UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LAMORAK INSURANCE COMPANY, as successor to Commercial Union Insurance Company Plaintiff, vs. EVEREST REINSURANCE CO. f/k/a Prudential Reinsurance Company Defendant.	Civil Action No.: 1:15-CV-13425-IT

MEMORANDUM OF LAW IN SUPPORT OF
EVEREST'S MOTION TO COMPEL

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Everest Reinsurance Company, formerly known as Prudential Reinsurance Company ("Everest") hereby submits this memorandum of law in support of its motion, pursuant to F.R.Civ.P. 37, to compel Lamorak Insurance Company ("Lamorak") to produce documents. This memorandum is accompanied by the March 24, 2017 declaration (the "Hargraves Dec.") of Daniel Hargraves.

PRELIMINARY STATEMENT

By this action Lamorak seeks to collect on billings it submitted to Everest on six one-year facultative reinsurance certificates (the "Facultative Certificates") Everest issued to Lamorak. Those Facultative Certificates reinsure two multi-year insurance policies (the "Alcoa Policies") that Lamorak issued to Alcoa. The billings concern Alcoa asbestos losses.

Everest seeks to compel the production of documents containing basic information relating to Lamorak's action. Everest sought production of the policy files for the Alcoa Policies, documents relating to the placement of the Facultative Certificates, and documents relating to Lamorak's allocation of the Alcoa asbestos losses among its various reinsurers.

Lamorak has refused to produce documents relating to any reinsurance covering the Alcoa Policies other than the Facultative Certificates. Lamorak has also refused to produce documents relating to its allocation of the Alcoa asbestos losses among its reinsurance contracts. By refusing to produce documents relating to its allocation, Lamorak is frustrating Everest's attempt to assess the reasonableness of the allocation.

Lamorak failed to produce complete policy files for the Alcoa policies or documents relating to the negotiation and placement of the Facultative Certificates. Despite Everest's request, Lamorak has refused to provide an explanation of its attempts to locate the

policy files or placement documents or the reason it was unable to locate them.

The documents that Lamorak did produce were heavily redacted. Lamorak redacted large portions of many documents, asserting that the redacted material was not "relevant." It appears from context that much of the redacted material related to Lamorak's reinsurance of the Alcoa Policies, a topic Everest clearly considers relevant. Lamorak also redacted certain material as "attorney/client communications," although its log failed to disclose the "attorney" or "client" involved in any of the communications. Further, Lamorak redacted certain other documents without providing any explanation at all. Lamorak asserted that these documents had been produced in a prior arbitration between the parties on different contracts and that Everest would be able to discern the reasons for the redactions from a redaction log Lamorak created in that arbitration. Lamorak has not, however, produced that log in this action. Further, the documents Lamorak produced do not show whatever Bates numbers they were produced within the arbitration. Accordingly, it is likely that the arbitration log would be unusable. Even if the documents from Lamorak's production in this action could be cross-referenced with its production from the arbitration, there is no reason to assume that the same reason for redaction would apply to this case.

In short, Lamorak should be compelled to produce: (1) documents relating to its reinsurance of the Alcoa Policies and its allocation of Alcoa asbestos losses among its reinsurance contracts; (2) unredacted copies of the documents it improperly redacted; and (3) its complete policy files for the Alcoa Policies and documents relating to its placement of the Facultative Certificates or, in the alternative, provide an explanation of its attempts to locate these documents and its failure to produce them.

FACTUAL BACKGROUND

Lamorak, by its predecessor, Commercial Union Insurance Company, issued a series of insurance policies to Aluminum Company of America ("Alcoa"). Many of the policies Lamorak issued to Alcoa were for multi-year terms. For example, Lamorak policy no. CLCY 9400-001 insured Alcoa for the period March 1, 1974 through February 28, 1978; Lamorak policy no. CLCY 9400-014 insured Alcoa for the period March 1, 1978 through February 28, 1981; and Lamorak policy no. CLCY 9306-006 insured Alcoa for the period March 1, 1981 through February 28, 1985. *See* Hargraves Dec., Exh. 1, (Schedule of Alcoa insurance) (Everest (LIC) 001646-47). Prior to Lamorak's coverage, Century Indemnity Company ("Century Indemnity") insured Alcoa for the period January 1, 1956 to March 1, 1974. *Id.* Following Lamorak's coverage, Liberty Mutual Insurance Company ("Liberty Mutual") insured Alcoa for the period March 1, 1985 to March 1, 1989. *Id.*

Lamorak, Alcoa, Century Indemnity, and Liberty Mutual entered into a cost-sharing agreement, pursuant to which the parties allocated among themselves various costs arising from non-employee asbestos-related bodily injury claims asserted against Alcoa. *See* Hargraves Dec. at Exh. 2. The costs relate to losses spanning the 1956-1989 coverage block for Alcoa asbestos losses.

