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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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| EXCESS INSURANCE COMPANY, LTD.<br><br>Plaintiff,<br>vs.<br><br>ROCHDALE INSURANCE COMPANY, and AMTRUST FINANCIAL GROUP<br><br>Defendant. | 05 CV 10174 |

**ROCHDALE'S MEMORANDUM OF LAW IN OPPOSITION TO EXCESS' MOTION TO COMPEL AND IN SUPPORT OF ROCHDALE'S CROSS-MOTION TO COMPEL**

Defendants, Rochdale Insurance Company and AmTrust Financial Group (collectively, "Rochdale") submit this memorandum of law in opposition to the motion to compel brought by Excess Insurance Company, Ltd. ("Excess") and in support of Rochdale's cross-motion to compel. This memorandum is accompanied by the December 22, 2006 Declaration of Andrew Costigan. In addition, this memorandum refers to Lawrence Rose's December 12, 2006 letter (the "Rose Letter") to the Court.

## PRELIMINARY STATEMENT

Excess' motion to compel is frivolous. Excess made no attempt confer substantively with Rochdale prior to making its motion. Excess' November 30, 2006 letter does

not identify any documents which it believed Rochdale should have produced, but did not. Instead, Excess simply contradicted one of the objections Rochdale made in its response to Excess' document request: "Despite Rochdale and Amtrust's objections, Excess requests are not overly broad or unduly burdensome." Excess also ignores the fact that Rochdale has already produced all of the documents its has that relate to two of three document requests which are the subject of Excess' motion to compel. The third document request for which Excess seeks responsive documents – all documents filed by Rochdale with any regulatory agency -- is patently overbroad. Excess has made no attempt to respond to Rochdale's objections to the document request, either prior to making the motion to compel or in its motion itself.

Rochdale's cross-motion to compel should be granted. Rochdale has been trying for six months to get responses to its document requests. Excess has not objected to them. The documents Rochdale is seeking relate directly to either: (i) Excess' allocation of amounts it agreed to pay pursuant a commutation agreement with H.S. Weavers to the parties' reinsurance contract; or (ii) Rochdale's late notice defense. In addition, following its document production, Excess should be compelled to produce a witness to be deposed with regard to the newly produced documents.

## FACTUAL BACKGROUND

Excess filed this action against Rochdale on December 2, 2005. The court's February 6, 2006 pre-trial order set a May 10, 2006 pretrial conference, and directed that "[p]rior to the pretrial conference, all counsel appearing in this action shall have exchanged discovery requests either formally or informally, and shall resolve or present all discovery disputes." See Costigan Dec. at Exh. A.

In accordance with the Court's Order Rochdale served its Automatic Disclosure

Pursuant to F.R. Civ. P. 26(a)(1) and its accompanying document production on May 8, 2006. Excess never responded to that document production. Excess also failed to serve a request for production of documents prior to the scheduled conference. See Costigan Dec. at ¶ 3.

On September 28, 2006, approximately four and a half months after it was due, Excess served its First Request For Production of Documents. See Lawrence Rose's December 12, 2006 letter (the "Rose Letter") at Exh. A.

Rochdale timely served its response to Excess' First Request For Production of Documents and accompanying document production on October 30, 2006. See Rose Letter at Exh. B.

In the meantime, as Excess had failed to serve any response to Rochdale's timely served First Request For Production Of Documents and had failed to comply with its obligation to produce documents, on October 27, 2006, Rochdale wrote a letter to the Court, seeking permission to move to compel. See Costigan Dec. at Exh. B.

On November 7, 2006, the parties entered into a stipulation (the "Stipulation") resolving Rochdale's motion. The Stipulation provided, among other things, that: (i) document production would be complete by November 30, 2006; (ii) party depositions would be completed by December 15, 2006; and (iii) upon the Court's so ordering of the Stipulation, Rochdale's motion would be withdrawn. See Rose Letter at Exh. C.

At no point between Rochdale's first production of documents in May 2006 and the parties' agreement on November 7, 2006 to resolve Rochdale's outstanding motion to compel did Excess raise any questions or complaints regarding Rochdale's document production. See Costigan Dec. at ¶ 8.

Only on November 30, 2006, the deadline for completion of document production, did Excess raise an issue with respect to Rochdale's production. Even at that point, Excess did not identify any documents or category of documents it thought should be produced. Instead, it simply declared, generally, that the objections raised in Rochdale's response to Excess First Request For Production Of Documents were unfounded: "Despite Rochdale and Amtrust's objections, Excess's requests are not overly broad or unduly burdensome." See Rose Letter at Exh. D. That's it. That was the extent of Excess' attempt to meet its obligation to meet and confer on whatever complaints it had about Rochdale's document production.

