IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY,
FLORIDA

CIRCUIT CIVIL DIVISION

INSTITUTO NACIONAL DE SEGUROS,

CASE NO. 10-33653 CA 04

Plaintiff,

vs.

HEMISPHERIC REINSURANCE GROUP, L.L.C., and HOWDEN INSURANCE BROKERS LIMITED,

Defendants.
_____/

DEFENDANT HOWDEN INSURANCE BROKERS LIMITED'S MOTION TO DETERMINE APPLICABLE LAW

Defendant, Howden Insurance Brokers Limited ("Howden"), files this motion seeking a determination by the Court as to the applicable law by which its conduct is to be assessed. As demonstrated below, the Court should determine that English law applies to Counts III, IV, and VI of plaintiff, Instituto Nacional de Seguros's ("INS") second amended complaint, specifically as to the standard of conduct or care which applies to Howden.

INTRODUCTION

This action involves parties in three different countries. Plaintiff INS is a Costa Rican state-owned insurance company. The defendants are two reinsurance brokers: HRG, a Miami reinsurance broker that served as producing broker; and Howden, a London broker which acted as a placing broker.[1] The case is over two years old and is specially set for trial in September 2013.

[1] Reinsurance is insurance for insurance companies, and based on the level of sophistication involved, has been described as "insurance between consenting adults." *Curiale v. DR Ins. Co.*, 593 N.Y.S.2d 157, 159 (N.Y. Sup. Ct. 1992). As here, it is common for an insurance company to contract with a familiar broker, which in turn engages a Lloyd's broker as a placing broker to access the international market.

The factual background is that, in the 2009-2010 timeframe, INS sought to reinsure a large property account in Costa Rica. It retained HRG for this purpose, which in turn retained Howden, a Lloyd's broker with access to the London reinsurance market. It is undisputed the brokers procured the reinsurance INS sought, at a price INS agreed to prior to the placement. Several months into the coverage period, however, INS claimed that the amount of commission received by the two brokers was excessive. This action ensued, in which INS seeks to recover from the two brokers the portions of the commission they received.

INS has claims, in the alternative, in contract and tort. Presently Counts I and II are for breach of express contract and breach of implied contract. These are based on the terms of an initial invitation to bid (a "broker beauty parade"), a proposal which contained a fixed broker fee that the defendants maintain never came into effect as to them. INS has hedged its bets, alleging that in the event the Court or fact-finder concludes that there was no contract, then the case should shift from contract to tort and be decided on the basis of whether Howden and HRG breached some duty to INS arising from common law.[2]

It is in respect of the tort counts that a ruling is needed as to what substantive law applies. The question of what law governs Howden's right to compensation – in the absence of any agreement with the client – is a threshold issue as to which the parties need guidance prior to trial.[3] It impacts the choice of experts, among other things, and will be an essential prerequisite to the Court's consideration of later dispositive motions.

This motion frames the issue for the Court and gives the Court the legal guidance it needs to fully consider the issue. There is an evidentiary component, as well, and Howden will

---

[2] Counts III, IV and V, against Howden, are for broker negligence/malpractice; breach of fiduciary duty; and aiding and abetting a breach of fiduciary duty by HRG.

[3] This assumes the two types of claims remain joined together and not bifurcated.

support its motion with a factual showing as to why English law must be chosen as applying to it. For the reasons outlined below, Howden respectfully requests that the Court determine that English law and practice are controlling with respect to Howden's legal and professional obligations.[4]

PROCEDURAL CONTEXT

As noted, Howden is a London-based Lloyd's broker engaged, among other things, in the business of obtaining reinsurance for insurance companies around the world which desire to place their reinsurance business in London. (SAC ¶ 6). In its tort-based claims, INS alleges that HRG, a Miami broker, requested that Howden place the reinsurance in the London market, which Howden did. Multi-layered and dimensional, the reinsurance program involved 35 different reinsurers, and afforded $300 million in facultative reinsurance in respect of a single policy of direct property damage and business interruption insurance issued by INS to its client, Instituto Costarricense de Electricidad ("ICE"), the Costa Rican state-owned electricity and telecommunications supplier. It is undisputed that INS received the reinsurance it sought, at the price INS agreed to pay HRG for the coverage. Nevertheless, INS brings this suit seeking to be repaid what it considers to have been too much commission charged by one or both brokers.

Prior to its second amended complaint ("SAC"), INS always alleged that Howden bears liability, in tort, because it received a commission from the reinsurers that exceeded reasonableness *in the relevant market.* The allegations were tied to industry standards with respect to alleging Howden's duty of care. *See* Howden's Mot. to Dismiss SAC at pp. 3-4.

In its SAC, however, INS *conspicuously deleted* all references to customary brokerage and to the usual custom and practice in the London reinsurance market. The present claims

---

[4] Exactly what constitutes the relevant English law and practice is not the subject of this motion, but will be addressed in a subsequent dispositive motion, as Howden fully complied with English law and practice.

against Howden for negligence/broker malpractice; breach of fiduciary duty; and aiding and abetting a breach of fiduciary duty are shorn of any such reference. Where such references once appeared, the allegations now are vague and confusing ones that brokerage charged was not reasonable "under the circumstances."

INS does not allege just what circumstances those were. Nonetheless, it is clear from the SAC that Howden's alleged tortious conduct occurred in London.[5] INS asserts that Howden, upon receipt of the first installment of premium, "deducted an unreasonable amount of brokerage, under the circumstances, for the provision of such services before passing along premium to the reinsurers." (SAC ¶¶ 16-17). Referencing a May 12, 2009 Debit Note from Howden (issued by its London offices) to HRG, INS alleges that Howden somehow assisted HRG in charging more premium than was due or even benefitted itself from HRG "grossing up." (SAC ¶¶ 32, 34).

In Count III for negligence/broker malpractice, INS alleges that Howden breached duties of reasonable skill and diligence by "(a) charging more premium than was set forth in the Reinsurance Slips; (b) charging more brokerage than was reasonable under the circumstances; (c) refusing to provide timely information to INS concerning the reinsurance and related matters; (d) wrongfully refusing to return the overcharged amounts to INS upon request; and (e) otherwise failing to act as a reasonable broker would under the circumstances." (SAC ¶ 54).

Virtually identical allegations are made with respect to Count IV for breach of fiduciary duty. (SAC ¶ 59).

Finally, INS claims that Howden aided and abetted HRG's breach of fiduciary duty by "locating some or all of the reinsurers for the INS Reinsurance Program, by facilitating the

---

[5] In contrast, the allegations of the SAC to support that Howden had sufficient contacts with Florida for jurisdictional purposes pertain to actions occurring prior to the alleged tortious conduct. (SAC ¶ 10).

improper overcharging of premium and brokerage, by wrongfully refusing to provide timely information to INS concerning the reinsurance and related matters and/or by wrongfully refusing to return the overcharged amounts to INS upon request." (SAC ¶ 67).

On May 18, 2012, Howden moved to dismiss the three tort counts of the SAC, arguing that the revisions to the complaint rendered the counts defective as a matter of law due to the omission of any allegation of the standard of care that applies to Howden, i.e., English law. While the prior judge assigned to this case, the Honorable Hogan Scola, appreciated the issue, Judge Scola ruled that it could be affirmatively raised in the answer and heard as a stand-alone motion at a later date. *See* Transcript of Sept. 14, 2012 hearing at pp. 24-25. Accordingly, when Howden answered the SAC it included the following matters as affirmative defenses:

> *For its Third Affirmative Defense*, Howden states that under English law and practice, which is controlling as to Howden, there is no legal or professional obligation to unilaterally disclose the amount of commission charged. In this case, no one asked about Howden's commission in connection with the Price Tender. Howden's Terms of Business Agreement ("TOBA"), which was attached to the cover note, stated that Howden's remuneration can be payable by insurers out of the premium paid.
>
> *For its Tenth Affirmative Defense*, Howden states that the proper law of the agreement between Howden and HRG is English law, for England is where Howden's duties were performed. As such, Howden's duties as a broker are to be assessed by English law.
>
> *For its Twelfth Affirmative Defense*, Howden states the commission taken by Howden as brokerage was fully earned at the time that the first installment of premium was paid. Under controlling law and custom and practice, Howden had the right to full payment of its brokerage on placement, regardless of whether the premium was paid in installments or service of the account was transferred to another producing broker after placement.
>
> *For its Thirteenth Affirmative Defense*, Howden states the brokerage commission it received in this case was reasonable and customary for this type of insurance business and thus compliant with English law.
>
> *For its Fourteenth Affirmative Defense*, Howden states that it did not "gross up." The slips were arranged on a "Net to Howden" basis and hence accounted only for Howden's remuneration. The gross premium (i.e. including brokerage) agreed between Howden and the reinsurers was never less than the premium amount

Howden notified to HRG as payable. Howden actually received less commission than permitted by the slips, not more.

These defenses squarely frame the issue of choice of law. The record in this case is sufficiently mature that the Court can and should now rule on this motion, determining that Howden's conduct, in the counts alleging breach of professional duties, is to be judged according to English law and practice.

SUMMARY OF EVIDENCE

Howden's evidence will demonstrate that its relevant conduct in the placement of reinsurance on INS's behalf took place in London, England.

It is true that in early 2009 INS invited certain brokers to bid for the renewal of the INS Reinsurance Program for the 2009-2010 policy year on the basis of a broker beauty parade or contest (essentially a service provider contest involving presentations by the invited companies and fixed fee proposals).[6] It is also true that HRG was one of the brokers invited to participate in the beauty contest; that HRG asked Howden to be available to place the reinsurance in the London and international markets in the event that HRG won the contest; and that Howden assisted HRG in preparing a response to the broker beauty parade contest. HRG's response to the proposal required content that could only come from the sub-broker for HRG actually placing the coverage in London – Howden – and it is undisputed that Howden contributed some content. However, it is also true that INS awarded the broker beauty parade contest to Willis, another reinsurance broker, not HRG. Further, it is the defendants' position that INS later cancelled the broker beauty parade process completely, and specifically terminated the award to Willis. INS ultimately awarded the reinsurance renewal business to HRG based on the traditional price tender competition (hereinafter

[6] The broker beauty parade or contest marked a change in the structure INS used when tendering for reinsurance broker services. The prior two policy years were traditional price tenders. A price tender differs from a broker beauty contest in that the brokers are asked to obtain quotes from the reinsurance market and report back with their pricing and best terms. In a price tender, the London brokers are typically paid by commission.

the "Price Tender"), not on the basis of the broker beauty parade. For purposes of its contract claims, INS contends that the broker beauty parade was not cancelled, and therefore that HRG (and by extension Howden) should have been remunerated only according to the fixed fee amount specified in HRG's response to the broker beauty parade proposal. We submit that the evidence on that issue is completely to the contrary, and that INS will be unable to prove otherwise.

However, for purposes of the instant motion, we focus on INS's tort claims which plead in the alternative that if no contractual arrangement existed, Howden received too much in commission from the reinsurers. INS impliedly asserts that the commission payable to the broker increased the amount payable by INS.[7] These claims arise *only if* INS's claim based on the February 2009 broker beauty parade bid process is defeated – as the defendants maintain it must be. The tort claims are based on the theory that Howden received *too much* commission from the reinsurers when it actually placed the business.

These alleged tortious activities took place months later, after INS gave an order to HRG, based on HRG's price to INS for the reinsurance, on April 2, 2009. Howden carried out -- in England -- *all* its brokerage activities to place the reinsurance requested by HRG.

The relevant chronology includes:

(a) Howden seeking quotes from certain "leading" reinsurers in the London market in an effort to identify the lowest price and best coverage terms that it could deliver to its principal, HRG, and still hope to make a profit by commission. (This was a competive bid situation involving some of the largest (re)insurance brokers in the world (e.g. Willis and AON)).

---

[7] As discussed infra, INS's premise is fundamentally flawed. "[T]he effect of the commission payable to the broker is the amount receivable by the insurer is reduced. It does not increase the amount payable by the assured." *N v. Rotterdamse Assurantiekas v. Golding Stewart Wrightson Ltd.,* (CA) (Transcript: Association), January 13, 1989 (unrep.). We thus submit that INS cannot sustain its evidentiary burden on its contention that the commission Howden received from the reinsurers was unreasonable. *See Kris Motor Spares Ltd. v. Fox Williams LLP*, [2010] EWCH 1008 (QB) (citing *Rogers v. Merthyr Tydfil County Borough Council*, (2007) 1 WLR 808 (CA) (paying party claiming premium charged was unreasonable had an evidentiary burden of establishing the same)).

(b) Howden preparing a quote for HRG and transmitting it to HRG on April 1, 2009;

(c) Howden being informed, by HRG on April 3, 2009, that INS had selected HRG to be INS's broker, and that HRG therefore in turn needed Howden to complete the reinsurance placement in the London market;

(d) Howden, on April 3, 2009, confirming terms and acceptance of the assignment by return e-mail to HRG;

(e) Howden negotiating with Lloyd's and other reinsurers in London over the final terms of the reinsurance coverage, as well as for its [Howden's] commission payable by reinsurers to Howden;

(f) Howden regularly updating HRG on the progress of its negotiations with the reinsurers as the layered program came together;

(g) Preparing a covernote to HRG on May 12, 2009, evidencing that coverage had been placed;

(h) Preparing a debit note (or bill) to HRG, reflecting that the coverage had been placed at the price that Howden had agreed with HRG, and that funds were to be remitted to Howden in London in two installments; and

(i) Howden being paid the first installment in London, and receiving its commission from the reinsurers at its London office.

The above is an oversimplification, as such a placement is an extremely sophisticated undertaking. A team of Howden brokers worked diligently to secure $300 million in reinsurance cover from about 75 reinsurers. In the end, the coverage was placed with approximately 35 separate reinsurers. Howden's London office not only placed the cover, but managed the administrative and accounting aspects of the undertaking.

Through this process, Howden took instructions from HRG, not INS, and reduced its agreement with HRG to writing in Howden's written Terms of Business Agreement, or "TOBA" from the outset of Howden's relationship with HRG. This document specified that Howden's services were being provided in accordance with English law; that English law would apply to any dispute; and that any dispute would be resolved in the English courts. The TOBA made clear that Howden was subject to the Financial Services Authority of the United Kingdom, which is the regulatory agency which governs UK insurance intermediaries generally. Thus, the only party with whom Howden was in privity, HRG, was clearly bound to an agreement that Howden's conduct was to be governed by standards of English law.

The evidence will also show that INS, prior to bringing this suit, never challenged that Howden was subject to English law. To the contrary, it has sought advice from English counsel with respect to Howden's obligations. INS's representative visited with the Corporation of Lloyd's,[8] in London, to complain that it had not received the reinsurance contracts (a/k/a "slips") from HRG. INS also sought the slips from Howden, which had advised INS that it could not turn over the slips to INS without the permission of Howden's principal (HRG). INS hired Lovells, in London, to address this issue with Howden, and Lovells proceeded to advise INS as to Howden's obligations under English law which confirmed Howden's own position that until Howden's client, HRG, had provided its authority, the slips could not be released. INS acted consistently with the recognition that Howden was a Lloyd's broker who had to comply with the regulations of Lloyd's, the Financial Services Authority and English law.

---

[8] Lloyd's of London is not a (re)insurance company but a market place for the placing of (re)insurance business. The Corporation of Lloyd's provides the administrative support for the placing of the business and regulates the operation of the marketplace. *See Insurance Intermediaries: Law and Practice* p. 5.1 (Lloyd's of London Press Ltd.).

ARGUMENT

ENGLISH LAW APPLIES TO INS'S TORT CLAIMS

The first steps in a choice of law analysis are to determine the nature of the problem involved – here, torts – and then to determine the forum's choice of law rule. *Marion Power Shovel Co. v. Hargis*, 698 So.2d 1246, 1247 (Fla. 3d DCA 1997).

For tort claims, the Florida Supreme Court, in *Bishop v. Fla. Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980), adopted the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws, § 145 (1971). This Court must determine what substantive law has the most significant relationship to INS's tort claims against Howden.

Application of the test involves going through a laundry list of factors that are found both in section 145 of the Restatement and in an earlier section, 6. Section 145 applies to tort claims and sets out four factors, while section 6 outlines general factors and there are seven to be considered. We start with the four section 145 factors and then discuss the section 6 factors: all of which arc towards the application of English law.

A. Tort Analysis under Restatement Section 145

The "most significant relationship" test is set forth in section 145 of the Restatement as follows:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state [or country] which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.[9]
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,

[9] *See* section A.2, *infra*.

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws § 145 (footnote added). We discuss these four contacts below.

1. Place of Injury

Howden submits that the "place of injury" factor is neutral in this case. The place of injury is arguably Costa Rica, in that INS is claiming economic injury and INS is a Costa Rican insurer. However, the place of injury is less important with respect to claims not involving personal injury.[10] Restatement (2d) of Conflict of Laws § 145 at comment e ("Situations ... arise ... where the place of injury will not play an important role in the selection of the state of the applicable law. This will be so, for example, when the place of injury can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties[.]"). *E.g., Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1116 (11th Cir. 1996) (place of injury not significant in breach of fiduciary duty claim). INS has never argued that Howden's compensation is to be governed by Costa Rican law, and there is really no basis on which Florida could be deemed the place of injury. This factor may relate to the typical car accident case, but it does not help here.

[10] In situations where negligence leads to personal injury, it can be said that "the tort rule is designed primarily to compensate the victim for his injuries," making it likely that the state where the injury occurred -- often the state where the plaintiff resides -- has the greater interest in the matter. *See* Restatement (2d) of Conflict of Laws § 145 at comment c.

2. Place of Conduct

The place of conduct is the most important of the four factors in this case, and that place is England. All Howden's conduct as a Lloyd's broker took place there. Given the types of alleged torts at issue here – broker negligence/malpractice and breach of fiduciary duty – the place of conduct has the most significance. "If the primary purpose of the tort rule involved is to deter or punish misconduct ... the state where the conduct took place may be the state of dominant interest and thus that of the most significant relationship." Restatement (2d) of Conflict of Laws § 145 at comment c; *see also id.* at comment e (in such case, place where conduct occurred is of "peculiar significance").

This is particularly so with respect to issues governing standards of conduct. Restatement (2d) of Conflict of Laws § 145 at comment e. For example, *Chase Manhattan Bank v. New Hampshire Ins. Co.*, 749 N.Y.S.2d 632 (N.Y. Sup. Ct. 2002), applied this principle in an insurance broker dispute. *Id.* at 634-36 (citing cases) (where the relevant law is conduct-regulating, the law of the jurisdiction where the tort occurred will apply because that jurisdiction has the greatest interest in regulating behavior within its borders).[11] The court explained that the interest in regulating behavior taking place within a state's borders is not vindicated by applying the law of a jurisdiction in which the behavior being regulated did not occur. A contrary finding "would tend to chill the willingness of other brokers to work with potential business contacts overseas, lest they find themselves subject to laws beyond their expectations." *Id.*; *accord Pittston Co. v. Sedgwick James of New York, Inc.*, 971 F. Supp. 915, 924 (D.N.J. 1997) (under

[11] Although New York does not follow the Restatement's "most significant relationship" test, its "interest analysis" test (considering the location of significant contacts and whether the law's purpose is to regulate conduct or allocate loss) is similar. New York courts cite with approval section 145 of the Restatement regarding the significance of the place of conduct when a law is conduct-regulating. *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 198 (N.Y. 1985).

Restatement analysis, state in which insurance broker resides and performs has most significant interest in regulating broker's conduct).

Howden is a Lloyd's broker regulated by Lloyd's and the Financial Services Authority of the United Kingdom and subject to English law. Its only contractual relationship with any party to this case was with defendant HRG, which served as the producing, or client-facing broker. As HRG has confirmed in its crossclaim, Howden and HRG did business under a Terms of Business Agreement, or TOBA, which Howden promulgated. The TOBA has a choice of law provision mandating that English law apply to any disputes between Howden and HRG. *See* HRG's Crossclaim at Attachment B.

By contrast, HRG engaged Howden in order to access the Lloyd's and London international reinsurance market. Howden has separately challenged INS's contract-driven claims on the basis that it never contracted with INS. While that issue will be determined another day, it is relevant here because it would make no sense for English law to apply to a dispute between Howden and a client, but not to a dispute between Howden and a client's client, whose suit against Howden is fundamentally improvident.

Thus, the place of the alleged conduct – England – is of the most importance here. *See also Trumpet Vine Investments*, 92 F.3d at 1116 (under Restatement analysis, place of conduct most significant in breach of fiduciary duty claim); *Grupo Televisa, S.A. v. Telemundo Comm. Group, Inc.*, 485 F.3d 1233, 1241-42 (11th Cir. 2007) (under Restatement analysis, district court erred in failing to give more significance to place of conduct in tortious interference claim); *Cagle v. The James Street Group*, 400 Fed. Appx. 348 (10th Cir. Oct. 28, 2010) (under Restatement analysis, applying Texas law to claim of malpractice filed by Oklahoma resident against Texas attorney in Oklahoma). Howden therefore submits that England is the state of the most significant relationship.

3. Domicile, Residence, Nationality, Place of Incorporation and Place of Business of the Parties

The third factor is where the parties reside, or in the case of corporations, where they do business. However, that one party does business in a certain place carries little weight by itself and this factor only becomes important when the place of business or domicile of all parties is grouped in a single location. Restatement (2d) of Conflict of Laws § 145 at comment e. Here, with INS doing business in Costa Rica and Howden doing business in England, this factor is neutral. *See Grupo Televisa*, 485 F.3d at 1242.

