

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 19887

ASPEN SPECIALTY INSURANCE
COMPANY; ENDURANCE
AMERICAN SPECIALTY
INSURANCE COMPANY;
PARTNERRE IRELAND INSURANCE
LTD.; HELVETIA SWISS INSURANCE
COMPANY; LEXINGTON INSURANCE
COMPANY; LIBERTY MUTUAL FIRE
INSURANCE COMPANY; LIBERTY
SURPLUS LINES INSURANCE
COMPANY; XL INSURANCE AMERICA,
INC.; ZURICH AMERICAN INSURANCE
COMPANY; and ACE AMERICAN
INSURANCE COMPANY,

Plaintiffs,

v.

NUCOR CORPORATION and NUCOR
STEEL LOUISIANA, LLC,

Defendants,

and

XL INSURANCE AMERICA, INC.; and
LIBERTY MUTUAL FIRE
INSURANCE COMPANY,

Intervening Complaint-
Plaintiffs,

v.

NUCOR CORPORATION and NUCOR
STEEL LOUISIANA, LLC,

Intervening Complaint-
Defendants.

**ORDER AND NOTICE OF
CONFERENCE
(Testing Protocol)**

1. THIS MATTER is before the Court pursuant to Business Court Rule (“BCR”) 10.9 to resolve a dispute regarding Defendants/Intervening Complaint-Defendants Nucor Corporation and Nucor Steel Louisiana, LLC’s (together, “Nucor”) proposed testing protocol for the “encoder,” a piece of equipment that is central to the claims in this case. Also before the Court is Intervening Complaint-Plaintiffs XL Insurance America, Inc. and Liberty Mutual Fire Insurance Company’s (the “EB Insurers”) Motion to Bar Nucor’s Proposed Destructive Testing, for Leave to Serve Rule 34 Request for Inspection, or for a Spoliation Adverse Inference. (ECF No. 133).¹

2. Having reviewed the parties’ written positions, and after a hearing conducted 12 April 2022 during which all parties were heard, the Court hereby ORDERS that both nondestructive testing and disassembly of the encoder may take place under the limitations and conditions specified below.

I. BACKGROUND

3. Nucor contends that whether the encoder performed properly on 7 November 2017 is an essential issue in this case and desires to perform both nondestructive and destructive testing on it. Nucor acknowledges that the encoder was tested in the presence of the parties in 2018, but it argues that it requires

¹ Nucor argues that the EB Insurers “jumped the gun” with respect to their motion and that the BCR 10.9 process had not been completed. The EB Insurers respond that their motion is in the nature of a request to modify the Case Management Order to permit additional written discovery after the deadline for such discovery had expired and, therefore, does not neatly fall within the BCR 10.9 process. At the hearing both parties were given an adequate opportunity to be heard with respect to the substantive issues that comprise both the BCR 10.9 dispute and the motion, and the Court opts to address the substance of the parties’ concerns in this Order. Consequently, the Court declines to rule on the procedural issue but underscores to all parties the importance of compliance with BCR 10.9 as it applies to the management of discovery disputes.

additional testing. In preparation for this testing, Nucor sent a proposed protocol to the other parties on 11 January 2022 and requested feedback.

4. The EB Insurers respond with their concern that the encoder has been in Nucor's possession for four years since its initial testing, and they contend that they need to determine whether its condition has changed over that period of time. Therefore, the EB Insurers request an opportunity to conduct their own nondestructive testing to determine the current condition of the encoder. They also express concern that Nucor's proposed protocol is not sufficiently detailed, particularly with respect to destructive testing, their belief that a neutral third-party should conduct the testing, and their objection to language in Nucor's draft protocol providing that disputes arising during the testing process be resolved by Nucor's expert alone.

5. Plaintiffs Aspen Specialty Insurance Company, Endurance American Specialty Insurance Company, Partnerre Ireland Insurance Ltd., Helvetia Swiss Insurance Company, Lexington Insurance Company, Liberty Mutual Fire Insurance Company, Liberty Surplus Lines Insurance Company, XL Insurance America, Inc., Zurich American Insurance Company, and Ace American Insurance Company (the "Property Insurers"; together with the EB Insurers, the "Insurers") do not object to Nucor's proposed testing in principle. However, the Property Insurers do express their view that any party that wishes to conduct nondestructive tests should be given the opportunity to do so, and that disputes regarding testing should be resolved by

the parties working collaboratively or, if necessary, by the Court or another neutral party.