Andrew Costigan responded to Mr. Rose's November 30, 2006 letter on December 8, 2006:

> You have not identified any documents Rochdale should produce which Rochdale has failed to produce. In fact, Rochdale has produced documents responsive to all of Excess's document requests except for Request Nos. 5 and 6. With respect to Request No. 5, which seeks documents between Rochdale and AmTrust relating to this dispute, Rochdale has no such documents. With respect to Request No. 6, which seeks regulatory filings, Rochdale has objected and Excess has not responded to those objections.

See Rose Letter at Exh. E. Excess never responded to Mr. Costigan's December 8, 2006 letter.

Instead, on December 12, 2006 Excess brought this motion. The Rose Letter still does not come to grips with Rochdale's objections or the information set forth in Rochdale's December 8, 2006 letter. Excess complains about Rochdale's production of documents in response to Request Nos. 2, 3, and 6 of Excess' document requests. However, as Excess has been informed previously, Rochdale has already produced all documents in its possession relating to Request Nos. 2 and 3. Notwithstanding Rochdale's specific request, Excess has not identified any documents it thinks Rochdale has, but has failed to produce, which relate to these topics. See Costigan Dec. at ¶ 11.

With respect to Document Request No. 6, Excess is seeking all documents Rochdale filed with regulatory authorities in the last decade. See Rose Letter, Exh. A at 5. Rochdale objected to Request No. 6 as: (i) overly broad and unduly burdensome; (ii) vague and ambiguous; (iii) seeking documents unrelated to any claim or defense at issue in this matter; and (iv) seeking documents equally available to Excess. See Rose Letter, Exh. B at 7.

Excess has not responded to, or attempted to address, any of these objections – not in Mr. Rose's November 30 letter, not in response to Mr. Costigan's December 8, 2006 letter (which was ignored), and not in the Rose Letter itself. Excess' request for all documents Rochdale has filed with any regulatory authority is patently improper and should be denied. Accordingly, Rochdale respectfully requests that Excess' motion be denied in its entirety.

In addition, Rochdale requests that its cross-motion to compel production be granted. Excess failed to serve any Automatic Disclosure or accompanying document production. In accordance with the Court's Order Rochdale served its First Request For Production Of Documents May 8, 2006. Despite several requests, Excess has never served a response to Rochdale's First Request For Production Of Documents. See Costigan Dec. at ¶ 14.

On May 10, 2006, Rochdale's counsel attended the scheduled pre-trial conference; Excess' counsel failed to appear. As a result, the Court rescheduled the pre-trial conference for June 7. At the June 7 pre-trial conference the court set a schedule which included an October 31, 2006 discovery cutoff. That schedule is memorialized in the Court's June 9, 2006 Order:

> The parties shall complete all discovery, inspection and motions by 10/31/06, after which no discovery will be conducted an no motion will be entertained without a showing of special circumstances. The parties shall submit to the court trial brief, a joint proposed pretrial order, and if applicable, proposed jury charges and voir dire requests in accordance with the annexed form and instructions

> by 11/15/06. A final pretrial conference will be held at 4:30 pm on that date and the action shall be added to the trial calendar published in the New York Law Journal.

A copy of the Court's June 9, 2006 Order is attached to the Costigan Dec. as Exh. C.

Excess' response to Rochdale's Document Request was due on June 11, 2006. However, as Excess failed to respond or make any document production. Rochdale's counsel wrote to Mr. Rose on August 1, 2006. See Costigan Dec. at Exh. D.

Mr. Rose failed to respond to Rochdale's counsel's August 1, 2006 letter. Accordingly, Mr. Costigan wrote him again on August 24, 2006, again seeking Excess' response to Rochdale's Document Request and Excess' document production (see Costigan Dec. at Exh. E); and again on September 18, 2006, again seeking the response and production (see Costigan Dec. at Exh. F).

On October 4, 2006, Excess served its "initial production of documents" to Rochdale. A copy of Mr. Rose's October 4, 2006 letter is attached as Exh. G to the Costigan Dec.. Excess' "initial production" ignored several of Rochdale's document requests. On October 23, 2006, Mr. Costigan spoke to Mr. Rose to make sure that Excess would complete its document production prior to its deposition, which was noticed for October 30, 2006. A copy of the deposition notice is attached as Exh. H to the Costigan Dec. Mr. Rose said that he couldn't say when Excess would complete its document production, and that, at any rate, Excess was not available for deposition on October 30. He told me that he would get instructions from his client as to its availability and call the next day. He did not. See Costigan Dec. at ¶ 19.