4. Center of Parties' Relationship

INS and Howden do not have a relationship in that they were never in contractual privity. Thus, there is no center to their relationship – making this factor neutral. *Cf. Grupo Televisa*, 485 F.3d at 1242 (business competitors had no center as they had no relationship).

In sum, the majority of the section 145 factors are neutral, with the place of conduct – England – having the most significant relationship. This does not end the analysis, as section 145 instructs that the general choice of law principles contained in section 6 of Restatement (Second) of Conflict of Laws must be considered. *See also Ryder Truck Rental, Inc. v. Rosenberger*, 699 So.2d 713, 715-16 (Fla. 3d DCA 1997) (applying section 6 analysis to tort claim). This analysis follows.

B. Choice of Law Principles under Restatement Section 6

Section 6 provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. [Here there is none.]

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states [or countries] and the relative interests of those states [or countries] in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

There is no statutory directive in Florida, so we turn to the factors in section 6(2). Each factor cuts in favor of applying English law to the tort claims against Howden.

1. Needs of the Interstate and International Systems – 2(a)

The "needs of the interstate and international systems" is indicative of the intent that choice of law rules "should seek to further harmonious relations between states and to facilitate commercial intercourse between them." Restatement (2d) of Conflict of Laws § 6 at comment d. Here, applying English law to regulate the conduct of Howden will facilitate the workings of the international system by continuing to encourage Lloyd's brokers to work in overseas markets without fear of regulation by unanticipated laws. *See Chase Manhattan Bank*, 749 N.Y.S.2d at 634-36. "England has an interest in maintaining the integrity and vitality of its market for reinsurance," *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F.Supp.2d 789, 798 (S.D. Tex. 1999), and the application of English law will facilitate commercial intercourse in the international system. *See also Heath Lambert v. Sociedad de Corretaje de Seguros* [2003] EWHC 2269 (Comm) ("Nowadays ... the London market quite frequently deals with non-English policies. Whatever the proper law of the reinsurance policy, the relationship between the placing brokers and their principals is typically governed by English law."). This cannot be overemphasized as Howden serves clients from all corners of the globe, and its professional liabilities arising from its conduct in the UK must conform to a single standard.

Further, as discussed below, INS has indicated its intent to seek punitive damages in this case. (SAC at Wherefore clause of Counts III, IV, and VI). While punitive damages are permitted in certain instances in this country, they are exceedingly rare in England. For this reason, application of Florida law in this case would be offensive to England's system of jurisprudence and public policy. *See Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1076 (9th Cir. 1971) (needs of international system warranted application of Venezuelan law where imposition of punitive damages under Colorado law would be offensive to Venezuela's system of jurisprudence and public policy).

2. Relevant Policies and Relative Interests of Florida and England – 2(b) & (c)

Here, INS has tried to plead a case in tort simply on the basis of its buyer's remorse: in the absence of any agreement as to commissions, it simply is not happy with the commission level earned by Howden. To be sure, Florida law seeks to prevent and remedy the torts of broker malpractice/negligence and breaches of fiduciary duty, but INS has yet to identify a Florida case involving these claims arising from a purported overcharging of commissions. INS can only point to generic examples of the duties it alleges are held by insurance brokers, such as that insurance brokers must use reasonable skill and diligence when dealing with an insured or that a breach of fiduciary duty claim can be brought against an insurance broker. *See* INS's Memo. of Law in Opp. to Howden's Mot. to Dismiss SAC at p. 17 (citing, *e.g.*, *Southtrust Bank v. Export Ins. Servs. Inc.*, 190 F.Supp.2d 1304 (M.D. Fla. 2002) and *Wachovia Ins. Servs., Inc. v. Toomey*, 994 So.2d 980 (Fla. 2008)). In this respect, it would seem that Florida and English law are somewhat similar.[12] *Aneco Reins. Underwriting Ltd. v. Johnson & Higgins Ltd.*, [2002] C.L.C.

[12] There may be a slight difference in that English law would not permit a claim of negligence by a reinsured against a placing broker – with whom the reinsured does not have privity – unless there were exceptional circumstances. *See generally BP plc v. Aon Ltd.*, [2006] EWHC 424 (Q.B. Comm.). However, this distinction is not significant at this stage in that INS has alternatively alleged that Howden is either a co-broker or sub-broker with HRG.

181, 188 (H.L.) (claim permitted against producing broker for breach of duty to use reasonable skill and care in placing reinsurance); *N v. Rotterdamse Assurantiekas v. Golding Stewart Wrightson Ltd.,* [1989] Court of Appeal (Civil) (unrep.) (claim for breach of fiduciary duty permitted against sub-broker).

However, this is not a case of "false conflict" between the laws of England and Florida. *See Fioretti v. Mass. Gen. Life Ins. Co.*, 53 F.3d 1228, 1234 n.20 (11th Cir. 1995) (false conflict exists where the potentially applicable laws do not differ).

(a) Standard for Alleged Overcharging of Commissions

First, INS has argued that there is a duty on the part of an insurance broker to charge an insured a commission based on what was allegedly reasonable "under the circumstances" without regard to what is customary in the industry. INS's Memo. of Law in Opp. to Howden's Mot. to Dismiss SAC at p. 19 (citing medical malpractice and railroad negligence cases). To the extent that such a duty exists under Florida law,[13] English law is to the contrary.

It has long been settled at common law in England that commission paid to an insurance broker by an insurer does not constitute an illegal secret profit *unless it is in excess of what is normally paid within the insurance market. See Great Western Ins. Co. of New York v. Cunliffe,* (1874) 9 Ch. App. 525 (Court of Appeal); *Baring v. Stanton,* (1876) 3 Ch. D. 502 (Court of Appeal); *N v. Rotterdamse Assurantiekas, supra.* In *Cunliffe,* the defendants, insurance brokers, were employed by the plaintiffs to effect reinsurances for them. There was no provision for the brokers' remuneration for this work by the plaintiffs, and according to the custom they received from the underwriters a brokerage of 5%, and also at the end of the year a further 12% on the

[13] Such an argument ignores the fact that Howden does not charge a commission to the reinsured. INS is well-aware that brokers are traditionally not paid by the reinsured, but rather by the reinsurers for introducing the reinsurance business to them. (SAC ¶ 15); *XL Specialty Insurance Company v. Carvill America, Inc. et al.*, 43 Conn. L. Reptr. 536 at n.34 (Conn. Super. Ct. 2007).

balance of the accounts if favorable. The plaintiffs knew of the 5% brokerage, but did not know of the 12%. Nevertheless, it was held that as the latter allowance, like the former, was according to a well-established practice which the plaintiffs might have ascertained if they had taken the trouble to inquire, the defendants were entitled to retain it.

Similarly, in *Stanton, supra*, where a ship owner employed agents to effect insurances for him on his ships, and they in their accounts charged him with the full premiums, although they had received a 5% brokerage from the underwriters and also an additional 10% allowance from the underwriters for cash payment, in accordance with the usual practice, it was held that, as the allowances were usual and the ship owner had never inquired on what terms the agents effected the insurances, he could not object to their retention by the agents. Mellish L.J. said: "If that 'practice' is generally known and acquiesced in I cannot conceive that it is a fraud upon anybody. It may be a misfortune to Mr. Stanton that, being an American, he really did not know the usage in London. But if a person comes and trades in London, he must make himself acquainted with the usages in London." The UK Court of Appeal stated much the same view more recently in *N v. Rotterdamse Assurantiekas:*

> [T]he effect of the commission payable to the broker is the amount receivable by the insurer is reduced. It does not increase the amount payable by the assured. The difficulty which thus arises in the insurance market is compounded by the fact that the assured is not normally told the amount of the commission which the broker has deducted from the premium. That is left to be decided between the broker and the insurer. In a superficial sense therefore everything which the broker receives by way of remuneration could be regarded as a "secret commission" paid by the insurer.
>
> But that difficulty, which is a difficulty peculiar to the insurance market, is overcome by the very sensible rule that a broker is not bound to disclose the commission which he has deducted from the premium, so long as the commission is a usual or normal commission in the particular line of insurance.

As evidenced by the above English authorities, the practice has been validated by over a century of judicial authority.

As expressed by the court in *Chase Manhattan Bank*, application of anything other than English law to regulate the conduct of Howden "would tend to chill the willingness of other brokers to work with potential business contacts overseas." *Chase Manhattan Bank*, 749 N.Y.S.2d at 634-36. Reducing the international reach of the London reinsurance market would be detrimental, as "England has an interest in maintaining the integrity and vitality of its market for reinsurance." *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F.Supp.2d 789, 798 (S.D. Tex. 1999). Unlike *Houston Casualty*, there is no interest here in protecting the solvency of a Florida insurer, as INS is a Costa Rican insurer. England's interest in this case far outweighs any interest Florida might have in giving extraterritorial effect to its own laws. *See CPS Intern., Inc. v. Dresser Industries, Inc.*, 911 S.W.2d 18, 34 (Tex. App. 1995) ("even if Texas had a significant policy interest in giving extraterritorial effect to its own laws, it would be countered by Texas' interest in having the tort claims in this litigation governed by the state with the most significant relationship to the claims and parties.").

(b) Aiding and Abetting Breach of Fiduciary Duty

Second, Florida law and English law differ with regard to INS's claim for aiding and abetting a breach of fiduciary duty (Count VI). INS contends it pleaded this claim under Florida law by alleging the elements of: (1) fiduciary duty on the part of HRG; (2) HRG's breach of this duty; (3) Howden's knowledge of this breach, and (4) Howden's substantial assistance or encouragement of the wrongdoing. *See* INS's Memo. of Law in Opp. to Howden's Mot. to Dismiss SAC at p. 21.

English law, however, imposes a standard of dishonesty on the part of the third party (here, Howden) for such a cause of action. *Royal Brunei Airlines Sdn. Bhd. v. Tan*, (1995) 2 A.C. 378 (P.C.) ("A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust of fiduciary obligation."). English law

requires more than just (1) knowledge and (2) assistance by the third party, as does Florida – negligence, or imprudence, is not enough. *Id.* Instead, Howden's actions would have to rise to the level of commercially unacceptable conduct. *Id.* Howden submits that English law imposes a higher burden on such a cause of action, and that the application of Florida law – and a lower standard of conduct for imposition of liability on a third party – would be offensive to England's sensibilities. *Cf. Franklin Supply Co.*, 454 F.2d at 1076 (needs of international system warranted application of Venezuelan law where imposition of punitive damages under Colorado law would be offensive to Venezuela's system of jurisprudence and public policy).

(c) INS's Intent to Seek Punitive Damages

As noted above, INS has indicated its intent to seek punitive damages in each of its tort counts. Florida law permits a plaintiff to seek punitive damages in certain circumstances. *Smith v. Jack Eckerd Corp.*, 577 So.2d 1321, 1322 (Fla. 1991) ("punitive damages may be awarded only when the tortious conduct rises to the level of legal malice, willful and wanton behavior, moral turpitude, outrageousness, or reckless indifference for the rights of others"). In contrast, punitive damages are more common in this country than in others, including England. *See Exxon Shipping* Co. *v. Baker*, 554 U.S. 471, 496-97 (2008). In *Baker*, the United States Supreme Court explained:

> [P]unitive damages overall are higher and more frequent in the United States than they are anywhere else. See, *e.g.,* Gotanda, Punitive Damages: A Comparative Analysis, 42 Colum. J. Transnat'l L. 391, 421 (2004); 2 Schlueter § 22.0. In England and Wales, punitive, or exemplary, damages are available only for oppressive, arbitrary, or unconstitutional action by government servants; injuries designed by the defendant to yield a larger profit than the likely cost of compensatory damages; and conduct for which punitive damages are expressly authorized by statute. *Rookes v. Barnard,* [1964] 1 All E.R. 367, 410–411 (H.L.). Even in the circumstances where punitive damages are allowed, they are subject to strict, judicially imposed guidelines. The Court of Appeal in *Thompson v. Commissioner of Police of Metropolis,* [1998] Q.B. 498, 518, said that a ratio of more than three times the amount of compensatory damages will rarely be appropriate; awards of less than £5,000 are likely unnecessary; awards of £ 25,000 should be exceptional; and £50,000 should be considered the top.

Id. Thus, punitive, or exemplary, damages are less frequent in England and, when awarded, are significantly smaller than those seen in this country. Application of Florida law in this respect would be offensive to England's system of jurisprudence and public policy. *See Franklin Supply Co.*, 454 F.2d at 1076.

Accordingly, after considering the relevant policies of Florida and England and weighing their relative interests, the balance favors the application of English law.

3. Protection of Justified Expectations and Certainty, Predictability and Uniformity of Result -- 2(d) & (f)

The protection of the justified expectations of the parties and the values of certainty, predictability, and uniformity of result are of lesser importance in the field of torts than they are in the field of contracts (where the parties are more likely to give thought to and plan their transactions).[14] Restatement (2d) of Conflict of Laws § 145 at comment b; Restatement (2d) of Conflict of Laws § 6 at comments g & i. In the field of torts, the remaining factors are of more significance. Restatement (2d) of Conflict of Laws § 145 at comment b. Accordingly we will not further discuss these factors.

4. Basic Policy Underlying Tort Law – 2(e)

As section 145 of the Restatement (2d) of Conflict of Laws recognizes, "every tort rule is designed both to deter other wrongdoers and to compensate the injured person." *Id.* at comment c. Since the laws of Florida and England both provide for deterrence of malpractice and fiduciary breach, as well as compensation for victims of such conduct, this factor is neutral.

---

[14] Nonetheless, to the extent these factors are considered, Howden submits that they weigh in favor of English law. INS was aware that its reinsurance was being placed in the London market. *See* Depo. of Villalobos at 54:8-55:16; Depo. of Castillo at 82:7-12. Therefore, English standards would be consistent with its expectations of Howden's conduct. Further, if the law regulating conduct is the law applicable where the conduct occurred, certainty, predictability, and uniformity of result are preserved and brokers will not be dissuaded from working with overseas business contacts. *See Chase Manhattan Bank*, 749 N.Y.S.2d at 634-36.

5. Ease in the Determination and Application of the Law – 2(g)

A Florida court may be slightly more at ease in applying Florida law. Nonetheless, given that the alternative is English law – from which this country's common law tradition is derived and, further, is in the same language as that of the United States, it cannot be said that applying English law would be difficult for this Court. Thus, this factor is either neutral or slightly in favor of Florida law, and does not outweigh the other significant factors weighing in favor of English law.

CONCLUSION

For the foregoing reasons defendant, Howden Insurance Brokers Limited, respectfully requests that the Court rule, and accordingly order, that English law is applicable to Counts III, IV, and VI of INS's Second Amended Complaint; specifically with reference to the standard of conduct and care by which Howden must be guided; and grant such other and further relief as this Court deems just and appropriate under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission on January 23 2013 on: **John F. O'Sullivan, Esq.**, Hogan Lovells US LLP, 1111 Brickell Avenue, Miami, Florida 33131; **Derek Craig, Esq./Luz Maria Hernandez, Esq./Pieter Van Tol, Esq./Maria Orecchio, Esq.**, Hogan Lovells US LLP, 875 Third Avenue, New York, NY 10022; and **Robert Harris, Esq.,** The Harris Law Firm Group, P.A., 777 Brickell Avenue, Suite 1114, Miami, Florida 33131.

SEDGWICK LLP
Counsel for Defendant Howden Insurance Brokers Limited
2400 East Commercial Blvd., Suite 1100
Ft. Lauderdale, FL 33308
Tel: (954) 958-2500 / Fax: (954) 958-2513

By: VALERIE SHEA

Valerie Shea
Florida Bar No. 0436800
valerie.shea@sedgwicklaw.com
Alfred C. Warrington, V
Florida Bar No. 0572111
alfred.warrington@sedgwicklaw.com
Charles S. Davant
Florida Bar No. 15178
charles.davant@sedgwicklaw.com

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 10-33653 CA 4

INSTITUTO NACIONAL DE SEGUROS,

Plaintiff,

vs.

HEMISPHERIC REINSURANCE GROUP, L.L.C., and HOWDEN INSURANCE BROKERS LIMITED,

Defendants.
_____/

MEMORANDUM OF LAW OF PLAINTIFF INSTITUTO NACIONAL DE SEGUROS IN OPPOSITION TO DEFENDANT HOWDEN INSURANCE BROKERS LIMITED'S MOTION FOR APPLICATION OF ENGLISH LAW TO PLAINTIFF'S TORT CLAIMS

Plaintiff Instituto Nacional de Seguros ("INS"), by and through its undersigned counsel, respectfully submits this memorandum of law in opposition to the motion ("Motion") by Defendant Howden Insurance Brokers Limited ("Howden") for a determination that English law applies to Counts III, IV, and VI of the Second Amended Complaint filed on May 5, 2012 (the "SAC"). INS states as follows:

Preliminary Statement

The Motion should be denied because the relevant factors in the choice-of-law analysis strongly favor an application of Florida law.

It cannot be disputed that the relationship among INS, Howden and Defendant Hemispheric Reinsurance Group, L.L.C. ("HRG") is centered in Florida, and that the parties here

have engaged in substantial business operations in the state. INS has alleged that HRG and Howden are co-brokers because there is an express or implied contract among the three parties. The Motion, however, addresses INS's tort claims, which are pled in the alternative and are based on the premise that Howden acted as a sub-broker for INS with respect to the reinsurance at issue in this case (the "2009 Reinsurance Program"). Howden does not deny that it was a sub-broker, which means that it owed duties to INS under agency law.[1] Howden instead argues that English law, rather than Florida law, should govern all aspects of the INS-Howden agency relationship and the issue of whether Howden breached its duties to INS because (a) Howden dealt exclusively with HRG; and (b) Howden's activities relating to the 2009 Reinsurance Program allegedly occurred only in England.

As shown below, it is not true that Howden's actions were limited to England. The 2009 Reinsurance Program was placed in the worldwide market, including the Florida market, and Howden actively participated in the Florida-based aspects of the placement.[2] Even more importantly, Howden's repeated assertion that all its work on the 2009 Reinsurance Program was channeled through or involved HRG — which is based in Miami — actually demonstrates that Florida law must apply here. The relationship among INS, HRG and Howden began in Florida and, with respect to the 2009 Reinsurance Program, Florida continued to be the center of the relationship. As a result, the funds for the 2009 Reinsurance Program — including the amounts that the Defendants overcharged — flowed through Miami. The early April 2009 agreement between HRG and Howden regarding the amount of premium, brokerage and taxes for the 2009 Reinsurance Program had a similar nexus to Miami. In addition, HRG primarily handled the

---

[1] As discussed below, it appears that English law, like Florida law, recognizes that sub-brokers owe duties to the reinsured. (*See infra*, 17.)

[2] In the reinsurance industry parlance, the process of obtaining reinsurance is referred to as the "placement."

communications among the parties relating to the placement, so the Defendants' collective failure to disclose the documentation and information repeatedly requested by INS from April through June 2009 also occurred in Florida. Thus, the conduct causing INS's injury, as well as the injury itself, took place in Florida because, absent a contract among INS, HRG and Howden, the sole relationship between INS and Howden was via HRG. In other words, the Defendants' overcharging of INS was planned, executed and hidden in Florida.

Other factors similarly favor the application of Florida law. Howden has not shown that the tort laws of Florida and England have different purposes. To the contrary, the laws of both jurisdictions share the goals of compensating tort victims and deterring wrongdoers. Moreover, in light of Howden's activities in Florida relating to the placement of the 2009 Reinsurance Program and the prior proceedings in this case in which it moved to dismiss based on Florida law, Howden cannot complain that an application of Florida law is unexpected. Finally, the application of English law to INS's tort claims against Howden — while at the same time applying Florida law to the same claims against Howden's partner in the placement, HRG — would result in unnecessary complexity and potential confusion for the jury.

Background[3]

Howden and HRG were the brokers jointly responsible for the placement of the 2009 Reinsurance Program, which related to one of the direct insurance policies that INS had issued for the 2009-2010 policy year. Howden and HRG contravened INS's express instructions, and violated their duties to INS as reinsurance brokers (including their duties of reasonable care and

---

[3] This background section is based on INS's allegations in the SAC, which is annexed hereto (without exhibits) as "**Exhibit 1**," and it is supplemented by the business records of the parties and testimony under oath. Given the size of the exhibits, they have been bound and filed as a separate document.

fiduciary duties), by secretly overcharging INS several million dollars in premium, brokerage and taxes for such reinsurance. In a further violation of the duties they owed to INS, Howden and HRG concealed facts concerning INS's overpayments and failed to disclose relevant information regarding the actual amounts owed by INS. That financial information was contained in, among other things, the reinsurance "slips" for the placement, which set forth the contractual terms between INS and the reinsurers.[4]

The SAC asserts causes of action against Howden for breach of express contract (Count I), breach of implied contract (Count II), negligence (Count III), breach of fiduciary duty (Count IV), imposition of a constructive trust (Count V), and aiding and abetting breach of fiduciary duty (Count VI). (Ex. 1, ¶ 2.) The Motion relates to the negligence, breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims in Counts III, IV and VI, which were pled in the alternative and in the event there was no contract among INS, Howden and HRG. (*Id.*, ¶ 8.)