6. At the hearing, Nucor confirmed that its expert intended to dismantle the encoder and, while it could not identify what additional destructive tests it ultimately planned to perform, Nucor acknowledged that its consultant *might* decide to conduct chemical testing during the process. Nucor opposes the EB Insurers' desire to repeat nondestructive testing, saying it would be unnecessarily duplicative, time-consuming and, therefore, expensive, and further contends that it is unnecessary for any testing to be conducted by a neutral third party because under its protocol, the Insurers are permitted to be present and record the testing procedure.

II. LEGAL STANDARD

7. Rule 26 of the North Carolina Rules of Civil Procedure (the "Rule(s)") provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" N.C. R. Civ. P. 26(b)(1). Under Rule 34 a "party may serve on any other party a request . . . to inspect and copy, test, or sample any . . . tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession or custody or control of the party upon whom the request is served[.]" N.C. R. Civ. P. 34(a).

8. Where "the parties differ as to whether an inspection or test is appropriate, the court must balance the respective interests by weighing the degree to which the proposed inspection [and testing] will aid in the search for truth against the burdens and dangers created by the inspection [and testing]." *DSM Dyneema*,

LLC v. Thagard, 2015 NCBC LEXIS 116, at *10–11 (N.C. Super. Ct. Dec. 18, 2015) (quoting *Ramos v. Carter Express, Inc.*, 292 F.R.D. 406, 408 (S.D. Tex. 2013)) (alterations in original).

9. When a party contemplates destructive testing such that there is a danger of irreversibly altering evidence that will be sought to be admitted at trial, the Court applies a “more stringent test.” *Id.* at *11 n.5 (citing *Mirchandani v. Home Depot, U.S.A., Inc.*, 235 F.R.D. 611, 613–614 (D. Md. 2006)).²

10. Ultimately, “[t]he decision whether to allow testing . . . falls within the sound discretion of the court.” *Id.* at *11 (quoting *Hunley*, No. 3:10-CV-455, 2013 U.S. District LEXIS 54259, at *7 (E.D. Tenn. Apr. 17, 2013)); *see also* N.C. R. Civ. P. 26(b)(1a) (“The . . . extent of use of the discovery methods . . . shall be limited by the court if it determines that. . . the discovery is unduly burdensome or expensive[.]”).

III. ANALYSIS

11. The requested testing in this case includes both nondestructive testing as well as destructive testing. The Court addresses the request for nondestructive testing first.

12. With respect to Nucor’s proposed nondestructive testing, the burden is on the Insurers to show prejudice. *See DSM Dyneema, LLC*, 2015 NCBC LEXIS 116,

² Decisions from the federal courts are instructive with respect to the North Carolina Rules of Civil Procedure. *See Turner v. Duke Univ.*, 325 N.C. 152, 164 (1989) (“Decisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules.”); *Dickens v. Puryear*, 302 N.C. 437, 442 (1981) (noting that “it is customary . . . to look for guidance in interpreting our rules to federal rules decisions”); *Sutton v. Duke*, 277 N.C. 94, 99 (1970) (“The North Carolina Rules of Civil Procedure are modeled after the federal rules.”).

at *10; *Hunley*, No. 3:10-CV-455, 2013 U.S. District LEXIS 54259, at *7. The EB Insurers' argument that the testing is repetitive and, therefore, unnecessary, falls short. Nucor is absorbing the cost of the testing it wishes to conduct, and the mere fact that it might repeat a test that was done in 2018 does not constitute prejudice.

13. On the other hand, the EB Insurers maintain that they will be unable to compare the results of the 2018 testing with the results of any 2022 testing unless they are also able to test the encoder to determine its condition after being in Nucor's possession for the past four years. The Court is satisfied that the EB Insurers' proposed solution that it also be allowed to perform nondestructive testing sufficiently remedies this concern. Moreover, Nucor has not shown that it will be prejudiced if the EB Insurers supply the necessary equipment and absorb the incremental increase in cost resulting from the addition of their requested tests.

14. Therefore, by 30 April 2022, the EB Insurers shall provide the Court³ and the other parties in this action with a proposed protocol for the EB Insurers' requested nondestructive testing, including a *detailed* description of the tests to be performed, an explanation of the equipment necessary and the EB Insurers' arrangements for that equipment, the name and qualifications of the individual(s) who will conduct the tests, and the EB Insurers' commitment to pay the costs associated with performing the tests they request.

³ The protocols required herein may be emailed to the Court's assistant at William.D.Moore@nccourts.org.

15. Likewise, on or before 30 April 2022, Nucor shall provide the Court and the other parties in this action a revised protocol for Nucor's requested nondestructive testing that details the same information provided in paragraph 14 above.