Mr. Costigan again wrote to Mr. Rose on October 26, 2006, outlining the deficiencies in Excess' document production and requesting that he respond by noon the next day with a schedule for Excess to complete its document production and appear for deposition.

Mr. Costigan's October 26, 2006 email to Mr. Rose identified specific deficiencies in Excess' document production:

> On October 23 you also said that Excess was planning to produce additional documents to supplement its "initial production" made on October 4. Although Rochdale served its document requests five months ago, Excess has not served any documents relating to: (i) notices of loss to Rochdale (Request No. 6); (ii) the Commutation Agreement and Excess' negotiation of same (Request no. 7); (iii) Rochdale's rehabilitation (Request no. 8); or (iv) Excess' practices and controls to ensure timely notice to its reinsurers. Moreover, Excess' initial document production contains sparse documentation relating to the Reinsurance Agreement, the Retrocession Agreement and H.S Weavers' reporting of losses to Excess. Here again, with the discovery cutoff approaching, Excess still hasn't supplemented its production, nor has it indicated when it will do so.

See Costigan Dec. at Exh. I. However, as Mr. Rose still refused to commit to a date to complete Excess' document production or appear for deposition, Rochdale sought permission to make a motion to compel Excess' production. Ultimately, Rochdale's motion was resolved by Excess' agreement that: (i) document production would be complete by November 30, 2006; and (ii) party depositions would be complete by December 15, 2006. See Costigan Dec. at ¶ 21.

On November 30, 2006, Excess served additional documents, but still failed to serve any response to Rochdale's First Request For Production Of Documents. More importantly, Excess still failed to produce documents sufficient to show how it was calculating the amounts it claims are due under the parties' reinsurance agreement. Accordingly, Mr. Costigan wrote to Mr. Rose on December 8, 2006, seeking Excess' agreement to complete its document production:

> I refer to my October 26, 2006 email to you regarding deficiencies in Excess' document production and your November 30, 2006 letter enclosing additional production.

> Despite repeated demand, Excess still has not produced the Commutation Agreement. Nor has Excess produced documents sufficient to allow Rochdale to understand how Excess has allocated amounts due under the Commutation Agreement to the parties' retrocession contract. Nor has Excess produced any actuarial analysis or other documents supporting Excess' claim for approximately $95,000 in IBNR.
>
> In addition, Excess still has not produced documents relating to: (i) reserves it posted relating to Reinsurance Contract No. K78018323 (the "Reinsurance Contract") (Document Request No. 6); (ii) Excess' acceptance and payment of claims under the Reinsurance Contact (Document Request No. 10); (iii) Excess' rejection of any claims under the Reinsurance Contract (Document Request No. 11); (iv) communications between Excess and Horizon relating to the Reinsurance Contract and retrocession contract (Document Request No. 15) and (v) Excess' practices and controls to insure timely notice to its reinsurers (Document Request No. 19).
>
> Excess has not objected to producing any of these documents, and their production is long overdue. I request that Excess produce these documents by December 12 at the latest.

See Costigan Dec. at Exh. J.

The Court should be aware that in this action Excess is not seeking recovery of amounts it paid directly under a contract that was reinsured by Rochdale. Instead, Excess entered into a commutation agreement (the "Commutation Agreement") with H.S. Weavers ("Weaver"), which resolved amount owed by Excess to Weavers on more than 500 reinsurance contracts, one of which was partially reinsured by Rochdale. See Undated Excess memorandum regarding it commutation agreement with Weavers, attached as Exh. K to the Costigan Dec. As a result, in order to determine how much Rochdale might owe Excess in connection with the Commutation Agreement, Rochdale needs to know how that Commutation Agreement was reached and how amounts paid under it were allocated to Excess' reinsurers. Nonetheless, Excess has failed to produce documents sufficient to show how it did that allocation or how its calculated the IBNR

(reserves for incurred but not reported losses) that it estimated and paid to Weavers. Indeed, Excess has not even produced the Commutation Agreement itself.