A. The Parties

INS is a state-owned insurance company with its principal place of business in San José, Costa Rica. (*Id.*, ¶ 4.) As part of its operations, INS has, for a number of years, provided property damage and business interruption insurance coverage to Instituto Costarricense de Electricidad ("ICE"), the Costa Rican state-owned electricity and telecommunications supplier,

---

[4] It is well settled that slips are fully enforceable contracts between the reinsured and reinsurers. *See Northbrook Indem. Co. v. First Auto. Serv. Corp.*, No. 3:07-CV-683-J-32JRK, 2008 WL 3009899, at *1 n.4 (M.D. Fla. Aug. 1, 2008) ("Regardless of whether a succeeding contract is issued, placement slips are treated as binding contracts."); *Ario v. Underwriting Members of Lloyd's of London*, 996 A.2d 588, 595 (Pa. Cmlwth. Ct. 2010) ("In general, reinsurers are bound once they have scratched [*i.e.*, signed] the slip."); *CNA Reinsurance Co., Ltd. v. Trustmark Ins. Co.*, No. 01 C 1652, 2001 WL 648948, at *1 (N.D. Ill. June 5, 2001) ("[B]ecause ... fully-worded [contracts] are not always prepared, in the practice of the reinsurance industry, the summary 'slip' is treated as the binding contract."); *Sumitomo Marine & Fire Ins. Co., Ltd. – U.S. Branch v. Cologne Reinsurance Co. of Am.*, 552 N.E.2d 139, 142 (N.Y. 1990) ("Under normal circumstances, the initialing of the slip constituted a binding agreement."). Howden's internal documents similarly refer to the slip as "the legal Contract document between the (re)insured and (re)insurers." (*See* "**Exhibit 2**" hereto, HIB 017525.)

under policy U-500 (the "ICE Policy"). (*Id.*, ¶ 14.) INS has used the services of reinsurance brokers to purchase reinsurance for the ICE Policy in markets outside of Costa Rica. (*Id.*)[5]

Howden and HRG acted as INS's agents by jointly placing the 2009 Reinsurance Program. (*Id.*, ¶ 15.)[6] HRG is a Florida limited liability company with its principal place of business in Miami-Dade County, Florida. (Ex. 1, ¶ 5.) Howden is a company registered in England and Wales with its principal place of business in London, England. (*Id.*, ¶ 6.) Nevertheless, Howden conducted business in Florida in connection with the placement of the 2009 Reinsurance Program, as set forth in more detail below.

B. HRG and Howden's Involvement in Placement of Reinsurance of ICE Policy for the 2007 and 2008 Years

Howden's participation in the placement of the reinsurance of the ICE Policy dates back to 2006. Howden, which launched an international property division that year, was looking to expand its business in Latin America. (*See* "**Exhibit 4**" hereto; "**Exhibit 5**" hereto, 15:24-16:7.) In late 2006, the Howden property and energy team was introduced to HRG (then known as HRG-HRH Partnership) through an affiliated company based in Miami named VK Howden (now known as Howden Insurance LLC). (*See* Ex. 5, 14:17-15:21, 16:22-19:8; "**Exhibit 6**" hereto.) HRG, in turn, was selected by INS to place the reinsurance of the ICE Policy for the 2007 year, and it asked Howden to work in conjunction with it on the placement. (*See* "**Exhibit 7**" hereto; Ex. 5, 63:8-64:7.) INS also selected HRG to place the reinsurance of the ICE Policy

---

[5] Reinsurance is protection, sometimes described as insurance for insurance companies, which direct insurers like INS often obtain in order to spread the risks covered by the policies they issue to their insureds. (*Id.*) In reinsurance terminology, the direct insurer, which lays off or "cedes" risk to the reinsurer, is often referred to as the "cedent."

[6] Cedents frequently use the services of reinsurance intermediaries, known as brokers, to place reinsurance coverage. The compensation paid to reinsurance brokers is either a percentage of the reinsurance premium, in an amount allowed by the reinsurers and determined by the broker, which is deducted from the premium, or a fixed amount agreed upon by the cedent and the broker, which can be deducted from the premium or paid directly by the reinsured. (*See id.*; "**Exhibit 3**" hereto, HIB 06468.)

for the 2008 year and HRG once again turned to Howden to assist with the placement. (*See* "**Exhibit 8**" hereto.) Although INS knew that a "London correspondent" broker was involved in the 2007 and 2008 reinsurance (the "Prior Reinsurance Program"), it did not learn until January 2009 that the broker assisting HRG in those years was Howden. (*See* Ex. 5, 251:16-253:16.)

C. INS's Selection of Howden and HRG as Brokers for the 2009 Reinsurance Program

INS selected Howden and HRG as the reinsurance brokers through a "beauty contest" procedure that had not been used prior to the 2009 Reinsurance Program. (Ex. 1, ¶ 18.) Recognizing that the commission paid to brokers for the placement of reinsurance can be an expensive component of the process, INS decided to reduce its overall costs by having a "beauty contest" in February 2009 in which it invited several firms to submit bids for brokerage that would become binding upon their acceptance by INS. (*Id.*)

On February 9, 2009, INS sent an Invitation to Bid to HRG. (*See* "**Exhibit 9**" hereto; "**Exhibit 10**" hereto (certified translation of Ex. 9).) HRG immediately forwarded the Invitation to Bid, with an explanation of its requirements, to Neil Holden of Howden and arranged for Mr. Holden to travel to HRG's office in Miami for the purpose of preparing a response. (*See* "**Exhibit 11**" hereto; "**Exhibit 12**" hereto; and "**Exhibit 13**" hereto.) Mr. Holden met with John Blake and Jesús Alberto Marcano of HRG, beginning on or about February 13, 2009 and lasting for a day or two, to draft a joint response to the Invitation to Bid. (*See* Ex. 5, 281:21-289:15; "**Exhibit 14**" hereto, 249:16-252:19; "**Exhibit 15**" hereto, 310:9-311:10.) The initial response from HRG and Howden included a fixed fee proposal of $258,350. (*See* Ex. 14, 260:22-261:14.) The revised response (the "HRG/Howden Bid") contained the same information as the initial response, but proposed a fixed fee in the lower amount of $187,530. (*See* "**Exhibit 16**" hereto; "**Exhibit 17**" hereto (certified translation of Ex. 16).)

In contrast to the Prior Reinsurance Program, in which Howden's participation was not made expressly visible to INS, the HRG/Howden Bid gives prominence to Howden and makes it clear that the brokers would be placing the reinsurance jointly. For example, the HRG/Howden Bid specifically cites Howden's expertise, includes the CVs for the Howden employees on the account, refers to other property placements on which the two brokers had worked together and provides evidence of Howden's errors & omissions coverage. (*See* Ex. 1, ¶¶ 24-25; Ex. 17.)

Around the same time, Willis Limited ("Willis"), another reinsurance broker, submitted a bid of $195,000. (Ex. 1, ¶ 26.) Willis was initially chosen as the exclusive broker, but, at the suggestion of ICE, INS decided in mid-March 2009 to seek quotations for the premium — and only the premium — for the 2009 Reinsurance Program from three brokers rather than one. (*See* "**Exhibit 18**" hereto; "**Exhibit 19**" hereto (certified translation of Ex. 18).) HRG/Howden and Willis were among the brokers that INS asked, by letter dated March 11, 2009 and sent on March 12, 2009, to submit premium quotes. (*See id.*)

In determining the amount of the quote, Howden and HRG approached reinsurers during the last two weeks of March 2009 to discuss the premium for the 2009 Reinsurance Program. Howden took the lead role, but it did not restrict itself to contacting reinsurers in the London market. Howden contacted several reinsurers in the U.S. market, including three reinsurers in Miami: ACE, Liberty and Navigators. (*See* "**Exhibit 20**" hereto (ACE correspondence) "**Exhibit 21**" hereto (Liberty correspondence) and "**Exhibit 22**" hereto (Navigators correspondence).) Based on the information that it received from reinsurers, Howden submitted a premium quote for the renewal to HRG on April 1, 2009. (*See* "**Exhibit 23**" hereto.)[7] HRG, in

[7] In the quote, Howden noted that it was "very close to completion" of the placement and, if Howden and HRG were chosen as brokers, the placement could be completed within 3 business days (or sooner) of INS's issuance of a firm order to Howden and HRG. (*See id.*)

turn, submitted a quote to INS the same day. (*See* "**Exhibit 24**" hereto and "**Exhibit 25**" hereto.) It is undisputed that Howden's quote was sent to HRG's office in Miami and that HRG sent the quote to INS from its office in Miami.

In their premium quote, HRG and Howden did not include a new brokerage bid because the original bid from February 2009 was, under the express terms of the "beauty contest," still open as of early April 2009. Accordingly, when INS selected HRG and Howden to act as the brokers for the 2009 Reinsurance Program in early April 2009, their brokerage was fixed at $187,530, which was the amount that they had bid in the "beauty contest." (*See* Ex. 1, ¶ 26.) At no point did the parties discuss or agree upon brokerage other than the amount of $187,530 set forth in the HRG/Howden Bid.

INS has alleged that HRG and Howden were co-brokers for the 2009 Reinsurance Program pursuant to an express or implied contract among the parties. (*Id.*, ¶ 7.) Even if, however, there was no contractual relationship among the parties, HRG and Howden acted as the agents for INS — HRG as the broker and Howden as the sub-broker assisting HRG — because they jointly provided broking services to INS in connection with the 2009 Reinsurance Program. (*See id.*, ¶¶ 8, 17, 40, 51-54 and 57-59.) While Howden has denied that there was any contract among the parties, it admits that it was a sub-broker for the 2009 Reinsurance Program. (*See* "**Exhibit 26**" hereto, ¶¶ 7-8.)

D. HRG and Howden Agree in Early April 2009, Without INS's Knowledge or Consent, to Charge More Than The Fixed Amount of Brokerage and to Engage in Grossing Up by Adding the Brokerage to the Reinsurance Premium

Despite the pendency of the HRG/Howden Bid, in the April 1, 2009 quote from Howden to HRG, Howden suggested that the brokers (a) take brokerage of 10%, split evenly between the two; and (b) add (or surcharge) such brokerage to the amount of premium to be paid to the reinsurers. (*See* Ex. 23; Ex. 5, Dec. 4, 2012 Tr., 43:19-44:9; Ex. 14, 412:11-415:8; Ex. 15,

494:3-497:14.)[8] Howden and HRG shortly thereafter agreed that the total brokerage would be increased to 12%, would continue to be added to the premium and would be split as follows: 4% for HRG, 4% for Howden and 4% for a local contact in Costa Rica, Ricardo Retana. (*See* Ex. 5, Dec. 4, 2012 Tr., 43:19-44:9; Ex. 14, 460:10-461:17; Ex. 15, 510:21-513:18; "**Exhibit 27**" hereto, 8-9.) INS was not aware of the Defendants' early April 2009 agreement until it conducted discovery in this case. The Defendants' secret agreement to take the 12% brokerage and add it to the reinsurance premium as a surcharge, which is an improper practice known as "grossing up," was a clear violation of the duties that the brokers owed INS.

E. Howden and HRG Place the 2009 Reinsurance Program and Jointly Negotiate with U.S. Reinsurers, Including Reinsurers Located in Florida

On or about April 3, 2009, Howden and HRG returned to the market to complete the placement process, which, as noted above, had begun in mid-March 2009. Once again, Howden took the lead role, but it also worked in conjunction with HRG to secure the participation of reinsurers located in the U.S. Those reinsurers included (among others) three companies in Florida — ACE, Liberty and Navigators — that Howden and HRG had jointly approached in mid-March 2009. The documents produced in this case demonstrate that Howden engaged in frequent and significant contacts with the Florida-based reinsurers in April 2009 to secure their participation in the 2009 Reinsurance Program. (*See* "**Exhibit 28**" hereto (ACE) "**Exhibit 29**" hereto (Liberty) and "**Exhibit 30**" hereto (Navigators).) Moreover, the slips signed by the foregoing reinsurers were on the Howden form. (*See, e.g.*, Ex. 28, HIB 016212-234; Ex. 29, HIB 07323-43; Ex. 30, HIB 08074-94.) Mr. Marcano of HRG testified that it was common place

---

[8] Exhibit 23 contains a copy of Deposition Exhibit 383. Messrs. Blake and Marcano are testifying in their depositions about Deposition Exhibit 165. Deposition Exhibit 165 and Deposition Exhibit 383 are very similar (differing only in their attachments) and, for purposes of this brief, the two are materially the same. Also, the transcript for the December 4, 2012 deposition of Mr. Holden erroneously restarted the page numbering. Accordingly, when citing to the December 4 transcript, we have indicated the date.

for Howden to negotiate with, and otherwise contact, the Florida-based reinsurers with respect to the 2009 Reinsurance Placement. (*See* Ex. 15, 603:1-615:20.)[9]

F. Defendants' Overcharging of Premium and Brokerage

On or about April 23, 2009, HRG confirmed to INS that the 2009 Reinsurance Program had been placed. (Ex. 1, ¶ 31.) On or about May 14, 2009, HRG issued a Debit Note — from Miami — in which it informed INS that the total net "premium" for the 2009 Reinsurance Program was $12,443,734.56 (*i.e.*, $13,080,207.03 minus $636,472.47 for applicable Costa Rican taxes), due in two installments: 60% ($7,466,240.74) on June 1, 2009 and 40% ($4,977,493.82) on July 1, 2009. (*See id.*; "**Exhibit 31**" hereto.) The "premium" figure in the Debit Note reflected the premium quote from Howden of $11,450,000 plus the 12% brokerage agreed upon by the Defendants in early April 2009. (*See* Ex. 14, 458:8-460:9; Ex. 27, 8-9.) Based on the foregoing information, but without any indication that the premium amount had been wrongfully inflated by 12%, INS paid the first installment of net premium, $7,466,240.74, on or about May 28, 2009. (*See* Ex. 1, ¶ 31.) INS made this payment by sending a wire transfer to HRG in Miami. (*See* "**Exhibit 32**" hereto; Ex. 14, 711:25-712:21.)

In fact, the total net "premium" figure of $12,443,734.56 provided by HRG was incorrect because it included an undisclosed commission of over $1.13 million. (Ex. 1, ¶ 32.) In a Debit Note from Howden to HRG dated May 12, 2009 (*see* Ex. 3), Howden informed HRG that the total net premium was $11,312,600, which is $1,131,134.56 less than what HRG reported to INS in the May 14, 2009 Debit Note. (*See* "**Exhibit 33**" hereto.) INS was not provided with a copy of the May 12, 2009 Debit Note from Howden to HRG until after this action was commenced. (Ex. 1, ¶ 32.) HRG — without INS's knowledge or approval and in keeping with the

[9] Mr. Marcano was testifying about Deposition Exhibit 447, which is the same document as HIB 06834-35 in Ex. 29.

Defendants' early April 2009 agreement — planned to use the $1,131,134.56 difference to pay itself, Howden and Mr. Retana an unauthorized 12% commission for the 2009 Reinsurance Program. To that end, HRG retained $678,680.74 as commission from the first premium installment of $7,466,240.74 and sent the remaining $6,787,560 to Howden, which amount included Howden's 4% commission (per the parties' early April 2009 agreement). (*See* Ex. 14, 559:5-563:1; "**Exhibit 34**" hereto.) The foregoing monies that HRG sent to Howden, which include overcharges and grossed up amounts in violation of the duties that Howden owed to INS, were transmitted from Miami. (*See* Ex. 34.)

G. Defendants' Failure to Disclose Information Regarding the 2009 Reinsurance Program

Howden and HRG compounded their misdeeds by trying to conceal evidence of, and by failing to disclose relevant information regarding, the overpayments by INS, to whom Defendants (as INS's agents) owed fiduciary duties and duties of reasonable care. (*See* Ex. 1, ¶¶ 35-36, 52-54, 57-59.) Before, and at the outset of, the placement of the 2009 Reinsurance Program, INS made it clear that Howden and HRG that they were required to provide full documentation for reinsurance placed on INS's behalf, including reinsurance "slips" for the 2009 Reinsurance Program (the "2009 Reinsurance Slips") (*Id.*, ¶ 35.) For example, in an e-mail dated March 26, 2009, Guiselle Monge of INS stated that for all reinsurance contracts placed through brokers INS must have the slips (which Ms. Monge referred to as "acceptance notes") showing premium and commission. (*See* "**Exhibit 35**" hereto (which includes the original in Spanish and an English translation), INS 014993-94.) On April 4, 2009, after Howden and HRG had been selected as brokers for the 2009 Reinsurance Program, Ms. Monge asked HRG to remind reinsurers of the requirement to produce slips. (*See* "**Exhibit 36**" hereto (which includes the original in Spanish and an English translation).) With respect to the Prior Reinsurance

Program, HRG had similarly agreed that it would be fully transparent, which included providing relevant documentation and information concerning premium and brokerage. (*See, e.g.*, "**Exhibit 37**" hereto (which includes the original in Spanish and an English translation); "**Exhibit 38**" hereto, 78:9-81:4.) It was important to INS to receive full copies of the 2009 Reinsurance Slips because they would reveal the amount of premium and would confirm the brokerage taken by Howden and HRG.

On numerous occasions from early April through mid-June 2009, INS requested that Howden and HRG produce the 2009 Reinsurance Slips. (Ex. 1, ¶ 35.) Despite INS's frequent requests, as of mid-June 2009, Howden and HRG still had not provided the 2009 Reinsurance Slips. (*Id.*, ¶ 36.) Around the same time, INS obtained a sampling of the 2009 Reinsurance Slips directly from several reinsurers. (*Id.*) The sample 2009 Reinsurance Slips, along with other documents, revealed that the reinsurance premium reflected in HRG's May 14, 2009 Debit Note to INS was far higher than it should have been, which led INS to believe that it had been overcharged and/or that the brokers had engaged in grossing up. (*Id.*) On or about June 23, 2009, INS terminated its broking relationship with Howden and HRG. (*Id.*)

In June and July 2009, when Howden and HRG continued to refuse to provide the 2009 Reinsurance Slips and other requested information, INS took several steps to obtain the release of the records. As noted in the Motion, an INS representative traveled to London in mid-June 2009 to meet with Howden and others in an effort to obtain a complete set of the Slips. (Mot. at 9.) INS also took advice from counsel regarding its ability to force Howden, as a matter of English law, to produce the Reinsurance Slips. (*Id.*) According to Howden, these actions demonstrate INS's "recognition" that English law applies to its tort claims. (*Id.*) Howden's recitation of the facts is incomplete and misleading. As of mid-June 2009, INS had just begun its

investigation into the matter and it was not fully aware of the facts, including the fact that Howden had conducted business in Florida and elsewhere in the U.S. in connection with the 2009 Reinsurance Program. Once INS completed that investigation (which did not take place until after all the Reinsurance Slips had been produced), INS determined that there was jurisdiction over Howden in Florida and a basis for contract and tort claims under Florida law.

By letter dated July 24, 2009, HRG informed counsel for INS that Howden and HRG finally would be producing the Reinsurance Slips, which INS received on July 28, 2009. (Ex. 1, ¶ 38.) The complete set of Reinsurance Slips (as well as other documents) revealed that Howden and HRG had indeed overcharged INS in respect of premium and brokerage. (*Id.*, ¶ 39.) The documents further demonstrated that Howden and HRG overcharged INS with regard to taxes for the 2009 Reinsurance Program. (*Id.*)

INS's termination of Howden and HRG as brokers in late June 2009, after its receipt of the sample 2009 Reinsurance Slips directly from certain reinsurers, allowed INS to avoid being overcharged with respect to the second installment of reinsurance premium. If Howden and HRG had produced the 2009 Reinsurance Slips and other information in April or May 2009, as requested by INS on numerous occasions, INS also would have detected the overcharging before the June 1, 2009 due date for the first premium installment.

Howden and HRG took the position in 2009 that Howden could not produce the 2009 Reinsurance Slips directly to INS and, instead, that only HRG could send the documents to INS. (*See, e.g.*, "**Exhibit 39**" hereto; Ex. 5, 582:8-583:18.) Accordingly, the refusal to produce the 2009 Reinsurance Slips and similar documentation requested by INS — as with the conduct constituting the overcharging — occurred in Florida because HRG and Howden claimed that HRG was the sole conduit for the transmittal of such information from Howden to INS.

H. Howden's Previous Two Motions to Dismiss

INS filed the original Complaint on June 15, 2010. On July 12, 2010, Howden moved to dismiss, alleging that INS's claims were improperly pleaded and that the economic loss doctrine barred INS from recovery. (*See* "**Exhibit 40**" hereto.) In moving to dismiss INS's tort claims, Howden argued that Florida law applied. INS agreed that Florida law applied to its claims. On September 8, 2010, General Magistrate Schwabedissen denied Howden's motion to dismiss but ordered INS to file an amended pleading setting forth its tort claims in more detail.

INS filed an Amended Complaint on September 23, 2010 (the "FAC"). (*See* "**Exhibit 41**" (without exhibits) hereto.) INS asserted the same five counts (with additional detail) from the original Complaint for (1) breach of express contract; (2) breach of implied contract; (3) broker negligence/malpractice; (4) breach of fiduciary duty; and (5) aiding and abetting a breach of fiduciary duty. On October 22, 2010, Howden filed a second motion to dismiss, contending once again that INS's claims were improperly pleaded. General Magistrate Schwabedissen denied Howden's second motion to dismiss on December 13, 2010.

I. INS's Allegations Relating to Counts III, IV and VI of the SAC

In the course of the discovery process, INS learned additional information that enabled it to expand upon and clarify the facts supporting its claims. In order to conform the FAC to the evidence, INS filed, on May 3, 2012, an unopposed motion for leave to file the SAC. The Court granted the motion on May 5, 2012, and the SAC was deemed filed that day.

The SAC includes minor amendments to Counts III, IV and VI. In Count III, the SAC alleges that: (a) "HRG was INS's agent and owed INS a duty to act as a reasonable broker of reasonable skill and diligence would act under the circumstances"; and (b) "Howden owed the same duty to INS as a sub-broker for HRG." (Ex. 1, ¶¶ 51-52.) The exact same allegations are in the FAC. (*See* Ex. 40, ¶¶ 45-46.) As in the FAC, the SAC further alleges in Count III that

"HRG and Howden breached the duties they owed INS by failing to act as a reinsurance broker of reasonable skill and diligence would act under the circumstances in placing the [2009] Reinsurance Program." (*Compare* Ex. 1, ¶ 54 *with* Ex. 40, ¶ 48.)

INS provided additional details in Count III of the SAC by alleging as follows:

> Those breaches of duty included, without limitation: (a) charging more premium than was set forth in the Reinsurance Slips; (b) charging more brokerage than was reasonable under the circumstances; (c) refusing to provide timely information to INS concerning the reinsurance and related matters; (d) wrongfully refusing to return the overcharged amounts to INS upon request; and (e) otherwise failing to act as a reasonable broker would under the circumstances.

(Ex. 1, ¶ 54.) The only difference between the above paragraph and the similar allegations in the FAC is that the SAC makes it clear that INS will not be referring to industry custom and standards with respect to the amount of brokerage.[10] INS amended the allegations in Count III regarding the reasonable amount of brokerage because it became clear, in the course of discovery, that INS would not need to resort to industry custom or standards regarding the amount of brokerage and instead could prove its unreasonableness based on a narrower set of facts, including the brokerage bids submitted by other parties in the broker bid process (which includes the amount that Willis charged for brokerage when it took over the account) and the amount that Willis charged for the renewal of the 2009 Reinsurance Program for the 2010-2011 policy year. Also, given that INS sought to avoid paying market rates for brokerage in connection with the Program, there was no need to include allegations regarding the custom and practice regarding the amount of brokerage.

---

[10] The allegations in subparagraph (e) of Paragraph 54 relate back to the allegation on Paragraphs 51 and 52 that Defendants had a duty to act as a reasonable broker of skill and diligence would act under the circumstances.

Count IV in the SAC contains similar amendments regarding Defendants' breach of fiduciary duty (*see* Ex. 1, ¶ 59), and Count VI has even more minor modifications relating to Howden's aiding and abetting of HRG's breach of fiduciary duty. (*See id.*, ¶ 67.)

J. Howden's Third Motion to Dismiss and HRG's Motion to Strike INS's Punitive Damages Allegations

On May 18, 2012, Howden filed a motion to dismiss portions of the SAC, which was its third such motion in this case; the Court denied Howden's motion at a hearing on September 14, 2012, holding that INS had sufficiently pled its tort claims under Florida law. (*See* "**Exhibit 42**" hereto, 15:7-25:8.) In late May 2012, HRG moved to strike the punitive damages allegations in the tort counts of the SAC as premature under Florida law. (*See* "**Exhibit 43**" hereto.) The Court struck INS's allegations, without prejudice (*see* Ex. 42, 29:5-12), and INS recently filed a motion seeking permission to amend the SAC to add claims for punitive damages.

Argument

The Motion Should Be Denied Because Florida Law Applies Here

INS agrees with Howden that, in undertaking the choice-of-law analysis, the Florida courts examine the relevant factors in Sections 6 and 145 of the *Restatement (Second) of Conflict of Laws*. (*See* Mot., 10.) Thus, there is no debate concerning the choice-of-law standard.

I. Howden Has Not Supported the Motion with Evidence

Howden asserts that it "will support its motion with a factual showing as to why English law must be chosen as applying to it." (*Id.*, 2-3.) As of the date of this opposition, however, Howden has not provided any such evidence. In contrast to the evidence that accompanies INS's opposition, the "Summary of Evidence" in the Motion does not contain any citations to documents produced by the parties, deposition testimony or other evidence. (*See id.*, 6-9.) Howden has informed counsel for INS that it plans to call Andrea Bragoli as a witness at the

evidentiary hearing on April 5, 2013. Mr. Bragoli gave deposition testimony in this case as Howden's corporate representative, but — unlike Mr. Holden or other Howden witnesses — he has no first-hand knowledge regarding the placement of the 2009 Reinsurance Program or the other events relevant to the choice-of-law issue. Also, despite INS's request of several weeks ago, Howden has refused to provide INS with a proffer regarding Mr. Bragoli's anticipated testimony at the April 5 hearing. (*See* "**Exhibit 44**" hereto.) Under the circumstances, INS reserves the right to object to the admissibility of Mr. Bragoli's testimony.

II. The Relevant Factors under *Restatement* Section 145 Strongly Favor an Application of Florida Law

A. The Center of the INS-Howden Relationship Is Florida

Howden asserts that this factor is neutral because "there is no center to the [INS-Howden] relationship." (Mot., 14.) According to Howden, "INS and Howden do not have a relationship in that they were never in contractual privity." (*Id.*; emphasis added.)

In relying on a purported lack of contractual privity, Howden ignores the fact that the Motion relates to INS's tort claims. INS has alleged that, even if there was no contractual relationship among INS, HRG and Howden, Howden was a sub-broker and owed duties to INS. Howden admits that it acted as a sub-broker for the 2009 Reinsurance Placement. (*See* Ex. 26, ¶¶ 7-8.) Howden also admits that Florida and English law impose similar duties on brokers, including sub-brokers acting on behalf of cedents. (*See* Mot., 16-17.) The question, therefore, is where the acknowledged relationship between INS and Howden is centered.

As discussed above, Howden was involved in the placement of the reinsurance of the ICE Policy for the 2007 policy year because HRG invited Howden to participate. HRG similarly asked Howden to assist with the placement of the reinsurance of the ICE Policy for the 2008 policy year. Assuming that there was no contractual relationship among INS, HRG and Howden

establishing that Howden was a co-broker, HRG requested (at a minimum) that Howden act as a sub-broker for the 2009 Reinsurance Program. (*See* Ex. 26, ¶¶ 7-8; "**Exhibit 45**" hereto.) Moreover, Howden has repeatedly stated that it took instructions regarding the 2009 Reinsurance Program from HRG, not INS. (*See, e.g.*, Ex. 26, ¶ 38 (stating that Howden could not have turned over the Reinsurance Slips to INS without HRG's authorization).) Thus, HRG was the key to relationship among INS, HRG and Howden because Howden could only act as the sub-broker for INS through HRG. Since HRG is located in Florida, the INS-Howden relationship was centered there as well.

B. The Injury Occurred in Florida

Howden variously contends that the "place of injury" factor is neutral, that the injury arguably took place in Costa Rica since INS is a Costa Rican insurer, and that "the place of injury is less important with respect to claims not involving personal injury." (Mot., 11.) In support of its argument, Howden cites the *Restatement (Second) of Conflict of Laws* § 145, comment e, which states that this factor will not play an important role in determining the applicable law "when the place of injury can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties[.]" (*Id.*) Howden's analysis is incorrect.

First, it cannot be disputed that Florida is the "place of injury." INS suffered its damages when HRG and Howden overcharged for premium, brokerage and taxes. The injury took place when HRG accepted INS's overpayment in Miami and then sent to Howden, from Miami, its portion of the overcharged amount. Those acts were the proximate cause of INS's harm. If HRG had not accepted the funds, had returned the overpayment to INS or had not forwarded to Howden its portion of the funds, INS would not have a claim against Howden. By the same token, INS was unable to prevent its damages because HRG and Howden failed to produce the 2009 Reinsurance Slips or other requested information relating to the 2009 Reinsurance Program

prior to the June 1, 2009 due date for the first installment of premium. This failure to disclose also occurred in Miami because HRG was the conduit for the flow of such information.

Second, the place of injury is not fortuitous at all. The center of the parties' relationship was Miami, so the place of injury is directly connected to the parties. As discussed below, the place of injury also bears a direct relationship to the conduct causing the injury.

C. The Conduct Causing INS's Injury Occurred in Florida

Howden argues throughout the Motion that all of its conduct relating to the placement of the 2009 Reinsurance Program took place in England. (*See, e.g.*, Mot., 2-3, 7-8, 12.) That is simply not the case. The evidence demonstrates that Howden and HRG jointly placed the 2009 Reinsurance Program in Florida, among other markets. Moreover, the focus of the choice-of-law inquiry should be on the location of the specific acts that caused INS's injury rather than the overall placement of the 2009 Reinsurance Program. Those acts occurred in Florida.

1. Howden Participated in the Placement of the 2009 Reinsurance Program in Florida

Howden did not restrict its placement activities to London, as it repeatedly claims in the Motion. The 2009 Reinsurance Program involved reinsurers from the London market and elsewhere in the world, including three reinsurers from the Florida market — ACE, Liberty and Navigators — that had key participations. As discussed above, Howden and HRG approached the Florida reinsurers jointly and both negotiated the terms of the reinsurance with them. Thus, Howden engaged in substantial placement activities in Florida.

Furthermore, one of the slips for the reinsurance that Howden negotiated, in conjunction with HRG, provides additional evidence that Howden knew about the improper grossing up of premium. As noted above, Howden and HRG had numerous discussions with the Miami office of Liberty regarding the placement of the 2009 Reinsurance Program. Liberty agreed to act as a

reinsurer on two different layers of the Program and it signed the slip for its 4% participation on the $50 million excess of $200 million layer on April 28, 2009. (*See* "**Exhibit 46**" hereto.) Liberty sent the slip to HRG in Miami and, in turn, HRG forwarded it to Howden. (*See id.*) The slip states that the premium of $225,000 will be "Net to Liberty" (*see id.*, HIB 07759), which means that Liberty would receive the $225,000 without any deductions for brokerage.[11] The slip includes 15% in total deductions (*i.e.*, brokerage), but notes that there would be a "Gross Up on Net." (Ex. 46, HIB 07768.) In other words, the brokerage would not be deducted from the slip premium — as in the normal course — and instead would be added to the premium, which is grossing up. Howden has claimed that it did not in fact take any brokerage on the Liberty slip and instead it has referred to the deduction as "monetary brokerage discounted to client," which would mean that the grossed up funds were available to HRG. (*See* "**Exhibit 48**" hereto.)[12] Therefore, even if Howden itself did not receive the grossed up funds from the Liberty slip, the slip demonstrates that Howden was fully aware of the grossing up as early as April 2009 and also benefitted from it because such funds were an available source of brokerage for HRG that Howden did not have to share.

2. The Specific Acts Causing INS's Injury Occurred in Florida

While Howden's placement activities in Florida support a finding that Florida law applies here, the focus for purposes of the "conduct" factor should be on the location of the specific acts and omissions that caused INS's injury. INS's tort claims arise out of the early April 2009 agreement between HRG and Howden that they would take far more than the $187,530 fixed fee

---

[11] The usual deductions on a slip are for brokerage and tax, but, as a U.S. reinsurer, Liberty was exempt from tax, so there should be no deduction for tax. (*See* "**Exhibit 47**" hereto (listing Liberty, referred to as "LIU," as one of the reinsurers exempt from tax).)

[12] Exhibit 48 is a chart that was prepared by Howden and the relevant entries for the Liberty slip are in the last line, slip reference 42 (which we have outlined in red). The chart mistakenly refers to 5.5% deduction for tax.

as their remuneration for placing the 2009 Reinsurance Program and would add commission to the reinsurance premium.[13] This agreement has a connection to Florida because it was reached through a series of e-mails and telephone conversations between HRG in Miami and Howden in London. The key event, however, was HRG's acceptance of the first premium installment from INS and its transmission of funds shortly thereafter to Howden in late May/early June 2009. This conduct — which took place in Miami — caused INS's injury because it is the point at which HRG and Howden jointly overcharged INS, thereby implementing their early April 2009 agreement. INS was also harmed by HRG's and Howden's failure to produce the 2009 Reinsurance Slips or disclose other requested information prior to the payment of the first premium installment. As noted above, this conduct also occurred in Florida.

A pair of New York cases, *Evvtex Co., Inc. v. Hartley Cooper Assoc. Ltd.*, 102 F.2d 1327 (2d Cir. 1996), and *Rose v. Arthur J. Gallagher & Co.*, 928 N.Y.S.2d 783 (App. Div. 2011), are instructive here. In *Evvtex*, the insured was represented by John A. Finch Associates, Ltd. ("Finch"), which was a New York-based excess line insurance broker. On behalf of the insured, Finch placed an order for an insurance policy with Hartley Cooper Associates Limited ("Hartley Cooper"). Hartley Cooper, which was a Lloyd's of London broker, procured the insurance from Underwriters at Lloyd's of London. *See* 102 F.2d at 1329. After the insured suffered a loss, it submitted a proof of loss and Hartley Cooper obtained settlement proceeds from the insurers. Hartley Cooper forwarded the funds to Finch, but Finch unlawfully failed to pay the insured. *See id.* at 1330-31. The insured subsequently sued Hartley Cooper, alleging a breach of fiduciary

---

[13] HRG and Howden have disagreed about whether the brokers' commission was limited to the 12% figure and whether Howden was entitled to a further deduction of brokerage from the slips (or must share such brokerage with HRG). However, this disagreement as to the scope of the parties' April 2009 agreement regarding brokerage and the division of the funds does not alter the fact that, at a minimum, the parties secretly agreed to an improper surcharge of commission.

duty. *Id.* at 1329. On appeal, Hartley Cooper alleged that the district court erred in applying New York law to a non-resident broker doing business only in the United Kingdom. *Id.* at 1332 n.6. The Second Circuit rejected Hartley Cooper's choice-of-law arguments, noting that Hartley Cooper had contacts with New York and was required to obey the laws of New York because it did business in the state through its agents. *Id.*

Howden is similarly obligated to obey the laws of Florida. In addition to doing business in Florida through HRG, Howden conducted its own operations in the state by, among other things, (a) meeting and communicating frequently via e-mail and letter with HRG, a Florida-based company; (b) entering into agreements with HRG, including the parties' agreement relating to overcharging INS; and (c) negotiating the placement of reinsurance with reinsurers located in Florida. *See id.* ("As Hartley Cooper did business through its agents in New York, its status as a foreign corporation does not negate its fiduciary duty [under New York law] to [the insured]."); *Rose*, 928 N.Y.S.2d at 784 (applying New York law to non-New York broker accused of negligence, professional malpractice and breach of fiduciary duty because the broker's allegedly negligent quote was sent by e-mail to New York).

The cases cited by Howden do not support a contrary finding. (*See* Mot. 12-13.) In *Chase Manhattan Bank v. New Hampshire Ins. Co.*, 749 N.Y.S.2d 632, 635-36 (Sup. Ct. N.Y. Co. 2002), and *Pittston Co. v. Sedgwick James of N.Y., Inc.*, 971 F. Supp. 915, 923 (D.N.J. 1997), the courts applied the law of the state where the brokers engaged in the alleged wrongful conduct. Here, as discussed above, that state is Florida.

D. HRG Is Located in Florida and the Other Two Parties Have Substantial Business Activities in the State

Howden contends that this factor, which considers "the domicile, residence, nationality, place of incorporation and place of business of the parties," is neutral. (Mot., 14.) The basis of

Howden's argument is an apparent claim that only one party, HRG, does business in Florida. (*See id.*) As discussed above, however, Howden conducted (and still conducts) substantial business operations in the state. INS also did business in Florida and selected HRG, a Miami-based broker, to place the 2009 Reinsurance Program. *See, e.g., Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1298 (11th Cir. 1999) ("[Had] the authors [of the Restatement] intended to limit § 145(2)(c) to a corporation's 'principal place of business,' they would have done so expressly. We cannot agree that a jurisdiction in which the party has sizeable business activities — especially when the activities are directly related to the relevant litigation — has no relationship with the litigation for purposes of section 145(2)."); *Walker v. Paradise Grand Hotel, Ltd.*, 2003 WL 21361662, *3 (S.D. Fla. April 24, 2003) (weighing the factor in favor of application of Florida law on the grounds that defendant had "business ties and interests" in the state). Given Howden's and INS's business activities in Florida, this factor provides additional support for the application of Florida law.

III. The Relevant Factors under *Restatement* Section 6 Strongly Favor an Application of Florida Law

A. Needs of the Interstate and International Systems — 2(a)

Citing the *Chase Manhattan Bank* case, Howden claims that "applying English law to regulate the conduct of Howden will facilitate the workings of the international system by continuing to encourage Lloyd's brokers to work in overseas markets without fear of regulation by unanticipated laws." (Mot., 15.) As an initial matter, Howden's statement regarding the "overseas markets" is wholly inconsistent with its assertion that the Howden brokers in this case worked only in the London market. Moreover, in *Chase Manhattan Bank*, the court held that the brokers in that case — which were based in England — would not expect the law of France (the domicile of the reinsurers) to apply where the brokers' conduct took place in New York. *See* 749

N.Y.S.2d at 636. Thus, the *Chase Manhattan Bank* court did not want to subject the brokers "to laws [*i.e.*, the law of France] beyond their expectations." *Id.* This case, by contrast, does not involve the application of an unforeseen law and Howden should have reasonably expected that its conduct in Florida would lead to the application of Florida law.

B. Relevant Policies of Florida and England — 2(b) & (c)

Howden argues that the English law should apply because of alleged differences between the law of Florida and England regarding (a) the standard for determining whether commission has been overcharged; (b) the standard for analyzing claims of aiding and abetting breach of fiduciary duty; and (c) the availability of punitive damages. (*See* Mot., 16-21.)[14] However, factors 2(b) and 2(c) do not relate to whether there are any differences in the details of the laws of the interested states; they examine whether the purposes underlying such laws are divergent. *See Restatement (Second) of Conflicts of Laws* § 6 cmt. e ("Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue.") Howden has conceded that, under both Florida and English law, brokers are required to use reasonable skill and diligence and may be subject to claims based on negligence and breach of fiduciary duty. (*See* Mot., 16-17.) Howden has also admitted that the rationale for these laws is the same in both countries, stating that "the laws of Florida and England both provide for deterrence of malpractice and fiduciary breach, as well as compensation for victims of such conduct." (*Id.*, 21.) Accordingly, there is no difference in the policies of Florida and England with respect to the laws regulating the conduct of brokers.

---

[14] On the one hand, Howden claims that there are differences between the laws of Florida and England, but, on the other hand, it states: "Exactly what constitutes the relevant English law and practice is not the subject of this motion … ." (Mot., 3 n.4.) Because Howden is not even attempting to provide evidence on English law, the Court should not accept Howden's statements regarding the alleged differences with Florida law.

Moreover, even if the Court examines the three areas of the law discussed in the Motion, it is clear that Howden has failed to demonstrate any divergence in the policies of Florida and England. *First*, Howden argues that, under English law, it is not improper for a broker to deduct its commission from the premium that the cedent pays to the reinsurer, in an amount that the broker deems to be usual and customary, where the cedent has not requested alternates to the usual method for paying brokerage. (*See* Mot., 17-18 (citing cases).) In each of the cases cited by Howden, the courts noted that the cedents did not inquire about, or place conditions on, the general market approach or the amount of brokerage that the brokers could take. *See Great Western Ins. Co. v. Cunliffe,* [1874] 9 Ch. App. 525; *Baring v. Stanton*, [1876] 3 Ch. D. 502; *N. v. Rotterdamse Assurantiekas v. Golding Stewart Wrightson Ltd.*, [1989] Court of Appeal (Civil) (unreported). These authorities are not relevant to the instant case because INS intentionally sought to control the amount of brokerage it would pay and informed the Defendants, in the Invitation to Bid and in several later communications, that they had to be fully transparent with INS regarding the premium and brokerage that would be charged for the 2009 Reinsurance Program. (*See* Ex. 1, ¶¶ 18-21 and 35.)

More importantly, Howden suggests that English law takes a *caveat emptor* approach to the issue of commission and that brokers are under no obligation to disclose their commission. (*See* Mot., 18 (citing *Rotterdamse* case for the proposition that "a broker is not bound to disclose the commission which he has deducted from the premium, so long as the commission is a usual or normal commission in the particular line of insurance").) That is incorrect. The Handbook of the Financial Services Authority ("FSA") in England, which regulates Howden, states that "[a]n insurance intermediary must, on a commercial customer's request, promptly disclose the commission that it and any associate receives in connection with a policy." ICOBS 4.4.1,

http://fsahandbook.info/FSA/html/handbook/ICOBS/4/4.[15] Thus, in circumstances where, as here, the cedent has requested transparency regarding the amount of commission, brokers in England are required to divulge the information. INS will present expert testimony in this case that U.S.-based brokers make similar disclosures upon request. Thus, the policies in Florida and England with regard to the disclosure of commission are the same.[16]

Second, Howden contends that Florida and English law differ with regard to aiding and abetting a breach of fiduciary duty because, according to Howden, English law requires a finding of "dishonesty" on the part of the aider and abettor. (*See* Mot., 19-20.) Once again, however, Howden has not shown that the laws in Florida and England have a different purpose. Howden claims that the application of Florida's purportedly lower standard "would be offensive to England's sensibilities," (*id.*, 20), but it provides no relevant support for such an assertion. Given that, as shown above, Howden engaged in conduct in Florida, it should make sense to an English court that the aider and abettor liability would be governed by the law of (a) where the primary breach of fiduciary duty by HRG occurred; and (b) where a substantial amount of Howden's activities relating to the breach of fiduciary duty took place.[17]

Third, Howden maintains that an award of punitive damages in this case under Florida law "would be offensive to England's system of jurisprudence and public policy." (*Id.*, 21.) Howden admits, however, that punitive damages are available in England and argues only that the awards of punitive damages in England are less frequent and smaller than those in the U.S.

---

15 "ICOBS" refers to the "Insurance: Conduct of Business sourcebook." http://fsahandbook.info/FSA/html/handbook/ICOBS. Copies of the FSA materials are attached hereto as an Appendix hereto.

16 The Motion ignores the allegations against Howden relating to grossing up, but it should be noted that the practice is improper in both Florida and England. INS will present expert evidence in this case regarding the grossing up prohibition in the United States, which is the same as in England. Howden has set forth the rule against grossing up in its pleadings in this case. (*See* Ex. 26, Affirm. Defenses, ¶ 14.)

17 Howden also cites to *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1076 (9th Cir. 1971). (Mot., 20.) That case, which involves the issue of punitive damages, is discussed below.

(*See id.*, 20-21.) This admission distinguishes Howden's sole authority, *Franklin Supply*, from the instant case. In *Franklin Supply*, the court noted: "Venezuela does not provide for punitive or exemplary damages under its civil law. Its policy in that regard must be that adequate compensation as well as deterrence is effected by its ordinary remedies." 454 F.2d at 1076. In contrast to Venezuela, the law of England does provide for the imposition of punitive damages.

Furthermore, Howden has not shown that Florida and England have a different rationale in allowing for punitive damages. Instead, it appears that the purpose behind the punitive damages — which is to deter egregious behavior — is the same in Florida and England. In addition, both Florida and England limit the imposition of punitive damages to certain circumstances and impose caps (albeit at different levels) on the amount.

One of Howden's cases, *Grupo Televisa, S.A. v. Telemundo Comm. Group, Inc.*, 485 F.3d 1233 (11th Cir. 2007), supports the application of Florida law, despite INS's intent to seek punitive damages. In *Grupo Televisa*, the defendants argued (as Howden does here) that the Florida court should apply foreign law, the law of Mexico, but the court held that the Mexico-based plaintiffs could invoke Florida law because the tortious conduct occurred in Florida. *See id.* at 1241-42. The court also noted that Florida has an interest in deterring conduct within the state through the imposition of punitive damages. *See id.* The same interest is present here.

C. Basic Policy Underlying Tort Law — 2(e)

As discussed above, Howden admits that the policies underlying tort law in Florida and England are the same. (Mot., 21.) Punitive damages reflect these policies, particularly the shared policy of deterrence. *See, e.g., Grupo Televisa*, 485 F.3d at 1242. Howden asserts that the similarities between the two tort systems render this factor "neutral." (Mot., 21.) To the contrary, this factor favors the application of Florida law because (a) the imposition of punitive

damages under Florida law would provide greater deterrence to wrongful conduct within the state; and (b) the policy of England would not be offended, since English law also allows for punitive damages. *See Restatement (Second) of Conflicts of Laws* § 6, cmt. h ("[T]here is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved.").

D. Ease in the Determination and Application of the Law — 2(g)

Howden argues that "this factor is either neutral or slightly in favor of Florida law" because English law derives from the same common law tradition and is in the same language as Florida law. (Mot., 22.) Howden, however, ignores several issues.

First, as the court noted in *Grupo Televisa*, "[n]othing could be easier than for a court in Florida to apply Florida law to tortious conduct which took place in Florida." 485 F.3d at 1246.

Second, despite the similarities in the common law tradition and language, the application of English law raises evidentiary issues and other complexities. It is likely that the Court would need guidance from experts with respect to English law, which would be expensive, time-consuming and fraught with potential pitfalls. Even the cursory discussion in the parties' submissions demonstrates that there are subtleties in the English law regarding the relevant areas.

Third, Howden incorrectly assumes that only the Court would be faced with applying English law. If INS survives summary judgment on its tort claims (which is likely given the fact-intensive nature of the issues), a jury would be faced with the daunting task of following instructions under both Florida and English law if the Court were to grant the Motion. Furthermore, the instructions for the tort claims would change depending on the parties involved. The parties agree that INS's tort claims against HRG are governed by Florida law. Thus, if Howden were to prevail on the Motion, the jury would apply Florida law to INS's tort claims

against HRG but English law with respect to the same claims against Howden. Such a result would be absurd, especially given that INS has alleged that Defendants engaged in joint conduct, and would greatly increase the likelihood of juror confusion.

In sum, this factor weighs heavily in favor of an application of Florida law.[18]

Conclusion

For the foregoing reasons, the Motion should be denied in its entirety.

[18] INS will not discuss the factors in 2(d) and 2(f) at length because they are of little significance in the choice-of-law analysis for torts, especially negligence. *See Restatement (Second) of Conflicts of Laws* § 6, cmt. g (noting that, in negligence actions, "the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question"). To the extent, however, the expectations of the parties are relevant here, the significant business activities described above demonstrate that the application of Florida law would not be beyond the parties' reasonable expectations.

Respectfully submitted,

HOGAN LOVELLS US LLP

Brickell World Plaza
600 Brickell Avenue
Suite 2700
Miami, Florida 33131
Telephone: (305) 459-6500
Facsimile: (305) 459-6550

By: _____

John F. O'Sullivan
Florida Bar Number: 143154
john.osullivan@hoganlovells.com

Matthew R. Bray
Florida Bar Number: 0030070
matthew.r.bray@hoganlovells.com

and

Pieter Van Tol *(Pro hac vice)*
pieter.vantol@hoganlovells.com

Derek Craig *(Pro hac vice)*
derek.craig@hoganlovells.com

Luz María Henríquez (*Pro hac vice*)
luz.henriquez@hoganlovells.com

875 Third Avenue
New York, New York 10022
Tel.: (212) 918-3000
Fax.: (212) 918-3100

Attorneys for Plaintiff
Instituto Nacional de Seguros

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U. S. Mail and electronic mail, this 2nd day of April 2013, to:

Robert N. Harris, Esq.
The Harris Law Firm Group, P.A.
777 Brickell Avenue, Suite 1114
Miami, FL 33131-2867

Attorneys for Defendant Hemispheric Reinsurance Group, L.L.C.

Alfred C. Warrington, Esq.
Valerie Shea, Esq.
Charles Davant, Esq.
Sedgwick LLP
2400 E. Commercial Blvd., Suite 1100
Ft. Lauderdale, FL 33308

Attorneys for Defendant Howden Insurance Brokers Limited

By: _____

Matthew R. Bray
Florida Bar Number: 0030070

APPENDIX

Chapter 4

Information about the firm, its services and remuneration

4.4 Commission disclosure for commercial customers

4

Commission disclosure rule

4.4.1 R FCA

(1) An *insurance intermediary* must, on a *commercial customer's* request, promptly disclose the *commission* that it and any *associate* receives in connection with a *policy*.

(2) Disclosure must be in cash terms (estimated, if necessary) and in writing or another *durable medium*. To the extent this is not possible, the *firm* must give the basis for calculation.

4.4.2 G FCA

An *insurance intermediary* should include all forms of remuneration from any arrangements it may have. This includes arrangements for sharing profits, for payments relating to the volume of sales, and for payments from premium finance companies in connection with arranging finance.

4.4.3 G FCA

(1) The commission disclosure *rule* is additional to the general law on the fiduciary obligations of an agent in that it applies whether or not the *insurance intermediary* is an agent of the *commercial customer*.

(2) In relation to *contracts of insurance*, the essence of these fiduciary obligations is generally a duty to account to the agent's principal. But where a *customer* employs an *insurance intermediary* by way of business and does not remunerate him, and where it is usual for the *firm* to be remunerated by way of *commission* paid by the *insurer* out of premium payable by the *customer*, then there is no duty to account but if the *customer* asks what the *firm's* remuneration is, it must tell him.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

INSTITUTO NACIONAL DE SEGUROS,

Plaintiff,

vs.

HEMISPHERIC REINSURANCE GROUP, L.L.C., and HOWDEN INSURANCE BROKERS LIMITED,

Defendants.
_____/

CASE NO. 10-33653 CA 04

DEFENDANT, HOWDEN INSURANCE BROKERS LIMITED'S, NOTICE OF FILING

Defendant, Howden Insurance Brokers Limited ("Howden"), gives notice of filing the transcript of the hearing in this matter held on April 5, 2013, regarding Howden's Motion to Determine Applicable Law.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic transmission this 9th day of April, 2013 to:

PIETER VAN TOL, ESQ.
DEREK J. CRAIG, ESQ.
LUZ MARIA HENRIQUEZ, ESQ.
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
pieter.vantol@hoganlovells.com
derek.craig@ hoganlovells.com
luz.henriquez@hoganlovells.com
Counsel for Plaintiff

JOHN F. O'SULLIVAN, ESQ.
Hogan Lovells US LLP
600 Brickell Avenue, Suite 2700
Miami, FL 33131
john.osullivan@hoganlovells.com
Counsel for Plaintiff

ROBERT N. HARRIS, ESQ.
The Harris Law Firm Group, P.A.
777 Brickell Avenue, Suite 1114
Miami, FL 33131
robert@harrislawinfo.com
Counsel for Hemispheric Reinsurance

SEDGWICK LLP
Counsel for Def. Howden Insurance Brokers Limited
2400 East Commercial Blvd., Suite 1100
Ft. Lauderdale, FL 33308
Tel: (954) 958-2500 / Fax: (954) 958-2513

By: _____
Valerie Shea
Florida Bar No. 0436800
valerie.shea@sedgwicklaw.com
Alfred C. Warrington, V
Florida Bar No. 0572111
alfred.warrington@sedgwicklaw.com
Charles S. Davant
Florida Bar No. 15178
charles.davant@sedgwicklaw.com

11322-000001/#2756

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION
CASE NO: 10-33653 CA 04

INSTITUTO NACIONAL DE SEGUROS,

Plaintiff,

vs.

HEMISPHERIC REINSURANCE GROUP, L.L.C., and HOWDEN INSURANCE BROKERS LIMITED,

Defendants.
_____/

Miami-Dade County Courthouse
73 West Flagler Street
4th Floor
Miami, Florida 33130
Friday, 7:30 a.m.
April 5, 2013

This cause came on for hearing before the Honorable Beth Bloom, Circuit Court Judge, pursuant to notice.

APPEARANCES:

PIETER VAN TOL, ESQUIRE
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
pieter.vantol@hoganlovells.com
Attorney for Plaintiff

VALERIE SHEA, ESQUIRE
ALFRED C. WARRINGTON, V, ESQUIRE
SEDGWICK, LLP
2400 East Commercial Boulevard
Suite 1100
Fort Lauderdale, Florida 33308
VALERIE.SHEA@SEDWICKLAW.COM
ALFRED.WARRINGTON@SEDGWICKLAW.COM
Attorneys for Defendant Howden

ROBERT N. HARRIS, ESQUIRE
THE HARRIS LAW FIRM GROUP, P.A.
777 Brickell Avenue
Suite 1114
Miami, Florida 33131
robert@harrislawinfo.com
Attorney for Defendant Hemispheric

ALSO PRESENT:
Andrea Bragoli
Ray Abadin
Mr. Blake

INDEX

DEFENDANT'S EXHIBITS FOR IDENTIFICATION

DEFENDANT'S EXHIBITS IN EVIDENCE

THE COURT: We're here on the case of Instituto Nacional De Seguros versus Hemispheric Reinsurance Group and Howden Insurance Brokers.

May I have your appearances, please.

MR. VAN TOL: Good morning, Your Honor. Peter Van Tol, from Hogan Lovells, for plaintiff INS.

MR. HARRIS: Robert Harris for the defendant HRG, Judge.

MR. WARRINGTON: Al Warrington for Howden.

MS. SHEA: Good morning, Your Honor. I'm Valerie Shea, also representing Howden.

With us is our client, Andrea Bragoli is here from London, from Howden Insurance Brokers, and Ray Abadin.

THE COURT: Good morning. Good to see each of you.

We are here, actually, for three motions. One is a motion to determine the applicable law. This is Howden's motion. However, as a predicate to that motion, there's a request for the court to take judicial notice. And then we'll certainly deal with the motion to dismiss

the cross-claim.

So I am ready to hear argument, unless there is an agreement with regard to judicial notice that I believe deals with four points of law and then a screenshot from a website of the Financial Conduct Authority.

MS. SHEA: Yes. Good morning, Your Honor. I don't know if there's any opposition to the --

MR. VAN TOL: I think we can cut to the chase, Your Honor.

THE COURT: Okay.

MR. VAN TOL: As a matter of judicial notice, we have no objection. We don't agree that it necessarily sets forth the exact state of English law, but they are reported cases. We don't dispute that. And we don't dispute the screenshots. So for purposes of judicial notice, we have no opposition.

THE COURT: All right.

MS. SHEA: If I can make a suggestion on how to proceed.

THE COURT: Go ahead.

MS. SHEA: The motion to determine applicable law is an evidentiary motion.

That's the one that was set for two hours for later this morning.

And we understand you're in trial. We very much appreciate your accommodating us coming in.

THE COURT: My pleasure.

MS. SHEA: It's really critical to our case and to our motion that Mr. Bragoli, who's here from London today, be able to testify because he, obviously, had flown in. He was in town before we got the call from Liz about the scheduling problem.

So the motion -- that motion was originally set for two hours. I understand you have just probably an hour and 20 minutes or so with us this morning. And what we would suggest is that we make a very brief opening statement, put Mr. Bragoli on, let him testify, cross, any questions the judge has, and then, if need be, we could come back later on, a different day, for completing oral argument on the motion.

THE COURT: Whatever is your pleasure. Perhaps we can get through everything today. I understand Mr. Bragoli is going to be

testifying as to why English law should govern. I know there was some question by way of the response with regard to the extent of his testimony.

Is there any objection to the Court considering Mr. Bragoli's testimony?

MR. VAN TOL: Not in the first instance, Your Honor. I suppose I'll have to hear what Mr. Bragoli has to say. If it is limited to what Howden said in its papers, which was a little vague, about Howden's operations, we'll have to see.

If Mr. Bragoli tries to testify about what other percipient fact witnesses did or said, then I will object. But as to Mr. Bragoli taking the stand, I have no objection.

THE COURT: Okay.

MS. SHEA: So with that, if I may, I'll just make a brief two- or three-minute statement to kind of put things into context. I very much appreciate the fact that you're familiar with the issues. And we'll get Mr. Bragoli on and off and see how far we can go.

As I believe you know, Howden, my client, is based in London. And this motion seeks to establish that as to the tort claims in this case, Howden's conduct should be judged in accordance with English law.

As you know, we're set for trial with you in September. The case is several years old, and we've only been before you, really, on fairly procedural matters before. This is the first one that really gets into the substance of it.

And again, I'm going to skip a lot of the run-up to this because if we need to, we could come back on a different date.

THE COURT: Well, we can actually move right to the Bishop "most significant relationship" test. That's what the court is going to look to.

MS. SHEA: Okay. That's exactly correct. And as I explained in the motion, there's a contract claim. If they win on a contract claim, then we don't care about any of this. But if they lose on the contract claim, then we get to the tort claims. And for the guidance of all the parties, we would like to get this

established in terms of under the Bishop factors.

THE COURT: Okay. Counts III, IV and VI.

MS. SHEA: With that, I will call Mr. Bragoli then.

THE COURT: Sir, if you'll step forward. Remain standing. Raise your right hand.

Thereupon:

ANDREA BRAGOLI

was called as a witness and, having been first duly sworn and responding, "I do," was examined and testified as follows:

THE CLERK: Defendant's Exhibit A1 for identification.

MS. SHEA: I've asked the in-court clerk to just mark four exhibits.

THE COURT: Yes, of course.

MS. SHEA: I don't need them yet, though.

DIRECT EXAMINATION

BY MS. SHEA:

Q. All right. Mr. Bragoli, would you please tell the court your full name and where you live, please?

A. My name is Andrea Bragoli, and I live in London, UK.

Q. And who do you work for in London, England?

A. I'm with Group Broking Director of Howden Broking Group, which is the parent company of the defendant Howden Insurance Brokers Limited, of which I'm also a board director.

Q. All right. And how long have you been with this company?

A. I've been with this company coming up on 18 years.

Q. And in all that time, have you worked as a broker in the London market?

A. Yes.

Q. What is the business of Howden?

A. Howden is a regulating insurance broker under the FSA rules. We procure insurance and reinsurance on behalf of our clients in the UK and abroad.

Q. For the benefit of the judge, could you briefly explain what the FSA is? What does that mean?

A. The Financial Services Authority was our regulator up until the 1st of April of this year where it was taken over by the Financial Conduct Authority. They are the overarching regulatory

authority for insurance intermediaries in the UK.

Q. It's a branch -- it's an executive office of the government in the UK?

A. Yes.

Q. And could you also briefly, for the judge's benefit, explain the difference between broking insurance and the role that you serve as a reinsurance broker?

A. "Insurance broking" is dealing with retail commercial clients and retail consumer clients for direct insurance where we act as the intermediary between our clients and the insurers.

"Reinsurance" is the procurement of reinsurance protection, which is basically insurance for insurers. So our clients are generally producing reinsurance brokers and/or insurance companies who require protection for their risks.

Q. Okay. Very good. Who are your clients? I'm sorry. You just said that they're primarily producing brokers or they could be direct insurers. But where do they come from?

A. They come from all over the world.

Q. Okay. Is there any formal affiliation between Howden and the producing brokers or the insurers that come to you seeking reinsurance?

A. No.

Q. In other words, anyone can call you and you'll take their call?

A. Anyone can call us. Our operations are based and centered in London in the financial center. It's really recognized as the financial insurance hub of -- globally. But we get calls from producing brokers throughout the world.

Q. Okay. And when you receive these calls from clients, by and large, where is it that it's understood you're going to be obtaining their reinsurance or their insurance?

MR. VAN TOL: Objection, Your Honor, to the extent Ms. Shea is asking Mr. Bragoli to speculate about what his clients are thinking as opposed to what Howden is thinking.

THE COURT: Sustained.

BY MS. SHEA:

Q. When you receive these calls, what is the premise on which Howden operates in terms of where it's going to obtain this reinsurance or insurance?

A. One of Howden's defining features is that we're a Lloyd's insurance broker, and that means that we have specific access to probably the most influential insurance market in the world. It's

based in the city of London, and generally, those clients come to us because we can access the major financial hub of insurance and reinsurance in London along with other international firms. But the primary focus is because we're a London-based broker, we can get access to the London market.

Q. And how much of your business comes from outside of the UK?

A. Approximately 60 to 65 percent of our business is sourced outside of the UK.

Q. And that can come from anywhere?

A. Can come from anywhere in the world, over 50 countries.

Q. And you mentioned that your office is right in the city of London?

A. Yes, it is.

Q. And is that where your team of brokers primarily is?

A. Yeah. All of our broking -- our international wholesale team -- teams, there are a few, are headofficed and based in London.

Q. And again, for the judge's benefit, would you just tell her what you mean by the "international wholesale team"?

A. The "international wholesale teams" are

the teams that primarily deal with reinsurance business throughout the world. There are a number of teams focused around product lines, and this particular issue is focused on our international property team.

Q. And you mentioned that Howden is a Lloyd's broker. Is that a choice that Howden makes?

A. Yes.

Q. Okay. Could you just briefly explain to the judge -- I realize it's a very broad question, but could you give her a sense of what Lloyd's is and what it means to be a broker admitted to Lloyd's?

A. I'll try. I suppose many people think Lloyd's is an insurance company, but it isn't. It's a marketplace made up of over 50 -- 50 to 70 syndicates. These are individual risk takers that make up their own decision with regards to selection of risks and rating. It's a -- the market is housed in a building, which is really like an underwriting trading floor. Each of these syndicates sit in a box, which is really a large desk.

And we, as brokers, really wander around the underwriting room negotiating terms and conditions for our clients, with each and every one of them, independently and individually.

Lloyd's itself is really an overarching brand. It provides a central fund to give security. It offers certain central processing and administration services, but each of the actual individual syndicates take risks and make their own decisions.

Q. So in terms of the operational side, you, as a Lloyd's broker, Howden as a Lloyd's broker, your folks all have access; they can go into the Lloyd's building, they can go negotiate directly with the underwriters in the boxes?

A. Yes, we can. But in order to do that, you must be accredited as a Lloyd's broker. It's an application process which is quite rigorous. You're required to demonstrate that you have all of the requisite means to negotiate terms, to manage the business, to process all of the individual accounts, to actually discuss and deal with all of the mechanics behind Lloyd's.

Q. You mentioned that there's actually a branding component to Lloyd's and administrative processes and so forth.

A. Yes.

Q. Does Howden make use of the Lloyd's brand and these administrative processes, and if so, if you

could just briefly explain that to the judge.

A. Yeah. As a fully accredited Lloyd's broker, we are allowed to use the Lloyd's brand in our marketing and promotion around the world and to, obviously, make use of Lloyd's licenses around the world.

But we also have access to certain central information systems and processing systems. The main processing system is called "exchanging." That's the process by which we settle funds into the Lloyd's underwriter. That's all based in the UK.

And we also make use of the central information system called "crystal," which gives us some detailed information regarding local regulations and/or tax issues, country reports, things like that, to help us understand the dynamics of a particular country if we're talking to a producing broker in that country.

Q. So, for example, if somebody calls you for reinsurance from Nigeria --

A. Yes.

Q. -- and you are trying to satisfy that order, you can make use of the crystal system and put in certain parameters and it will assist you in making sure there's compliance with Nigerian --

A. Well, it helps us understand some of the major issues, but we would generally also want to make sure that we understand the local requirements in conjunction with that producing broker locally, and that's why producing brokers are so important.

Q. When you place a piece of reinsurance business at Lloyd's, how is it documented?

A. We use a document called the Market Reform Contract Slip. It's a multi-paged contract which sets out in a very structured form the terms and conditions that we are seeking to negotiate with the underwriters and reinsurers. It has -- it covers details of the risk, client name, address, type of business, for example, the wording, the coverage.

Then it has a section which deals with processing and certain agreement requirements. It has a section on commissions and on taxes. It has another section which is where the underwriters will put their agreement in terms of conditions. We call those "lines."

And they normally follow the format of a stamp and a signature, which we call a "scratch." And that contract is really standard across the market for all brokers involved.

Q. Okay. I have an example of one that I've

asked the court clerk to mark as an exhibit.

MS. SHEA: Have you had a chance to mark that?

THE CLERK: Yes.

MR. VAN TOL: Counsel, can I have a copy, please?

MS. SHEA: Yes.

BY MS. SHEA:

Q. Let me show you what's been marked for identification -- sorry, am I missing the --

Oh, he marked it all. Okay. One moment.

I may need these individually marked.

THE COURT: Okay. No problem. Robert, do you mind?

MS. SHEA: So sorry.

BY MS. SHEA:

Q. While we're waiting for that. Is there ever a policy of insurance issued?

A. Generally --

Q. Reinsurance, pardon me.

A. Generally, for reinsurance, no. The Market Reform Contract Slip is utilized as the contract of reinsurance.

Q. All right. Would you please explain to the Court, as an admitted Lloyd's broker, what are

the levels of regulation to which you are subject?

You briefly mentioned the FSA. What is the nature of the FSA's compliance authority, for example?

MR. VAN TOL: Your Honor, I object to the extent that Mr. Bragoli is purporting to give expert testimony on how brokers in London are regulated. If he has an understanding as a lay person, I don't have an objection. But I just want to be clear that Mr. Bragoli has not been qualified as an expert.

THE COURT: The objection is noted. It's overruled.

THE WITNESS: Well, the structure and regulation in the UK is fairly stringent, and we probably work in one of the most regulated environments for insurance in the world. We have, really, at the top of the tree what we call the European Insurance Mediation Directive which sets out the structure for regulation of insurance intermediaries across Europe.

The Financial Conduct Authority now, previously the Financial Services Authority, interprets those rules and sets out its own principles-based regulation structure for

insurance intermediaries. That is set out in a format of 11 principles and certain insurance conduct business rules and sourcebooks.

And then Lloyd's has its own further structure of which it requires us to demonstrate that we are fit and proper to be Lloyd's insurance brokers, that we have the wherewithal to conduct business within Lloyd's and to look after our clients' interests, and it reflects very closely the FSA/FCA's requirements.

We also then have a number of other associations, like British Insurance Brokers Association, which also seeks to interpret and generate guidance and instruction upon how we should operate in relationship to our clients.

BY MS. SHEA:

Q. So that's just they changed the name from the Financial Services Authority to the Financial Conduct Authority?

A. Yes, the 1st of April.

Q. And does the FSA have any kind of disciplinary -- does it do any audits? Does it have any disciplinary ability? How does it interact with Howden --

A. Yes, it does.

Q. -- in your experience, not as an expert on the agency?

A. The FSA had authority to undertake regular -- and, in fact, was obligated to undertake regular audits of insurance intermediary firms that regulate the buyer. They tended to occur every three to five years. It also had the authority to come in at any given point and take Dematic review of the insurance intermediary's activities at any time.

Its audits can take -- could take two to three weeks. They were very substantial and significant and went through all of the business processes of the firm. In fact, Howden's had a, what we call, an ARROW visit -- that's what they call them -- some five years ago. So it's due for another audit now by the FCA.

The FCA's approach is very, very new, and it's really just starting to understand what their requirements are going to be, but it looks like they're going to be much more focused on retail customers and really sort of be clear on their interpretation that the regulation locally was really focused around specific aspects of the broker's activity rather than trying to cover everything in

one go.

Q. And I believe I asked you, but the FCA now has the ability to levy fines, sanctions --

A. Yes.

Q. -- and so forth?

A. The FSA and FCA have the ability to fine, to remove individuals from being fit and proper persons, to even conduct what we call a Section 166, which is to obligate the firm to take on a third-party review firm to look into one particular aspect to pay for those costs and then implement whatever requirements are needed.

(Thereupon, Defendant's Exhibit A1 was marked for identification.)

BY MS. SHEA:

Q. Let me just stop right here and just get back -- let me just show you what was marked now as --

THE CLERK: A1 --

MS. SHEA: -- A1 --

THE CLERK: -- for ID.

MS. SHEA: -- for ID.

BY MS. SHEA:

Q. Can you just, please, identify that for the Court?

A. Yes. This is a Market Reform Contract Slip.

Q. All right. I'll offer that in evidence.

MR. VAN TOL: No objection, Your Honor.

THE COURT: Without objection. It's Exhibit 1 in evidence.

BY MS. SHEA:

Q. Does the FSA, now the FCA, address broker remuneration? Again, recognizing you're not an expert. We're not asking you as an expert in English law. But in your experience as an officer of Howden, are you familiar with whether the FCA addresses broker remuneration?

A. Both the FSA and FCA have the principles-based regulatory structure. There is no specific referral to how commission is structured or what levels of commission can be charged, but there are various sections within those principles that require brokers to act fairly and with reasonable -- with a reasonable approach to their clients.

And so what generally drives commission is custom and practice. Many different insurance and reinsurance lines have different levels of commission that are generally acceptable, but these things are very variable and to change over time.

Q. Does Lloyd's have written and unwritten rules?

A. Yes, it does. It has quite unique rules. Again, these change over time. The unwritten rules are probably greater than the written rules. You know, we -- Lloyd's had rules many years ago that extended to which set of the double doors you should walk into a room and out of a room from, right through to, you know, how you should address an underwriter and how you should process an account.

Q. I believe you told me yesterday there's even dress codes, right?

A. A few years ago lady brokers weren't allowed to wear trousers in the underwriting room, but we managed to get that out of the way.

Q. So that was an unwritten rule, but it was a rule?

A. It was an unwritten rule, yes.

Q. Everybody had to live with that one?

A. Yeah, everyone had to live with that one.

Q. Okay. No trousers at Lloyd's.

A. Yeah.

Q. How, in any way, does Lloyd's address broker remuneration?

A. Again, it's really a matter of custom and

practice that Lloyd's itself just really relies on the brokers working within the law.

As I've mentioned previously, the underwriting room is made up of a selection of different syndicates and markets. They tend to write, what we call, on a subscription basis, and that is, that they all take small participations and an overall risk either within one layer or a series of layers.

So there's a general need for brokers to agree terms with each underwriter. Each underwriter within each product line understands what the general level of commission is that is acceptable in the market, and people work within those generally acceptable levels.

Q. Okay. And is the given commission in a given agreement with a given underwriter memorialized in the slip, as a matter of course?

A. Yes, it is.

Q. Could you just briefly show the judge where that is?

THE COURT: Okay. Thank you, sir.

BY MS. SHEA:

Q. And does Lloyd's have any kind of --

MR. VAN TOL: For the record, Your Honor,

would counsel or the witness mind identifying the page number that we're looking at?

THE COURT: On the bottom it's HIB00173.

MR. VAN TOL: Thank you, Your Honor.

THE COURT: Mr. Bragoli, I'm just going to ask the clerk to mark this as Exhibit 1 and then I'll give it back to you, sir.

THE CLERK: A1 for identification will move in as Defendant's A.

THE COURT: You're going to label as A?

(Thereupon, Defendant's Exhibit A was admitted in evidence.)

MS. SHEA: Thank you.

BY MS. SHEA:

Q. Does Lloyd's have any written advisories that are instructive to a broker, such as Howden or such as yourself, with respect to the amount of allowable brokerage?

A. There are no advisories with regards to the amount of brokerage, other than, as I said, what is customary and common practice within each product line. There are advisories that are issued with regard to an issue called "grossing up," where Lloyd's have issued advice and -- in the past which state that brokers should not express or should not

take, what we call, secret profit, and that is charging a client a premium which is higher than the premium that is demonstrated in the slips.

Q. Premium comprised of the different elements on the slip?

A. Premium comprised of all the elements on the slip, which include deductions.

Q. All right. So then, as an admitted Lloyd's broker, is Howden subject to the Financial Conduct Authority as well as the Lloyd's written rules and all of these customs and practices?

A. Yes, it is.

Q. And does Howden govern itself by those rules?

A. Yes, we do.

Q. Turning to the transaction involved in this suit. When was Howden retained and by whom?

MR. VAN TOL: Object to the form. I'm sorry, objection, Your Honor. I thought the whole basis of Mr. Bragoli's testimony was he was going to speak generally about the operations of Howden. In fact, in the pleading that Howden put before the Court, it expressly has that limitation. It says, quote -- and this is referring to Mr. Bragoli -- he will not

be testifying to details of transactions but as to Howden's structure, governance and the like, period, end quote.

We've just heard about Howden's structure, governance and the like. And now we're going to the 2009 transaction.

MS. SHEA: No.

MR. VAN TOL: Mr. Bragoli was not present for those transactions. Everything he says is hearsay, Your Honor.

THE COURT: Okay.

MS. SHEA: Briefly. I filed a brief on this, in which I said, he's not testifying to the detail of transactions. I don't have a single e-mail. I don't -- I'm not going to ask about a single telephone call. I am asking him as the corporate representative --

THE COURT: The date Howden was retained?

MS. SHEA: The date Howden was retained, by whom, and, in general, some questions. I think we can take --

THE COURT: I'll allow it. The objection is overruled.

MS. SHEA: Okay. Sorry.

THE WITNESS: Can I just ask for some

clarification?

BY MS. SHEA:

Q. Yes. You're allowed to answer the question: When was Howden actually retained and by whom?

A. For this --

Q. Took place.

A. -- for this particular year?

Q. Correct.

A. So we were originally --

MR. VAN TOL: I'm sorry, Your Honor, to burden the Court with another objection. The issue of by whom Howden was retained actually calls for a legal conclusion. We're debating that in this case. That's what the case is about.

THE COURT: Okay. The objection is noted. It's overruled. Let's move forward with the testimony.

BY MS. SHEA:

Q. Who hired you, when?

A. We were hired by HRG, and we were hired for this particular transaction around about March 2009.

Q. And what were you hired to do --

A. We were --

Q. -- in general?

A. -- we were asked by HRG to support them in obtaining capacity for the reinsurance program of INS, which in turn was ensuring the insurance program, the property program of ICE, which is the electrical grid of Costa Rica.

Q. And when you say "support capacity," just because that's a term of art, that means get reinsurance --

A. That was to get --

Q. -- in a certain amount?

A. Yeah, the program is a very large, complex program involving some $300 million of protection, and it requires, really, a very, very complex and large placement with many, many underwriters to support that reinsurance program. And HRG asked us to support them in the system in approaching the markets in London and elsewhere, but predominantly in London.

Q. All right. And how did Howden go about doing that?

MR. VAN TOL: Objection, Your Honor.

Now, we really are into the facts of the case.

Mr. Bragoli had no involvement in 2009. He's

not on a single document dated 2009. I've deposed Mr. Bond, Mr. Holden, several other brokers who were there. Mr. Bragoli was not there.

If Howden wanted to have testimony about what happened, what the conduct was at the time, they could have brought those witnesses, and they didn't. They brought Mr. Bragoli.

So I object to this --

THE COURT: The objection is noted. It's overruled.

BY MS. SHEA:

Q. How did Howden go about doing that?

A. Howden really put together a team of people to access the market that was made up predominantly of brokers. We had a very limited timeframe in order to achieve what we needed to achieve. So the brokers were the individuals that approached the underwriters and negotiated terms.

We had account executives who are interacting with HRG and making sure that the communication was efficient and effective, and we had a number of senior managers who were overseeing the process. And that was all supported behind the scenes by technicians who were involved in compiling

general spreadsheets and documents that supported that whole process.

MS. SHEA: All right. I'm sorry. Forgive me again. These -- could you mark these as individual?

Thank you.

BY MS. SHEA:

Q. So where were all these people physically located that undertook this project?

A. They were all physically located in our head office in London.

Q. All right. And how many reinsurers did your London team make contact with in order to achieve this placement?

THE CLERK: What are these?

MS. SHEA: They are diagrams.

THE CLERK: Diagrams.

MS. SHEA: Thank you.

THE WITNESS: At the end of the day, for -- to complete the program, I think that the -- I know that the brokers approached in excess of 60 markets.

BY MS. SHEA:

Q. Okay. And again, you're talking about people walking from your office over to Lloyd's,

going around to these boxes; some of it may have been done elsewhere, but a large part of it is face-to-face at the Lloyd's building, correct?

A. Predominantly the Lloyd's environment is a face-to-face environment. That's what makes it quite unique in the world. And that's the predominance of the support that's provided and discussed, but they also had e-mail correspondence and phone correspondence with both markets in the UK and elsewhere.

Q. When you say "and elsewhere" -- I'm sorry. When you say "and elsewhere," did some of the reinsurance capacity come from outside of the UK?

A. Yes, it did.

Q. Can you give an estimate of percent or what -- of the total composite picture?

A. An exact percentage, I'm sorry, I can't, but it was a minority. The majority of it was London-based markets.

(Thereupon, Defendant's Exhibit A4 was marked for identification.)

(Thereupon, Defendant's Exhibit A5 was marked for identification.)

BY MS. SHEA:

Q. Okay. I'd like to show you what I've

marked Exhibits A4 and A5 for ID.

A. Thank you.

Q. I'm sorry. I've been asked for the number on that again.

A. A4 and 5.

Q. Sir, can you identify those?

A. Yeah, we colloquially call these mud maps, and they're basically market diagrams that allows us to follow the individual support that's obtained on very complex layer structures to ensure that we end up with a full placement and have no gaps.

MR. VAN TOL: Your Honor, before Mr. Bragoli testifies further, I think these exhibits should be admitted because -- or attempted to be admitted because I have objections to them. There's no foundation laid that Mr. Bragoli has ever seen these or who created them or where they came from.

THE COURT: For now they've just been identified. So before we use the demonstrative, are you intending to introduce the exhibit?

MS. SHEA: I would like to use it just as a demonstrative. I don't -- it doesn't need to be in evidence. It's just really an

illustration, which, if I may, I'll just put it up here.

BY MS. SHEA:

Q. Mr. Bragoli, have you seen this diagram before?

A. Yes, I have.

Q. And can you -- are you capable of interpreting and explaining to the judge what this illustrates?

A. Yes, I think I can.

Q. Can you please do that?

A. What this basically illustrates is the structure of layering that takes us up to the full 95 percent audit that we were asked to complete by HRG to the $300 million capacity that was required to reinsure INS. Each of the boxes show a particular layer of limit in a position within the layering structure, so there are different primaries and different excess layers, as we call them, which are additional layers that build up the structure to 300 million.

So each one of those boxes will have different participation by different syndicates. Each one of those boxes could be completed by one or more markets, be they Lloyd's markets or non-Lloyd's

markets.

And this diagram really demonstrates with the -- the lettering is really a key to access the different slips and reinsurance contracts that exist.

Q. And likewise, are you familiar with -- then can you explain what's depicted on A5, the second chart?

MR. VAN TOL: Objection, Your Honor. This is not merely a demonstrative. This is -- Mr. Bragoli is purporting to give testimony about what these documents are.

THE COURT: Mr. Bragoli, would this assist you in explaining your testimony, sir?

THE WITNESS: Yes.

THE COURT: The objection is overruled.

THE WITNESS: This is another version of the previous diagram. This with more detail. This, again, we would use to make sure that we fully understand each and every line that we've picked up, each participation from each market, and to demonstrate the -- the complete structure. So within that, one could tell where the markets are, who they are, where they reside.

BY MS. SHEA:

Q. All right. And again, this just shows the complexity in terms of the number of participants involved and how many shares you have to account for in completing this mud map?

A. Yes.

Q. And again, all the work that Howden did on this undertaking, this large, complex undertaking, took place from your London offices, correct?

A. All done in London, yes.

Q. Now, when you completed the placement, did there come a time you sent confirming paperwork to HRG?

A. Yes, there did.

(Thereupon, Defendant's Exhibit A3 was marked for identification.)

BY MS. SHEA:

Q. Let me show you what's been marked as Exhibit A3 for identification.

Please leaf through that and see if you can identify that.

A. Yes, I can.

Q. All right. Please tell the judge what that is.

A. This is our -- what we call our cover note

and debit note and Terms of Business Agreement which was sent out to HRG to confirm what was placed and on what terms.

Q. All right. And that is a business record of Howden that you compile in the ordinary course of how you do business with your producing broker?

A. Yes, it's a very -- its generality is very standard. Obviously, the detail changes with every risk.

Q. All right.

MR. VAN TOL: No objection to the admission, Your Honor.

MS. SHEA: With that, please.

THE COURT: Defendant's Exhibit B into evidence.

May I have that, sir, just so the clerk can mark that.

Thank you.

THE CLERK: Prior A3 is now Defendant's B in evidence.

(Thereupon, Defendant's Exhibit B was admitted in evidence.)

BY MS. SHEA:

Q. Mr. Bragoli, could you turn to the page that I've marked with the tag with the flag on it?

This document has a lot of pieces to it, it appears, correct?

A. Yes.

Q. Please turn to that tabbed page and please just briefly explain to the Court what that document consists of, what that part of the exhibit consists of.

A. Okay. This is what we call our Terms of Business. It's otherwise known as a TOBA. It's what we send out to all clients that sets out certain disclosures that we need to make in accordance with our regulation in the UK. It sets out what services we're agreeing to offer, and it sets out, really, our dealings and relationship with our client.

Q. All right. And on the first page of that, which is marked at the bottom with the Bates number HIB6467.

A. I can only see HIB06 here. So please -- it's the first page, is it?

Q. The first page of the TOBA.

A. Yes.

Q. It says page 1 of the TOBA.

A. Okay.

Q. On the right-hand column there's a section that says "about us."

A. Yes.

Q. Could you please read the first two paragraphs of that into the record?

A. Yes, it's, "About us. Howden Insurance Brokers Limited, brackets, HIB, closed brackets, whose head office is, Bevis Marks House, Bevis Marks, London, EC3A 7JB is authorized and regulated by the Financial Services Authority. Our firm reference number is 312584.

We are permitted to advise upon, arrange and assist in the administration, performance of noninvestment insurance contracts. We are also permitted to act as an agent of insurers and Lloyd's of managing agents."

Q. All right. Sir, would you please turn to page 4 of that document, which I believe has the Bates number of 6470.

A. Yes.

Q. Do you see that?

And there's a shaded box at the bottom --

A. Yes.

Q. -- of that page. Could you kindly read the first and third paragraph of that into the record?

A. I'll do my best.

Q. It's little.

A. My eyesight -- "Important: This document sets out how we conduct business with all our clients and contains information that our regulator requires us to give to certain clients. You should read it carefully, and if there is anything you do not understand, or there is anything with which you disagree, you should contact your usual Howden executive immediately."

And the third paragraph states, "These Terms of Business are governed by and construed in accordance with English law and both you and we agree to submit to the jurisdiction of the English courts, if the occasion arises."

Q. All right. Thank you.

And is -- I believe you mentioned you incorporate this TOBA or these Terms of Business Agreement into all your communications or all your dealings with clients, correct?

A. We issue a TOBA with all of our documents confirming coverage.

Q. And why is that? You said it contains disclosures, but is that because you deal with people both inside and outside of the UK?

A. Well, it deals with disclosures that we're

required to make as part of our regulation in the UK. And we -- because these regulations are principle based, we have guidance and advice with regard how to interpret those regulations, and the requirement to issue a TOBA to our clients is an interpretation of that. So we are discharging our duties and we believe operating with best practice by issuing these terms of business agreements.

Q. Are you required to be licensed in states from which your customers come?

A. No, generally we are not. I believe there may be some one or two states where even as a foreign reinsurance broker you're required to be approved before you can accept business from producing brokers in that country. But generally our licensing is UK based.

Q. All right. Did you ever send this TOBA to INS?

A. No, we never did.

Q. Why not?

A. Because they're not our client.

Q. Did anyone from Howden ever travel to the United States or Costa Rica in connection with INS's business?

A. Yeah, our business development trips are

undertaken and we traveled there.

Q. So would you differentiate business development trips from execution of orders?

A. Yes, it's very different.

Q. And where did all of the work relating to the execution of the order by HRG take place?

A. All of our work as Howden, in execution of our duties, was undertaken in London.

Q. Isn't it true that Howden has some kind of affiliate here in Florida?

A. Yes, it is.

Q. Could you please explain to the Court what that consists of?

A. At the time or now?

Q. Well, how about at the time.

A. At the time the group had an operation called VK Howden, it was an operation based here in Miami but was focused solely on the generation of and support of business in Central and Latin America.

Q. Was there a business line in which it specialized that's different from what you do in London?

A. Not different to London, but it was a specialist line. They were focused on financial lines, which is really made up of directors, officers

and insurance professionals, indemnity or errors and omission and financial institution business.

