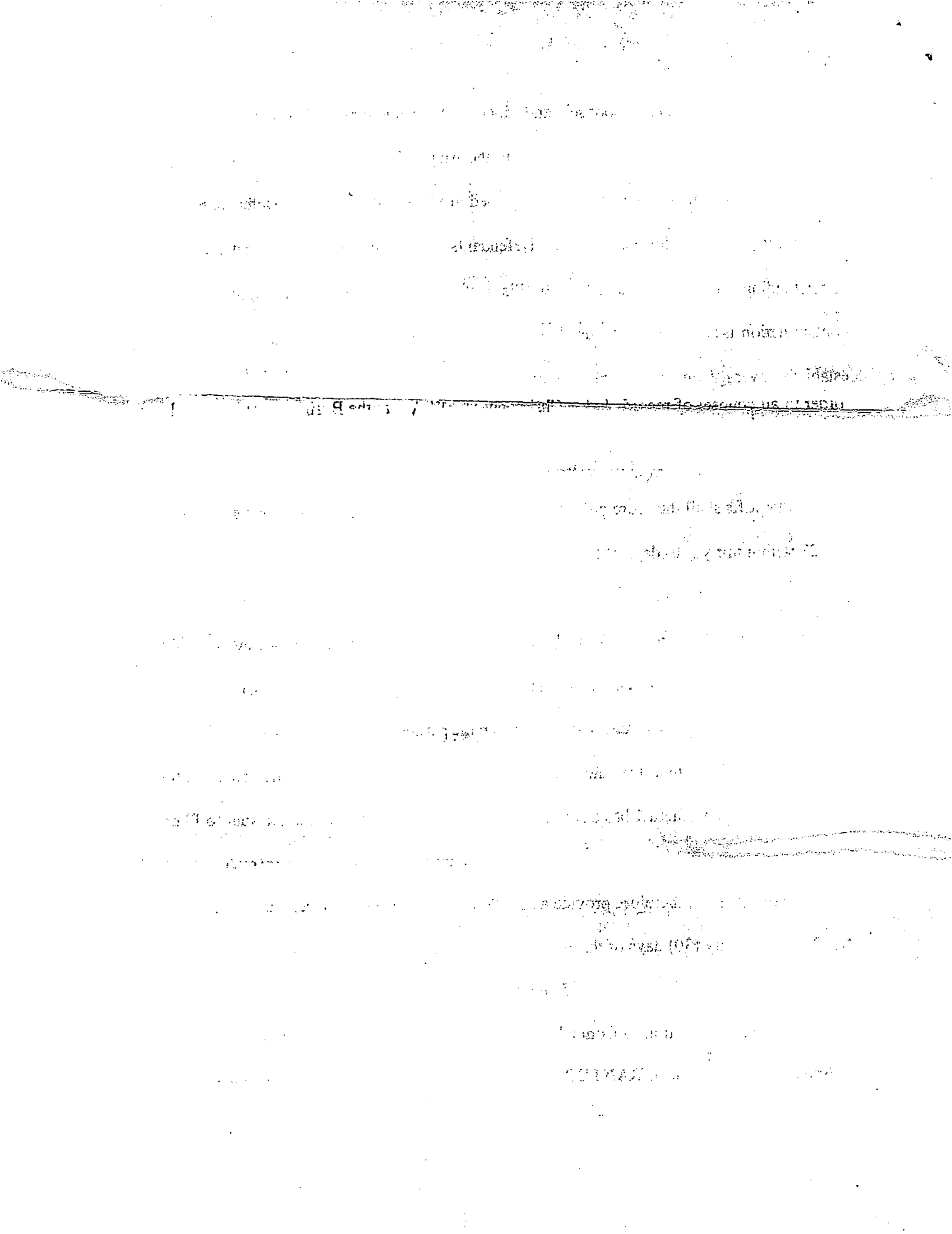
Interrogatory No. 25

Defendants' Motion to Compel Plaintiffs to provide a complete and detailed response to Interrogatory No. 25 is **GRANTED**. The information requested in Interrogatory No. 25 is fundamental to the core coverage dispute between the parties, and Defendants are entitled to know whether Plaintiffs contend that the Policy covers damage caused by chlorine contamination, as well as the legal and factual basis for this contention. This information is relevant to Plaintiffs' breach of contract and bad faith arguments and to Defendants' ability to defend against the same.

Plaintiffs shall therefore provide a complete written response to Defendants' Interrogatory No. 25 within thirty (30) days of the entry of this Order.

Interrogatory No. 29

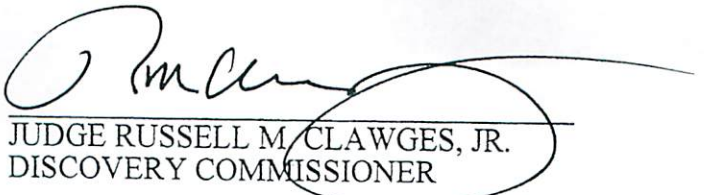
Defendants' Motion to Compel Plaintiffs to provide a complete and detailed response to Interrogatory No. 29 is **GRANTED**. The information requested in Interrogatory No. 29 is



fundamental to the core coverage dispute between the parties, and Defendants are entitled to know whether Plaintiffs and/or Plaintiffs' industry recognize chlorine as a contaminant. This information is relevant to Plaintiffs' breach of contract and bad faith arguments and to Defendants' ability to defend against the same.

Plaintiffs shall therefore provide a complete written response to Defendants' Interrogatory No. 29 within thirty (30) days of the entry of this Order.

The Discovery Commissioner directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, Judge Christopher C. Wilkes at the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, WV 25401 and to Judge Russell M. Clawges, Jr., Discovery Commissioner, at 9 Stewart Farm Lane, Morgantown, WV 26508.


JUDGE RUSSELL M. CLAWGES, JR.
DISCOVERY COMMISSIONER

A Copy Teste:

Joseph M. Rucki, Clerk

By Donna Crow Deputy