16. Moving next to destructive testing, and as for Nucor's proposed disassembly of the encoder, the Court finds merit in the EB Insurers' contention that Nucor's proposed protocol with respect to this form of destructive testing is insufficiently detailed. The Court must "balance the [parties'] respective interests by weighing the degree to which the proposed [testing] will aid in the search for truth against the burdens and dangers created by the [testing]." *DSM Dyneema, LLC*, 2015 NCBC LEXIS 116, at *10–11. A more detailed protocol will facilitate that analysis. The Court therefore directs Nucor to provide the Court and the other parties in this action a testing protocol that more specifically details the disassembly process (step-by-step) on or before 30 April 2022. The protocol should also include steps to reassemble the encoder once the testing is complete.

17. At the hearing, Nucor left open the possibility that it would perform other forms of destructive testing, such as chemical testing, that could irreparably destroy or alter parts of the encoder. However, Nucor was unable to describe the chemical testing it might seek to perform, or the state in which the encoder will be left once such testing was completed.

18. In the absence of controlling state law, this Court looks to federal law for guidance. *See Turner*, 325 N.C. at 164. The federal courts have largely adopted a consistent approach, which this Court likewise adopts. When a party seeks

destructive testing that will irreversibly alter evidence, the Court will consider: (1) “[w]hether the proposed testing is reasonable, necessary, and relevant to proving the movant’s case”; (2) “[w]hether the non-movant’s ability to present evidence at trial will be hindered, or whether the non-movant will be prejudiced in some other way”; (3) “[w]hether there are any less prejudicial alternative methods of obtaining the evidence sought”; and (4) “[w]hether there are adequate safeguards to minimize prejudice to the non-movant, particularly the non-movant’s ability to present evidence at trial.” *Mirchandani*, 235 F.R.D. at 614; *see also, e.g., USF Ins. Co. v. Smith’s Food & Drug Ctrs., Inc.*, 2:10-CV-01513-RLH, 2011 U.S. Dist. LEXIS 121824, at *4–5 (D. Nev. Oct. 19, 2011) (applying this standard to destructive testing); *Bostic v. Ammar’s Inc.*, CIV.A. 03-146-ART, 2011 U.S. Dist. LEXIS 7748, at *8–9 (E.D. Ky. Jan. 16, 2011) (same).

19. Any irretrievably altering destructive testing, whether chemical or otherwise, that Nucor might seek to perform must be evaluated with respect to the factors above. But absent a detailed testing protocol, the Court does not have sufficient information to conduct that evaluation. Accordingly, the Court defers ruling on the permissibility of any chemical or other irreversibly altering destructive testing until Nucor has revised and resubmitted to the other parties in this case and the Court a detailed testing protocol.

20. The Court will address concerns, if any, regarding the parties’ testing protocols at a status conference to be held on 2 May 2022 at 9:30 a.m. via WebEx videoconference.

21. WHEREFORE, the Court, in the exercise of its discretion, hereby ORDERS as follows:

- a. The EB Insurers shall have through and including 30 April 2022 to: (i) submit a testing protocol regarding the nondestructive testing that the EB Insurers seek to perform on the encoder, and (ii) report to the Court (via email to the Court's assistant) the parties' progress on the same. The protocol shall include a detailed description of the test(s), an explanation of the equipment involved and the arrangements for that equipment, the individual(s) who will conduct the test(s), and the additional expense resulting from the test(s), which expense is to be borne by the EB Insurers.
- b. All testing will be recorded by audio and visual means. A neutral third party is not required to perform nondestructive testing.
- c. Nucor shall have through and including 30 April 2022 to: (i) resubmit a detailed protocol with respect to its nondestructive testing as specified herein; (ii) submit a more detailed testing protocol regarding the disassembly process and *any* other destructive testing that it may wish to perform on the encoder, and (iii) report to the Court (via email to the Court's assistant) the parties' progress regarding the same.
- d. The Court defers ruling on Nucor's request for possible chemical testing until the parties have exchanged detailed protocols in accordance with this Order.

- e. Except as specified herein, the EB Insurers' Motion to Bar Nucor's Proposed Testing, for Leave to Serve Rule 34 Request for Inspection, or for a Spoliation Adverse Inference, (ECF No. 133), is DENIED.
- f. TAKE NOTICE that the Court will hold a status conference via WebEx videoconference in the above-captioned matter on 2 May 2022 at 9:30 a.m. to discuss the parties' progress on the testing protocol. Instructions for joining the conference will be provided by email.

IT IS SO ORDERED, this the 19th day of April, 2022.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases