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

AXIALL CORPORATION and WESTLAKE CHEMICAL CORPORATION,

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 DENYING DEFENDANTS' OBJECTIONS TO DISCOVERY COMMISSIONER'S ORDER GRANTING PLAINTIFFS' SECOND MOTION TO COMPEL

This matter came before the Court this 8th day of June 2021, upon Defendants' Objections to Discovery Commissioner's Order Granting Plaintiffs' Second Motion to Compel.

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 case involves a claim for insurance proceeds under all risk property policies in effect from November 19, 2015 to November 19, 2016 ("2015-2016 Policy") when the August 27, 2016 chlorine release occurred at the Natrium plant in West Virginia. Westlake Chemical Corporation ("Westlake") acquired Axiall days after the incident. By virtue of written discovery, Defendants have produced the thirteen underwriting files relative to the placement of the 2015-2016 Policy. *See* Defs' Mot., p. 3.

2. Plaintiffs served their First Requests for the Production of Documents Directed to All Defendants ("RFPs") on the Defendant Insurers on June 28, 2019. These RFPs specifically included requests for underwriting materials that were the subject of Plaintiffs' Motion to Compel, such as underwriting manuals, as well as any documents related to "the existence, terms, conditions, interpretation or scope of coverage of each such POLICY." Throughout November and December 2020, Plaintiffs took depositions of the Defendant Insurers' Rule 30(b)(7) witnesses on topics related to the negotiation, placement, interpretation, underwriting, and issuance of the relevant policies in this action. *See* Pl's Resp., p. 3.

3. Plaintiffs filed *Plaintiffs' Second Motion to Compel Discovery* on February 16, 2021. Defendants filed *Defendants' Response in Opposition to Plaintiffs' Second Motion to Compel* on March 9, 2021. After Plaintiffs filed their reply, a virtual hearing was held on the motion before Discovery Commissioner Clawges on April 12, 2021. On April 26, 2021, Discovery Commissioner Clawges entered his Order.

4. On May 11, 2021, Defendants filed the instant Defendants' Objections to the Discovery Commissioner's Order Granting Plaintiffs' Second Motion to Compel[1], arguing a detailed review of the underwriting testimony cited by Plaintiffs does not support Plaintiffs' argument that in order to understand the origins of the terms in the 2015-2016 Policy, one would need to look to the underwriting documents related to the issuance of policies to Axiall (including the former Named Insured, Georgia Gulf) ***in prior policy years*** and arguing the Discovery Commissioner erred in finding the requested documents relevant. *See* Def's Mot., p. 6-7, 9. Further, the motion argued the discovery ordered is oppressive and burdensome. *Id.* at 14.

5. On May 17, 2021, Plaintiff filed its Objections to Defendants' Objections, arguing that a "fair reading of the Order and the record on which the Order relies demonstrates that the Insurers' objections should be denied and that Judge Clawges' Order should be affirmed in its entirety". *See* Pl's Resp., p. 2.

6. On May 21, 2021, Defendants filed their Reply[2], reiterating their position that the underwriting documents are not relevant or discoverable and that the 2015-16 policy year is the only relevant period, as well as their position that the subject discovery requests are oppressive on their face. *See* Reply, p. 3, 6-7.

7. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

The Discovery Commissioner's findings of fact and conclusions of law are reviewed *de novo,* and procedural matters are reviewed for abuse of discretion. *See* Order Appointing Discovery Commissioner, at 3.

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[1] The Court notes a motion to file the Objections under seal was filed contemporaneously with the Objections, and the Court granted such request by Order entered May 12, 2021.

[2] The Court notes a motion to file the Reply under seal was filed contemporaneously with the Reply, and the Court granted such request by Order entered on or about June 8, 2021.

Rule 26 of the West Virginia Rules of Civil Procedure governs the general provisions governing discovery.

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).

Broad discovery is necessary to eliminate surprise and trial by ambush. *McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 796 (1995); *Graham v. Wallace*, 214 W. Va. 178, 184-85, 588 S.E.2d 167, 173-174 (2003). Further, discovery is not limited "only to admissible evidence, but applies to information reasonably calculated to lead to the discovery of

admissible evidence." *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 246, 460 S.E.2d 54, 61 (1995).

The Court will take the arguments contained in Defendants' Objections in turn.

Relevancy

First, this Court addresses the arguments as to relevancy. Defendants argued in their Objections that the Discovery Commissioner erred in finding that corporate designee witness testimony showed that "they relied on these very documents during the process of underwriting Axiall's policies". *See* Def's Mot., p. 6. Defendants aver that Defendants' 30(b)(7) corporate representatives "testified that the 2015-2016 Policy form was a broker manuscript form provided by Willis that Axiall/Willis had used for a number of years prior to 2015-2016, and that certain limited information from prior underwriting periods may help assess the overall risk of the account". *Id.* The Court finds that documents from prior underwriting years which may have helped assess overall risk of the account could lead to relevant and discoverable evidence regarding the process of underwriting Axiall's policies.

Further, with regard to the 2015-2016 policy year versus prior policy years, the Court finds as follows. Plaintiffs have proffered that they took depositions of the Insurers' Rule 30(b)(7) witnesses on topics related to the negotiation, placement, interpretation, underwriting, and issuance of the relevant policies in this action. These witnesses testified that the versions of their policies issued in 2015-2016 – which is the policy period during which the Natrium plant tank rupture occurred – were renewals of earlier-year policies. *See* Pl's Resp., p. 3.

