UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

TECK METALS, LTD, Plaintiff, v. LONDON MARKET INSURANCE, Defendant.	NO. CV-05-411-LRS REPORT AND RECOMMENDATION REGARDING MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND RESPONSES TO INTERROGATORIES (Ct Rec. 482) AND CROSS MOTION FOR PROTECTIVE ORDER (Ct. Rec. 508)

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 33, 34, and 37, and Local Rules 33.1, 34.1, and 37.1, Plaintiff Teck Metals Ltd. ("Teck") moves to compel Defendants Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (together hereafter referred to as "LMI") to produce certain documents and respond further to certain interrogatories.

The London Insurers object to any further production of documents or response to interrogatories. Pursuant to Federal Rule of Civil Procedure 26(b), and Local Rules 34.1 and 37.1 Defendants move for a protective order against the discovery requests by Teck. Specifically, LMI seek a protective order relating to Teck's Requests for Production Nos. 1, 3-6, 16, 23-24, 33, 37-45, 49, 89, 91-12, and 102 and Interrogatories, Nos. 4, 12-13, and 20.

These issues have been referred to the undersigned Magistrate Judge for a Report and Recommendation by the District Judge pursuant to Ct. Rec.518.

BACKGROUND

The factual background is well stated in the pleadings and will only be summarized here. Since 1908, Teck has operated a lead and zinc smelter located in Trail, British Columbia. The smelting process generates a by-product referred to as "barren slag" or "fuming slag." From 1930 until the mid-1990's, in accordance with standard industry practices and, at relevant times, pursuant to permits issued to Teck by Canadian regulatory authorities, slag was discharged from the Trail smelter into the Columbia River. During this period, and continuing to the present, Teck believed that the slag discharged from the Trail smelter was not harmful to human health or the environment. The Teck smelter was/is located approximately 3 miles from the British Columbia border with Washington State.

In the late 1930's and early 1940's, the Grand Coulee Dam was constructed in the Upper Columbia River. The resulting reservoir that developed behind the dam is known as Franklin D. Roosevelt Lake ("Lake Roosevelt"). As a result of investigations undertaken by the State of Washington and the federal government, slag purportedly discharged from Trail since 1930, as well as byproducts released from the historic mining, smelting and industrial operations of other American and Canadian companies adjoining the Columbia River and municipal waste discharges, were identified in Lake Roosevelt and the Upper Columbia River.

Since 2002, the United States Environmental Protection Agency has taken administrative and legal enforcement action against Teck, and others, related to the discharge of pollutants into the

Columbia River south of the international border. See Plaintiff's Fifth Amended Complaint at pp. 10 (Ct. Rec. 398). In July, 2004, members of the Confederated Tribes of the Colville Tribes filed suit under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. s. 9601, et seq. That suit seeks damages, declaratory judgment against Teck finding Teck has violated and continues to violate CERCLA and seeking correction of violations, payment of civil penalties and award of costs and attorneys fees. The State of Washington has successfully intervened in the CERCLA suit and the Confederated Tribes of the Colville Reservation have joined as an additional plaintiff. Said plaintiffs are hereafter referred to as "underlying claimants".

Teck alleges it has incurred in excess of $40 million in environmental response costs, attorneys fees and other expenses in defense of the CERCLA suit and has been ordered to pay $1.3 million of the underlying claimants' attorneys fees. Such costs are ongoing. (Ct. Rec. 398 pp. 13)

The alleged contamination of the Upper Columbia River site has triggered demands for coverage for environmental claims under certain policies of insurance issued by the London Insurers to Teck. Defendants have reserved their rights and have refused to defend and indemnify Teck in the CERCLA suit. Plaintiff sues here for Declaratory Judgment and Breach of Contract.

DISCOVERY REQUESTS

Teck's Motion to Compel (Ct Rec. 482) generally relates to five areas of controversy that Teck argues arise from LMI assertion of nearly forty affirmative defenses (Ct. Rec. 410).

The five areas are:

(1) the handling of Teck's claim for insurance coverage in this case,

(2) their practices in handling other claims like Teck's,

(3) their communications regarding construction of the standard-form policy language they sold to Teck ("Policies") and their witnesses' prior testimony about LMIs' understanding of the same policy terms and similar claims,

(4) their reinsurance claims and reserve information,

(5) the purported transfer of certain coverage obligations to an entity in the United States despite their continued claim that they are purely "London" insurers.