Everest reinsured Lamorak for a portion of the time Lamorak insured Alcoa. Everest issued one-year Facultative Certificates for each year from 1979 to 1984. *See* Hargraves Dec. at Exhs. 3-8. All of the Facultative Certificates Everest issued were excess reinsurance, meaning that Everest's reinsurance coverage only applied after Lamorak satisfied the specified retention. When submitting Alcoa asbestos claims to Everest, Lamorak took the position that it was entitled to allocate its retention required by Everest's single-year Facultative Certificates

over the multi-year term of its insurance policies. That would have permitted Lamorak to access Everest's reinsurance while taking only a fraction of the retention required by each Facultative Certificate. Everest objected to Lamorak's billings. *See, e.g.* Hargraves Dec. at Exh. 9 (EVEREST (LIC) 002051-52).

In July 2016 the parties served document requests. Everest sought documents that would explain Lamorak's allocation of Alcoa asbestos losses to its reinsurance. *See* Hargraves Dec. at Exh. 10 (Everest's document requests). The documents Everest sought included: (1) Lamorak's policy files for the Alcoa Policies at issue in the case (*id.* at request no. 2); (2) documents relating to the Facultative Certificates Everest issued to Lamorak (*id.* at request no. 9); and (3) documents relating to Lamorak's allocation of Alcoa asbestos losses among its reinsurers (*id.* at request no. 8).

The parties served their written responses to each other's document requests on September 27, 2016. With respect to the three Everest document requests cited above Lamorak made certain objections, but agreed to produce any "responsive and discoverable documents within Lamorak's possession, custody or control." *See* Hargraves Dec., Exh. 11 at responses to request nos. 2, 8, and 9.

Everest produced its documents on September 27, 2016. Lamorak initially produced documents on September 27, 2016, September 30, 2016, and October 5, 2016. *See* Hargraves Dec. at Exh. 12-14. On October 26, 2016, Everest's counsel wrote to Lamorak's counsel about deficiencies in Lamorak's production, including documents produced in response to Everest document request nos. 2, 8 and 9. *See* Hargraves Dec. at Exh. 15.

Lamorak responded on November 8, 2016. *See* Hargraves Dec. at Exh. 16. Lamorak did not provide any explanation for its failure to produce its policy files for the Alcoa

policies at issue, but merely asserted, "[s]ubject to Lamorak's objections, all such documents were produced." *Id.* at 2. With respect to Everest's request for documents relating to "allocation of losses under policies insuring [Alcoa]," Lamorak indicated that it "has documents ready to produce following Everest's agreement to an appropriate protective order." Lamorak responded to Everest's request for documents relating to the Facultative Certificates it issued to Lamorak by noting that "Lamorak is looking to see if it has additional documents and will supplement its production as appropriate." *Id.* at 3.

Lamorak then produced additional documents on December 15, 2016. Although Lamorak's supplemental production more than quadrupled the size of its production, it retained the same deficiencies with respect to Everest's requests for documents relating to policy files, Lamorak's allocation of Alcoa asbestos losses among its reinsurance contracts, and communications with respect to the Facultative Certificates Everest issued to Lamorak. On February 1, 2017, Everest's counsel wrote to Lamorak's counsel about these deficiencies. *See* Hargraves Dec. at Exh. 17. Further, because Lamorak's production was heavily redacted, Everest requested a redaction log, explaining the basis for those redactions. *Id.* at 1.

Lamorak responded on February 24, 2017. *Id.* at Exh. 18. Lamorak did not produce the policy files for the Alcoa policies at issue in this case, but instead produced the policy file "pertaining to Policy No. 9400-001, which pre-dates the policies at issue in this litigation." *Id.* at 2.

Further, although Lamorak ceded Alcoa asbestos losses to several other reinsurers, it refused to produce any documents relating to those reinsurers or its allocation of Alcoa losses to them, claiming: "With respect to documents relating to other reinsurance, Lamorak maintains its position that these documents are not discoverable. Lamorak's business

dealings with reinsurers other than Everest are in no way relevant to the present dispute over the parties' interpretations of the terms of the underlying policies and facultative certificates." *Id.*

With respect to Everest document request no. 9, seeking documents relating to the Facultative Certificates, Lamorak responded simply, "[s]ubject to its objections, Lamorak confirms that all such responsive documents have been produced." *Id.* at 4. Lamorak also enclosed a redaction log with its February 24, 2017 letter. Lamorak's February 24, 2017 letter did not resolve any of the three issues discussed.

On March 10, 2017, Everest's counsel wrote to Lamorak's counsel, attempting to resolve the outstanding discovery disputes. *See* Hargraves Dec. at Exh. 19. Everest's counsel noted that "Lamorak has not offered any justification for refusing to produce the policy files requested, nor has it provided any excuse for its failure to do so." *Id.* at 2. Everest's counsel also observed that Everest was entitled to documents relating to Lamorak's allocation of Alcoa asbestos losses to its reinsurance contracts:

> Lamorak contends that "documents relating to other reinsurers of the Alcoa Policies are not discoverable." In fact, Lamorak allocated its Alcoa-related asbestos losses over several different reinsurance contracts. Everest is entitled to know how that allocation was conducted and whether the allocation to its own reinsurance contracts was consistent with how Lamorak was allocating the Alcoa asbestos losses generally. Accordingly, documents relating to Lamorak's reinsurance are relevant to Lamorak's suit against Everest and should be produced.

Id.

Similarly, Everest pointed out to Lamorak that it had not produced the documents relating to the placement of the Facultative Certificates at issue in this action:

> Lamorak agreed to produce all responsive documents relating to Everest's request for documents "relating to the Facultative Certificates." *See* Everest's document requests at Request Nos. 9-11. Your February 24, 2017 letter indicates that "all such responsive

> documents have been produced." That is incorrect. Everest's own document production includes much correspondence between the parties relating to the Facultative Certificates at the time of their placement that is not included in Lamorak's document production. Lamorak has not provided any explanation for the discrepancy. From our review of Lamorak's document production it appears that part of the problem is that Lamorak has not produced files that were in the possession of the Commercial Union Special Risks office (the "Special Risks Office") located at the Federal Reserve Plaza in Boston, Massachusetts. The Special Risks Office handled the placement of the Facultative Certificates for Lamorak. Accordingly, we request that Lamorak produce its complete files relating to the Facultative Certificates, including those files that were created at the Special Risks Office.
>
> If Lamorak is unable to produce its files relating to the Facultative Certificates, we request that it provide an explanation as to why it cannot produce those files consistent with Instruction No. 9 of Everest's document requests.

Id. at 2-3.

In addition, Everest pointed out three problems with Lamorak's redaction log: (1) 174 of the items on Lamorak's redaction log indicated "attorney/client communication" as the reason for redaction, but no attorney or client were indicated in the log; (2) 21 items on the log were redacted based on "relevance," an improper basis for redaction; and (3) for 12 items on the log, no reason for redaction was given:

> Thank you for providing Lamorak's redaction log. Items 1 to 174 on the log all indicate that they were redacted as an "attorney/client communication." I attach a revised version of the log, which adds line numbers, for reference. Nothing in the log supports the claim that any of the redactions are attorney-client communications. There is no indication that any of the parties to the communications are attorneys. Moreover, Lamorak appears to be claiming privilege over its communications with Everest personnel. *See* e.g., entry nos. 1-5, emails between Harvey Green and Steve Martin. We request that for each of the entries for which Lamorak is claiming privilege it identify the attorney involved and the basis for claiming the communication privileged.

