

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 03-E-0106

**In the Matter of the Liquidation of
The Home Insurance Company**

**COMMISSIONER'S AND LIQUIDATOR'S EMERGENCY MOTION FOR
EXPEDITED DECISION OR HEARING ON MOTION FOR ORDER
GOVERNING CONFIDENTIALITY OF REGULATORY DOCUMENTS**

Roger A. Sevigny, both as New Hampshire Insurance Commissioner and as Liquidator of The Home Insurance Company ("Home") (collectively "Commissioner"), hereby moves that the Court issue an expedited decision or schedule a hearing during the week of February 22, 2010 on the pending Commissioner's and Liquidator's Motion for Order Governing Confidentiality of Regulatory Documents filed October 30, 2009 ("Motion"). As reasons therefor, the Commissioner states:

1. Summary. The Commissioner requests an expedited decision or hearing on the pending Motion because it concerns the proper application of important statutory protections regarding oversight of Home by the New Hampshire Insurance Department ("Department"). The motion has been opposed by the plaintiffs in California litigation ("California Plaintiffs") and, to a lesser extent, the defendants in that litigation ("Zurich"). The California Plaintiffs have now raised the same issues in a motion to compel filed in the California litigation on February 4, 2010, which initially was scheduled to be heard on February 26, 2010. That motion is directed to third-party Risk Enterprise Management Limited ("REM"). REM holds documents subject to statutory confidentiality because it administered Home, under Department oversight, from 1995 to 2003. The issues of New Hampshire law presented are of great significance and should be determined in New Hampshire. Both the New Hampshire and California courts are facing the

same issue, which is the proper interpretation of New Hampshire statutes, reflecting New Hampshire public policy, on a matter of high importance to the Department. The issue should most properly be addressed in the first instance by a New Hampshire court. Among other factors, this is because it is the only forum where the most interested party – the Commissioner – can be heard. Under general principles of comity among the states, the California court is entitled to the benefit of, and will consider, the New Hampshire court’s determination on the same issue. Absent that guidance, however, the California court will have no basis on which to properly evaluate the interests of its sister state in the uniform application of its laws. In light of the compressed time frame (which is beyond the control of the Commissioner), a prompt decision by the New Hampshire court is highly desirable.

2. On October 30, 2009, the Commissioner filed the Motion seeking an order governing the confidentiality of regulatory documents regarding the Department’s oversight and supervision of Home. The California Plaintiffs have separately sought discovery encompassing such documents both from the Commissioner as Liquidator of Home and from REM.¹ The Liquidator objected to producing such documents on grounds of statutory confidentiality, in particular under RSA 400-A:37 and RSA 401-B:7. In responding to the subpoena directed to it, REM also objected to production of documents based upon the same statutory confidentiality asserted by the Commissioner. This is appropriate because REM only has possession of the documents because it administered Home from 1995 to 2003. Indeed, the Order of Liquidation for Home expressly recognizes REM’s role.²

¹ The first round of discovery directed to the Commissioner was the subject of a Stipulation between the California Plaintiffs, Zurich and the Liquidator approved by the Court (McGuire, J.) in this proceeding in June 2006.

² See Order of Liquidation ¶ (n)(2) (enjoining actions or proceedings “against The Home’s, the Rehabilitator’s or the Liquidator’s present or former directors, officers, employees, agents, representatives, or consultants, including, without limitation, Risk Enterprise Management Limited and each of its officers, directors and employees, arising from their actions on behalf of The Home, the Rehabilitator or the Liquidator.”)

3. The Commissioner filed the Motion to obtain a decision concerning the proper reach of the statutory confidentiality. The Motion is fully briefed. The California Plaintiffs filed their opposition on November 9, 2009, and Zurich filed its limited opposition on November 16, 2009. The statutory confidentiality issues presented by the Motion apply to documents in the possession of either the Commissioner or REM. In their initial papers, no party requested a hearing.

4. On February 4, 2010, despite the pending Motion, the California Plaintiffs filed a motion to compel in the California litigation seeking production of documents withheld by REM on grounds of statutory confidentiality. A copy of the California Plaintiffs' memorandum in support of the motion is attached as Exhibit A. The statutory confidentiality issues are raised at pages 5-8 of the California motion. (The motion also raises other issues such as attorney-client privilege, which are not the subject of the Commissioner's Motion.) The California Plaintiffs disregard the plain language of the statutes and contend, based upon assertions concerning purported statutory purpose, that the statutes do not apply at all. These arguments are essentially the same as those made in the California Plaintiffs' objection to the Motion pending in this Court, but the California Plaintiffs did not inform the California court of the fact that the Motion is pending in this Court.

5. The newly filed California motion makes urgent a decision on the statutory confidentiality issues presented by the Motion. The California motion directed to REM was initially scheduled to be heard on February 26, 2010. See Exhibit A at 1. In connection with requesting assent to this motion, the Commissioner has been informed by Zurich that the California motion will need to be refiled such that, following standard procedure, it most likely will not be heard until early March.

6. The issue of statutory confidentiality should be determined by this Court where the Commissioner is present to address it. The proper application of the confidentiality provided by the New Hampshire statutes for the Department's regulatory activity to documents held by the Commissioner and REM, and sought by the California Plaintiffs, should be determined by this Court to provide for consistent treatment of the documents, regardless of who holds them.

7. To avoid the potential for inconsistent results, and to have the issues of New Hampshire law that involve documents regarding regulation of Home determined in the Court that is supervising the Home liquidation proceeding, the Commissioner requests that the Court issue a decision or set the Motion for an expedited hearing during the week of February 22, 2010.

8. Counsel for the California Plaintiff's has not responded to a request for concurrence in the relief sought herein. Counsel for Zurich concurs in a request for expedited treatment as long as it is accompanied by a request for a hearing. Counsel for Zurich requests that a hearing be scheduled on February 22 or 23.

WHEREFORE, the Liquidator respectfully requests that this Court:

A. Grant this motion;

B. Either issue an expedited decision on the Commissioner's and Liquidator's

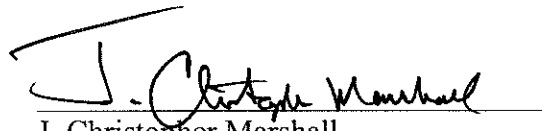
Motion for Order Governing the Confidentiality of Regulatory Documents or set that motion for hearing during the week of February 22, 2010; and

C. Grant such other and further relief as justice may require.

Respectfully submitted,

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NEW HAMPSHIRE AND LIQUIDATOR
OF THE HOME INSURANCE
COMPANY,

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 COUNTY OF SAN FRANCISCO

12 FULLER-AUSTIN ASBESTOS
 13 SETTLEMENT TRUST, *et al.*,

Plaintiffs,

vs.

15 ZURICH-AMERICAN INSURANCE
 16 COMPANY, individually and as successor
 17 to Zurich Insurance Company, *et al.*,

Defendants.

Case No. CGC 04-431719
 Case No. CGC 04-436181
 Case No. CGC 05-442140
 Case No. CGC 05-442745

**PLAINTIFFS' MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF THE MOTION TO
 COMPEL THIRD-PARTY RISK
 ENTERPRISE MANAGEMENT,
 LIMITED TO FURTHER PRODUCE
 DOCUMENTS AND PRODUCE A
 WITNESS FOR FURTHER DEPOSITION
 TESTIMONY**

Date: February 26, 2010
 Time: 1:00 p.m.
 Place: ADR Services
 50 Fremont, Suite 2110
 San Francisco, CA 94105
 Judge: Honorable Laurence Kay, Ret.

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WESTERN ASBESTOS SETTLEMENT TRUST, *et al.*,
Plaintiffs,
vs.
ZURICH-AMERICAN INSURANCE COMPANY, individually and as successor to Zurich Insurance Company, *et al.*,
Defendants.

PEPSIAMERICAS, INC., *et al.*,
Plaintiffs,
vs.
ZURICH-AMERICAN INSURANCE COMPANY, individually and as successor to Zurich Insurance Company, *et al.*,
Defendants.

PNEUMO ABEX LLC,
Plaintiff,
vs.
ZURICH-AMERICAN INSURANCE COMPANY, individually and as successor to Zurich Insurance Company, *et al.*,
Defendants.

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1 **I. INTRODUCTION**

2 On June 8, 2007, Plaintiffs subpoenaed business records from Zurich-affiliated third party
3 Risk Enterprise Management, Limited (“REM”). See Declaration of Elham Marder in Support of
4 Motion to Compel Third-Party Risk Enterprise Management, Limited to Further Produce
5 Documents and Produce a Witness for Further Deposition Testimony (“Marder Decl.”) at ¶ 3,
6 Exh. 1. Plaintiffs sought the records because REM, an entity created by Zurich as part of the so-
7 called “Recapitalization,” is integral to several of Plaintiffs’ fraudulent transfer claims.

8 After a two year delay and associated motion practice,¹ REM begrudgingly completed its
9 document production² and thereafter took three additional months to provide Plaintiffs with its
10 various privilege logs.³ These privilege logs indicate that REM has taken every liberty in
11 shielding documents from production based on inapplicable statutory privilege claims as well as
12 unsupported and untenable claims of attorney-client privilege and work product protection.

13 REM first claims, based on self-serving interpretation of various New Hampshire statutes,
14 that various statutory provisions – RSA 400-A:37, RSA 401-B:7, and RSA 404-F:8 – absolve
15 REM, a private party, of its discovery obligations to the Home Insurance Company (the “Home”)
16 policyholders.⁴ In fact, the plain language of the statutes as well as their legislative history
17 demonstrates that, at best, the statutes were enacted to protect an insurer’s commercially sensitive
18

19 ¹ In June 2009, Plaintiffs moved to compel REM to comply with the deposition subpoena for
20 production of business records, because REM had not yet completed its document production two
21 years after the issuance of the subpoena and six months before the initial Phase I Trial date.

22 ² REM has supplemented its production with documents released from its privilege logs as
23 recently as January 29, 2010.

24 ³ REM provided a document containing a redaction log and two separately identified privilege
25 logs. The first is entitled “Privilege Log” and contains attorney-client communication, attorney
26 work product, and New Hampshire statutory privilege claims. The other is entitled “Home
27 Privilege Log” and contains largely New Hampshire statutory privilege claims. The “Redaction
28 Log,” “Privilege Log” and the “Home Privilege Log” are collectively referred to as the “privilege
logs.” REM provided its privilege logs on September 3, 2009, supplemented on November 6,
2009, and amended on December 9, 2009. Marder Decl. at ¶¶ 5-7, Exhs. 3-5.

⁴ REM asserts that it invokes these statutory privileges with “input” and confirmation from the
New Hampshire Liquidator. Accordingly, REM contends Plaintiffs must address this issue
directly with the New Hampshire Liquidation Court.

1 business information from competitors when such information is shared with the New Hampshire
2 Insurance Commissioner.⁵ The statutes were not enacted to preclude policyholders from
3 obtaining relevant information from an insurer pursuant to a subpoena and with all necessary
4 confidentiality assured through a stipulated protective order. The legislative history of these
5 statutes makes clear their purpose is to protect the public and policyholders.

6 Moreover, even after REM's provision of several "Privilege Logs", REM has still failed to
7 meet its burden in establishing that hundreds of documents are protected by the attorney-client
8 privilege and/or work product doctrine. REM's own "Privilege Log" suggests these documents
9 are not privileged and REM has not provided further information supporting its privilege claims.

10 Accordingly, Plaintiffs move to compel⁶ REM to release Document Nos. 2-7, 11-13, 17,
11 22-25, 27, 29-33, 35, 42-46, 48-76, 80-91, 94-95, 97-98, 100-121, 128-129, 133-137, 140, 144-
12 145, 149, 162, 167, 176, 179, 184-185, 189-190, 195, 197-198, 205-206, 218-219, 221, 223, 228,
13 230, 234-236, 243-244, 246, 310, 350, 410, 414-419, 421-426, 429, 432, 435-437, 440-448, 450-
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15 571, 573, 581-582, 586, 591, 595, 604, 608, 612-615, 622-623, 625, 639, 642, 644-645, 657, 668,
16 673, 677, 680, 689, 708, 712, 715, 718, 720-721, 726, 729-731, 733, 736-737, and 740 from its
17 amended supplemental "Privilege Log" and all documents withheld based on the statutory
18 privileges on the amended supplemental "Home Privilege Log."⁷ Plaintiffs also move to compel
19 REM to provide un-redacted copies of the four documents on its Redaction Log, for which REM
20
21

22 ⁵ Moreover, REM is not an insurer, and its basis for asserting the statutory privileges is unclear.
23 In addition, these are "confidentiality" provisions that REM broadly construes to assert
24 documents are privileged and immune from discovery.

25 ⁶ Plaintiffs bring this Motion to Compel before Justice Kay who is to hear "all discovery disputes
26 in connection with the Phase I Trial." Marder Decl. at ¶ 31, Exh. 29 at 4:1-3. Moreover, REM
27 has already asserted other orders in this action, including the Protective Order and Case
28 Management Order No. 1, in discovery disputes with Plaintiffs. Marder Decl. at ¶¶ 23, 32, Exhs.
21 at 244:25-245:17, 30.

⁷ For the reasons discussed above, REM's reliance on the New Hampshire statutory privileges to
withhold these documents is misplaced.

1 has not provided a clear, tenable privilege claim.⁸

2 Lastly, REM should be compelled to produce a witness for further deposition testimony,
3 pursuant to the Deposition Subpoena for Personal Appearance, served on September 21, 2009.
4 Marder Decl. at ¶ 22, Exh. 20. Plaintiffs' took the corporate deposition of REM on December 10,
5 2009, and since that date REM has released documents for which it previously asserted a
6 privilege. REM should be compelled to provide a witness for further deposition testimony on
7 these documents as well as any documents released pursuant to this Motion to Compel.

8 **II. MEET AND CONFER**

9 On June 8, 2007, Plaintiffs served a Deposition Subpoena for Production of Business
10 Records on REM ("Subpoena"). Marder Decl. at ¶ 3, Exh. 1. After obtaining an extension, REM
11 served its responses and objections to the Subpoena on July 27, 2007. Marder Decl. at ¶¶ 4, 9,
12 Exhs. 2, 7. REM agreed to produce documents to certain categories, and Plaintiffs agreed to
13 allow REM to produce documents on a rolling basis. Marder Decl. at ¶¶ 4, 9, Exhs. 2, 7. By
14 December 2008, nearly a year and a half later, REM had only produced 744 pages of documents.
15 Marder Decl. at ¶ 7, Exh. 9. Two years after the Subpoena was issued, REM still had not
16 completed its document production. Therefore, in June 2009 Plaintiffs moved to compel REM to
17 complete its document production by July 6, 2009. Marder Decl. at ¶ 10, Exh. 8. REM did not
18 provide a certificate of completion, but stated its July 17, 2009 production completed its
19 document production. REM provided its privilege logs on September 3, 2009.

20 On October 7, 2009, Plaintiffs prepared meet-and-confer correspondence to REM
21 requesting further clarification for the privilege logs and a telephonic meet and confer. Marder
22 Decl. at ¶ 11, Exh. 9. Plaintiffs and REM telephonically met and conferred on October 19, 2009.
23 Marder Decl. at ¶ 12, Exh. 10. REM agreed to provide supplemental privilege logs with clearer,
24 more specific document descriptions. REM also agreed to provide a separate list identifying the

25 _____
26 ⁸ REM's Redaction Log is unintelligible. The document descriptions state the documents
27 contain attorney-client communication, but no author/recipient is identified or third parties are
28 identified as receiving the documents. Moreover, REM also references "settlement discussions"
(without any clarification) and the statutory privileges. Plaintiffs are left to guess which
privileges are actually asserted.

1 title and employer of persons listed on the privilege logs. REM also stated it would provide
2 further clarification regarding its assertion of the statutory privileges.

3 On November 6, 2009, REM released some documents from its privilege log and provided
4 supplemental privilege logs and an identification chart for persons listed on the supplemental
5 privilege logs. Marder Decl. at ¶¶ 6, 8, Exhs. 4, 6. While these supplemental documents assisted
6 in verifying REM's privilege claims as to certain documents, Plaintiffs continued to question
7 REM's privilege claims for the rest of the documents on the privilege logs. REM provided no
8 further clarification as to its New Hampshire statutory privilege claims. Moreover, REM stated
9 that it would amend the supplemental Privilege Log as it found several documents.