Parties are entitled to discovery "regarding any non-privileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). In discovery, information is relevant when "reasonably calculated to lead to the discovery of admissible evidence." *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) (citation omitted)). Indeed, "relevancy is broadly construed at the discovery stage," and a request is relevant "'if there is any possibility that the information sought may be relevant to the subject matter of the action.'" *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976) (quoting 8 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 2008 at 46-47 ("WRIGHT & MILLER")).

The Court has "broad discretion in determining relevancy for discovery purposes." *Surfvivor Media*, 406 F.3d at 635. The Court

limits "the frequency or extent" of proposed discovery if its burden or expense outweighs its benefit, considering the circumstances of the case. FED. R. CIV. P. 26(b)(2)(C)(iii). The party resisting discovery has the burden to show that discovery should not be allowed, and "'the burden of clarifying, explaining, and supporting its objections.'" *Global Ampersand, LLC v. Crown Eng'g and Const., Inc.*, 261 F.R.D. 495, 499 (E.D. Cal. 2009) (quoting *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998)); *accord Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 378 (C.D. Cal. 2009).

1. DISCOVERY RELATED TO TECK'S OWN CLAIM

RFP No. 41

Teck argues it is entitled to any non-privileged business files regarding London Insurers' handling of Teck's claims. LMI have produced documents that London Insurers' obtained from Teck or from government agencies. LMI argue that since coverage will hinge on the words of the London policies and facts concerning Teck's operations, that documents such as internal communications or notes from London Insurers' files are not relevant. London Insurers also argue that RFP 41 improperly encompasses the parties' settlement negotiations which commenced in August 2002 and are confidential by agreement. Teck does not seek Confidential Settlement Documents, as defined in that agreement. Ct. Rec. 513 at 3. LMI does not argue that production would be burdensome.

DISCUSSION AND RECOMMENDATION

LMI does not cite any authority for their proposition that an insured's own non-privileged claim file is not subject to discovery. Teck cites Front Royal Ins. Co. v. Gold Players, Inc., 187 FRD 252, 256-57 (W.D. Va. 1999) for the proposition that an insurer's claim file is not protected by the work product privilege and must be produced.

Notes and other non-privileged materials in the claim file may very well lead to the discovery of evidence that would be admissible at trial on the issue of coverage. Additionally, certain communications between the parties after August 2002 would not all fall within confidential settlement negotiations since obviously the parties knew settlement would not occur at some juncture and likely continued dialogue over the claim thereafter.

The Court **RECOMMENDS** as follows:

That the District Court finds non-privileged documents comprising in any way Teck's own claim file and not subject to the "Confidential Settlement Documents" definition shall be produced by the Defendants to the Plaintiff.

2. Other Lawsuits and Claim Files Similar to Teck's-

These discovery requests relate to the following requests for production and interrogatories:

Lawsuits- relate to RFP 1, 3-6, 33, 42, 89 and Interrogatories 4 and 12

Claims- relate to RFP 37-41, 89

Teck moves to compel discovery of LMIs' handling practices in response to other similar claims on grounds of relevance and as necessary to rebut London Insurers' Affirmative Defenses.

First, LMI deny that the Eastern District of Washington has personal jurisdiction. Teck seeks discovery of other suits in Washington in which LMI were plaintiffs or defendants to establish the extent to which LMI have availed themselves of the "benefits of Washington law" in Washington's courts and have thus submitted to personal jurisdiction.

Second, Teck seeks discovery of LMIs' other suits in which they took a position on issues central to this case, including subject matter jurisdiction under the Foreign Sovereign Immunities Act, venue in Washington, choice of law, and interpretation of the qualified pollution exclusion in the policies of insurance under scrutiny herein. FRCP 26(b)(1) provides that a party must give discovery on defenses it asserts.

Third, Teck seeks discovery of documents related to London Insurers' handling of similar environmental coverage claims. Teck asserts that such discovery is relevant because LMI take the position that they have no liability due to Teck's alleged late notice or tender of its claim. Ct. Rec. 410 at 14 p. 8; 19 p. 8; 22 p. 25.

To avoid coverage, Teck maintains that London Insurers must show that they were actually prejudiced by the alleged late notice. To show prejudice, LMI must show that they would have acted differently if notice were timely (e.g., investigated the

claim, provided a defense etc.) Key Tronic Corp. v. St. Paul Fire and Marine, 134 Wash.App. 303, 307 (2006).