Q. And Howden's involvement in the INS reinsurance was what line of business?

A. Property.

Q. Did you ever interact with the compliance side of Lloyd's as a result of this INS business?

A. Yes, we did. The -- at some point within 2009 we were contacted by Lloyd's and -- our compliance officer was contacted by Lloyd's, I should say, and asked regarding problems that they had been advised of with regard to the INS placement at that time. We explained what our understanding of the issues were at that time and we offered Lloyd's complete access to our records and our files, if they felt that there was anything that they needed to look at, but we never heard anything more after that.

Q. Okay. And how did Howden get paid in this transaction?

A. We were paid by means of commission that we agreed with our markets.

Q. And did you disburse premium payments to the reinsurers as well?

A. Yeah, we collected premium payment from HRG, we deducted our commission, and we paid the net

premiums to the markets all from our offices in London.

Q. Okay. Thank you. I don't have anything further on direct.

MS. SHEA: I would offer these -- the mud maps, the two mud maps into evidence.

MR. VAN TOL: I object, Your Honor. And that first document, the first time I've seen it is today. It's not been produced in this case. It was not produced to me in advance. I had no notice of it coming in. I don't know its providence. I don't know who prepared it. So I'm going to object to its admission.

It was -- counsel told the Court it was going to be used for demonstrative purposes only. That's how Mr. Bragoli used it. There's no reason to admit it into evidence, so I object.

THE COURT: The objection is sustained.

Okay. Cross-examination.

MS. SHEA: Thank you.

MR. VAN TOL: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. VAN TOL:

Q. Good morning, Mr. Bragoli.

A. Good morning, Mr. Van Tol.

Q. Now, if I understand your testimony right on direct, you said that Howden procures reinsurance for clients both in the UK and abroad; is that right?

A. Yes.

Q. To your knowledge, is there any restriction whatsoever on Howden placing reinsurance in the U.S. market?

A. The restrictions that we operate generally apply to different territories in different ways. Our access to the U.S. market is limited because we don't have many relationships here, but nothing stops us from accepting participations from American reinsurers.

Q. So you're free to come into the United States and place reinsurance?

A. We don't tend to come into the United States or anywhere else because we don't really have an office here on the ground, but we can correspond with them.

Q. Okay. That wasn't my question, Mr. Bragoli. My question is: Is there any restriction from you, Howden, coming into the United States and placing reinsurance?

A. Not that I'm aware of.

Q. And isn't it true that there's also no restriction on Howden coming into Florida to place reinsurance?

A. Not that I'm aware of.

Q. And isn't it also true that in this case Howden brokers did come into Florida and place several of the reinsurances?

A. The lines that -- participation of U.S. reinsurers on this program were originally negotiated by HRG, but we were asked by HRG, for the sake of expediency and commonality of terms and conditions, to ensure that those lines were subsequently picked up on our slips; and that's what we did. We took their instructions.

Q. Are you aware, though, Mr. Bragoli, of whether any of your Howden brokers had direct negotiations with the Florida reinsurers?

A. I'm not aware, no.

Q. Because you weren't involved in the placement, right?

A. Correct.

Q. If I wanted to know that information, wouldn't I ask Mr. Holden, for example?

A. You could.

Q. And Mr. Bond, also?

A. You could.

Q. Now, I'd like to have -- I'd like to show this to you, Mr. Bragoli.

MR. VAN TOL: I'm not sure it needs to be admitted into evidence, Your Honor, because it's for impeachment purposes.

I have copies for counsel.

BY MR. VAN TOL:

Q. Mr. Bragoli, this is a screenshot from the Howden website that I asked Mr. Bond about at his deposition. I want to draw your attention to the second paragraph from the bottom, which I'll read into the record. Quote, we place our business into Lloyd's, the London company market, regional markets such as Singapore and Miami, hyphen, in fact, worldwide, in the locations that serve our clients the best.

Do you see that?

A. Yes.

Q. And does that comport with your understanding that Howden places reinsurance in Miami?

A. Well, it supports the fact there's no restriction to us doing so.

Q. I asked Mr. Bond about that very sentence

and he -- I said, quote -- this is on page 23 of his deposition.

Quote, what does it mean?

Answer: There are underwriters and reinsurance companies that are based in Miami that on occasion we will offer them business.

Question: When you say "we," do you mean the Howden office located in London?

Answer: Yes. I'm speaking as the Howden property division.

Question --

MS. SHEA: Finish the question. I'll object.

BY MR. VAN TOL:

Q. -- which is headquartered in London, correct?

Answer: Correct. Yes.

Question: Now, the statement that I just read about placing business in the Miami market, was that also true, to your knowledge, as of 2009?

Mr. Warrington interposed a form objection.

The answer was: Yes, I believe we were placing business into certain underwriters in Miami in 2009, period, end quote.

Do you have any reason to doubt the veracity of Mr. Bond's testimony?

MS. SHEA: Objection. Improper --

THE COURT: Sustained.

BY MR. VAN TOL:

Q. Was Mr. Bond one of the brokers that was involved in the 2009 placement, Mr. Bragoli?

A. Mr. Bond, I believe, was the senior executive managing the team. I'm not aware that he was involved strictly as a broker brokering any of the participations.

Q. Do you know Mr. Bond?

A. Yes, I do.

Q. Do you trust his word?

A. Yes, I do.

Q. Now, we looked at an example, I believe it was Exhibit 1, of a Market Reform Contract, which is also known as a slip.

Now, were those -- was that the same type of slip used when Howden was placing business in Florida?

MS. SHEA: Object to the form.

THE COURT: The objection is overruled.

THE WITNESS: This would have been a sample, a good sample, of a slip that would

have been used to pick up all lines and that would have included any lines that we were instructed to pick up in Florida, yes.

BY MR. VAN TOL:

Q. And Ms. Shea asked you a series of questions about the brokerage that's listed on the slip.

Do you remember that?

A. Yes, I do.

Q. And I believe Ms. Shea used the phrase "allowable commission." Are you familiar with that phrase?

A. It's been used a lot in this case. But I think we've sort of disagreed with regards to what its actual meaning is or actual formal usage is in the market.

Q. Well, let's use terms that you and I are comfortable with, then. I think we came to an accommodation in London. A slip will list an amount of commission typically, correct?

A. Yes.

Q. It is fully within Howden's power to take less than the commission listed on the slip; is that right?

A. It's more than that, Mr. Van Tol. The

commissions are generally negotiated by the brokers at the time of face-to-face discussions or general correspondence with the markets. So the commission can start at a level significantly higher than the actual commission that's agreed on the slip because that's part of the negotiation process.

So if we, as Howden, wish to achieve a certain price for our client, and we aren't able to get an underwriter to agree to that price with the standard commission that we would normally expect, we have the power to agree for that underwriter to reduce our commission to a level which achieves the price we need and that can go down to zero.

Q. Okay. So the answer to my question is, yes, you can reduce it to whatever you like?

A. But we can reduce it from a number before it goes on the slip. Your question was related to we can reduce the commission on the slip. Our reduction can come from before the number goes on the slip.

Q. Let's go to after the numbers on the slip. Are you aware of experiences, Mr. Bagoli, at Howden where there's a number on the slip, let's say 20 percent, and Howden has decided that notwithstanding that allowance, it's going to take less brokerage?

A. Yes, I am.

Q. And are you aware that it happened in this case?

A. Yes, I am.

Q. I want to talk to you about the rules regarding disclosure of commission, Mr. Bragoli. If a client comes to Howden and asks information about the commission, is it your experience that Howden is required to divulge that information?

A. You asked about rules. Generally, if they are retail or commercial insurance clients, our general rules require us to disclose commission on formal request.

For reinsurance, the rules are a little bit different in that there are no rules governing reinsurance for that requirement, and that's governed by our TOBA. So if, in our TOBA, we have stated to our reinsurance client that we will disclose commission if asked, then we would, of course, disclose commission if asked.

Q. And do you know whether, in the TOBA that was used in this case, there was a representation by Howden that it would disclose information about remuneration?

A. I don't, but I can read through it quickly, if you wish me to.

Q. We have it right now. Maybe I'll guide you to it.

A. Yeah.

Q. It's in Exhibit A3 at the back of the document. And I'll give you the Bates number at the bottom, which is HIB06469.

A. Sorry. They're gone. What page?

Q. Oh, I'm sorry, Mr. Bragoli. Let me come and show you. It is the next to last page.

A. Next to last page?

Q. Yes.

And you should be there. If you're on the right page, you see the paragraph that says "market security"?

A. Yes.

Q. And if you move up just a little from that, there's a paragraph, and let me read it into the record. "You are entitled, at any time, to request information regarding any commission which we may have received as a result of placing your insurance business."

A. Yes.

Q. Is that the reference you were --

A. Yes.

Q. -- talking about earlier?

A. Yes.

Q. So in this case, if the client had made a request for disclosure of the amount of commission, Howden would have given them the information, right?

A. If HRG had done that, we would have, yes.

Q. Are you aware of any discussions that were held between representatives of HRG and Howden with respect to the amount of brokerage in this case?

A. I'm aware of a commission that was referred to in correspondence from Howden to HRG.

Q. So there were discussions between the two parties about what the commission would be?

A. There were -- there was correspondence between the parties, yes.

Q. Now, I believe I heard on your direct testimony -- and I may have misheard it, and if I did, I apologize -- there was a reference to all placement being done in London. I'd like to -- I'd like to talk about that a bit further. When you said that, did you mean that the brokers are physically located in London?

A. That's what I meant, that the broker is physically located and our operations are physically located in London.

Q. But you were aware based on your earlier

testimony today that no matter where the brokers were located, they sent communications, slips, correspondence into Florida in order to place with Florida reinsurers, correct?

A. As I said, we were asked and instructed to pick up those lines after negotiations were undertaken by HRG.

Q. And you were instructed by whom?

A. By HRG.

Q. Was it Mr. Blake?

A. I believe so, or Mr. Blake's association, HRG.

Q. And to your knowledge, was Mr. Blake actually involved in the placement of the reinsurance in 2009?

A. I don't know.

Q. You mentioned, near the end of your testimony, contact that was made by the Lloyd's office.

A. Yes.

Q. Do you recall that?

Were you directly involved in that?

A. No, I wasn't.

Q. Was Mr. Holden the person who was directly involved in that?

A. No, he wasn't.
Q. Who was?
A. It was our compliance officer.
Q. Do you know when that was, Mr. Bragoli?
A. No, I don't know the exact date because there's no record of it.
Q. As of the time -- I understand -- I appreciate your answer and I thank you for it.
But do you know whether, as of that time, Howden had any information about how much HRG had charged INS for the 2009 program?
A. I'm not aware.
Q. So you don't know whether there was complete information at the time?
A. No.
Q. Ms. Shea asked you if any Howden representative, to your knowledge, ever traveled to Costa Rica in connection with the INS account.
Do you recall that?
A. Yes, I do.
Q. Let's focus on Florida. To your knowledge, did any Howden representative ever travel to Florida in connection with the ICE -- ICE/INS account?
A. I believe so.

Q. And who was that?
A. Mr. Holden.
Q. Do you know how many times Mr. Holden came to Florida?
A. No, I don't.
Q. And if we wanted better information on how many times and what those visits involved, would you suggest that we ask Mr. Holden?
A. Yes, I do.
MR. VAN TOL: I'm sorry, Your Honor. I'm just checking my notes.
I think that's all I had for Mr. Bragoli.
However, Your Honor, I would note that we were not aware of what Mr. Bragoli's testimony was going to be today, but we are lucky enough to have a percipient fact witness here, Mr. Blake, so I'd like to be able to call Mr. Blake as a rebuttal witness because I think he has information about several of the areas that Mr. Bragoli talked about or areas that came up that he didn't know about.
THE COURT: Okay. Finished with the cross-examination?
MR. VAN TOL: Yes, thank you, Your Honor.
THE COURT: Any redirect? Ms. Shea, any

redirect?

MS. SHEA: No, Your Honor.

THE COURT: All right. And is that the extent of the testimony that's being presented by Howden?

MS. SHEA: Yes, it is.

THE COURT: Okay. Mr. Bragoli, go ahead and have a seat, sir. Thank you.

MR. VAN TOL: May I call Mr. Blake, Your Honor, as a rebuttal witness?

THE COURT: Yes.

MR. VAN TOL: Thank you.

MS. SHEA: Let me just note an objection to that because they filed 900 pages of exhibits, a huge memorandum of law, lots and lots of material, and they did not provide any notification of this intent that apparently is being formed on the fly. So I object and I reserve the right to call Mr. Bragoli to rebut the rebuttal witness.

THE COURT: Surrebuttal to Mr. Blake.

MS. SHEA: If necessary.

THE COURT: Let me ask you, Ms. Shea, have you had the opportunity to take the gentleman's deposition?

MS. SHEA: His deposition -- everybody's -- this record is mature.

THE COURT: All right. So it's not -- all right. Certainly. But this is assisting the Court in determining the applicable law.

MS. SHEA: No, I understand that. But Neil Holden, all these people, Mr. Bond; I mean, I don't know if their testimony is in the exhibits or not, in the 900 pages, but there's no loose ends on this.

THE COURT: Okay. For the narrow purpose of any rebuttal.

Okay. Let's call forward the gentleman, please.

MS. SHEA: Okay. Thank you.

THE COURT: If you'll remain standing and raise your right hand, the clerk will place you under oath.

Thereupon:

MR. BLAKE

was called as a witness and, having been first duly sworn and responding, "I do," was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VAN TOL:

Q. Good morning, Mr. Blake.

A. Good morning.

Q. Just to orient us, could you just tell the Court what your role was with respect to the placement of the 2009 reinsurance?

A. When the opportunity came up for us to quote the INS account, we contacted Howden, asked Howden if they would work with us. The reason we did that was because Howden was in a position to place with certain markets more easily than we could. However, we agreed that we would -- we would work together.

And we placed some of the placements in the Miami marketplace on their behalf and then ceded the -- all of the details of those placements to Howden because you don't want to have two slips with two different wordings. You want to have one common wording; otherwise, at the time of a claim, there could be a differential which might prejudice the payment of the claim by the reinsurers.

Consequently, we agreed that we would put it all on Howden's slip, and we did place several placements in the Miami marketplace and, in fact, in the U.S. marketplace and some with the Latin American

reinsurance markets.

Q. When you say -- I'm sorry.

A. Excuse me. I'm sorry. However --

Q. I apologize.

A. However, Howden did have direct conversations with some of the markets here. One market in particular was Navigators Reinsurance Company which is located here in Miami. Howden dealt with them directly and, in fact, there were some questions at the end of the placement, and they asked us to please clarify for them with Navigators, on their behalf, those questions.

Q. And are you referring to conversations that were had with Mr. Jose Torres at Navigators?

A. Yes.

MS. SHEA: Objection. Leading.

BY MR. VAN TOL:

Q. Are you also --

THE COURT: Sustained on grounds of leading.

MS. SHEA: I better come over here. The witness is too quick for me.

MR. VAN TOL: I missed the ruling, Your Honor. I'm sorry.

THE COURT: It was sustained on grounds

of leading.

MR. VAN TOL: Thank you, Your Honor.

BY MR. VAN TOL:

Q. Are you aware of any contact, other than with Navigators, that Howden had directly with Miami reinsurers, Mr. Blake?

A. Yes, with several of the reinsurers in Miami.

Q. Could you list them, please?

A. I can't list them all, but certainly with Everest, with Liberty International Underwriters, with Zurich, I think, in New York, not in Miami but in New York. There were several reinsurers that Howden had direct contact with because even after we negotiated the placements, Howden was the one that tied up the final terms.

Q. Pardon me for approaching, Mr. Blake. It's kind of hard to see this chart.

Do you see at the top here, there's a reference to Navigators Miami?

A. Yes.

Q. Is that who you're talking about?

A. Yes.

Q. Above that is ACE. Do you see that?

A. Yes.

MS. SHEA: Objection to questions on exhibits not in evidence.

THE COURT: Would this exhibit assist you --

MS. SHEA: Now he's questioning the witness on the exhibit that he objected to. It's not in evidence and I object.

THE COURT: Mr. Blake, would this assist you in explaining your testimony, sir?

THE WITNESS: Yes.

THE COURT: The objection is overruled.

BY MR. VAN TOL:

Q. We saw a reference to ACE, Mr. Blake. Do you know where the ACE office is located?

A. I don't specifically recall whether that was ACE Miami or ACE New York or ACE London. I have no recollection as to where it was.

Q. Where would we go to get that information?

A. Neil Holden.

Q. You mentioned that you worked together -- strike that.

I'm sorry, Mr. Blake. Were you aware of any visits to Miami by Mr. Holden?

A. Yes. Mr. Holden, I believe, came to Miami to our office twice and was here for several days

assisting in the preparation of the final submission of terms to INS.

Q. When was that, if you recall?

A. This had to have been March, beginning of April. It must have been March 2009.

Q. Was it in connection with the placement of the 2009 reinsurance program?

A. Yes.

Q. Did you ever tell anyone from Howden, Mr. Blake, that they were forbidden from coming into the Florida market to approach reinsurers?

A. No.

Q. Why not?

A. Did I -- could you repeat that question?

Q. Yes. I wanted to know whether you ever told anyone at Howden not to come into the Florida market to place reinsurance.

A. I didn't. And the reason I didn't was because we were in a common agreement to place business in the best manner possible. We were working as partners on the placement.

Q. Was it a joint placement?

MS. SHEA: Objection. Calls for a legal conclusion.

THE COURT: Sustained.

BY MR. VAN TOL:

Q. How would you characterize the working relationship with Howden on this account, Mr. Blake?

A. We worked jointly on the account.

MR. VAN TOL: Thank you, Mr. Blake.

Thank you, Your Honor. That's all I have.

THE COURT: All right.

Cross-examination.

MS. SHEA: Just very quickly.

CROSS-EXAMINATION

BY MS. SHEA:

Q. All of the contacts that you described that Howden engaged in with these several reinsurers that you mentioned, took place from Howden's London office, correct?

A. I believe some of them took place while Mr. Holden was in Miami at our office.

Q. Okay. When Mr. Holden was in Miami in your office, you did not yet have the business solidified, correct? You did not have the order from INS, correct?

A. That's correct.

Q. So there may have been some contacts, but they were not broking reinsurance because you did not yet win the business for the '09 renewal, correct?

A. We had not gotten a firm order.
Q. Okay. Thank you. That's all.
THE COURT: All right. Any redirect?
MR. VAN TOL: No, Your Honor. Thank you.
THE COURT: All right. Thank you, Mr. Blake. You may have a seat.
Any further rebuttal evidence?
MR. VAN TOL: No, Your Honor.
THE COURT: Any surrebuttal evidence?
MS. SHEA: I think not, Your Honor.
THE COURT: All right. We ready to proceed with argument?
MS. SHEA: Yes. And again, we thank you very much for accommodating us this morning.
Okay. As the Court is aware, INS is a state-owned insurance company. This is a large risk. The risk is in Costa Rica. It sought to reinsure part of the risk. In early 2009 it placed an order for reinsurance with HRG, which happens to be in Miami.
We believe, for purposes of this Bishop analysis, HRG could have been in Pennsylvania or Quebec or Netherlands, Antilles. The risk is in Costa Rica. The broker is wherever the broker is. And the broker came to London to us

to get access to the unique Lloyd's market.

The reinsurance was placed, and then INS decided to switch brokers a few months into the coverage period, in this case.

You've probably had insurance broker E&O cases in front of you before, and they entail what almost all insurance agent E&O cases entail, which is they didn't get the insurance, there was a gap in insurance, the insurance didn't pay the claim they thought it was going to pay.

That is not the issue here. Everything was done perfectly. All the reinsurance, this whole thing, they did a great job. Nobody has ever said they didn't. They did it for a price competition that HRG told INS, "This is the price we'll charge to do this," and INS agreed. They in turn got Howden involved.

Howden got it all done. HRG did a piece of it in Miami, that's undisputed, a small piece, and INS now claims that even though it agreed to the price, once it requested the commission information and got it, it decided that it was overcharged or that it paid an excessive amount of commissions. And that's

basically what this lawsuit is about.

If you were the mediator in this case, for example, you'd probably say at this point, "Well, what did you all agree to? I mean, it's a commercial international transaction of sophisticated parties. What was the agreement on commission?"

And indeed they have a Count I for an express contract. And we deny that there's an express contract. And you'll be hearing about that another day on a summary judgment motion. But that would be the obvious place that you would look to see if there's liability here, if the INS has any case at all, is express contract.

And only if you find, or somebody finds, that there's no express contract do we even leave what I call "contract world" and move over into "tort world." So maybe we'll never get to "tort world," but if we get to "tort world," it's because you've held there was no contract; and now what we're left with is INS -- it's not in direct privity with my client -- suing my client in London, claiming professional malpractice. That's all it is,

long and short. They're claiming negligence, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty.

So the tort claims, you know, as I said, only have legs if there's no writing or no express agreement.

For the first two years in this case, through several versions of the Complaint, INS alleged that Howden's conduct was to be judged by reinsurance industry standards. And we acquiesced to that, we answered the amended -- the first amended complaint, and we said, okay, here's three or four affirmative defenses which show that we did not gross up. We complied with Lloyd's customs. We did everything right. Our commissions were within the band that's accepted in the market, et cetera. We're like, we're fine. We are ready to defend our conduct under the governing principles and the English market in which we operate.

And then all of a sudden -- and this was our last major hearing before Judge Scola -- INS amended the Complaint and they got rid of all of that. They struck out of the second amended complaint every single reference to

custom and practice or reinsurance industry.

And what did they do? They just eliminated all of that, and they just said the amount was not reasonable.

And we don't think it was unreasonable, and we objected to that. We filed a motion to dismiss. We went to Judge Scola, and we said, wait a second, you know, you're suing an orthopedic surgeon, you have to allege that he failed to comply with the relevant market or with authoritative -- you know, the rules governing the AMA. I'm a Florida lawyer, I need to comply with the Florida Bar rules. I don't need to comply with the Nebraska Bar rules, and I don't need to disgorge a fee if my fee met Florida Bar rules, even if they say they think it was too much, down the road.

And that's basically what they want to do here. They want to get rid of any external standard or any boundary that anybody could objectively find and just have the jury decide, well, gosh, they got a lot of money. Maybe that was too much money. Maybe somebody else would have done it for less. Maybe somebody else did do it for less in another situation.

And have it go to the jury that way.

And this motion is about seeking a ruling from you now. You know, we have experts, we have to tee everything up for trial, on what is the standard of care that's going to govern our behavior. And the Bishop test, you're absolutely right, is the correct -- you know, correct analysis. And then, of course, it segues into the restatement, which there's restatement 6 which is general considerations, and then there's restatement 145 which is tort-based considerations.

And the body of law that we went to that we briefed and which we believe controls here says that when you are talking about a professional person and their negligence, in other words, conduct -- regulated conduct, the place where they are regulated and the place where their conduct occurred is paramount to any other consideration.

So we're not doing diversity here where, like: Where is, you know, Visor located? And where is Xerox located? The place of the businesses isn't really that relevant, even where the injury occurred, although plainly

here INS is in Costa Rica. They're the claimant. There's no reason why the injury would have occurred in Florida.

All of those other factors really are either neutral or they tip towards English law here. But the main overriding consideration is the place where my client had a reasonable expectation that its professional undertakings would be judged by that set of standards by which it operates.

So just to briefly touch on three cases that are in our binder. There's the Cagle case which is tab 5. A plaintiff in Oklahoma is suing a Texas attorney for malpractice. It was one of these, like, Fen-Phen people or something, and they weren't satisfied with the money that they got.

And the Court ruled that if the primary purpose of the tort rule involved is to punish misconduct or deter it, the state where the conduct took place has the most significant relationship. In that case it was a Texas attorney; Texas law applied.

Tab 6 in our binder, Chase Manhattan case, is insurance brokers. There's a French

reinsurer, there's a New York broker, there's international parties.

And the Court ruled that New York law applied because New York had an interest in regulating the behavior of brokers within its borders because the brokers acted within its borders; and in light of the regulatory framework, this trumped all the other factors.

These are all cases that go through the restatement analysis.

The last one, the Pittston case, tab 19, is another malpractice case against a broker who's from another state. And the primary issue was the improper performance of the broker who had minimal, if any, contacts with the state.

And they said -- the Court held that the state in which the broker resides and performs has the greatest interest in ensuring that the broker complies with any relevant contract and satisfies reasonable performance standards.

That state had a lot -- that state was New York again, it had a much greater interest in regulating the conduct of the broker whose alleged malpractice took place in New York.

So here we're alleged to have taken excessive commissions, to have overcharged for tax, to have done several things wrong. All of which, if we did them wrong, we did them wrong in England. Did we have -- is there venue for this case in Florida? Yes. Did we come to Florida? Yes. Did we come to Florida and work with Mr. Blake to try to get this business? Absolutely.

That's why we did not contest personal jurisdiction when we were sued here because Mr. Bragoli has said, "We'll go anywhere to try to get business." On purpose. We get on planes and we go places to try to get business. But when we get the business, when we are retained to do the work and execute the complex work of broking a reinsurance bid like this, it all takes place in London. Do we e-mail other places? Yes.

But we are -- we are cradle-to-grave regulated by Lloyd's, by the Financial Conduct Authority, no less, and that is, you know, absolutely the standard by which it should be judged whether or not we committed a tort claim, again, in the absence of any agreement

as to commission whatsoever.

You also -- to put Mr. Bragoli's testimony into further context, you also have heard that Howden had a TOBA, a Terms of Business Agreement, with HRG, its client, that specified English law would apply to any dispute between Howden and its client.

And we would submit it would make absolutely no sense to apply Florida law to a claim between Howden and INS, which we didn't even have privity of contract with, and yet apply English law to a dispute between ourselves and our co-broker.

So we've provided you -- the other point that I'll make is that we provided you with a request for judicial notice. Because one of the restatement factors is: Well, is there really a conflict? What do we care? Why do we care? And we provided that judicial notice just to let the Court know that in addition to this entire scheme at Lloyd's -- which, by the way, Florida has no counterpart -- you won't hear a word about if Florida law applies, then reinsurance intermediaries. There's no comparable scheme in Florida that instruct us

in any way.

The cases that they cited in their opposition to our motion to dismiss were literally train whistle cases, slip-and-fall case, just saying reasonable under the circumstances.

And we would submit that that is absolutely not the correct arena to be in. That's not the correct inquiry. But to the extent that one of the considerations for the Court would be, are there differences in the English law and the U.S. law? The answer is, yes.

And we did submit the request for judicial notice just to underscore to the Court the fact that there's a very, very, very well-developed body of English common law as well as all these regulatory laws that you've heard about that mean that if we choose English law, everybody will know the rules of the road will be a little different, not only on the regulatory standpoint but on the common law standpoint.

So that is basically -- we had the evidentiary burden to show you why we believe

England had the more significant relationship in this case. It's all because it's a conduct-regulated environment.

And we thank you very much for your hearing Mr. Bragoli this morning, taking testimony.

And we would propose to submit an order that would simply state that with respect to the enumerated counts of the second amended complaint, the standard for conduct for judgment of any professional malpractice claims will be that of English law.

THE COURT: Thank you.

MS. SHEA: Thank you.

MR. VAN TOL: Your Honor, given the hour, would it make sense for me to start? Because I'm afraid I may have more than ten minutes. Or should we adjourn and reconvene at another hearing?

THE COURT: No, sir, let's continue.

MR. VAN TOL: Continue now?

THE COURT: Yes.

MR. VAN TOL: There is another motion pending, also. I didn't know if that was going to be heard.

THE COURT: The motion to dismiss the cross-claim? I think we suggested in the beginning, Ms. Shea suggested, that we may want to reset that, and perhaps we may have to.

MR. VAN TOL: Okay. I'm sorry, I misunderstood. Thank you, Your Honor.

THE COURT: Not a problem.

MR. VAN TOL: Your Honor, I am going to touch upon the restatement factors, obviously, because we agree that they apply. But just a bit on the history of the case that Ms. Shea went through a bit.

INS filed this complaint in June of 2010. Immediately Howden filed a motion to dismiss the Complaint in July of 2010. And its argument was that the economic loss doctrine, which I now understand has been altered in Florida, barred INS's tort claims. That's clearly a Florida law doctrine.

The same conduct that we allege in the first complaint, was negligence, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Those counts were also in the second amended complaint. They're in every complaint. We have also alleged the same

conduct.

What we changed was how much the -- or what level of proof we'd have to present to the Court or to the jury, but the allegations of conduct remain the same. If Howden had thought, Your Honor, that English law applied and that they were to be regulated by English law and custom and practice, they would have brought that in their first motion. That would have been my first motion. Why are you arguing under Florida law? English law should apply. But they didn't.

They made two motions, Your Honor. One motion to dismiss on Florida law. That was partially granted. We amended the Complaint. They moved again under Florida law. That was denied. And then they answered the Complaint. When they answered the Complaint, Your Honor, there's not a single word in there saying English law applies. That's the time you're going to do it, even if you don't move to dismiss.

So for all this time, Your Honor, until 2012, Howden focused only on Florida law and never suggested English law applied. And

what's key, Your Honor, is neither did HRG. HRG never said anything about English law applying. They've always said that Florida law applies to them.

Now, if, as Howden is arguing now, the circumstances so clearly warrant an application of English law, you have to ask yourself why they didn't bring it earlier. And the answer is because the circumstances don't warrant an application of English law.

Now I will talk about the factors, Your Honor. And I don't want to burden the Court with too much oral argument because there's a lot of paper in this case, so I'll hit the highlights. I'll start with the center of the relationship.

You've heard today that it is defendant's theory -- we don't necessarily agree -- but it's defendant's theory that the way the relationship worked was INS hired HRG, HRG instructed Howden.

Howden does not deny that there is a relationship between INS and Howden. It says that the parties aren't in contractual privity, but they admit that Howden acted as a

sub-broker; and under Florida law, and English law for that matter, sub-brokers owe duties. So there is a relationship.

The question is: Where is that relationship? It has to be centered in Florida because HRG is the linchpin, Your Honor. Without HRG, according to their theory, there's no Howden. So the center of relationship is here.

Place of injury, Your Honor, is the next factor. And Howden derives that by saying there's no way the injury could take place in Florida because INS is a Costa Rican corporation. As we pointed out in our brief, all the acts necessary for an injury to occur happened here.

And I have to step back and focus on what our claims are, Your Honor. Our claims are that in early April of 2009 Howden and HRG had a secret agreement. That secret agreement was, whatever premium the reinsurers agreed to, that they were going to take their commission on top of that premium.

We submit that that's improper and we'll have expert testimony saying that's not the way

you do it. But the key is, that was the agreement, Your Honor, in early April 2009. It was made by HRG in Miami and it was made by Howden in London.

Now, the second thing that happened, Your Honor, is the program was placed. Now, we saw from today's testimony that notwithstanding Howden's claims that all the conduct took place in London, a lot of conduct took place in Florida. And I will come back to that in the conduct factor. The point of mentioning it now is that the placement was done and it was finished sometime in the April timeframe.

Then it became time for INS to pay. So in late May, INS made a payment, and when it made that payment, the payment went from Costa Rica to Miami to London. Again, Miami is the linchpin and the center and the key.

As we said in our brief, HRG could have refused the money, they could have said, "Wait a minute, you overpaid." They could have kept the money and never involved Howden. But the fact is, Your Honor, they took the money, subtracted their commission based on the secret agreement, passed it on to Howden based on the

secret agreement, and that's when the injury occurred.

Now, to segue into the conduct factor. You heard Mr. Blake tell you this was a joint placement. There's no doubt about that. Mr. Bragoli doesn't deny it. No one denies it. The brokers acted jointly. Whatever purpose Howden purports that HRG had in coming to Howden, they say they came to Howden only to access the London market. We don't know if that's the case or not, Your Honor. Mr. Bragoli wasn't there, so he certainly doesn't know. But even if that were true, Your Honor, that's not where it stopped. HRG did not say, "Okay, Howden, you take London. We'll take the rest of the world." Howden placed this business around the world; London, the continent, Khagistan, the United States, several reinsurers in the United States. You heard Mr. Blake, it wasn't just Florida reinsurers; but those Florida reinsurers were very important.

Howden tries to say, well, these are just a couple of the minor players on high levels. But you have to ask yourself, if they were so

minor, why is there so much correspondence between Howden in London and the reinsurers here in Florida? And also, if they're so minor, why did Mr. Holden visit one of the reinsurers when he was here in Miami? That was news that came out for the first time in this hearing. And it's highly critical, Your Honor; they did not just stay in their offices in London. They came here.

If it were the case that INS had hired Howden directly and if it were also the case that Howden had only done business in London, just to access that market, I would fully understand Howden's position and I would agree with it. But that's not how it worked here.

And also, Your Honor, you may have noted in our brief that not only was there conduct in Florida, one of the key documents in the case is the Liberty slip which is on Howden letterhead, and it says -- when it talks about commission and premium, it says, "gross up on net."

That is exactly our case. That is exactly what we said happened. There is evidence of a tort that occurred in Florida.

And it would be incredible to me that you would say, well, even though the tort occurred right here and there was evidence right here in Miami, you have to apply English law.

And the last part of our tort allegations is that HRG and Howden concealed the evidence of what they did by not producing slips.

You've heard Mr. Bragoli say that the slip is the contractual document between my client, INS, and the reinsurers. And you saw that it has critical bits of information. Premium, brokerage, and it also sets forth the taxes.

My client wanted copies of the slips in order to confirm that they had not been overcharged for premium and had not been overcharged for brokerage, because they had in the past, not by these parties but by others. And so INS has strict regulations about getting slips.

Our allegation is that HRG and Howden intentionally delayed producing the slips so they could get the first and possibly the second premium payment from INS.

But the key for choice of law purposes is

that -- again, Howden takes the strict position that if INS had requested the slips, and we did, that they would not produce them to INS, that it had to go through HRG. So going back to my word "linchpin." The linchpin for the production of the slips was Miami, and Florida law is involved again.

And I can wrap up quickly, Your Honor, with the restatement 6 factors, because while I think they're important, I think they're well set out in the briefs; and that is, the first has to do with English law and Florida law. I appreciate that Howden gave the Court Florida law and English law to show that there actually is a conflict.

We have not opposed that. I'm not an expert in English law, but it appears that there are subtle differences between the laws.

But that's not what restatement 6 factors go to. They go to, would a policy of England be violated if Florida law were applied to one of its brokers? So you have to look behind the law to the purpose. And they have the same purpose that tort laws do here, punish wrongdoers, deter wrongful conduct.

So there is no policy of England that would be violated and there's no -- there's no purpose of the law that would be different between the two jurisdictions, and Howden doesn't disagree.

The last -- the next to last factor that I want to discuss is the reasonable expectations one. And this is where the Chase Manhattan case is very interesting because what it says is, you can't subject someone to law that is wholly unanticipated.

And I'll submit to the Court that there's no way it could be unanticipated for Howden to have Florida law apply when it had so much activity in this jurisdiction.

And the last point, Your Honor, is a practical one, and Ms. Shea alluded to it a bit when she was talking about the application of different law to different parties. That TOBA agreement you heard Mr. Bragoli say was never shown to my client. That's a different issue for a different day. The Terms of Business Agreement is between HRG and Howden. What law applies to their relationship is different.

But what Howden is suggesting on the tort

claims is that even though you have joint tortfeasors who work together jointly, that what the jury has to do is get an instruction that when you look at the behavior of HRG, you have to apply Florida law. When you look at the exact same behavior of their co-defendant and joint tortfeasor, Howden, you have to apply English law.

That's going to lead to massive confusion, Your Honor. It's exactly what that factor goes to. It's highly impractical, and as one of the courts said, there's nothing easier for a Florida court to do than apply Florida law.

So in summation, Your Honor, all of the factors weigh in favor of Florida law. Some are neutral, but I haven't found a single one that weighs in favor of English law. And even if you -- even if you focus on the conduct factor, that won't save Howden because so much of the conduct was done in Florida.

The cases are clear. If you come into a jurisdiction and you engage in business activity, you subject yourself to the laws of that jurisdiction.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Van Tol.

Ms. Shea.

MS. SHEA: You have been very generous with your time, so I will be extremely brief.

Mr. Van Tol alluded to a lot of evidence. To be honest, I'm not sure what may be in the 900 pages of exhibits that was filed or not. The Liberty slip that's so important and all that, that wasn't part of the evidentiary hearing today.

You heard the evidence. This is a London-centric operation, as far as Howden is concerned. That's where we operate. The reasonable expectations of Mr. Bragoli's company, as you've heard, are entirely embedded in its role as a Lloyd's of London broker.

Mr. Blake said today, for the first time, that -- he said that they were jointly working on the project. And he could only have meant that colloquially, because there's been abundant evidence and testimony, part of which was filed with our reply brief, in which Mr. Blake's own office, the person handling this issue, Marcano -- Alberto Marcano,

testified that, no, we were never co-brokers, we weren't in that type of relationship. Howden was a sub-broker to HRG. That is what all the evidence has been. And those are terms of art in the business.

So to say they were joint might be to say, like, oh, we were complementing one another. We were friendly. But there is certainly -- Mr. Blake is not stating that we were joint tortfeasors together. And to make that suggestion is just flatly belied by all the deposition discovery in this case, much of which has been filed, part of which has been filed by us.

There's also a discussion in our reply brief about this Liberty slip business, which I don't think is that pertinent for today, but we do disagree with that characterization of that. And again, it harkens back to English law concepts. You will ultimately perhaps be considering the legal effect of a slip, which is a very unique London-centric concept. It's a way of doing business in London. The fact that the money happened to go through Miami is completely inconsequential.

And again, we have not denied that personal jurisdiction exists here, because we come here, but we are not regulated by Florida, we are not subject to Florida. We as attorneys in this case know that there's no comparable scheme. There's really -- in Florida there's a void. But certainly Howden, Mr. Bragoli's operation, they never had any reason to research Florida law, to understand Florida law. They did what they did from London.

The last point I'll make, which I -- probably does not need rebuttal, but the first answer that was filed in the case did raise the English law issues. And again, I don't know that it really helps the Court now to belabor the whole tortured procedural posture.

Our argument would be that we never thought they didn't intend to judge our conduct by English law until they deliberately filed the second amended complaint, overboarded those allegations. And they even argue, in their reply in opposition to our choice of law motion, that they decided to do that in a calculated basis because they felt like they could go on a narrower ground because they can

just -- and it's right. I think it's page 15 of their brief -- they're like, well, we decided we could go on a narrower ground. We could just get another broker to say we would have done it for less, and we think it was too much, and that will carry the day.

And again, when you're licensed professionals in a regulated environment, that would be like telling me if I do a plaintiff's case for 40 percent, and then the plaintiff recovers his money, finds out his neighbor is an attorney, and the neighbor says, "You should have hired me to do it. I would have done it for 20 percent." That doesn't mean that I, a Florida lawyer, overcharged, because I went with the law that I know and I'm accustomed to.

So it would be grossly unjust to just allow us to be -- have jury instructions, expert testimony, and so forth, just informed by some meaningless concept of reasonableness, when indeed we function in this very structured regulated environment.

And that's our motion. We ask you to hold that English law applies to the tort counts.

And we thank you again very much for hearing us this morning.

THE COURT: Thank you, Ms. Shea.

You raised your hand.

MR. HARRIS: Yeah, can I make one statement, Judge, on behalf of HRG?

THE COURT: Certainly.

MR. HARRIS: Just one statement regarding this whole matter. We're all suing each other here, Judge. There's no love lost between HRG and Howden, and INS and HRG.

MR. VAN TOL: We'll stipulate to that, Your Honor.

MR. HARRIS: The fact is, Howden came into Florida, they did business here. They're subject to Florida law.

Thank you.

THE COURT: Okay. Thank you, sir.

MR. VAN TOL: Can I raise just a housekeeping issue, Your Honor?

THE COURT: I think we're -- housekeeping in terms of the second motion?

MR. VAN TOL: It's just housekeeping in terms of this motion, which is, I had understood that we were making submissions to

the Court, which we did, and that the evidence today was supplementary. In other words, the Court will consider the evidence attached to our briefs.

THE COURT: Certainly.

MR. VAN TOL: Thank you, Your Honor. That's it.

THE COURT: Believe me. I've taken the time and I've had the opportunity -- let me thank you for not only the thorough presentation here this morning but certainly by way of the arguments and the case law and the briefs that you submitted.

MR. VAN TOL: Thank you, Your Honor.

THE COURT: Before the Court today, solely, is with regard to what law should apply in addressing and applying at trial the claims Counts III, IV and VI.

You can go ahead and have a seat.

And while the rules of the road, as Ms. Shea has stated, regarding the regulation of conduct, may be different if English law applies, as opposed to Florida law, and certainly if policy considerations have been made by the Court.

But clearly the law to be applied is that of the Supreme Court in the Bishop case, and certainly, that's the law to be applied in evaluating these tort claims and that constitutes the "most significant relationship" test.

And looking at the four factors -- and I don't want to, just for time, because we do have the court reporter -- I certainly have taken notes with regard to the relationship between the party, the place of the injury, the place of the conduct, obviously the relative place of business, and the center of the parties relationship, in looking at the factors to be weighed.

But I do need to state that all of the torts allege that Howden/HRG, working in concert, whether it was jointly, but certainly one is a producing broker and certainly the second as a placing broker, that Howden and HRG agreed to take a commission and the claim as to which they were not entitled. Each of the tort claims were based on that theory, that Howden received too much commissions from the reinsurers when it actually placed the

business.

This Court finds that the factors weigh in favor of applying Florida law. And that will be the law to be applied in Counts III, IV and VI in this case.

So the motion is granted to the extent that the Court has determined the applicable law and Florida law will apply with regard to those tort claims.

Is there anything further we need to address this morning?

MR. VAN TOL: No, Your Honor. Thank you.

THE COURT: All right. With regard to the motion to dismiss the cross-claims, since my judicial assistant is here, I would suggest, perhaps, since you're here and your calendars may be with you, why don't you make the arrangements today to set some time for the cross-claim.

I don't need anything further regarding that. I'm well briefed. You just need to set a time on the Court's calendar.

We have form orders for your use. And have a good afternoon.

MR. VAN TOL: Thank you.

(Thereupon, the hearing was concluded at 9:08 a.m.)

HEARING CERTIFICATE

I, DEBBIE L. OATES, Registered Professional Reporter, certify that I was authorized and did stenographically report the foregoing proceedings and that this transcript is a true record of the proceedings before the Court.

I further certify that I am not a relative, employee, attorney, or counsel for any of the parties nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 9th day of April, 2013.

_____

DEBBIE L. OATES, RPR

D

U