

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

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

Discovery Commissioner:
Russell M. Clawges, Jr.

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FILED

**ORDER DENYING IN PART PLAINTIFFS'
THIRD MOTION TO COMPEL DISCOVERY**

On a previous day to wit, came 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

(collectively “Defendants”), and Plaintiffs Axiall Corporation and Westlake Chemical Corporation, by and through their respective counsel, and presented the Court with their respective arguments on Plaintiffs’ Third Motion to Compel Discovery and accompanying Memorandum (collectively “Motion”). The Court, having fully considered the arguments of Defendants and Plaintiffs, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This matter involves an insurance coverage dispute concerning a railroad tank car rupture and resulting chlorine release that occurred in August 2016 at Plaintiffs’ Natrium plant in Marshall County, West Virginia.

2. Defendants retained counsel on December 19, 2017.

3. Plaintiffs and Defendants are engaged in a discovery dispute concerning certain documents redacted or withheld from production by Defendants. The parties exchanged letters and participated in a good faith meet and confer video conference concerning 1,111 documents identified in a letter from Plaintiffs’ counsel dated March 12, 2021. The parties were unable to resolve the instant discovery dispute over these documents. The parties have not met and conferred over any other documents referenced in Plaintiffs’ Motion.

4. On a prior day, Plaintiffs filed the instant Motion and their supporting Memorandum, asking the Court to enter an order compelling discovery.

5. On a prior day, Defendants filed their opposition to Plaintiffs’ Third Motion to Compel Discovery.

6. On a prior day, Plaintiffs filed their Reply.

7. After a meet and confer and guidance from the Discovery Commissioner, the parties were able to narrow the field of documents.

ORDER DENYING PLAINTIFFS’ THIRD MOTION TO COMPEL DISCOVERY

Circuit Court of Marshall County -- Business Court Division
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8. Thereafter, the Defendants' Counsel produced to the Discovery Commissioner a binder containing 75 documents from Exhibit 22 to the Plaintiffs' Third Motion to Compel for *in camera* review, as well as a privilege log for the documents.

9. The Discovery Commissioner thereafter conducted the *in camera* review of the documents provided.

10. The Court finds that the issues addressed herein are ripe for adjudication.

CONCLUSIONS OF LAW

Under West Virginia law, if the party seeking privileged documents files a motion to compel, or the responding party files a motion for a protective order, the trial court "must then make an independent determination for each communication the responding party seeks to shield from discovery." *State ex rel. Westfield Ins. Co. v. Madden*, 602 S.E.2d 459, 464 (W.Va. 2004) (quoting *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W.Va. 358, 373, 508 S.E.2d 75, 90 (1998)). In *State ex rel. Westfield*, the Supreme Court of Appeals stated that in situations such as the instant discovery dispute, the court should review the privilege log *in camera* or appoint a special master to review the documents at issue *in camera* to determine whether they are protected from disclosure. *Id.* at 465.

Based upon the Court's *in camera* review of the materials provided from Exhibit 22 of the Plaintiffs' Third Motion to Compel, the Court finds that the materials at issue were created for the primary purpose of assisting in pending or probable future litigation by or for a party or party representative and are protected work product and/or protected by the attorney-client privilege. In addition, Plaintiffs have not met the substantial need and undue hardship component of the above-cited rule. Furthermore, Defendants have already produced numerous documents identified in Plaintiffs' Motion and Defendants have also adequately explained their basis for certain redactions

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that Plaintiffs have challenged. For these reasons, Plaintiffs are not entitled to the relief requested in the Motion as to the 75 documents provided to the Court by Defendants' Counsel on August 2, 2021.

In conclusion, after the *in camera* review of the produced documents from Exhibit 22 of the Plaintiffs' Third Motion to Compel, the Court finds that the Plaintiffs' arguments are without merit and as such, the Court DENIES Plaintiffs' Third Motion to Compel Discovery as to the documents identified in Exhibit 22.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Third Motion to Compel Discovery is hereby DENIED as to the seventy-five (75) documents from Exhibit 22 of the Plaintiffs' Third Motion to Compel and reviewed *in camera* by the Court.

IT IS SO ORDERED.