Teck believes that the "other" claims files will demonstrate that LMI do not meaningfully inject themselves into any environmental claim whenever tendered and therefore late notice of claim would not affect how they respond whenever received.

LMI respond that Teck's request is too broad. Additionally, they assert that since personal jurisdiction can be waived in any given case, LMI's waiver in other cases cannot serve as a waiver here. As to legal positions taken by LMI in other litigation, LMI argue that such information is irrelevant since issues of venue or choice of law are fact- specific.

Additionally, as to documents relating to claims submitted to LMI by any insured related to (a)property in Washington, (b) contamination by slag, (c)contamination by sediment, and (d) coverage incepting at $5 million or more, LMI contends that such request is over broad, requiring hundreds of hours of hand searching files and would shed no light on what LMI would have done in a hypothetical "timely notice" situation since no Washington case requires an insurer to prove what it MIGHT have done.

Finally, LMI contend that the files sought contain proprietary and confidential information of other insureds and cannot be produced without notice to those insureds and opportunity to object to production or seek a protective order. They argue that even with a protective order limiting the dissemination of discovery to the parties and counsel, that

competitors of Teck would be at risk due to the disclosure of sensitive and proprietary information and should be given notice before any disclosure occurs. (Ct. Rec. 5)

DISCUSSION AND RECOMMENDATION

The burden of production can be minimized by agreeing to the parameters outlined at the parties' "meet and confer" sessions. It is Teck's burden to prove personal jurisdiction and, since LMI have raised that as an affirmative defense, the other cases where personal jurisdiction was raised or waived might tend to lead to the production of admissible evidence at trial.

The parties spar over the impact of Dow Chemical v. Calderone, 422 F.3d 827(9th Circ. 2005). Cited therein are General Contracting & Trading Co. v. Interpole, Inc., 940 F.2d 20 (1st Cir. 1991) and International Transactions Ltd. v. Embotelladora Agral Regionmontana S.A. de C.V., 277 F.Supp. 2d 654 (N.D. Tex, 2002). Those cases stand for the proposition that personal jurisdiction exists where a defendant also independently seeks affirmative relief in a separate action before the same court concerning the same transaction or occurrence. Dow Chemical and the cited cases do not fully discuss the Plaintiff's theory here; that other suits count or do not count as "minimum contacts" for purposes of establishing personal jurisdiction. But depending on what other actions LMI took in Washington where the same or similar policies were at issue, Plaintiff ought to have the opportunity to see what suits LMI has participated in for a reasonable period of time past.

Secondly, documents from other suits are relevant since they may contain information material to LMI's legal positions on subject matter jurisdiction under FSIA, venue in Washington, choice of law or interpretation of the qualified pollution exclusion.[1] LMI raised these defenses and documents from other suits may reveal inconsistent positions taken by LMI on them.

Third, since LMI has asserted they have no liability due to Teck's alleged late notice or tender of its claim, documents related to how LMI handled similar environmental claims in Washington may lead to the discovery of admissible evidence.

Fourth, other claims evidence is relevant to LMI's position that Teck misrepresented itself when it applied for coverage. Discovery relating to LMI's experience insuring mining and smelting companies during the time of Teck's applications may show the extent of LMI's prior knowledge concerning the types of risks they claim Teck withheld from them, the information they usually obtained from a prospective insured and so forth.

It may be helpful to the District Court to assess each individual interrogatory and request for production of documents relevant to this section and therefore the Court makes a specific recommendation for each.

[1] The relevance of other files discussing the pollution exclusion clause may be more apparent given the District Court's decision in Ct. Rec. 516, holding that Washington has the most significant relationship to the parties' coverage dispute and that Washington law applies if there is a conflict between British Columbia and Washington law and "that extrinsic evidence may yet be discovered which is relevant to the parties' mutual intent...".

The Court **RECOMMENDS** as follows:

Request for Production No. 1

That the District Court order Defendants to identify all suits commenced since January 1, 1995 where LMI availed themselves of Washington's laws and affirmatively filed suit in Washington state in either state or federal court or filed a cross claim or counterclaim, regardless of whether the claim was for environmental damage or not. Once identified by Defendants, the parties shall confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.

Request for Production No. 3

That the District Court order Defendants to identify all cases filed in Washington (federal or state court) since January 1, 1995, where Defendants argued for or against the exercise of supplemental jurisdiction directly under the Foreign Sovereign Immunities Act (FISA) or under 28 U.S.C. 1367 in any case filed originally in federal court pursuant to FISA or removed to federal court pursuant to FISA. Once identified by Defendants, the parties shall confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.

Request For Production No. 4

That the District Court order Defendants to identify all suits commenced since January 1, 1995 where LMI availed themselves

of Washington's laws and affirmatively filed suit in Washington state in either state or federal court or filed a cross claim or counterclaim, regardless of whether the claim was for environmental damage or not. Once identified by Defendants, the parties shall confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.

Requests For Production Nos. 5 and 6

That the District Court order Defendants to identify the most recent 30 environmental liability insurance cases filed in Washington in either federal or state court in which LMI were parties, regardless of whether the choice of law or choice of law forum issues were raised. Once identified by Defendants, the parties shall confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.[2]

Request For Production No. 33

That the District Court order the Defendant to produce all Documents reflecting LMI's position asserted in any suit filed in Washington state since January 1, 1995, either federal or state court, regarding the meaning of the seepage and pollution clause (NMA 1685). Once identified by Defendants, the parties shall

[2] The District Court has now determined that Washington law applies where there is a conflict with British Columbia law and it is unclear whether Plaintiff still has need of this discovery. Ct. Rec. 516.

confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.

Request For Production No. 37

That the District Court order the Defendant to produce all claims-related Documents and Policies of Insurance relating to all environmental claims, not otherwise privileged, relating to all environmental claims asserted against LMI since January 1, 1995 to date by any insured resident in Washington or litigated as coverage cases involving Washington property.

Request For Production No. 38

That the District Court order the Defendants to produce all claims-related Documents, not otherwise privileged, and policies of insurance relating to all environmental claims asserted against LMI since January 1, 1995 to date in Washington state courts, federal or state, relating to slag, whether or not slag was the only source of alleged contamination or one of several sources of alleged contamination giving rise to the environmental claim.

Request For Production No. 39

That the District Court order the Defendants to produce all claims-related Documents, not otherwise privileged, and policies of insurance relating to all environmental claims asserted against LMI since January 1, 1995 to date in Washington state courts, federal or state, relating to alleged contamination of sediment.

Request For Production No. 40

That the District Court order the Defendants to produce all claims-related Documents, not otherwise privileged, and policies

of insurance relating to all environmental claims asserted against LMI since January 1, 1995 to date in Washington state courts, federal or state, in which coverage attached at $5 million or more and LMI associated in the defense of the underlying claim or undertook the defense of the underlying claim.

Request For Production No. 41

That the District Court order the Defendants to produce all Documents, not otherwise privileged, generated since January 1, 1980 and kept in LMI claim files as ordinary business records, related to environmental claims concerning the Lake Roosevelt site.

Request For Production No. 42

That the District Court order the Defendants to identify all documents reflecting LMIs' legal position in suits in Washington State courts (either federal or state) since January 1, 1995 with respect to the applicability of any form of pollution exclusion to a policyholder's claim for coverage. Once identified by Defendants, the parties shall confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.

Request For Production No. 89

That the District Court order the Defendants to produce all non-privileged Documents, either public or internal, in which LMI communicate the meaning, interpretation, or proper application to environmental claims of any of the insuring agreements, definitions, conditions, exclusions, or other terms or wording in

any of the policies of insurance sold by LMI to Teck, including without limitation, the policy provisions raised by or alluded to in LMI's affirmative defenses, quoted in full.

Interrogatory No. 4

That the District Court order the Defendants to identify all suits commenced since January 1, 1995 in Washington State (state or federal courts) relating to insurance filed by or against any persons that subscribed to policies of insurance sold by LMI to Teck. Once identified by Defendants, the parties shall confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.

Interrogatory No. 12

That the District Court order the Defendants to identify all suits in Washington state (federal or state court) since 1980 naming persons to whom any Defendant issued a policy of insurance from 1972 through 1985 and which was brought by those persons against the Defendants or by the Defendants against those persons relating to any environmental claims. Once identified by Defendants, the parties shall confer about the appropriate method for Plaintiff to obtain the files, including having a public entity produce them from public dockets or files in an electronically searchable format.

3) Prior Testimony and Communications Regarding Policy Terms

RFP 16, 23-24, 43, 49, 89, 91,92

Interrogatories 13, 20

Teck seeks discovery of London Insurers' non-privileged communications about the meaning of Policy wordings that are disputed in this case. London Insurers' understanding and representations to others concerning these provisions are relevant to their interpretation.

First, Teck seeks non-privileged communications among London Insurers shedding light on such interpretations, including (1) their participation in the Environmental Claims Group and London Non-Marine Association, London market industry groups formed to develop policy provisions, interpretations, and strategies for handling environmental claims presented under London policies, (2) formal discussions with other insurers, outside of legal proceedings, regarding the application of policy wording to environmental claims, and (3) prior testimony of persons involved in drafting disputed language in the Policies.

Second, Teck seeks documents reflecting London Insurers' external representations – regulatory filings, and statements to insurance organizations – showing how they represented these policy provisions to others.

If insurance policy language is ambiguous, the parties' intent regarding its meaning may be relevant to its interpretation. *E.g.*, *Conrad v. Ace Prop. & Cas. Ins. Co.*, 532 F.3d 1000, 1005 (9th Cir. 2008); *Findlay v. United Pac. Ins. Co.*, 129 Wash. 2d 368, 379 (1996). Because communications among insurers and to third parties reveal the insurers' intent, courts look to those representations in construing policy language. *See,*

e.g., *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wash. 2d 50, 83-86 (1994) (representations "of the insurance industry to state regulators may be considered insofar as they present a reasonable interpretation of the policy language")

DISCUSSION AND RECOMMENDATION

LMI does not really resist the notion that the information sought is discoverable. Their primary objection is the burdensome nature of the requests since those are unrestricted as to time and scope. However, Teck has limited the scope of its requests during the parties' "meet and confer" sessions. Generally, Teck is entitled to discover prior depositions or trial testimony of individuals who are likely to be central witnesses in the case. Transcripts should be provided of those persons who are "leaders" or "lead underwriters" as those terms are commonly used in the London insurance market. And the testimony should be limited to that obtained in environmental liability insurance coverage cases only. Further, the answers and production should be limited to the time periods when LMI subscribed policies in favor of Teck or that relate to the policies of insurance sold to Teck and at issue in this declaratory judgment action.

Thus, the Court would **RECOMMEND** that:

The District Court order the Defendants to provide full and complete answers to Interrogatories 13 and 20 and provide all documents responsive to Request For Production numbers 16, 23-24, 43, 49, 89,91,92 limited only as to persons who are "leaders" or "lead underwriters" as those terms are commonly used in the London insurance market and only as to environmental liability insurance

coverage cases. Any documents that Defendants contend are subject to privilege and work/product claims should be identified.

4. Documents Relating to Reinsurance and Reserve Information

RFP 44, 45

Teck requests production of documents disclosing reinsurance and reserve information for Teck's claim. Teck contends it is in need of this information because it would show when the insurer had notice of a claim and passed that information on to its reinsurer. Additionally, Teck says that LMI would have given its reinsurers a genuine assessment of the claim.

LMI disputes the relevance of the reinsurance and reserve information in a declaratory judgment action for coverage.

Discussion and Recommendation

Case law goes both directions on whether this information is relevant in discovery. Flintkote Co. v. General Accident Assur. Co. of Canada, 2009 U.S. Dist. Lexis 44066 at 13-14 (N.D. Cal. May 26, 2009) holds that courts "generally deny discovery of reinsurance because it was irrelevant". One of the cases cited by Teck, National Union Fire Ins. Co. v. Stauffer Chemical, 558 A.2d 1091 (1991), held that the insured was entitled to discovery of reinsurance information and communications between the carriers and their reinsurers because it is relevant to whether the insurers believed that the policies covered the claims against Stauffer.

Additionally, FRCP 26(a)(1)(A)(iv) requires as an initial disclosure that a party has to provide "for inspection and copying as under Rule 34, any insurance agreement under which an insurance

business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." It should be noted that the Rule does not require, on its face, an insurer to produce its assessment of a claim.

It should also be noted that some of the cases relied on by the parties find that a work product privilege exists for part or all of the reinsurer's files.

Here, LMI asserts that Teck failed to give timely notice of a claim or claims against it. It seems to the Court that any notice given to a reinsurer might shed some light on the issue of when LMI knew about the claims. At a minimum, LMI should be required to disclose the date, method of transmittal and author of its first communication(s) to the reinsurers about Teck's claims.

As to the discovery of reserves, this is not a bad faith case, nor is the amount of any reserve set by LMI relevant at this stage of the proceedings. As stated in Stauffer, supra, at 1097-1098, " In essence, reserves are general estimates of potential liability which may not involve a detailed factual and legal basis...The fact that reserves were established does not necessarily mean that the insurers believed that such claims would be covered by the policies."

The Court does not believe that reserve information would be relevant at this juncture of the case.

Accordingly, the Court would **RECOMMEND** as follows:

That the District Court order Defendants to produce all non-privileged documents relating to notification by LMI to any of its

reinsurers relating to any claims and/or potential claims by Teck relating to the Lake Roosevelt site, and any responses of any such reinsurers to such notification. That a Protective Order in favor of Defendants be issued as to documents relating to Defendants or any reinsurers' assessment of the validity, value, and/or merit of Teck's claims and/or potential claims. That the Protective Order shall also deny the Plaintiff's motion to compel production of all documents relating to any reserves that the Defendants have established for the Lake Roosevelt claim. That a motion to dissolve the Protective Order may be entertained by the District Court if the District Court finds that coverage exists as to the policies issued by Defendants to Teck.

5. Documents Relating to the Part VII Transfer

RFP 102

Teck seeks discovery regarding the statutory transfer under Part VII of the U.K. Financial Services and Markets Act 2000, in which the liabilities of Lloyd's "Names" and Syndicates were transferred to Equitas Insurance Limited. In lieu of discovery, London Insurers have referred Teck to documents posted on the Internet. LMI asserts that the Part VII transfer did not change the London Policy language or eliminate any coverage defenses. They argue that the Plaintiff is on a fishing expedition.

Discussion and Recommendation

In this case, LMI have asserted that their liability is 'several" and not "joint".

Teck believes that the Part VII transfer may have eliminated any distinction among former Syndicates, because all such

Syndicates are now represented by Resolute Management Inc. (in Boston)and any liability borne by these Names or Syndicates will be paid by National Indemnity Company. Teck asserts that since London Insurers raised this defense to their potential liability, they are bound to disclose relevant, non-privileged information that may disprove it.

LMI has given Teck the necessary information on the EIL website to review the English High Court order effecting the transfer. LMI asserts that nothing in the Part VII Transfer purports to change the language of the London Policies or change the nature of the subscription to the Policies. LMI argues that the transfer does not alter the terms of the policies in which the Lloyd's underwriters expressly "bind ourselves each for his own part and not for the other....in respect of his due proportion only."

Teck does not accept that liability remains "several" after the transfer. They argue that this may not be the case and that they are entitled to more than appears on the Equitas public website. Specifically, Teck believes that there is now an indemnity agreement that changes the legal relationship among the London Insurers. Teck maintains, and LMI does not dispute, that all documents and regulatory approvals are not available on the Internet.

The Court finds that Defendants should make available to Plaintiff documents that would clarify the understanding that the Defendants have concerning the transfer. Although not of great significance in determining coverage in this case, discovery is

not to be conducted piecemeal and the issue of joint or several liability would be of significance if the District Court decides coverage in favor of the Plaintiff.

Accordingly, the Court **RECOMMENDS** that:

The District Court order LMI to produce all documents not otherwise privileged, including but not limited to correspondence and regulatory approvals, related to the statutory transfer under Part VII of the U.K. Financial Services and Markets Act 2000 in which, inter alia, obligations of Names under policies of Insurance sold by LMI to Teck were transferred to Equitas Insurance Ltd.

Objection as to Proprietary and Confidential Information of Other Insureds

LMI argues that its other insureds should have notice and opportunity to object to disclosure of confidential and proprietary information in their underwriting files. While there may be such information contained in said files, for example trade secret information about mining or smelting operations, no showing has yet been made by LMI that the files do, in fact, contain such information. Once the files have been identified, LMI would have the opportunity to review them and determine if such confidential and proprietary information is contained in them. At that point, it may be necessary to contact those insured and determine if they contend certain information is in need of a non-disclosure order.

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within **fourteen (14)** days following

service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within **fourteen (14)** days after receipt of the objection. Attention is directed to FED. R. CIV. P. 6(d), which adds additional time after certain kinds of service.

A district judge will make a de novo determination of those portions to which objection is made and may accept, reject, or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72; LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The District Court Executive is directed to file this Report and Recommendation and provide copies to the parties and the referring district judge.

DATED this 25th day of August, 2010.

s/ James P. Hutton
JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE