4/27/2006

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No.: 05-1360-BLS

Marcia Rhodes, Harold Rhodes, Individually, Harold Rhodes, on Behalf of his Minor Child and Next Friend, Rebecca Rhodes Plaintiffs,	)
v.	)
AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc., National Union Fire Insurance Company of Pittsburgh, PA, and Zurich American Insurance Company Defendants.	)

DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND FOR SANCTIONS

Defendant Zurich American Insurance Company ("Zurich") respectfully requests this Court to deny Plaintiffs' Motion to Compel and for Sanctions, and submits the following Memorandum of Law.

INTRODUCTION

When one looks beyond all of the inflammatory rhetoric and hyperbole in Plaintiffs' Memorandum in Support of Their Motion to Compel and for Sanctions (Plaintiffs' Memorandum"), what emerges is a simple dispute over the discoverability of a handful of documents that Zurich has produced to Plaintiffs in redacted form. The disputed documents include a "BI Claim Report" prepared by Zurich and three reports, entitled "Liability Transmittal Letters," that former Crawford & Company adjuster John Chaney prepared after Plaintiffs filed suit in the underlying tort action. Plaintiffs contend that the Court's January 23rd Order on their

original Motion to Compel ("Order") required Zurich to disclose material in the BI Claim Report provided by defense counsel in the underlying tort action. Moreover, despite the clarity of the Order, Plaintiffs argue that Zurich must produce the opinion work product of Mr. Chaney, a claim representative who played no part in determining the timing or amount of the policy-limits settlement offer Zurich extended to Plaintiffs six months before the trial of the underlying tort action—an offer that was immediately and summarily rejected by Plaintiffs' counsel. As explained below, Plaintiffs' interpretation of the Order is untenable, and their arguments regarding the discoverability of the disputed documents are not supported by Massachusetts law. Their Motion to Compel should be denied.

Rather than confine their motion to its essence—a legitimate and narrow discovery dispute—Plaintiffs have elected, once again, to pursue sanctions against the Defendants. On this occasion, they have concocted a theory that Zurich willfully violated the Order and played "hide-and-seek" with several documents. The facts, however, reveal that Zurich complied with the Order, had legitimate, good faith reasons for withholding certain documents or portions thereof, and otherwise conducted discovery fairly. Accordingly, there is no basis for Plaintiffs' request for Rule 37 sanctions against Zurich.

BACKGROUND[1]

The genesis of the instant dispute is the Order. In it, the Court directed the Defendants to produce,

- The opinion work product "created by insurance company claims representatives who participated in determining the timing or the amount of the settlement offers made to the plaintiffs...," including the "Reserve Amount;"

[1] In a section of their Memorandum loosely entitled "Factual Background," Plaintiffs restate the core allegations of their Complaint against Zurich. Because those allegations are not germane to the instant motion, Zurich will not waste the Court's time by responding to them. At the appropriate time, however, Zurich will prove that it attempted to effectuate a prompt, fair and equitable settlement of Plaintiffs' tort claims when liability became reasonably clear by offering its $2 million policy limits to Plaintiffs six months before trial, and that Plaintiffs rebuffed that attempt.

- Communications directly between or among the defendants that were not otherwise protected by the attorney-client privilege or work product doctrine;
- Otherwise privileged communications that were shared with insurance agent Willis Coroon; and
- Withheld claim manuals.

(Order, p. 25, ¶¶ 3, 6-9).[2] On February 8, 2006, pursuant to the Order, Zurich produced from its files all communications between the Defendants, communications shared with Willis Coroon, and its "Liability Best Practices" manual, the only claim manual it had previously withheld.[3] The opinion work product of claim representatives was not disclosed because that aspect of the Order was the subject of Defendants' Petition for Interlocutory Relief.

On March 1, 2006—the next business day after the Single Justice ruled on the Petition—Zurich produced the opinion work product "created by insurance company claims representatives who participated in determining the timing or the amount of the settlement offers made to the plaintiffs," including Jody Mills and Stephen Penick of Crawford and Kathleen Fuell of Zurich. At that time, Zurich withheld only the work product of John Chaney, who did not participate in those decisions. All told, Zurich produced more than 130 pages of additional materials to Plaintiffs after the Court issued its Order and before depositions commenced.

As this Court envisioned in its Order (Order, p. 26, ¶ 11), the parties had further discussions regarding the applicability of the Order to certain other documents. In most instances, Zurich agreed to produce additional materials to Plaintiffs so as to avoid burdening the

[2] The Court also directed the insurers to produce "fact work product in Category 2," but Zurich disclosed all fact work product in its claims file in July 2005.

[3] Zurich subsequently produced certain litigation management guidelines that were not the subject of the Plaintiffs' original motion to compel or the Court's Order and, in fact, were first requested by Plaintiffs through a document request served in December 2005.

Court with further discovery disputes. The sole exceptions are the documents that are the subject of Plaintiffs' motion to compel, portions of which Zurich has properly withheld.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO COMPEL BECAUSE THE OPINION WORK PRODUCT OF ZURICH'S DEFENSE COUNSEL AND CLAIM REPRESENTATIVE JOHN CHANEY IS NOT DISCOVERABLE UNDER THE ORDER OR MASSACHUSETTS LAW.

Plaintiffs' contention that the Order required Zurich to produce the attorney work product in Zurich's BI Claim Report and the opinion work product created by claim representative John Chaney defies the Order's unambiguous terms. That work product remains protected under Massachusetts law.

A. Opinion Work Product of John Chaney

Plaintiffs maintain that the Order required disclosure of the opinion work product of all insurance claims representatives who played any part in handling the underlying tort claims against Zurich's insured, and seek unredacted copies of three Liability Transmittal Letters that John Chaney prepared in September 2002, December 2002 and November 2003.[4] Plaintiffs' interpretation of the Order is untenable. In the Order, the Court unambiguously ruled that opinion work product "created by insurance company claims representatives who participated in determining the timing or the amount of the settlement offers made to the plaintiffs must be disclosed in discovery because the conduct of these claims representatives is at issue and the need for such work product is compelling." (Order, p. 25, ¶ 3). That ruling was grounded in the following rationale set forth on pages 12 and 13 of the Order:

[4] Plaintiffs erroneously assert that Zurich has withheld the opinion work product of Zurich employee David McIntosh. In fact, Mr. McIntosh did not generate any opinion work product during his time overseeing Plaintiffs' underlying tort claims. In two documents, however, Mr. McIntosh did make reference to the work product of Crawford adjuster Jody Mills. Zurich has produced those documents to Plaintiffs in unredacted form.

> In an unfair claim settlement case such as this, the conduct of the insurance claims representatives who were responsible for deciding what settlement offer to tender to the plaintiffs is "at issue" because the reasonableness of the settlement offer tendered by the insurance company is the focus of this case.
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> * * *
>
> The need for disclosure of the opinion work product in the insurance claims file becomes clear when one considers that the plaintiffs are certainly entitled to depose the claims representative responsible for determining the settlement offer and ask him to explain his reasons for making that offer. He could not refuse to answer questions asking him to explain his thought process by invoking any privilege or by denying its relevancy because his state of mind is protected by no privilege, and his good faith and that of his employer is plainly relevant in an unfair claim settlement case. If his opinion work product in the claims file were not discoverable, the plaintiffs would be denied access to any writings he made prior to or contemporaneously with the settlement offer that may contradict or influence his deposition and trial testimony. It would make no sense for the law to allow the plaintiffs to ask the claims representative today what he was thinking in 2004 when the settlement offers were made but deny the plaintiff access to the writings he made in 2004 that reflect what he was thinking at that time.

(Order, pp. 12-13 (Emphases added)).

The Court's ruling and rationale reflect a clear intent to grant Plaintiffs access to opinion work product in documents created by those claim representatives who actually played a role in determining when Zurich should make a settlement offer and how much it should offer. In accordance with the Order, Zurich has disclosed the opinion work product created by those claim representatives, including Crawford adjuster Jody Mills, Crawford Branch Manager Stephen Penick, and Zurich employee Kathleen Fuell.[5] Zurich withheld the opinion work product contained in reports that John Chaney prepared after the Underlying Action was filed because Mr. Chaney was not among the individuals who "participated in determining the timing or the amount of the settlement offers made to the plaintiffs." (Order, p. 25, ¶ 3; Affidavit of Kathleen

[5] These documents included Zurich's BI Claim Report (prepared by Kathleen Fuell; ZA 0412-417); Crawford reports and Liability Transmittal Letters prepared by Jody Mills dated 5/6/03 (ZA 0540-541), 6/4/03 (ZA 0542-544), 7/22/03 (ZA 0546-547), 9/11/03 (ZA 0548-551), 9/24/03 (ZA 552-553), and 10/9/03 (ZA 0554-555); and Liability Transmittal Letters prepared by Stephen Penick dated 9/3/04 (ZA 0561-562). Zurich also produced numerous pages of Crawford's Claims Progress Notes in which opinion work product was revealed.