> Items 175-177, 183-184, 189, 191-206, and 209-215 of the redaction log all indicate "relevance" as the reason they were withheld. Relevance is not a proper basis for redacting responsive documents. Everest's document requests explicitly called for documents "to be produced in their full and unexpurgated form, together with all drafts and non-identical copies of each." *Id.* at Instruction no. 4. It is inappropriate for the producing party to unilaterally decide which parts of the documents it is producing are relevant. Further, redaction ultimately makes it more difficult for the fact-finder to understand the context of documents submitted in evidence. Accordingly, we request that Lamorak immediately produce unredacted versions of the aforementioned documents.
>
> Items 178-182, 185-188, 190, and 207-208 were redacted, but no reason was given for the basis of the redaction. We understand these are documents which Lamorak had previously produced in an arbitration and has reproduced in this action because they are responsive to Everest's documents requests. With respect, it is unfair to Everest to restrict it to documents produced in Lamorak's arbitration. Lamorak has the obligation to produce responsive documents from its own files, not merely those already in its attorneys' possession. Accordingly, Everest requests that Lamorak immediately produce unredacted versions of these documents.

Id. at 1-2.

On March 13, 2017 counsel for the parties conferred with respect to Everest's outstanding discovery requests. Daniel Hargraves and Andrew Costigan participated for Everest. Michael Batson and Michael Kinton participated for Lamorak. Despite extensive discussion of the matter, counsel were unable to resolve the production issues involved in the instant motion. Lamorak's counsel did however, agree to provide a written response to Everest's counsel's March 10, 2017 letter.

On March 14, 2017, Lamorak's counsel sent an email seeking clarification of two points: (1) the timeframe for Lamorak's Special Risks Office's involvement with the Facultative Certificates at issue; and (2) the reinsurance information that Everest would require in

production. *See* Hargraves Dec. at Exh. 20. Everest's counsel responded on March 16, 2017. *See* Hargraves Dec. at Exh. 21.

On March 23, 2017 Lamorak provided a partial response to Everest's counsel's March 10, 2017 letter. *See* Hargraves Dec. at Exh. 22. Lamorak's counsel suggested that the parties attempt to reach a compromise with respect to Everest's request for reinsurance information. However, Lamorak did not propose what that compromise might entail. In essence, the parties had made no progress on that issue since their March 13, 2017 conversation.

Lamorak indicated that it had no more policy file documents to produce:

> With respect to giving you more information about why there are no more documents in the "policy files," I've checked and the best I can tell you is that is all we were able to locate. There is nothing else for us to disclose. Please note, your comment that we have not produced our "policy files" is wrong. We produced what we have.

Id.

Lamorak's counsel also indicated that Lamorak had no documents from the Special Risks Office: "With respect to the Special Risks Office, the time period is so long ago that if those documents still exist in any of our databases, they would have been revealed by our searches and produced. Accordingly, there is nothing else we can do there." *Id.* Despite Everest's request, Lamorak did not provide any explanation for its loss or destruction of these documents, nor did Lamorak provide any explanation for the deficiencies in its redaction log.

In response to Everest counsel's March 23, 2017 email following up on Everest's requests, Lamorak refused to produce any of the redacted documents. Lamorak insisted that it was entitled to redact based on relevance, and asserted that Everest should look to an unidentified redaction log that Lamorak apparently produced in an arbitration between the parties to understand why it had redacted documents in this case. It also rejected Everest's request that it

properly log the claimed attorney-client privilege redactions by indicating the attorney and client involved. Lamorak claimed that Everest was not entitled to that information. *Cf.* Exh. 19 at 1 and Exh. 22.

Lamorak also refused Everest's counsel's request for "clarification" of Lamorak's failure to produce policy file documents. Everest inquired:

> "We also request that you clarify your response with respect to Lamorak's production of its "policy files." Your email indicates that our comment that Lamorak has not produced its policy files 'is wrong,' but also states that what Lamorak produced was 'all we were able to locate.' Please advise whether Lamorak can confirm that no documents in its policy files were lost or destroyed prior to production.

See Hargraves Dec. at Exh. 23. Lamorak responded: "With respect to an explanation regarding why we do not have additional documents, I have told you everything I can tell you. I will have nothing further to disclose in that regard and you are welcome to address any questions you have during depositions." *See* Hargraves Dec. at Exh. 24.

This motion followed.

ARGUMENT

I.

