COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 05-1360-BLS2
(Judge Burnes)

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD AND NEXT FRIEND, REBECCA RHODES,

Plaintiffs,

v.

AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and ZURICH AMERICAN INSURANCE COMPANY

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL SERVICES, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA TO PRODUCE DOCUMENTS**

This is an action to recover for the unfair settlement practices employed by the Defendants throughout the underlying personal injury action. In response to Plaintiffs' Document Requests[1], Defendants, AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc. ("AIGDC") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") (collectively, "Defendants"), produced only a smattering of documents, some of which are redacted for no reason, written responses and a 59-page Privilege Log containing little explanation for withholding over 250 responsive documents. Defendants clearly violated the rules of discovery, and are simply continuing to hinder Plaintiffs' recovery. Such delay tactics

[1] Pursuant to Sup. Ct. R. 30A, Plaintiffs' Requests for Production of Documents are attached as Exhibit A, and Defendants' Responses are attached as Exhibit B.

are what gave rise to this suit in the first place. As such, Plaintiffs request that this Court order Defendants to produce unredacted copies of all responsive documents and to pay the costs of bringing this Motion.

## FACTUAL BACKGROUND

Marcia Rhodes was paralyzed from the waist down on January 9, 2002 when she was rear-ended by a 78,000-pound tractor-tanker unit driven by Carlo Zalewski. Zalewski was insured, through the motor carrier for whom he was driving the truck, for $2,000,000 under Zurich American Insurance Company's primary policy and under an additional $50,000,000 umbrella policy from National Union. AIGDC facilitated the claims handling for National Union. The Rhodes family sought damages in the underlying personal injury action and on September 15, 2004, obtained a $9,400,000 jury verdict for Plaintiffs (plus $2,500,000 prejudgment interest) (the "Underlying Action").

Liability was reasonably clear within days of the accident. In fact, at the scene of the crash, Zalewski admitted that he had not been paying attention to the traffic in front of him, he was cited by the Medway Police Department and eventually admitted to sufficient facts to warrant a guilty finding in the subsequent criminal proceeding. The Massachusetts State Police also determined that Zalewski's failure to use care in braking caused the accident. Moreover, Zalewski's employer conducted an investigation and terminated him because the accident was preventable.

Plaintiffs filed suit six months after the accident and thereafter kept the underlying defendants apprised of their ever-increasing damages. Nonetheless, Defendants refused to make any settlement offer for more than two years after the accident, and then made only lowball offers. By the time the case went to trial (more than 2 ½ years after the accident), the underlying

defendants had admitted to liability and Mrs. Rhodes' special damages were more than $3.2 million (excluding pain and suffering and loss of consortium). The three Defendants, however, had made a combined offer of only $3.5 million. The final offer, made on the last day of trial, was approximately one-half of the ultimate award, including interest.

After trial the underlying defendants filed a motion for a new trial or remittitur. When that motion was denied, the underlying defendants filed a notice of appeal. Zurich tendered its policy three months after the jury verdict. After an additional six-month delay, AIGDC and National Union finally agreed to settle the Underlying Action for almost the entire judgment and interest and dismissed the appeal. In short, Defendants engaged in unfair settlement practices by constantly delaying and lowballing the Plaintiffs in the Underlying Action.

**The Current Dispute**

In the present action, Plaintiffs served their Requests for Production of Documents and Interrogatories on National Union on or about April 8, 2005 and on AIGDC on or about April 12, 2005. Defendants' written responses contain nothing more than inappropriate general objections and sweeping privilege claims. In the accompanying 59-page Privilege Log, listing 259 documents, each of which is a document from the claim file from the Underlying Action, Defendants do little to support their privilege claims.[2] Therefore, Plaintiffs' request that AIGDC and National Union be required to produce unredacted versions of all documents responsive to their requests, including those contained in Defendants' purported Privilege Log.[3]

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[2] Defendants' Privilege Log is attached as Exhibit C. Additionally, for the Court's convenience, a chart summarizing Defendants' Privilege Log and the deficiencies in their objections is attached as Exhibit D.