Fuell, Exhibit A hereto, ¶¶ 2-4). Since, Mr. Chaney was not among the persons whose conduct the Court deemed to be "at issue" in this case, his opinion work product is not discoverable.[6]

Furthermore, there is no merit to Plaintiffs' arguments that Zurich's reading of the Order is "unreasonably based on who was involved in the claim at the particular time settlement offers were made," and "ignores the importance of the analysis of the earlier claims representatives." (Pltfs. Memo., pp. 8-9). As explained above, Zurich produced on March 1, 2006, a substantial volume of opinion work product created by Jody Mills (the Crawford adjuster who handled the Plaintiffs' underlying tort claims from January 2003 through early December 2003), despite the fact that Ms. Mills had no involvement with the claims in March 2004 when Zurich attempted to settle the Plaintiffs' tort claims for its $2 million policy limits. Based upon evidence in the documents suggesting that Ms. Mills had discussions with employees of GAF and others regarding the timing of a potential settlement offers and the prospect of mediation, her work product was deemed to be responsive to the Order. The same cannot be said for Mr. Chaney, however.

In summary, it is not Zurich that has adopted a narrow interpretation of the Court's Order, but Plaintiffs who seek to expand the Order to encompass materials that lie beyond what the Court intended. Had this Court truly intended for the insurers to produce the opinion work product of all claim representatives, it would not have limited its Order to the work product of claim representatives who participated in determining the timing and amount of settlement offers.

[6] Without any rational basis to do so, Plaintiffs characterize the Court's repeated and deliberate use of the phrase "claims representatives who participated in determining the timing or the amount of the settlement offers made to the plaintiffs" as merely "illustrative." Given the substantial effort the Court devoted to resolving the parties' discovery disputes, it is unreasonable for Plaintiffs to assume that the Court intended the scope of the Order to be any broader than articulated.

Distorting the legal analysis set forth in the Order, Plaintiffs also argue that Mr. Chaney's opinion work product should be produced because it "is directly at issue in determining whether Zurich knew liability was reasonably clear, yet failed to make a reasonable settlement offer." (Pltfs. Memo., p. 9). Of course, the mere fact that Mr. Chaney's analyses of the underlying tort claims may have been reduced to writing does not make the writings discoverable under Mass. R. Civ. P. 26. This is true even though Plaintiffs would prefer to have the writings to test Mr. Chaney's memory. Under Rule 26(b)(3), work product is discoverable only where there is a showing, *inter alia*, that the party seeking the material "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Mass. R. Civ. P. 26(b)(3). As used in this context, the term "substantial equivalent" does not mean "exact duplicate." Raffa v. Gymnastics Learning Center, Inc., 00-1966A, 2002 WL 389889, *3 (Mass. Super., Jan. 2, 2002), citing 7 SMITH AND ZOBEL, RULES PRACTICE, § 26.5. Applying this rule, both the state and federal courts in Massachusetts have denied access to investigative reports and similar documents reflecting the work product of a party's representative where the authors of the documents, or witnesses mentioned therein, were available for a deposition. See Colonial Gas Co. v. Aetna Casualty & Sur. Co., 139 F.R.D. 269, 275 (D. Mass. 1991)("Discovery of work product will therefore be denied where the party seeking discovery can obtain the information by taking the deposition of witnesses."); Bondy v. Brophy, 124 F.R.D. 517, 518 (D. Mass. 1989); Poteau v. Normandy Farms Family Campground, Inc., 2000 WL 1765424, *3 (Mass. Super., Aug. 1, 2000); Harris v. Steinberg, 1997 WL 89164, *4 (Mass. Super., Feb. 10, 1997).

In this case, Plaintiffs deposed Mr. Chaney for a full day and obtained the substantial equivalent of the opinion work product contained in his Liability Transmittal Letters of September 2002, December 2002 and November 2003. Though Plaintiffs characterize Mr.

Chaney's testimony regarding the content of his Liability Transmittal Letters as "diluted," the record reveals that he recalled the substance of the redacted material and explained his analyses and opinions to Plaintiffs.[7] While Mr. Chaney did not recall each redacted entry verbatim, Rule 26 does not entitle Plaintiffs to the "exact duplicate" of his written work product. 7 SMITH AND ZOBEL, RULES PRACTICE, § 26.5. Because Mr. Chaney's opinion work product does not fall within the scope of the Order and is protected by Rule 26(b)(3), Plaintiffs are not entitled to it.