In addition, Rochdale seeks the production of documents relating to its late notice defense. Specifically, Rochdale seeks: (i) documents relating to reserves Excess posted relating to Reinsurance Contract No. K78018323 (the "Reinsurance Contract"); (ii) documents relating to Excess' acceptance and payment of claims under the Reinsurance Contact; (iii) Excess' rejection of any claims under the Reinsurance Contract; (iv) communications between Excess and Horizon relating to the Reinsurance Contract and retrocession contract and (v) Excess' practices and controls to insure timely notice to its reinsurers.

Finally, Rochdale respectfully requests that following Excess' document production, Excess should be compelled to produce a witness to be deposed with regard to the newly produced documents.

## ARGUMENT

## I.

## EXCESS' MOTION TO COMPEL SHOULD BE DENIED

Excess' motion to compel should be denied on both procedural and substantive grounds. Procedurally, Excess' motion should be denied because it failed to suitably "meet and confer" with Rochdale prior to making the motion.

Substantively, Excess' motion should be denied because it seeks documents which have either already been produced (Excess Document Request Nos. 2 and 3) or which Excess has no right to demand (Excess Document Request No. 6).

A. Excess Failed To Comply With Its Meet And Confer Obligations

Rule 37(a) of the Federal Rules of Civil Procedure requires that a party moving to compel disclosure to "include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Excess has not supplied any such certification with its motion, and will not be able to do so. In fact, Excess failed to make any substantive attempt to confer with Rochdale prior to making its motion. The duty to confer requires a genuine attempt to determine what there is to produce and whether any objections to production can be resolved:

> Rule 37(a)(2) (A and B), Fed.R.Civ.P., requires the attorneys to confer in good faith in an effort to resolve or narrow all discovery disputes before seeking judicial intervention. "Confer" means to meet, in person or by telephone, and make a genuine effort to resolve the dispute by determining, without regard to technical interpretation of the language of a request, (a) what the requesting party is actually seeking, (b) what the discovering party is reasonably capable of producing that is responsive to the request, and (c) what specific genuine issues, if any, cannot be resolved without judicial intervention. The exchange of letters between counsel stating positions "for the record" shall not be deemed compliance with this requirement, or with Rule 37(a)(2) (A and B). Failure to hold a good faith conference is ground for the award of attorney's fees and other sanctions.

Kalu v. City of New York, 2006 WL 3500011 (S.D.N.Y.) citing Apex Oil Co. v. Belcher Co., 855 F.2d 1009, 1019-20 (2d Cir. 1988).

Excess' alleged compliance with the obligation to confer is its November 30, 2006 letter. However, that letter does not identify a single discovery request to which Rochdale's response was allegedly deficient. See Rose Letter at Exh. D. It simply states: "Rochdale and Amtrust have failed to comply with Excess' document requests. Despite Rochdale and Amtrust's objections, Excess's requests are not overly broad and unduly burdensome." Id. In addition,

Excess did not respond at all to Rochdale's counsel's December 8, 2006 letter attempting to resolve Excess' discovery concerns.

Excess' failure to confer prior to making its motion demonstrates its lack of serious purpose. Indeed, Excess let the prior deadline for making discovery motions, October 31, 2006, come and go without raising any issues with Rochdale's document production. The Court should infer from this that Excess' actual purpose in bringing it motion now is simply to secure additional delay and provide a rationale for failing to take Rochdale's deposition.

B. Excess Has Already Received All Documents In Rochdale's Possession Responsive To Its Document Request Nos. 2 and 3.

Excess' motion nowhere addresses Rochdale's representation that it has already produced the documents in its possession responsive to Excess' document request nos. 2 and 3. See Rose Letter at Exh. E. Because these documents have already been produced, there is no purpose served in ordering their production. See Serra Chevolet, Inc. v. General Motors Corp., 2006 WL 941902 (11th Cir.) (order compelling discovery improperly required manufacturer to produce certain allocation documents that it did not possess).

C. Excess Is Not Entitled To All Documents Filed With Regulatory Agencies.

Excess' Document Request No. 6 seeks all documents filed by Rochdale with any regulatory authorities within the past decade. Excess has not provided any rationale for seeking these documents, nor has it sought to address any of Rochdale's objections to producing these documents. Excess' motion should be denied.

## II.

## ROCHDALE'S CROSS-MOTON TO COMPEL SHOULD BE GRANTED

Rochdale's cross-motion to compel should be granted. Excess has not objected to producing any of the documents The documents Rochdale is seeking are relevant to the claims and defenses at issue in this case.