LAMORAK SHOULD BE COMPELLED TO PRODUCE DOCUMENTS RELATING TO ITS ALLOCATION OF ALCOA ASBESTOS LOSSES TO ITS REINSURERS

Everest disputes the reasonableness of Lamorak's allocation of Alcoa's asbestos losses to the Facultative Certificates that Everest issued to Lamorak. Despite repeated requests, Lamorak has refused to produce documents relating its other reinsurance agreements and its allocation of Alcoa's asbestos losses among them. Lamorak has not provided any excuse for that refusal, other than its claim that such documents are not relevant. However, because the

reasonableness of Lamorak's allocation is in dispute, there can be no legitimate question that documents relating to that allocation are relevant.

In *Travelers Indem. Co. v. Excalibur Reinsurance Corp.*, 2013 WL 1409889 (D. Conn. April 8, 2013), the court faced this same issue. Excalibur, the reinsurer, sought production of documents relating to Traveler's allocation of losses to its reinsurance. Travelers argued that such "discovery relates solely to irrelevant or forbidden issues, would not lead to admissible evidence, and cannot be compelled under the federal discovery rules." *Id.* at * 9. Excalibur argued that "as one of the reinsurers, it is entitled in law to challenge the amount Travelers allocated to it on two factual grounds: the allocation was unreasonable in the circumstances, and it imposes a liability contrary to the terms of the reinsurance contracts."

The court found in favor of Excalibur:

> I conclude that as between these conflicting and irreconcilable contentions of counsel, Excalibur's position is in accord with New York law and Travelers' is contrary to that law. Excalibur is entitled under the New York Court of Appeals cases to challenge the reasonableness of Travelers' post-settlement allocation decision, and to argue that the economic consequence of that allocation violates or disregards provisions in the reinsurance contract. The discovery Excalibur seeks may lead to evidence admissible on these issues. The legitimate boundaries of the requested discovery exceed the limited disclosures Travelers has previously made. Travelers' protestation that those disclosures are sufficient is based upon its view of the powers in which it is clothed by the follow the settlements doctrine, but I have rejected that application of the doctrine. Accordingly, Excalibur's motions to compel discovery will be granted.

Id. at 10. *See United States Fidelity & Guaranty Co. v. American Re-Insurance Co.*, 20 N.Y.3d 407, 421, 985 N.E.2d 876, 883, 962 N.Y.S.2d 566, 573 (N.Y. 2013) ("a cedent's allocation of a settlement for reinsurance purposes will be binding on a reinsurer if, but only if, it is a reasonable allocation").

Lamorak cites no countervailing interest opposing Everest's need for reinsurance-related documents to challenge Lamorak's allocation. Lamorak's reinsurance documents are not confidential, it has no justification for imposing a veil of secrecy over them. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Illinois Corp.*, 116 F.R.D. 78, 82 (N.D. Ill. 1987) ("Insurers claim their pre- and post-issuance communications with their reinsurers as to Continental are not relevant to the subject matter involved in the pending action ... [or] reasonably calculated to lead to the discovery of admissible evidence. Insurers are wrong. Order ¶ 1(B) fully comports with the liberal scope of discovery prescribed by Rule 26(b)(1)").

Accordingly, Lamorak should be compelled to produce documents relating to its reinsurance of Alcoa asbestos claims and its allocation of such claims among its reinsurance contracts.

II.

LAMORAK SHOULD BE COMPELLED TO PRODUCE UNREDACTED DOCUMENTS

Lamorak's redaction log shows that it has redacted 21 documents based on "relevance," an improper basis for redaction. Its log reflects that it redacted another 12 items without supplying any reason at all. Its log also indicates that it redacted 121 items for "attorney-client communications," even though the log does not reflect the attorneys or clients allegedly communicating.

A. Relevance Is An Improper Basis For Redaction

Lamorak improperly redacted documents based on "relevance." It is well-established that "relevance" is an improper basis for redaction:

> Redaction is an inappropriate tool for excluding alleged irrelevant information from documents that are otherwise responsive to a discovery request. It is a rare document that contains only relevant

> information. And irrelevant information within a document that contains relevant information may be highly useful to providing context for the relevant information. Fed.R.Civ.P. 34 concerns the discovery of "documents"; it does not concern the discovery of individual pictures, graphics, paragraphs, sentences, or words within those documents. Thus, courts view 'documents' as relevant or irrelevant; courts do not, as a matter of practice, weigh the relevance of particular pictures, graphics, paragraphs, sentences, or words, except to the extent that if one part of a document is relevant then the entire document is relevant for the purposes of Fed.R.Civ.P. 34. This is the only interpretation of Fed.R.Civ.P. 34 that yields 'just, speedy, and inexpensive determination[s] of every action and proceeding.' Fed.R.Civ.P. 1.

Bartholomew v. Avalon Capital Grp., Inc., 278 F.R.D. 441, 451–52 (D. Minn. 2011) (footnote omitted).

The *Bartholomew* court noted that review of the Federal Rules of Civil Procedure compels the conclusion that a party may not unilaterally redact documents based on relevance:

> This interpretation is buttressed by the fact that the Federal Rules of Civil Procedure do not grant parties the power to unilaterally redact information on the basis of relevance. The Federal Rules of Civil Procedure explicitly provide when redaction may be used. *See* Fed.R.Civ.P. 5.2 (discussing redaction within the context of filings with the Court); *see also* D. Minn. LR 5.5 (discussing redaction of transcripts). The Federal Rules of Civil Procedure also explicitly provide a method for a party to object to a request for production of documents. *See* Fed.R.Civ.P. 34(b)(2). Rule 34(b)(2)(B)–(C) states: "For each item or category, the response must ... state an objection to the request, including the reasons" and "[a]n objection to part of a request must specify the part and permit inspection of the rest." This method for objection does not explicitly include the option of producing redacted documents. In addition, the Federal Rules of Civil Procedure provide parties with the option to bring a motion for a protective order. Fed.R.Civ.P. 26(c). Thus, a party seeking the power to unilaterally redact documents for relevance should request leave to redact those portions that the party contends are irrelevant. Furthermore, there is a Protective Order [Docket No. 40] in the present case, which could be utilized to limit the dissemination of any confidential information.

> Therefore, for the reasons set forth above, Defendants must produce unredacted versions of the documents that Defendant previously produced with redactions based solely on relevance.

Bartholomew v. Avalon Capital Grp., Inc., 278 F.R.D. 441, 452 (D. Minn. 2011).

Practical reasons also weigh against allowing a party to unilaterally redact for relevance:

> The Court does not welcome unilateral editing of documents by the producing party. Even when implemented with restraint and in good faith, the practice frequently gives rise to suspicion that relevant material harmful to the producing party has been obscured. It also tends to make documents confusing or difficult to use. All too often, the practice results in litigation of collateral issues and *in camera* review of documents by the Court, with the result that the time of both counsel and the Court is wasted. These drawbacks ordinarily outweigh the minimal harm that may result from disclosure of some irrelevant material.

In re Medeva Sec. Litig., 1995 WL 943468, at *3 (C.D. Cal. May 30, 1995).

Accordingly, Lamorak should be compelled to produce in unredacted form the documents it unilaterally redacted based on relevance.[1]

B. Lamorak Should Produce Unredacted Copies Of Documents For Which It Has No Justification For Redaction

It is axiomatic that the point of a redaction log is to provide a justification for the redactions in a party's document production. Lamorak has logged 12 items on its redaction log for which it has provided explanation of the reason for the redaction. Indeed, as these documents were apparently produced in a prior arbitration between the parties, Lamorak cannot even claim that it is aware whether they should be redacted in this action.

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[1] From inspection, it appears that most of the redactions relate to reinsurance information that Lamorak chose to withhold from Everest. Accordingly, these documents should be produced in unredacted form if the Court grants Everest's motion to compel Lamorak to produce documents relating to its reinsurance of Alcoa asbestos claims.

Lamorak's sole excuse for failing to provide a justification for these redactions is that Everest should be able to infer a basis for the redactions from a redaction log Lamorak provided in the parties' arbitration:

> With respect to the redactions on documents produced in the arbitration, Everest was a party to the arbitration and, therefore, is already in possession of the redaction log and all of the documents. Requiring Lamorak to duplicate this work by affixing redactions to clean copies of the documents serves no purpose other than to harass Lamorak and cause it to incur additional and unnecessary expense. We will not be producing those documents without the redactions.

See Hargraves Dec. at Exh. 24.

With respect, Lamorak's excuse is absurd. First, Lamorak has not even bothered to produce the arbitration redaction log in this case. None of the redacted documents reflect Bates numbers from the arbitration, so Everest would simply have to guess which documents relate to which entries on the log. Even if Everest were to get past that obstacle, there is no reason to believe that the arbitration redaction log would explain why the redactions are appropriate for the instant dispute between the parties. Accordingly, Lamorak should produce unredacted copies the documents.