10 On December 9, 2009, REM released a few more documents from its supplemental
11 Privilege Log and provided amended supplemental privilege logs. Marder Decl. at ¶ 7, Exh. 5.
12 Plaintiffs prepared further meet-and-confer correspondence on December 23, 2009 regarding
13 concerns with REM's privilege claims. Marder Decl. at ¶ 13, Exh. 11. Plaintiffs' requested a
14 telephonic meet and confer and that the parties agree upon a date and time by December 31, 2009.

15 REM never responded to Plaintiffs' December 23, 2009 correspondence. Accordingly,
16 Plaintiffs sent follow-up meet and confer correspondence on January 5, 2010. Marder Decl. at ¶
17 14, Exh. 12. Plaintiffs again requested a telephonic meet and confer.

18 REM responded on January 5, 2010 and requested to provide a written response to the
19 issues raised in Plaintiffs' December 23, 2009 and January 5, 2010 correspondence before
20 engaging in a telephonic meet and confer as requested by Plaintiffs. Marder Decl. at ¶ 15, Exh.
21 13. Plaintiffs agreed but requested that REM provide its written response by January 14, 2010,
22 to allow time for a subsequent telephonic meet and confer. Marder Decl. at ¶ 16, Exh. 14. On
23 January 12, 2010, REM asked for an extension to January 22, 2010 to provide its written response
24 to which Plaintiffs agreed. Marder Decl. at ¶¶ 17-18, Exh. 15-16.

25 REM did not meet its own January 22, 2010 deadline. REM did not provide its written
26 response to Plaintiffs' meet and confer correspondence until January 29, 2010, over a month after
27 the initial letter. Marder Decl. at ¶ 19, Exh. 17. REM released an additional 300 pages from its
28 amended supplemental "Privilege Log," but hardly addressed the concerns raised in Plaintiffs'

1 December 23, 2009 letter regarding the attorney-client communication and attorney work product
2 privilege claims for the other documents at issue. Instead, the thrust of REM's response was that
3 it was still reviewing documents in light of the issues raised by Plaintiffs and finding previously
4 un-located documents, but without any indication as to when that would be done.

5 Plaintiffs agreed to continue meet-and-confer efforts with REM to the extent fruitful.
6 Marder Decl. at ¶ 20, Exh. 18. REM agreed to a February 18, 2010 deadline for Plaintiffs'
7 motion to compel on the privilege logs issues.² Marder Decl. at ¶ 21, Exh. 19. REM and
8 Plaintiffs, however, have reached an impasse on the statutory privilege claims. Moreover, REM
9 has given no indication as to when it will provide further clarification and information as to its
10 attorney-client communication and attorney work product claims. It's notable that these matters
11 relate to a document production pursuant to a subpoena that was issued in June 2007 and
12 following a motion to compel in June 2009. Given the amount of time it has already taken REM
13 to respond to this subpoena and the fast approaching Phase I Trial date, Plaintiffs cannot delay
14 any further addressing the concerns set forth in this Motion to Compel. Plaintiffs will withdraw
15 their Motion to Compel as to any issues that may be resolved through the continuing meet-and-
16 confer process.

17 **III. ARGUMENT**

18 **A. The New Hampshire Statutory Privileges Do Not Remove REM's Discovery**
19 **Obligations.**

20 The New Hampshire Insurance Code provisions RSA 400-A:37, RSA 401-B:7, and RSA
21 404-F:8 provide for the confidentiality of certain information filed with, produced to, obtained by,
22 or disclosed to the New Hampshire Insurance Commissioner ("Commissioner").

23 RSA 400-A:37 (IV)(a) provides for the confidentiality and privilege
24 of "documents, materials, or other information, including, but not
25 limited to, all working papers, and copies thereof created, produced

26 ² Although REM amended its supplemental privilege logs on December 9, 2009, Plaintiffs
27 conservatively calculated their Motion to Compel deadline from November 6, 2009, when REM
28 provided its supplemental privilege logs. Accordingly, under the Case Management Order No. 1,
which REM has asserted applies to it, Plaintiffs' motion to compel deadline was February 4,
2010. Marder Decl. at ¶¶ 31-32, Exhs. 29 (Case Management Order at 1-2), 30.

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or obtained by or disclosed to the commissioner or any other person in the course of an examination made under this title, or in the course of analysis by the commissioner of the financial condition or market conduct of a company.” Marder Decl. at ¶ 24, Exh. 22.

RSA 401-B:7 provides for the confidential treatment of “all information, documents, and copies thereof obtained or disclosed to the commissioner or any other person in the course of an examination or investigation.” Marder Decl. at ¶ 26, Exh. 24.

RSA 404-F:8 provides for the confidentiality of “all RBC reports, to the extent the information therein is not required to be set forth in a publicly available annual statement schedule, and RBC plans, including the results or report of any examination or analysis, with respect to any domestic insurer or foreign insurer which are filed with the commissioner.” Marder Decl. at ¶ 28, Exh. 26.

REM, at the directive of the New Hampshire Insurance Liquidator for the Home, broadly construes these New Hampshire Insurance Code provisions to contend that certain documents are privileged by virtue of the New Hampshire Insurance Department’s “oversight” and “supervision” of the Home. REM, however, improperly invokes these statutes, construing them beyond, even opposite to, their intended purpose.¹⁰ REM should be compelled to produce all documents withheld based only on these statutory privileges.

1. The Intended Purpose of the New Hampshire Statutes is the Free Flow of Information between Insurers and the Commissioner

The intended purpose of the confidentiality provisions in RSA 400-A:37, RSA 401-B:7, and RSA 404-F:8 is to encourage the free flow of information – including financial information – from insurers to the Commissioner, which regulates those insurers and aims to insure that the insurers remain solvent. By removing the fear that information disclosed to the Commissioner

¹⁰ For example, for Document No. 425 on its amended supplemental “Privilege Log,” REM asserts the statutes to preclude the production of a letter from the Commissioner to “REM/Home General Counsel” enclosing the (1) Consulting Agreement appointing Mike Averill as the New Hampshire Insurance Department representative responsible for monitoring the Home, (2) a letter from the Commissioner to Mike Averill authorizing him to act as the New Hampshire Insurance Department representative appointed to Home, and (3) a letter from the Commissioner to REM regarding Mike Averill’s supervision authority. These documents, however, are not Home or REM documents that were filed with, produced to, obtained by, or disclosed to the Commissioner as provided for under the New Hampshire provisions. Moreover, to the extent REM is invoking these statutes to protect the Home from policyholders, it is misusing the provisions against their intended purpose, which is to protect the public and policyholders.

1 may become publicly-available, and therefore the subject of competitive intelligence efforts, the
2 New Hampshire statutes afford insurers comfort that the required submission of information does
3 not result in competitive harm. RSA 404-F:8 specifically states that information provided to the
4 Commissioner shall be kept confidential by the Commissioner as “it might be damaging to the
5 insurer if made available to its competitors.”

6 REM’s reliance on the statutes to block discovery to Plaintiff policyholders makes no
7 sense. To begin with, Plaintiffs do not seek documents from the Commissioner. Plaintiffs seek
8 documents directly from REM. Neither do Plaintiffs seek discovery specifically as to documents
9 or information disclosed to the New Hampshire Commissioner. The mere fact that a document
10 has been disclosed to the Commissioner does not make it privileged. By way of analogy, the
11 attorney-client communication privilege protects communications between an attorney and a
12 client, but the facts underlying those communications are not privileged. *State Farm Fire and*
13 *Casualty Co. v. Sup. Ct.*, 54 Cal. App. 4th 625, 639 (1997). A fact does not become privileged
14 merely because it was communicated to an attorney. Likewise, that REM’s documents were
15 given to the Commissioner does not provide them with any greater protection than they would
16 have otherwise. Accordingly, the New Hampshire statutory provisions do not remove REM’s
17 discovery obligations.

18 Furthermore, the confidentiality provisions were not intended to protect against disclosure
19 in these circumstances. Here, the Home is insolvent and has entered liquidation. There is no
20 concern regarding a competitive disadvantage. The Commissioner has essentially become the
21 Home. Withholding such documents does not aid in the free flow of information between the
22 Home and the Commissioner. Moreover, even if the Home were not insolvent, there is no party
23 to this litigation that is either the Home’s or REM’s competitor, and there is a protective order
24 that can adequately protect such documents against disclosure beyond parties to this litigation.
25 Accordingly, these confidentiality provisions do not remove REM’s discovery obligations.

26 2. Intended Purpose of the Confidentiality Provisions is to Protect
27 Shareholders

28 The legislative history for in RSA 400-A:37, RSA 401-B:7, and RSA 404-F:8 makes clear

1 these statutes are intended to protect *policyholders* and the *public*. The confidentiality provisions
2 are merely a mechanism to assist in the exchange of information between insurers and the
3 Commissioner, enabling the Commissioner thereby to better protect the public and policyholders.

4 Specifically, the legislative history for RSA 400-A:37 states that the purpose of the statute
5 is to “strengthen the ability of the insurance department to protect the public.” Marder Decl. at ¶
6 25, Exh. 23 (Journal of the House, House Bill 649, page 1198).

7 The legislative history for RSA 401-B:7 states, this is a “model act to protect the public
8 against insurance holding companies.” In addition, RSA 401-B:7 expressly provides for the
9 disclosure of information when “the interest of policyholders . . . will be served by the publication
10 thereof.” Marder Decl. at ¶ 27, Exh. 25 (Journal of the House, House Bill 648, page 648).

11 Lastly, the legislative history for RSA 401-B:7 makes clear the bill was intended to give
12 statutory ability to deal with insolvency of insurers and states, “if capital falls below certain
13 levels, then the insurance department can step in and take steps to protect policyholders.” Marder
14 Decl. at ¶ 29, Exh. 27 (House Committee Public Hearing Minutes on Senate Bill 32 on March 23,
15 1995).

16 Here, however, REM is using the confidentiality provisions in these statutes against the
17 interest of policyholders—that is, the Plaintiffs. To allow REM to use these statutory provisions
18 to withhold relevant documents in this litigation based on these statutes turns the statutes on their
19 heads and should not be permitted.

20 **B. REM’s Attorney-Client Communication Privilege Claim Fail for Documents**
21 **that Do Not Involve Attorneys and Clients.**

22 The attorney-client communication privilege protects communications between an
23 *attorney* (or an *attorney’s agent*) and a *client* (or a *client’s agent*). Cal. Evid. Code § 952.
24 Therefore, communications not involving an attorney (or an attorney’s agent) are inherently not
25 attorney-client communications and are not privileged. Similarly, communications not involving
26 a client (or a client’s agent) are inherently not attorney-client communications and are not
27 privileged.

28 REM’s amended supplemental “Privilege Log,” however, is interspersed with documents

1 in which no REM attorney (or an agent of a REM attorney) and/or no REM personnel (or REM
2 agent) are involved in the communication.

3 For example, Document Nos. 197 and 198 on the amended supplemental "Privilege Log"
4 are emails from Michael Riney (REM EVP, Claims) to Tom Kober (REM VP, Claims), Paula
5 Maguire (REM SVP, Claims), Kevin Kelly (VP, Claims), and Michael Brambier (VP, Claims).
6 The communications do not involve a REM attorney. Neither are the people identified seemingly
7 agents for a REM attorney. Also, Document No. 425 on the amended supplemental "Privilege
8 Log" is communication between Paula Rogers of the New Hampshire Insurance Department and
9 Roger Moak, REM General Counsel. Paula Rogers is neither a REM employee nor agent.
10 Therefore, REM's attorney-client communication privilege assertion is without merit for these
11 documents.

12 On similar grounds, REM's attorney-client communication privilege assertions are also
13 improper for Document Nos. 24, 51, 228, 230, 234, 236, 310, 414-416, 450-451, 466-467, 470,
14 474-477, 479, 482-483, 508, 512, 515-518, 522-526, 532, 540-541, 544, 551-552, 573, 581-582,
15 608, 612-615, 645, 715, and 729-731.

16 In its January 29, 2010 correspondence,¹¹ REM asserts these documents are privileged
17 because they contain (1) privileged hand written notes by REM General Counsel Roger Moak, (2)
18 handwritten notes seeking legal advice directed to Roger Moak, or (3) information protected by
19 statutory privilege. Marder Decl. at ¶ 19, Exh. 17.

20 If REM's attorney-client communication claims are based on handwritten notes, copies of
21 these documents should still be released with the privileged handwritten notes redacted.¹²

22 **C. REM's Attorney Work Product Privilege Claims Fail for Documents Not**
23 **Authorized by an Attorney.**

24 The Discovery Act refers only to the work product of an *attorney* (or an *attorney's agent*)
25

26 ¹¹ This information was NOT included on the amended supplemental "Privilege Log." This after
the fact explanation begs the question as to why such information was not originally provided.

27 ¹² For reasons discussed in Section III.A above, the New Hampshire statutory privileges do not
28 prevent the disclosure of these documents.

1 acting on a client's behalf. Cal. Civ. Proc. Code § 2018.010 et seq. Accordingly, documents not
2 authored by an attorney or by an attorney's agent are not protected by the attorney work product
3 doctrine.

4 REM, however, improperly invokes the attorney work product doctrine for documents that
5 are not authored by a REM attorney. Nor is there any suggestion the authors of such documents
6 are the agents of a REM attorney. For example, Document No. 425 on the amended supplemental
7 "Privilege Log" identifies a letter prepared by Paula Rogers of the New Hampshire Insurance
8 Department. The letter encloses the Consulting Agreement between the New Hampshire
9 Insurance Department and Mike Averill and correspondence prepared by the New Hampshire
10 Insurance Department to Mike Averill and REM concerning the appointment of Mike Averill as
11 Representative. Paula Rogers is not a REM attorney nor an agent of a REM attorney. An
12 attorney work product claim for this document clearly fails.

13 Without any further clarification, in its January 29, 2010 letter, REM asserts these
14 documents are privileged because they contain (1) attorney-client privileged communications, (2)
15 attorney work product, *or* (3) information protected by statutory privilege. Marder Decl. at ¶ 19,
16 Exh. 17. It is NOT sufficient for REM to list various privileges that "might" apply and leave
17 Plaintiffs to guess as to which privilege it intends to assert. REM needs to state with specificity
18 the privileges asserted as statutorily required. See Cal. Civ. Proc. Code § 2031.240.

19 These documents are not authored by an attorney (or an attorney's agent), and therefore
20 are clearly not attorney work product.¹³ REM's attorney-client communication privilege fails for
21 many of these documents because (1) the document description suggests the provision of non-
22 legal services, (2) the communication involved third parties, and/or (3) no REM attorney (or an
23 agent of a REM attorney) and/or no REM personnel (or REM agent) are involved in the

24
25 ¹³ For similar reasons, REM's attorney work product claim is without merit for Document Nos. 2-
26 6, 17, 23-25, 27, 35, 42-45, 49-50, 54-73, 76, 80-85, 88-91, 95, 97-98, 102-104, 106-110, 114-
27 116, 119-121, 133-134, 137, 140, 144-145, 149, 162, 179, 184, 189-190, 195, 197-198, 205, 221,
28 228, 230, 234, 236, 310, 410, 415-418, 421-425, 428, 432, 446-447, 452, 455-456, 458-459, 464-
466, 472, 474-475, 478, 484, 496-497, 500-502, 505-506, 508-513, 515-517, 520-522, 524-527,
532-533, 536, 538, 543, 554, 570, 591, 595, 604, 622, 625, 639, 642, 657, 668, 673, 677, 680,
689, 721, 733, and 736.

1 communication.¹⁴ Accordingly, REM should be compelled to produce Document Nos. 3-6, 24,
2 42-45, 49-50, 54-73, 76, 82-83, 89-90, 98, 102-103, 107, 114-116, 119-121, 133-134, 140, 179,
3 197-198, 205, 228, 230, 234, 236, 310, 416, 421-425, 428, 446-447, 459, 464, 466, 472, 474-475,
4 501-502, 505-506, 508-509, 512, 515-517, 520-522, 524-526, 532-533, 543, and 639.