B. Zurich's BI Claim Report

Plaintiffs' contention that the Order required Zurich to produce its "BI Claim Report" in unredacted form is also unsupportable. As an initial matter, the Court should not be misled by Plaintiffs' discussion of the BI Claim Report, which erroneously suggests that Zurich continues to withhold the opinion work product of Kathleen Fuell, author of the Report. In accordance with the Order, Zurich produced a version of the BI Claim Report that disclosed all fact and opinion work product created by Ms. Fuell, which previously had been withheld.[8] Thus, prior to Ms. Fuell's deposition, Plaintiffs were aware of her recommendation for the setting of a loss reserve (Exhibit C, ZA 0412); her analysis of the potential liability and exposure of the Town of

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[7] Specifically, Mr. Chaney testified that the text redacted from the "Liability" and "Potential Case Value" sections of his September 2002 (marked as deposition exhibit 2D) and December 2002 (marked as deposition exhibit 2E) Liability Transmittal Letters was similar to the text appearing under the same headings of a subsequent Liability Transmittal Letter dated May 6, 2003 prepared by Crawford adjuster Jody Mills (marked as deposition Exhibit 2F), which Zurich produced to Plaintiffs in unredacted form. (See Depo. of J. Chaney, relevant portions of which are attached hereto as Exhibit B, pp. 84-88, 91-92). Mr. Chaney candidly answered numerous questions about his analysis and assessment of "potential case value" and related matters. Similarly, Mr. Chaney testified about the substance of text redacted from those sections of his November 13, 2003 Liability Transmittal Letter (deposition exhibit 2L) entitled "Reserves," "Liability," "Positioning" and "Action Plan." (Id., pp. 103-115.) Significantly, Mr. Chaney also stated on several occasions that he would have recalled the substance of redacted material even without the aid of subsequent reports or other documents. (Id., pp. 96, l. 5-16; p. 115, l. 1-13). Thus, Plaintiffs had a full and fair opportunity to explore Mr. Chaney's opinions and analyses even without the benefit of his written work product.

[8] Plaintiffs omitted that fact from their Memorandum, and without explanation, attached as Exhibit 4 to their Memorandum a copy of the BI Claim Report that Zurich originally produced in July 2005. The most recent version of the BI Claim Report produced by Zurich on March 1, 2006, is attached hereto as Exhibit C.

Medway and the tree service that had been working in the area of Mrs. Rhodes' auto accident (Id., ZA 0415); and her recommendation that Zurich tender its $2 million policy limits (Id., ZA 0417).

The parties' dispute over the BI Claim Report concerns only the redaction of the text in the following sections of the Report: Sections 3 ("Insured's Negligent Acts or Omissions"), 4 ("Insured's Defenses"), 5 ("Co-Defendant's Negligent Acts or Omissions"), 6 ("Co-Defendant's Defenses"), and 13 ("Current Status and Resolution Strategy"). Zurich redacted that text because it constitutes the opinion work product and advice of defense counsel whom Zurich paid to represent its insured in the underlying tort action.[9] Notably, the Court did not compel Zurich to disclose the work product of its counsel or attorney-client communications. Rather, the Court was careful to point out in its Order that Plaintiffs have no right to discover the advice or opinions of legal counsel retained by the insurers. (See Order, p. 14) ("Consequently, since the attorney could not be asked his opinions at deposition to trial, the attorney's opinion work product would be entitled to equivalent protection.") Plaintiffs' request for disclosure of the information contained in sections 3, 4, 5, 6 and 13 should be rejected.[10]

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[9] During her deposition, Kathleen Fuell testified that the sole source of the redacted information was defense counsel, who had provided "his overall assessment of the case." (See Depo. of K. Fuell, relevant portions of which are attached hereto as Exhibit D, pp. 74-75). In footnote 12 of their Memorandum, Plaintiffs cleverly combine unrelated excerpts of Ms. Fuell's deposition testimony and then use them to argue that the information contained in sections 3, 4, 5, 6 and 13 of the BI Claim Report was derived from sources other than defense counsel. A review of pages 80 and 81 of the Fuell deposition reveals, however, that only her estimated value of the total damage award in section 9 of the Report may have incorporated information from sources other than counsel. (Id., pp. 80-81).

[10] Similarly, Zurich had previously redacted the majority of the data set forth in sections 9 and 10 because it was derived principally and substantially from defense counsel. In one of its document productions, however, Zurich inadvertently disclosed some of the data appearing under sections 9 and 10. This inadvertent disclosure was not discovered by Zurich's counsel until just before Ms. Fuell's deposition on March 10, 2006, however. In light of this inadvertent disclosure, and in a good faith effort to further narrow the areas of disagreement between the parties, Zurich has subsequently produced the balance of the data in section 9, which data formed the basis of the "'Estimated Value" of Total Damage Award" that was inadvertently disclosed to Plaintiffs. Thus, sections 9 and 10 of the BI Claim Report are not in dispute.

In their Memorandum, Plaintiffs suggest that Zurich's disclosure of limited data in sections 9 and 10 of the BI Claim Report constitutes a waiver of the work product immunity as to all other protected material contained in that Report. That proposition is not supported by Massachusetts law. Where, as here, a party waives the protection afforded to privileged information through inadvertent disclosure, courts have generally held that the waiver is limited in scope to the material that was inadvertently disclosed. See Walker v. Bertucci's, Inc., 1997 Mass. Super. LEXIS 490, *6-7 (Jan. 24, 1997) (defendant's inadvertent disclosure of incident report waived work product immunity for that report alone, not other work product, where plaintiffs failed to show they were misled by or detrimentally relied upon inadvertent disclosure); see also Fleet National Bank v. Tonneson & Co., 150 F.R.D. 10, 15 (D. Mass 1993) (no waiver of work product privilege as to three-volume report where one volume was inadvertently left among documents to be inspected by opposing counsel, but other two volumes were removed as part of pre-inspection screening for privileged materials); Prudential Insurance Co. v. Turner & Newall, PLC, 137 F.R.D. 178, 182-83 (D. Mass. 1991) (no waiver beyond documents actually disclosed inadvertently).[11] Just as a party's inadvertent disclosure of one document does not constitute a waiver of protection for other privileged documents, Zurich's inadvertent disclosure of limited data in its BI Claim Report did not waive protection for other attorney work product redacted from other sections of that Report.

[11] Plaintiffs' reliance on AMCA International Corp. v. Phipard, 107 F.R.D. 39, 44 (D. Mass. 1985) is misplaced. (See Pltfs. Memo., p. 7.) The plaintiffs in AMCA voluntarily—not inadvertently—disclosed a privileged memorandum to the defense. The court ruled that the privilege waiver extended to certain other documents that related to the memorandum, but did so in order to allow defendants to gain information to counter the "offensive" use plaintiffs made of their privilege communications. Contrary to Plaintiffs' portrayal of the case, however, the AMCA court declined "to rule that the disclosure in this case was a waiver of all prior and subsequent communications between the plaintiff and its counsel" with respect to the subject matter at issue. AMCA, 107 F.R.D. at 44. Because Zurich's disclosure of certain data in this case was inadvertent, and since Zurich is not attempting to use its counsel's work product offensively, AMCA is inapposite.

Plaintiffs' argument that Zurich placed its counsel's work product "at issue," and therefore, has waived any protection for it is also flawed. (Pltfs. Memo, p. 7) Although the contours of the doctrine of "at issue" waiver are not well defined under Massachusetts law, the doctrine has been held to apply where a party raises the advice of counsel as an affirmative defense or otherwise, by some affirmative and voluntary act, makes privileged information relevant to the case. See Sax v. Sax, 136 F.R.D. 542, 543-44 (D. Mass. 1991)(defendant placed attorney-client communications "at issue" by raising as a defense his lack of understanding of settlement agreement in circumstances where the only person who could have explained the agreement to him was his attorney); see also Dedham-Westwood Water Dist. v. Nat'l. Union Fire Ins. Co., 2000 Mass. Super. Lexis 31, *12 (Mass. Super., Feb. 15, 2000).

The doctrine of "at issue" waiver clearly does not apply here. Zurich has not raised the advice of defense counsel as a defense, nor has it otherwise affirmatively or deliberately made the work product of said counsel relevant to any issue in this case. As explained above, the disclosure of portions of counsel's work product in sections 9 and 10 of the BI Claim Report was inadvertent, and not the product of a tactical decision to use counsel's opinions or advice to advance Zurich's cause in this litigation. Therefore, Plaintiffs' reliance on the "at issue" doctrine is misplaced.

II. THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR SANCTIONS BECAUSE ZURICH COMPLIED WITH THE COURT'S ORDER OF JANUARY 23RD AND HAS NOT OBSTRUCTED DISCOVERY.

Rule 37(b) of the Massachusetts Rules of Civil Procedure authorizes a trial court to impose sanctions against a party only where the party has failed to obey an order to permit discovery. Contrary to Plaintiffs' accusations, Zurich faithfully adhered to the Court's Order,

and has otherwise conducted discovery in this matter in good faith. Therefore, there is no basis to impose any sanction against Zurich, much less the extreme penalties requested by Plaintiffs.

As demonstrated above, a legitimate discovery dispute between Zurich and Plaintiffs has been narrowed at this point to a few documents, and is rooted in the parties' disagreement over the meaning and scope of certain aspects of the Order. For the reasons articulated above, Zurich maintains that its discovery disclosures are consistent with the letter and spirit of the Order. However, even if the Court ultimately orders Zurich to produce unredacted copies of the BI Claim Report or the reports John Chaney prepared after commencement of the underlying action, it is clear that Zurich's decision to withhold the opinion work product in those documents was based on a reasonable, good faith application of the Order to the facts.

In apparent recognition that Zurich had a reasonable basis to withhold the BI Claim Report and Mr. Chaney's reports of September 2002, December 2002 and November 2003, Plaintiffs have gone to great lengths to manufacture support for their baseless allegation that Zurich has played a game of "hide and seek" with other documents. As a threshold matter, the Court will note that Plaintiffs possess all of the other documents discussed on pages 3 through 11 of their Memorandum, and have used a number of them in the depositions taken to date. Though Zurich regrets having to burden the Court with a point-by-point discussion of the circumstances of its production of certain documents to Plaintiffs, it appears that such a discussion is necessary to demonstrate why Plaintiffs' current motion for sanctions, like those that came before it, is unfounded.

A. **Handwritten notes concerning November 19, 2003 teleconference**

Plaintiffs' assertion that Zurich obstructed discovery by failing to produce a page of handwritten notes prepared by Zurich employee Kathleen Fuell is unfounded. The notes in

question (which bear Bates No. ZA 1190-91) concern a November 19, 2003 conference call that Ms. Fuell had with defense counsel in the underlying tort action, employees of AIGDC, Crawford & Company, GAF, and GAF's insurance agent, Fred Hohn. Zurich withheld the notes from its original document production based on its good faith belief that the subject matter of the conference call was protected by the joint defense privilege, the attorney-client privilege and the work product doctrine.

After receipt of the Order, Zurich undertook to identify the specific documents that were required to be produced. As part of that process, Zurich considered several e-mails from Plaintiffs' counsel in which they listed the documents they believed Zurich had to produce. Ultimately, Zurich identified 31 pages of privileged documents that had been shared with GAF's insurance agent and produced them to Plaintiffs on February 8, 2006, together with some other records. Unfortunately, in its review of the withheld documents, Zurich did not initially identify Ms. Fuell's handwritten notes as among the documents required to be produced. Nor did Plaintiffs request that particular document in their emails to Zurich, despite the acknowledgment in their Memorandum that they knew (from a review of Claims Progress Notes Zurich had produced back in July 2005) that GAF's insurance agent had participated in the conference call. (See Pltfs. Memo., pp. 3-4).

Plaintiffs requested the handwritten notes from Zurich for the first time on April 12, 2006. The very next day, Zurich agreed to produce the notes. Thus, contrary to Plaintiffs' unsupported accusations, Zurich's failure to produce the notes earlier was not deliberate or part of some "giant game of hide-and-seek;" it was due to an oversight. In any event, Plaintiffs were not affected by their lack of prior access to Ms. Fuell's handwritten notes. By prior agreement of the parties, Plaintiffs will complete Ms. Fuell's deposition in May 2006, at which time Plaintiffs

will have ample opportunity to question her about the content of her notes. Of course, should they elect and be permitted to depose other participants in the November 2003 conference call, Plaintiffs may use the notes in those depositions as well.

B. Reports Prepared by John Chaney Prior to Litigation

Contrary to Plaintiffs' contention, Zurich did not violate the Order by initially refusing to produce unredacted copies of three reports prepared by former Crawford & Company adjuster John Chaney (collectively, the "Chaney Reports.").[12] Indeed, Zurich's decision to redact Mr. Chaney's opinion work product from these reports was rooted in a reasonable, good faith conclusion that the Order did not require production of such material.

In July 2005, Zurich produced those portions of the Chaney Reports (and all other reports prepared by employees of Crawford) that related to factual investigation of Plaintiffs' underlying tort claims. Mr. Chaney's opinion work product was redacted from his reports, however, based on Zurich's conclusion that the reports were prepared in anticipation of imminent litigation. That conclusion was based on the fact that, after having an extensive telephone conversation in January 2002 with Frederick Pritzker (Plaintiffs' lead trial counsel in the underlying action), Mr. Chaney noted in his very first report (dated January 30, 2002) that "we fully expect suit to be filed soon, since it appears Plaintiffs would have a good case against someone."[13]

In the Order, the Court concluded that, "until litigation has been threatened or commenced, the factual reports of investigation and the insured's evaluation of those reports contained in the claims file are prepared in the ordinary line of business and duty and not in

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[12] The first report was entitled "First Full Formal Report," is dated January 30, 2002, and bears bates number ZA 0421-0427. The second and third reports are Liability Transmittal Letters dated April 8, 2002 (Bates Nos. ZA 0428-29) and June 10, 2002 (Bates Nos. ZA 0430-32).

[13] A true and accurate copy of the January 30, 2002 First Full Formal Report is attached hereto as Exhibit E. (Emphasis added.)

anticipation of litigation...." (Order, p. 7; Emphasis Added). After receipt of the Order, Zurich continued to withhold the opinion work product in the Chaney Reports because it still appeared that Mr. Chaney had prepared those reports after the threat of litigation, and because Mr. Chaney was clearly not among those claim representatives who participated in determining the timing or amount of the settlement offer Zurich made to Plaintiffs. Because Zurich had a good faith basis to withhold the work product in the Chaney Reports, its decision to do so was not a violation of the Court's Order. Zurich subsequently agreed to produce unredacted copies of the Chaney Reports to Plaintiffs because, in the spirit of Superior Court Rule 9C, it sought to narrow the areas of disagreement over discovery and avoid burdening the Court with unnecessary motion practice. The Court should not indulge Plaintiffs in their attempt to use Zurich's good faith effort to compromise as a basis for imposing sanctions.