ENTER: _____

August 30, 2021

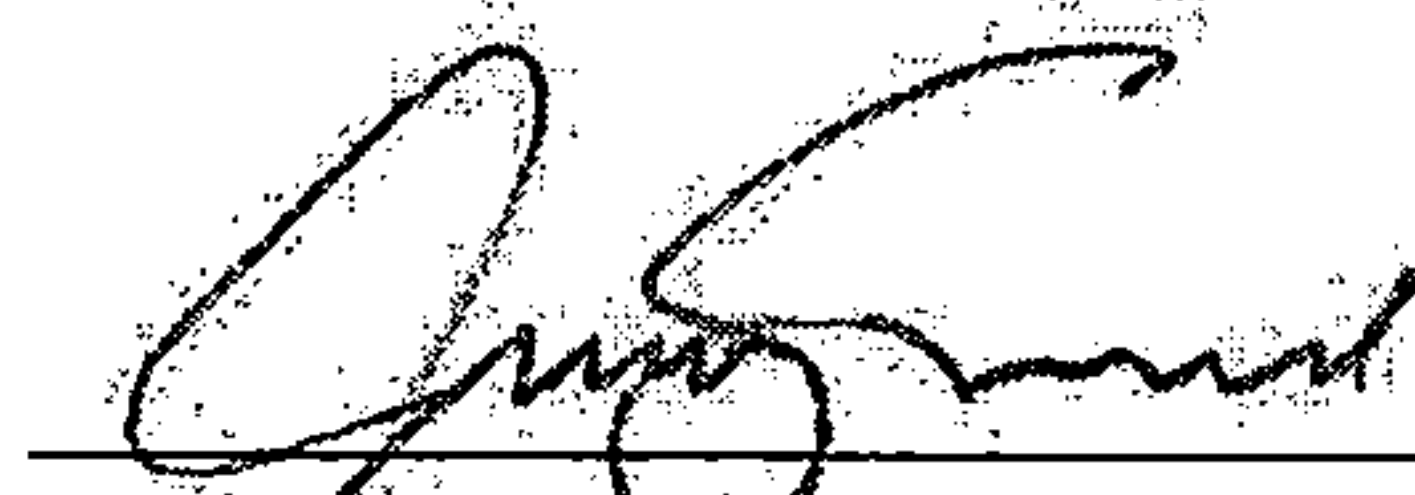


Russell M. Clawges, Jr.
Discovery Commissioner

PREPARED AND SUBMITTED BY:



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FILED

RUSSELL M. CLAWGES, JR.
9 Stewart Farm Lane
Morgantown, WV 26508
August 30, 2021

Mr. Joseph M. Rucki
Marshall County Circuit Clerk
600 7th Street, Rm 127
Moundsville, WV 26041

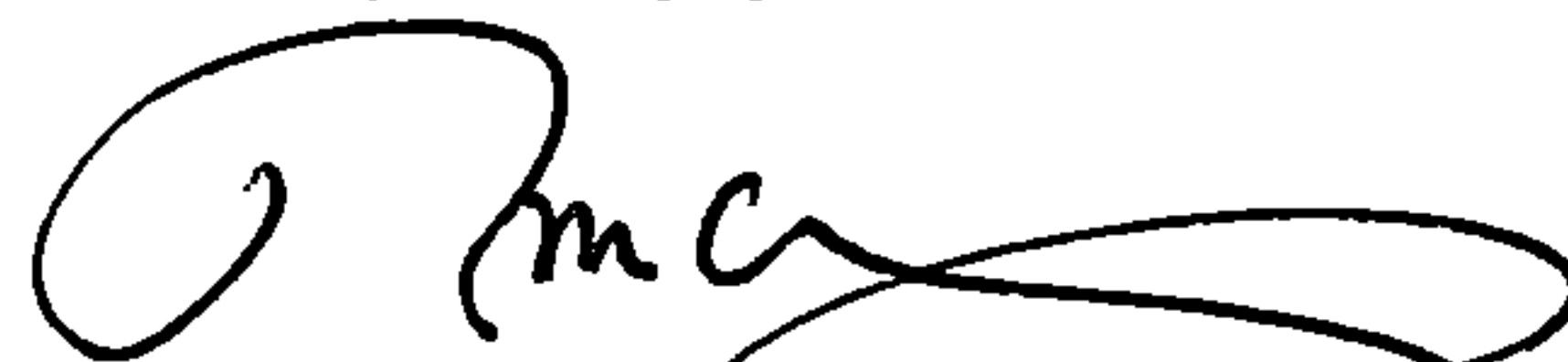
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2021 SEP -2 AM 11:46
JOSEPH M. RUCKI

RE: Axiall et al v. National Union et al,
Civil Action No. 19-C-59
Business Court Division

Dear Mr. Rucki,

Enclosed please find an Order of the Discovery Commissioner in the above-referenced civil action. Please see that this order is entered and attested copies sent to the parties' counsel. Your cooperation and attention to this matter are appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "RmC", enclosed within a large, loopy oval.

Russell M. Clawges, Jr.
Discovery Commissioner