5 **D. REM Waived its Attorney-Client Communication and/or Attorney Work**
6 **Product Privilege Claims by Disclosing to Third Parties.**

7 Both the attorney-client communications privilege and attorney work product doctrine are
8 subject to waiver if the protected information is disclosed to certain third parties. Specifically, the
9 attorney-client communications privilege only applies to confidential communications. There is
10 no protection for communications involving third parties who are not essential to furthering the
11 client's interests. Cal. Evid. Code § 952. The attorney work product doctrine is waived when the
12 work product is disclosed to third persons with no interest in maintaining its confidentiality.
13 *Laguna Beach County Water Dist. v. Superior Court*, 124 Cal. App. 4th 1453, 1459 (2004).

14 Many documents and communications on the amended supplemental "Privilege Log"
15 involve third parties. The third parties identified on the various documents and communications
16 are representatives, consultants, personnel, or attorneys for (1) the New Hampshire Insurance
17 Department, (2) Trygg-Hansa AB, (3) Zurich Affiliates and/or (3) the Home Holdings, Inc.

18 For example, Document No. 30 on the amended supplemental "Privilege Log" is a memo
19 from Roger Moak, REM General Counsel, to Alden Warner of Centre Insurance Company, a
20 Zurich affiliate. If REM is a separate and distinct entity from Zurich affiliates, it is unclear why
21 these third parties are essential to furthering REM's interest or have an interest in maintaining the
22 confidentiality of the documents. REM has not provided any clarification on its amended
23 supplemental "Privilege Log" or meet-and-confer correspondence.

24 In addition, Document No. 53 on the amended supplemental "Privilege Log" is
25 correspondence from Roger Moak, REM General Counsel, to Michael Averill and Ray Tatti,
26 Representative for and Consultant to the New Hampshire Insurance Department, respectively, and

27 ¹⁴ Furthermore, for reasons discussed in Section III.A., the New Hampshire statutory privileges
28 do not prevent the disclosure of these documents.

1 copying Al Lawrence, Arthur Wilson, and Timothy Callahan of REM Finance. The New
2 Hampshire Insurance Department is a public agency with its primary purpose being to protect
3 policyholders and the public. Its role in furthering REM's interest or its interest in maintaining
4 REM's confidences is questionable at best.

5 Because Document Nos. 11, 22, 30, 43-45, 48-49, 51, 53-54, 57-73, 83, 185, 205, 230,
6 244, 350, 414, 416, 418-419, 421-426, 428, 442-443, 445-447, 450-451, 453, 457, 459, 464, 466-
7 472, 474-475, 477, 479, 482-483, 486, 488, 491, 493-494, 498, 501-502, 505-506, 512, 515-516,
8 522, 524-526, 529-531, 546-549, 552, 555, 557, 558, 568, 571, 582, 623, 639, 644-645, 737, and
9 740 were disclosed to third parties with whom REM has not asserted a common interest, the
10 attorney-client communication and attorney work product claims are waived.

11 **E. REM's Attorney-Client Communication and Attorney Work Product Claims**
12 **Fail for Documents Not Involving the Provision of Legal Services.**

13 The attorney-client communication privilege and attorney work product doctrine are not
14 available where an attorney is performing *nonlegal* services. *Aetna Cas. & Sur. Co. v. Superior*
15 *Court*, 153 Cal. 3d 467, 475-476 (1984). Yet, many document and communication descriptions
16 on the amended supplemental "Privilege Log" do not suggest the provision of legal services and
17 are largely of a financial nature.

18 Roger Moak (and possibly other REM attorneys) serves REM as both General Counsel
19 and in an executive capacity, and his authorship or receipt of documents and communications
20 does not necessarily indicate the provision of legal services nor implicate the attorney-client
21 communication privilege and/or attorney work product doctrine. The attorney-client privilege
22 does not apply when an attorney merely "acts merely as a negotiator for the client or is providing
23 business advice." *Costco Wholesale Corp. v. Sup. Ct.*, 47 Cal. 4th 725, 735 (2009).

24 For example, Document Nos. 43-44 on the amended supplemental "Privilege Log" are
25 described as "Emails re Time Allocations" from Al Lawrence (REM VP, Finance) to Mike
26 Averill of the New Hampshire Insurance Department and copying Timothy Callhan (REM EVP,
27 Finance), Maria Cruce (REM AVP, Finance), and Roger Moak. Based on the document
28 descriptions, these documents do not appear to relate to Mr. Moak's role as General Counsel, but

1 rather merely in a business capacity.

2 Descriptions for document Nos. 3-6, 13, 42-46, 48-56, 58-64, 66-76, 82-83, 89-90, 94, 98,
3 100-103, 105, 107, 112-121, 128-129, 133-134, 140, 179, 197-198, 310, 425, 442-443, 446-447,
4 495, 501-502, 505-506, 515-516, 520-522, 524-526, 533, 543, and 639 do not suggest the
5 provision of legal services so as to warrant the applicability of the attorney-client privilege. REM
6 should be compelled release these documents.

7 **F. REM's Amended Supplemental Privilege Log Lacks Sufficient Information to**
8 **Substantiate REM's Privilege Claims.**

9 As discussed above, the identification of individuals authoring and receiving documents
10 and communications is imperative for evaluating claims for the attorney client communications
11 privilege and work product doctrine. Yet, REM's amended supplemental "Privilege Log" fails
12 even to sufficiently identify individuals authoring and/or receiving certain documents.

13 First, the amended supplemental "Privilege Log" fails to provide the author and/or
14 recipient of certain documents. For example, the entry for Document No. 234 on the amended
15 supplemental "Privilege Log" fails to provide the date, author, and recipient of the document.
16 REM's attorney-client communication and attorney work product claims can not be verified.