C. **Crawford & Company's Reserve Worksheets**

Plaintiffs' contention that Zurich obstructed discovery by not producing two of Crawford & Company's "Reserve Worksheets" on March 1, 2006, is also without merit. Moreover, Plaintiffs possessed copies of those documents prior to the deposition of the individual who authored them, and questioned her extensively about their substance.

When it responded to Plaintiffs' First Request for Production of Documents in this matter, Zurich arguably had no duty to obtain and produce to Plaintiffs those documents relating to the underlying tort claims that were once in files maintained by Crawford & Company. Nevertheless, in order to expedite the discovery process, Zurich obtained copies of the files and produced the non-privileged documents to Plaintiffs in July 2005. Zurich also produced a copy of the electronic claim notes Crawford had maintained during the underlying tort action, as well

as a copy of Crawford's claim guidelines, entitled "Liability Standards of Excellence," in response to Plaintiffs' requests for such documents.

Based on discussions with Crawford, Zurich understood that all available responsive documents that had been maintained by Crawford during the underlying tort action had been provided to Zurich and either produced to Plaintiffs or disclosed on Zurich's privilege log. The Reserve Worksheets are records that Crawford maintained electronically in its computer database.[14] They were not contained in any hard-copy file maintained by Crawford, and were not provided to Zurich at any point. Nor was Zurich aware that the Reserve Worksheets were even available. Thus, contrary to Plaintiffs' accusations, Zurich did not withhold the Reserve Worksheets at any time.[15]

Plaintiffs requested Reserve Worksheets for the first time in March 2006. As a courtesy to Plaintiffs, Zurich's counsel requested Crawford to double-check to determine whether any of the Reserve Worksheets were electronically available. After a diligent search of its database, Crawford was able to retrieve two of the Worksheets. Zurich produced them to Plaintiffs immediately and prior to the deposition of Jody Mills, the Crawford claim representative who prepared them. Plaintiffs thoroughly questioned Ms. Mills about the Reserve Worksheets during her deposition,[16] and will have the opportunity to examine her supervisor, Steve Penick, should they desire to depose him in this action. Since Zurich did not improperly withhold the Reserve Worksheets, and because Plaintiffs have not been prejudiced by their lack of prior access to those

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[14] Exhibit B, p. 119, l. 6-9.

[15] The allegation in footnote 4 of Plaintiffs' Memorandum that Zurich "controlled Crawford's discovery responses" is specious. Indeed, the quote in that footnote attributed to Crawford's corporate counsel merely reinforces that Zurich's counsel believed, based on discussions with Crawford personnel prior to December 2005, that all available and responsive Crawford documents had been produced to Plaintiffs or listed on Zurich's privilege log.

[16] See Depo. of Jody Mills, relevant portions of which are attached hereto as Exhibit F, pps. 61-69; 98-101.

records, there is no basis to conclude that Zurich violated the Order by not producing the Reserve Worksheets on March 1, 2006.[17]

As demonstrated in the foregoing discussion, Plaintiffs' allegations of noncompliance with the Order are unfounded. Zurich has conducted discovery in this document-intensive case in good faith, and has complied with the letter and spirit of the Court's Order. Specifically, Zurich produced—on the dates mandated by this Court—those documents within its possession that it reasonably concluded fell within the categories of documents the Court had ordered to be disclosed. In short, there are no grounds to impose sanctions of any kind against Zurich.

It bears noting that the sanctions requested by Plaintiffs—orders (i) precluding Zurich from introducing certain evidence, (ii) prohibiting Zurich from challenging the authenticity of certain documents, and (iii) requiring Zurich to pay the costs of depositions Plaintiffs claim they are entitled to re-open—are among the most extraordinary and severe imaginable. The case law upon which Plaintiffs' requests are based, however, demonstrates that such sanctions are reserved for instances of egregious and/or repeated noncompliance with a court order—a situation which clearly is not evident here. For example, in support of their request that Zurich be precluded from introducing certain evidence, Plaintiffs cite the Superior Court's unreported decision in Pantano v. Bartolini, a personal injury action. The trial court in Pantano precluded the plaintiff from testifying at trial as a sanction for her unexplained failure to produce her medical records (which forced the defense to conduct many out-of-state record keeper

