

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN SECTION OF TENNESSEE  
WESTERN DIVISION

ET ENVIRONMENTAL CORP., LLC;

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Case No. 2:18-cv-02245-JPM-cgc

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PLAINTIFF,

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v.

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ACE AMERICAN INSURANCE

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COMPANY, now known as THE CHUBB

)

CORPORATION; JEFFREY D.

)

GERMANY; MARSHALL J. DIGMON,

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MORTON & GERMANY, PLLC;

)

ANTHONY FOSTER; JOHN H. PALMER;

)

WILLIAM B. HOUSAM; ANDREW S.

)

TAKACS; JEFFREY L. BAIN and

)

CHEMTECH CONSULTANTS, INC.

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)

DEFENDANTS.

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**ORDER GRANTING IN PART PLAINTIFF’S MOTION TO COMPEL  
REPORT AND RECOMMENDATION ON REQUEST FOR ATTORNEY’S FEES**

**I. Order on Motion to Compel**

Before the Court, by way of order of reference for determination is the July 31, 2018 Motion of Plaintiff ET Environmental Corp., LLC (“Plaintiff”) “(1) for sanctions in connection with the failure of Defendants Jeffrey D. Germany, Morton & Germany, PLLC, and Marshall J.

Digmon to produce all emails and other communications as previously Ordered by this Court on June 4, 2018 and as instructed by ChemTech Consultants, Inc., (2) to Compel Defendants to produce a full copy of any applicable insurance policies as required by Rule 26(a)(1)(iv). (D.E. # 51) The Motion was fully briefed by the parties and argued before this Court on September 21, 2018. For good cause shown, the Motion is granted, in part, and denied in part. The Court finds as follows:

1. On June 4, 2018, the Honorable Judge Jon P. McCalla held a Rule 16(b) Discovery Scheduling Conference. At that hearing, the Court, pursuant to Rule 26 of the Federal Rules of Civil Procedure (“Rule 26”), ordered Defendants Jeffrey D. Germany, Morton & Germany, PLLC, and Marshall J. Digmon (the “Germany Defendants”) to produce all correspondence, communication, or other transmissions of information between themselves and any of their employees or agents and Anthony Foster, John H. Palmer, William B. Housam, Andrew S. Takacs, Jeffrey L. Bain, and ChemTech Consultants, Inc., as well as any of their employees or agents.

2. Judge McCalla intended for all such correspondence, communication, or other transmissions of information to be produced on or before June 25, 2018 and for any claims of privilege to be asserted at that time. To the extent that any claims of privilege were asserted, Judge McCalla ordered the Germany Defendants to submit all documents that were the subject of privilege claims to the Court for *in camera* review.

3. The Germany Defendants did not produce any such correspondence, communication, or other transmissions of information on or before June 25, 2018 or at all, and Plaintiff filed its Motions on July 31, 2018.

4. On September 21, 2018, the Germany Defendants, through counsel, indicated to the Court that it was their understanding that they were not obligated to produce documents pursuant as a result of the Scheduling Conference and that any production obligations would not be triggered until Plaintiff served a request for production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure (“Rule 34”).

5. This Court finds that the Germany Defendants failed to comply with Judge McCalla’s June 4, 2018 Order.

6. The Court further finds that Judge McCalla’s June 4, 2018 Order was issued pursuant to Rule 26, not Rule 34. Accordingly, the Germany Defendants were not entitled to delay document production pending a formal Rule 34 request for production.

7. The Court further finds that Plaintiff’s July 16, 2018 email request for any documents not included in the description of “all correspondence, communication, or other transmissions of information between themselves and any of their employees or agents and Anthony Foster, John H. Palmer, William B. Housam, Andrew S. Takacs, Jeffrey L. Bain, and ChemTech Consultants, Inc., as well as any of their employees or agents” is sufficient<sup>1</sup> to constitute a Rule 34 request. However, because Plaintiff filed the present Motions on July 31, 2018, less than 30 days after the Rule 34 request was served, Plaintiff’s Motion to Compel was premature to the extent that it was intended to enforce the July 16, 2018 Rule 34 request.

8. Plaintiff also seeks to compel the Rule 26(a) production of any applicable insurance policies 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, the production of which is clearly required under Rule 26.

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<sup>1</sup> The finding is that the email is only barely sufficient to constitute a Rule 34 request and this ruling is not meant in any way to condone this email as a model Rule 34 request going forward.

9. The Germany Defendants initially provided a redacted declaration page and provided the full policy on the morning of the motion hearing.

It is therefore ORDERED, this 27<sup>TH</sup> day of September, 2018, that the Motion is granted, in part, and that:

(i) Defendants Jeffrey D. Germany, Morton & Germany, PLLC, and Marshall J. Digmon shall produce on or before September 28, 2018 all correspondence, communication, or other transmissions of information, including, but not limited to, all emails, letters, faxes, memoranda, notes, or any other means of communication, between themselves and any of their employees or agents and Anthony Foster, John H. Palmer, William B. Housam, Andrew S. Takacs, Jeffrey L. Bain, and ChemTech Consultants, Inc., as well as any of their employees or agents;

(ii) In doing so, Defendants Jeffrey D. Germany, Morton & Germany, PLLC, and Marshall J. Digmon shall, on or before September 28, 2018 and to the extent that they contend that privilege has not been properly waived, assert claims of privilege over such correspondence, communication, or other transmissions of information, if any such claims exist, produce to Plaintiff a detailed and itemized privilege log describing each privilege claim asserted, and provide to the Court each document that is the subject of such a privilege claim for *in camera* review;

(iii) Thereafter, Plaintiff shall have seven days, until October 5, 2018, to submit briefing challenging any privilege claim asserted by Defendants Jeffrey D. Germany, Morton & Germany, PLLC, and Marshall J. Digmon.

## **II. Report and Recommendation on Attorney's Fees<sup>2</sup>**

Also before the court, by way of order of reference for report and recommendation is the portion of the motion pertaining to Plaintiff's request for sanctions and attorney's fees related to the filing of the motion.

Pursuant to Fed.R.Civ.P 37(a)(3)(A), (5)(A) and (5)(C), if Plaintiff's motion to compel disclosure required by Fed.R.Civ.P 26(a) is granted "the court must, after giving an opportunity to be heard, require the party... whose conduct necessitated the motion ... to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees."

Having reviewed the submissions of the parties and after listening to the arguments of counsel, it is RECOMMENDED that Plaintiff be awarded its reasonable expenses incurred in making the motion, including attorney's fees apportioned to the successful issues in the motion as Plaintiff did attempt in good faith to obtain the disclosures prior to filing the instant motion and the Germany Defendants were not substantially justified in their refusal to produce the disclosures. It is FURTHER RECOMMENDED that the Germany Defendants be allowed an opportunity to challenge the reasonableness of the award within an appropriate time after Plaintiff files its supporting affidavit of fees and expenses, if ordered by the court, consistent with this report.

Signed this 27<sup>th</sup> day of September, 2018.

s/ Charmiane G. Claxton  
CHARMIANE G. CLAXTON  
UNITED STATES MAGISTRATE JUDGE

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<sup>2</sup> At the hearing, Plaintiff acknowledged that the only sanctions sought are attorney's fees.

**ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE SAID OBJECTIONS OR EXCEPTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.**