17 Second, the accompanying identification chart fails to provide the title and company
18 affiliation for the author and/or recipient of certain documents. For example, Document No. 499
19 on the amended supplemental "Privilege Log" is correspondence from Andrew Serell to "NHID"
20 and copying Scott Levitt. REM did not provide the title and company affiliation for Andrew
21 Serell or Scott Levitt. REM's attorney-client communication privilege and attorney work product
22 claims not be verified.

23 Given the lack of information, REM's good faith basis for its attorney-client
24 communication privilege and attorney work product claims for Document Nos. 7, 12, 29, 31, 33,
25 167, 218, 223, 228, 230, 234-236, 243-244, 246, 429, 435-436, 446-447, 489, 499, 508-509, 517,
26 520-521, 532-535, 540-541, 543-544, 550-553, 565-566, 571, 573, 581, 608, 612-615, 623, 639,
27 644-645, 708, 712, 715, 718, 720, 726, and 729-731 is questionable. REM should be compelled
28 to provide further information substantiating its privilege claims or release these documents.

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G. REM's Time Period Objections

REM unilaterally limited the time period for its document production to a period from June 12, 1995 to June 11, 2003, which is improper in light of discovery rulings already rendered in this action. Specifically, the Discovery Referee has compelled Defendants in the above-entitled actions to provide discovery regarding services by REM from 1995 to when REM ceased being a Zurich subsidiary, i.e., 2007. Marder Decl. at ¶ 30, Exh. 28 (Motion to Compel 105). Accordingly, Plaintiffs are entitled to REM's documents for periods from at least as early as 1995 to 2007, and REM's artificial time limitation is inappropriate. REM should be compelled to produce all documents withheld based on its unilateral time limitation, including Document Nos. 12-13 and 219 on the amended supplemental "Privilege Log."

H. REM's "Claims Related" Objections

REM inadvertently included certain documents on its amended supplement "Privilege Log" that are not in fact privileged. REM, however, contends these documents are "claims related" and therefore not related to the Phase I Trial. Despite Plaintiffs' request for clarification on this objection, Plaintiffs have not provided any further information. Because the document descriptions for Document Nos. 5-6, 11, 31, 235, 417-419, 445, 448, 455-456, 476, 478, 480, 482, 486, 499-500, and 527 are not substantive or detailed, it is difficult, if not impossible, to evaluate the validity of REM's objection as to producing these documents. REM should be compelled to provide further information substantiating its objection or release these documents.

I. REM Should be Compelled to Produce a Witness for Further Deposition Testimony.

REM should be compelled to produce a PMQ witness to address matters that, because of REM's own conduct, were not covered and could not be covered during the initial PMQ deposition. Since REM's PMQ deposition on December 10, 2010, REM has released many improperly withheld documents from its privilege log.¹⁵ To the extent necessary, REM should

¹⁵ REM has released documents from its privilege log numerous times. The continuous release of documents after Plaintiffs raise concerns regarding REM's privilege claims demonstrates REM's improper withholding of documents.

1 be compelled to produce a PMQ witness to provide further testimony as to these documents.
2 Moreover, to the extent documents are released pursuant to this Motion to Compel, REM should
3 produce a PMQ witness to provide further testimony as to these documents if questioning
4 regarding these documents is necessary. In fact, REM's PMQ deposition concluded subject to
5 resolution of disputes regarding REM's privilege logs. Marder Decl. at ¶ 23, Exh. 21 at 357:20-
6 359:2. Therefore, any new documents produced off the privilege logs provide a reason to re-open
7 the deposition.


8 Furthermore, during the deposition, REM instructed its PMQ witness, Mr. Joel M. Ross,
9 not to testify as the *amount of time* spent in preparing for deposition with counsel. Marder Decl.
10 at ¶ 23, Exh. 21 at 24:16-25:3. REM asserts this information is protected by the attorney work
11 product doctrine. Only *writings* containing an attorney's impressions, conclusions, and opinions,
12 however, are absolutely protected under the attorney work product doctrine. *See* Cal. Civ. Proc.
13 Code § 2018.030. In turn, the qualified protection for "other work product" extends to
14 information that reflects an attorney's evaluation or interpretation of the laws or facts. Cal. Prac.
15 Guide Civ. Proc. Before Trial Ch. 8C-4 § 8:235. Plaintiffs, however, only seek the amount of
16 time counsel spent preparing with the PMQ witness, which reflects the preparedness of the
17 witness. REM should be compelled to provide a response to this deposition question.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request their Motion to Compel be
20 granted in its entirety and that REM release improperly withheld documents from its privilege
21 logs and produce a witness to provide further deposition testimony within twenty (20) days of the
22 Court's Order.

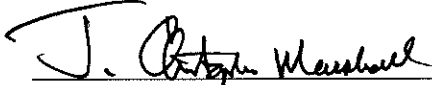
24 Dated: February 4, 2010

MORGAN, LEWIS & BOCKIUS LLP

26 By 
27 Elham Marder
Attorneys for Plaintiffs

Certificate of Service

I hereby certify that a copy of the foregoing Emergency Motion for Expedited Decision or Hearing on Commissioner's and Liquidator's Motion for Order Governing Confidentiality of Regulatory Documents were sent, this ^{9th} day of February, 2010, by first class mail, postage prepaid to all persons on the attached service list and by email to counsel for the California Plaintiffs, Zurich, and REM.



J. Christopher Marshall

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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