[17] Finally, Plaintiffs' accusation that Zurich attempted to "hide" evidence contained in one of Crawford's Claim Progress Notes is baseless and merits little discussion. The portion of the November 13, 2003 Progress Note quoted by Plaintiffs is the opinion work product of John Chaney. When it produced the Claims Progress Notes in July 2005, Zurich intended, but inadvertently failed, to redact that particular entry. The inadvertent disclosure is evidenced by Zurich's more thorough redaction of the corresponding Liability Transmittal Letter dated November 13, 2003. (See Pltfs. Memo., Ex. 1A, ZA 0557). When Zurich produced a less redacted version of certain Claim Progress Notes on March 1st pursuant to the Order, it took care not to disclose that particular entry a second time. Zurich's redaction of that material was appropriate because, as explained in Section I *supra*, Mr. Chaney's opinion work product is not among the material required to be disclosed under the Order.

depositions), and her disregard of three separate court orders requiring her to give a deposition and submit to an independent medical examination. 1999 WL 515753, *2 (Mass. Super. May 4, 1999). Similarly, the severe sanction of default was affirmed in Roxse Homes L.P. v. Roxse Homes, Inc., 399 Mass. 401 (1987), another case relied upon by Plaintiffs, where the defendant failed to respond at all to the plaintiff's document requests and subsequently disregarded three trial court orders compelling the production of certain documents. See also Young v. Gordon, 330 F.3d 76, 79-80 (1st Cir. 2003) (cited at p. 17 of Plaintiffs' Memorandum) (affirming dismissal where plaintiff failed to participate in preparation of the Rule 16 scheduling memorandum, refused to answer defendants' counterclaim until expressly ordered by court, abandoned agreed-upon deposition schedules and repeatedly failed to appear for deposition)

In contrast to the parties sanctioned in the cases cited by Plaintiffs, Zurich has not disobeyed any Order of this Court or otherwise obstructed discovery. Rather, Zurich has disclosed all documents mandated by the Court, with the exception of those that are the subject of legitimate and legally supportable claims of privilege. Under these circumstances, an award of any sanction against Zurich would be manifestly unjust.

Plaintiffs' requests for sanctions should be denied for the further reason that they are based upon a misleading portrayal of the discovery record. The most striking example appears in the context of Plaintiffs' request to preclude Zurich from introducing evidence that it did not have enough information to "conduct a proper analysis" of the underlying tort claims. At page 18 of their Memorandum, Plaintiffs represent that Zurich took the position in discovery that, "as of November 2003, after discovery had closed in the Underlying Action, [it] still did not have enough information to properly analyze the claims. However, Defendants ignore the fact that

Plaintiffs responded to discovery in April 2003 and sent a detailed demand in August 2003." (Pltfs. Memo, p. 18)

Contrary to Plaintiffs' characterization of the record, Kathleen Fuell (the sole Zurich employee to testify to date) did not state that Zurich lacked sufficient information in November 2003 to "properly analyze" or "properly value" the claims. What Ms. Fuell did say is that before Plaintiffs submitted a settlement demand package in late August 2003—approximately 13 months after suit was filed and 19 months after Mrs. Rhodes' auto accident—Zurich did not possess sufficient information regarding Plaintiff Marcia Rhodes' medical prognosis, potential recovery, future care needs, potential economic losses, and other claimed damages. (Exhibit D, p. 83, l. 1 – p. 84, l. 6; p. 107, l. 12 – p. 108, l. 1; p. 135, l. 22 – p. 136, l. 17). Notably, the demand package included a considerable volume of information that previously had not been provided to defense counsel or any insurer, including, without limitation, reports and damage calculations prepared by Plaintiffs' medical experts, life care planner, and economist. According to Ms. Fuell, such information was essential to Zurich's ability to evaluate the claims and adjust its loss reserve. (Id., p. 107, l. 12 – p. 108, l. 1). Ms. Fuell reviewed the demand package in September 2003, and formed a belief as to the value of the claims at or about that time. (Id., p. 84, l. 2-6; pp. 130-131). In light of Ms. Fuell's actual deposition testimony, there is no logical basis for Plaintiffs' request to preclude Zurich from introducing evidence, or for any other sanction requested by Plaintiffs. Accordingly, Plaintiffs' Motion for Sanctions should be denied.

CONCLUSION

As demonstrated in this Memorandum, Zurich's decision not to disclose the attorney work product contained in the BI Claim Report and the post-suit opinion work product created by John Chaney is amply justified by the terms of the Court's Order and Massachusetts law. Moreover, because Zurich abided by the Court's Order and has otherwise acted fairly in discovery, there is no basis to impose any sanction against it under Mass. R. Civ. P. 37. Accordingly, Zurich respectfully requests the Court to DENY Plaintiffs' Motion to Compel Production of Documents and for Sanctions.

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Dated: April 27, 2006

CERTIFICATE OF SERVICE

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