### A. Excess Has Not Objected To Producing The Documents Sought

Excess has not made any objection to producing the documents sought by Rochdale. Indeed, Excess failed to serve any response to Rochdale's document requests, nor did Excess provide any substantive response to Rochdale's October 26, 2006 email seeking the documents. Excess did not respond at all to Rochdale's December 8, 2006 letter seeking production of the documents. Accordingly, as no objection has been made, the documents should be produced. See Krewson v. City of Quincy, 120 F.R.D. 6, 7 (D. Mass. 1988) ("If a party fails to file timely objections to document requests, such failure constitutes a waiver of any objections which a party might have to the requests."); Diniero v. U.S. Lines Co., 21 F.R.D. 316, 317 (S.D.N.Y. 1957) (Where defendant did not object to production of statements or affidavits of plaintiff's fellow servants made before retention of counsel, their production was ordered even though injured seaman made no showing that eh could not examine them as witnesses on an oral deposition.).

### B. The Documents Sought By Rochdale Are Relevant

The documents sought by Rochdale are vital both to Excess' claims and Rochdale's defenses. Documents relating to (i) the Commutation Agreement, (ii) allocation of amounts paid under the Commutation Agreement to the parties' Reinsurance Agreement, and (iii) calculation of IBNR reserves allegedly paid under the Commutation Agreement and

allocated to the Reinsurance Agreement, are all necessary in order to determine whether Excess can show whether any amounts it paid under the Commutation Agreement are properly indemnified by the Reinsurance Agreement. The difficulty is exacerbated by the fact the Commutation Agreement commuted more than 500 reinsurance agreements between Excess and H.S. Weavers. The other documents Rochdale is seeking relate to its late notice defense, and are unquestionably relevant and subject to production, i.e., (i) documents relating to reserves Excess posted relating to Reinsurance Contract No. K78018323 (the "Reinsurance Contract"); (ii) documents relating to Excess' acceptance and payment of claims under the Reinsurance Contact; (iii) Excess' rejection of any claims under the Reinsurance Contract; (iv) communications between Excess and Horizon relating to the Reinsurance Contract and retrocession contract and (v) Excess' practices and controls to insure timely notice to its reinsurers

C. Excess Should Be Required To Produce A Witness To Be Deposed On The Newly Produced Documents

All of the documents which Rochdale is seeking in this motion should have been produced six months ago. Rochdale repeatedly sought to obtain Excess' compliance with its document production obligations. See Costigan Dec. at Exh. D, E, F, I, and J. The documents Rochdale is seeking now were the subject of its prior motion to compel. That motion was resolved by Excess' agreement to complete its document production by November 30, 2006. Excess failed to comply with that stipulation and order. Excess also failed to respond at all to Rochdale's December 8, 20006 letter seeking the documents.

Excess should not benefit from its intentional dereliction of its discovery obligations. See e.g. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2nd 1062 (2nd Cir. 1979) (One of the purposes of Rule 37 sanctions is to ensure that a party will not profit from its own failure to comply); Baker v. Ace Advertisers' Service, Inc., 153 F.R.D.

38 (S.D.N.Y. 1992) (Discovery sanctions are designed to obtain compliance with specific discovery order, to ensure that parties do not benefit from their own failure to comply with order, and to provide general deterrent for case at hand and for other cases.). In particular, Excess should not be entitled to avoid be deposed with regard to documents relating its allocation to the parties' reinsurance agreement or Rochdale's late notice defense. Accordingly, Rochdale respectfully requests that in addition to granting Rochdale's motion to compel, the Court order Excess to produce a witness to be deposed with respect to the documents produced in response to the Court's order.

## CONCLUSION

For the reasons set forth above Rochdale respectfully requests that Excess' motion to compel be denied in its entirety. Rochdale further respectfully requests that its cross-motion to compel Excess to produce: (i) the Commutation Agreement, (ii) documents relating to the allocation of amounts paid under the Commutation Agreement to the parties' Reinsurance Agreement, and (iii) calculation of IBNR reserves allegedly paid under the Commutation Agreement; (iv) documents relating to reserves Excess posted relating to Reinsurance Contract No. K78018323 (the "Reinsurance Contract"); (v) documents relating to Excess' acceptance and payment of claims under the Reinsurance Contact; (vi) documents relating to Excess' rejection of any claims under the Reinsurance Contract; (vii) documents relating to communications between Excess and Horizon relating to the Reinsurance Contract and retrocession contract; (viii) documents relating to Excess' practices and controls to insure timely notice to its reinsurers; and (ix) a witness to be depose with regard to foregoing documents.

Dated: New York, New York
December 22, 2006

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