Further, Plaintiffs proffered that the lead Defendant Insurers' Rule 30(b)(7) witness, who was designated to testify about document retention and related topics, testified that an insurance policy renewed year after year without interruption constituted a single "active policy" spanning

from the original policy through all subsequent renewals. *Id.* at 3-4. For these reasons, the Court concludes it was reasonable for Judge Clawges to conclude production of underwriting documents related to all of the policies that preceded the 2015-2016 renewal, going back to the year when each Insurer first issued a policy to Axiall or its predecessor-in-interest Georgia Gulf Corporation would be relevant. Judge Clawges' Order specifically stated that:

> Documents relating to the origin of the language are potentially relevant to the meaning and application of insurance policy language. Here, the parties dispute the meaning and application of certain exclusions, and the origin and history with respect to the drafting and incorporation of those provisions into the policies, or revisions thereto, in prior years could provide important evidence regarding the parties' intent behind the language. The Insurers' 30(b)(7) corporate representatives on underwriting topics testified that their 2015-2016 policy issued to Axiall was a renewal of prior years' policies. Because the 2015-2016 policy is a renewal and each uninterrupted renewal is part of a single "active policy", the negotiations and drafting of the language for the prior policy years is indisputably relevant.

Order at 7-8 (internal citations omitted).

This Court finds it important that the disputed policy language did not appear for the first time during the 2015-2016 renewal year, it had already been put in place in a prior year – either in the very first year of an Insurer's issuing a policy to Axiall (or its predecessor Georgia Gulf), or in some subsequent renewal year prior to 2015-2016. *See* Pl's Resp., p. 7. As such, considering that some relevant policy language originated in some other, earlier year, discovery should not be confined to just the 2015-2016 year. With the policy language and coverage at issue, prior years are necessarily implicated. While Defendants maintain that the 2015-2016 policy year "is the only relevant period", the Court does not agree and rejects this argument. *See* Defs' Reply, p. 3.

The Court has reviewed Judge Clawges' decision regarding relevancy on a *de novo* basis and finds that it will not disturb Judge Clawges conclusion that the pre-2015 underwriting documents are indeed relevant. The Court notes that it affirms Judge Clawges' decision that not only are the documents in the Defendants' "underwriting files" relevant, but so are other documents that inform the underwriting process, such as underwriting manuals, including any updates thereto; lists of standard exclusions; draft/standard-form endorsements; policy forms, including those used by the Insurer and those provided by the broker; and engineering reports.

Burdensome

Next, this Court addresses the arguments as to whether or not the requested discovery would be unduly burdensome.

As an initial matter, Judge Clawges found that the Insurers presented "no evidence of any kind – no affidavits, no deposition testimony, no documentary evidence – to substantiate their claim that the requested discovery would be unduly burdensome." Order at 8. Further, this Court has held in prior orders that West Virginia law plainly requires a specific showing as to how each discovery request is burdensome or oppressive. The Court laid this out in its February 16, 2021 Order Granting Defendants' Motion to Compel Complete Discovery Answers From Plaintiffs and to Strike Plaintiffs' "Unduly Burdensome" Objections to Defendants' Discovery Requests, when it, that time, held that Plaintiff must fulfill the obligation to show why discovery is burdensome. *See* Ord., 2/16/21. In that instance, the Court concluded there had not been sufficient specificity for the Court to rule on the unduly burdensome objection. *Id.* at 7.

"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).

Here, a *de novo* review of Judge Clawges' Order reveals Judge Clawges' determinations that the requested discovery would not be unduly burdensome shall be undisturbed. Defendants argued in their pleadings before this Court, as well as before Judge Clawges, that the sought-after discovery is "oppressive on its face". *See* Pl's Resp., p. 14; *see also* Defs' Reply, p. 2. However, the Defendants have not shown to this Court or explained why it is oppressive on its face. The Court does not find that the type of information sought in this instance is so large that it would be, in light of the issue, oppressive on its face, and Defendants have had many opportunities in its briefing on the underlying Second Motion to Compel and on its Objections to Judge Clawges' Order, to further explain. Further, Plaintiffs proffered to the Court that testimony of Defendants' witnesses has revealed that underwriting information pertaining to previous policy years can be searched for electronically, and in some cases can be located in a matter of minutes. *See* Pl's Resp., p. 14-15. While Defendants seek to limit the volume by

maintaining that the 2015-2016 policy year is the only relevant time period in which it should have to produce documents, the Court does not agree. *See* Defs' Reply, p. 3.

The Court, in analyzing the issues in the case, including drafting and the origins of the policy language and coverage disputes and claims of bad faith, the amount in controversy, and the resources of the parties, including the potential to search electronically, concludes that the requested discovery is not overly burdensome or oppressive. Syl. Pt. 3, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 624, 425 S.E.2d 577, 579 (1992). Further, the court has considered the relevancy and materiality of the information sought, which is detailed in the above section. *Id.*

Accordingly, the instant Objections are DENIED and Defendants shall serve responses consistent with the terms of this Order within thirty (30) days of entry of this Order.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Objections to Discovery Commissioner's Order Granting Plaintiffs' Second Motion to Compel is hereby DENIED. It is further hereby ADJUDGED and ORDERED that Judge Clawges' April 26, 2021 Order Granting Plaintiffs' Second Motion to Compel remains in full force and effect.

It is further hereby ADJUDGED and ORDERED that Defendants will produce to Plaintiffs, within thirty (30) days hereof, all documents in their possession, custody, or control, relating to the origin, negotiation, drafting, placement, interpretation, and underwriting of the property policies they issued to Axiall, or its predecessor Georgia Gulf Corporation, for each policy period, beginning with the period that each Insurer first issued a property policy to Axiall or Georgia Gulf, until the 2015-2016 policy period, including but not limited to the categories of documents discussed in this Order.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, to any *pro se* parties of record, and to the Business Court Central Office at 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