

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

AXIAL 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

**Presiding Judge Christopher C.
Wilkes**

**Discovery Commissioner Judge
Russell M. Clawges, Jr.**

**ORDER DENYING DEFENDANTS' RENEWED MOTION FOR RELIEF
UNDER RULE 37**

The Defendant insurance companies (collectively, "Defendants"), by counsel, have filed a Renewed Motion for Relief Under Rule 37 against Plaintiffs Axial Corporation and Westlake Chemical Corporation (collectively, "Plaintiffs"). Plaintiffs and Defendants have fully briefed the issues. So upon full consideration of the issues, the record, and the pertinent legal authorities, the Discovery Commissioner enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On September 17, 2021, the Discovery Commissioner issued an Order directing Plaintiffs to supplement their response to Defendants' Interrogatory No. 15.
2. On October 25, 2021, Plaintiffs timely provided to the Defendants a supplemental response to Interrogatory No. 15.
3. Plaintiffs' supplemental response to Interrogatory No. 15 includes: (a) an itemized list of thousands of pieces of equipment at the Natrium Plant that were damaged (including equipment that failed outright) as a result of the August 27, 2016 tank car rupture and chlorine release (the "Tank Car Rupture"); (b) the location of each piece of equipment at the Natrium Plant; (c) a detailed, comprehensive metallurgical and electronic analysis describing the nature of the damage to all of the equipment impacted by the Tank Car Rupture, specifying all applicable types of damage and failure modes for specific categories of equipment (although not for specific items); and (d) the best available information regarding dates of manufacture, purchase, and installation that Plaintiffs possess for each piece of damaged equipment.
4. Plaintiffs' supplemental response to Interrogatory No. 15 also includes two uncontested, detailed affidavits from Natrium Plant employees that explain the efforts involved in collecting the best available information for the supplemental response.
5. Defendants filed a Renewed Motion for Relief Under Rule 37 based on Plaintiffs' supplemental response to Interrogatory No. 15.
6. The Discovery Commissioner finds this issue ripe for decision.

CONCLUSIONS OF LAW

"The party seeking sanctions under Rule 37(b) has the burden of proving noncompliance with a discovery order." *Bartles v. Hinkle*, 472 S.E.2d 827, 836 (W. Va. 1996). "[B]ecause of

their very potency, sanction powers must be exercised with restraint and discretion.” *Id.* (internal punctuation and quotations omitted); *Mills v. Davis*, 567 S.E.2d 285, 291 (W. Va. 2002) (same); *Hadox v. Martin*, 544 S.E.2d 395, 400 (W. Va. 2001) (same). The Court may only impose a potentially case-dispositive sanction if it “has been established through an evidentiary hearing and in light of the full record before the court that the failure to comply has been due to ***willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.***” *Bell v. Inland Mut. Ins. Co.*, 332 S.E.2d 127, 134 (W. Va. 1985) (emphasis added). The Supreme Court of Appeals of West Virginia has “stressed that a court must have good cause to issue a sanction, and that when used, the sanction must bear some reasonable relationship to the conduct at issue.” *Mills*, 567 S.E.2d at 290. If a sanction is warranted, the Supreme Court of Appeals has “cautioned that, the more severe the sanction, the more restraint a trial court must show....” *Id.* at 291. In determining what constitutes an appropriate sanction, if any, the Court should consider “the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” *Id.* (quoting *Bartles*, 472 S.E.2d at syl. pt. 2); *Hadox*, 544 S.E.2d at 400 (same)).

Plaintiffs have substantially responded to Interrogatory No. 15 as required pursuant to the Discovery Commissioner’s September 17, 2021 Order, although not with the precision and specificity requested by Defendants. This lack of precision and specificity may limit Defendants’ ability to defend Plaintiffs claims to some extent, but also limits Plaintiffs’ proof of those claims. As such, sanctions are neither warranted nor appropriate here. However, Plaintiffs have by their nature of their Response limited their proof of damages to the information submitted in that

Response. Whether that information is sufficient to meet their burden of proof as to their claims is a matter for resolution by the Court on Motion for Summary Judgment or a jury at trial. As a result, Defendants' Renewed Motion for Relief Under Rule 37 must be denied.


CONCLUSION

Upon consideration of Defendants' Renewed Motion for Relief Under Rule 37, and the briefs and arguments in support thereof and in opposition thereto, the Discovery Commissioner hereby ORDERS that the Defendants' Renewed Motion for Relief Under Rule 37 be and hereby is DENIED. It is further ORDERED that the Plaintiffs' evidence relating to damages is limited to the evidence produced in discovery herein.

IT IS SO ORDERED.

The Clerk is directed to send copies of this Order to counsel of record.

ENTER: _____

January 18, 2022


Russell M. Clawges, Jr.

Discovery Commissioner

A Copy Teste:

Joseph M. Rucki, Clerk

By _____

 Deputy