C. Lamorak's Improperly Logged "Attorney/Client Communication" Documents

None of the 174 items on Lamorak's redaction log that were allegedly redacted based on "attorney/client communication" are properly logged, as the log does not reflect the attorney or client allegedly communicating. Indeed, for all 174 of these items it appears that the "authors" and "recipients" identified are those reflected in the *unredacted* portion of the document, rather than the redacted portion.

When pressed for an explanation, Lamorak asserted that only the identity of the attorney receiving the documents had been redacted:

> With respect to the attorney-client communication redactions, the information redacted merely relates to the identity of individuals within Hermes, Netburn, O'Connor & Spearing, P.C. who received and reviewed the documents (*i.e.*, Outlook affixed the name of the individual(s) within HNOS who printed the documents). Everest is not entitled to this information.

Id.

While Lamorak's position is incorrect – a log of supposedly privileged communications between an attorney and a client should identify the attorney – Everest does not press the point with respect to 172 of the 174 items on the log. With respect to the other two items, however, the documents logged as items 34 and 44 on the redaction log, it appears that considerably more information than just an attorney's identity has been redacted. *See* Hargraves Dec., Exh. 19 at Lamorak's Redaction Log at pp. 3 and 4. For both these documents nearly half a page has been redacted. No explanation appears for these redactions – not on the redaction log, not on counsel's email explaining the redaction log. Accordingly, Everest respectfully requests that Lamorak be required to properly log these two documents or produce them.

III.

LAMORAK SHOULD BE COMPELLED TO PRODUCE ITS POLICY FILES AND DOCUMENTS RELATED TO THE FACULTATIVE CERTIFICATES OR EXPLAIN ITS FAILURE TO DO SO

Lamorak failed to produce its policy files for the Alcoa Policies. Lamorak also failed to produce documents maintained in its Special Risks Office that relate to the Facultative Certificates. The Special Risks Office was responsible for placing the Facultative Certificates with Everest. Everest's own production includes its correspondence with the Special Risks Office. However, Lamorak has not produced documents from the Special Risks Office's files. As a result, Lamorak has not produced documents relating to internal evaluations of the

Facultative Certificates at the time the parties agreed to them.

Lamorak does not contend that it is entitled to withhold the policy files or documents relating to the Facultative Certificates from production. Instead, it claims that it has produced what it has and Everest is not entitled to an explanation for the deficiencies in its production. Everest requested clarification from Lamorak whether any "documents in its policy files were lost or destroyed prior to production." *See* Hargraves Dec., Exh. 23. Everest also sought an explanation as to why Lamorak was unable to produce documents from its Special Risks Office's files. *Id.* Lamorak refused to respond. *See* Hargraves Dec., Exh. 24 ("With respect to an explanation regarding why we do not have additional documents, I have told you everything I can tell you. I will have nothing further to disclose in that regard and you are welcome to address any questions you have during depositions.")

Everest is entitled to production of the requested documents before depositions take place. *See Cooper v. Charter Communications, Inc.*, 2016 WL 1430012 at * 3 ("plaintiffs were entitled to conduct a Rule 30(b)(6) deposition on the basis of a complete production of documents they had requested"). Lamorak's refusal to explain its efforts to find responsive documents or explain their non-production simply frustrates Everest's efforts to obtain production of the documents before depositions take place.

Accordingly, Everest respectfully requests that Lamorak be compelled to produce the documents requested or explain what efforts it made to locate them and why they were not found.

CONCLUSION

For the aforementioned reasons, Everest respectfully requests that Lamorak be compelled: (1) to produce documents relating to its reinsurance of Alcoa policies and its allocation of Alcoa asbestos losses among them; (2) to produce unredacted copies of the improperly redacted documents; and (3) to produce its policy files for the Alcoa policies and its documents relating to the Facultative Certificates or describe its efforts to find those documents and explain their non-production.

Dated: New York, New York
March 24, 2017

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CERTIFICATE OF SERVICE

Pursuant to Local Rules 5.2(b)(2) and 5.4 of the Local Rules of the United States District Court for the District of Massachusetts, I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and that paper copies will be sent by first-class mail to those indicated as non-registered participants, if any, on March 24, 2017.

Daniel Hargraves