[3] In the alternative, the Court could of course conduct an in-camera review of each of the documents. However, this would not necessarily be the most valuable use of the Court's time. As Judge van Gestel has stated after reviewing withheld documents, "[t]he documents now have been reviewed by this court—acting, it seems, much like a paralegal assistant. . . . To suggest that causing a busy Superior Court Justice to conduct this *in camera* exercise was a monumental and frustrating waste of time and resources is an understatement at best." ITT Sheraton Corp. v.

## ARGUMENT

### A. Defendants' general objections are inappropriate.

Defendants' Responses are virtually identical, and most of the individual responses simply mirror each other.[4] Additionally, the Responses contain little more than improper general objections. For example, in every response Defendants state that they cannot adequately respond because the requests do not "specify documents with reasonable particularity." It is pure gamesmanship that Defendants would claim that every request lacks reasonable particularity, including Requests as simple as No. 9 ("Any and all correspondence between you and any experts involved in the Lawsuit [which is a defined term]."). Asserting such blanket objections "is irresponsible and inconsistent with the obligations imposed upon parties and witnesses in connection with discovery in civil actions." Cipolleta v. Sharp, 13 Mass. L. Rptr. 483, 2001 Mass. Super. Lexis 333, *9 (Mass. Super. Ct. 2001) (denying motion to compel documents as subpoena was overly broad but admonishing witness for asserting blanket privileges even when numerous documents in the privilege log were not entitled to protection).

Defendants also claim that certain Requests are not reasonably calculated to lead to the discovery of admissible evidence. Additionally, in the documents that Defendants did produce, they did not provide a single document that discusses their analysis of the claims, the value of the claims, the reserve or their behavior in handling the claims. Instead, Defendants merely

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Flatley, No. 98-4797E (Mass. Super. Ct. June 27, 2000) (van Gestel, J.), as quoted in John A. Houlihan, et al., Massachusetts Discovery Practice, vol II, § 17.9, p. 17-19 (MCLE 2002).

[4] The most frequent response is: "[National Union/AIGDC] is unable to adequately respond because Request No. [ ] fails to specify documents with reasonable particularity. Moreover, Request No. [ ] seeks documents protected from disclosure by one or more of the following: (a) the attorney-client privilege; (b) the work product rule; (c) the confidentiality of materials prepared in anticipation of litigation; or (d) the joint defense and common interest privileges. Subject to and without waiving these objections and the foregoing General Objections, please see Exhibit A (the discoverable portion of AIGDC Claims File No.: 169-151612)." See AIGDC Response Nos. 1-3, 7-9, 11-18, 20; National Union Response Nos. 1-3, 7-9, 11-18, 20.

produced discovery from the Underlying Action, documents created by Plaintiffs and forms from the claims file that are redacted to the point of providing no information.[5] In responding in this fashion, Defendants ignore the fact that this is a claim for unfair settlement practices and Plaintiffs are seeking documents from the claim file that describe Defendants handling of this claim, which are the operative documents in this case.[6] Plaintiffs also ignore the fact that relevance in the discovery context is defined broadly. See, e.g., Meyer v. King, 1995 WL 1312543, * 2 (Mass. Super. Ct. 1995) (quoting Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136, 138 (1977) for proposition that "Discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the subject matter of the action.").

Specifically, Defendants object to producing the policies and procedures for adjusting or processing personal injury or motor vehicle accident claims (Request No. 4) and documents concerning the insurance policy applicable to the Rhodes family's claims (Request No. 5). Defendants also claim that certain documents in their Privilege Log are "not reasonably calculated to lead to the discovery of admissible evidence," despite the fact that such documents contain reserve information, claim handling strategy, or insurance coverage. Doc. Nos. 18, 55, 109-112, 259.[7]

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[5] Attached as Exhibit E is a sampling of the redacted Excess Claim Notes produced by Defendants, which provide nothing more than file management information (Bates Nos. 0108, 0115, 0141), another copy of the Defendants' response to Plaintiffs' 93A Demand (Bates Nos. 0116-0118), or that the parties could not settle the matter (Bates No. 0116).

[6] It is also disingenuous that Defendants moved to stay this action pending the outcome of the appeal in the Underlying Action, claiming that they would be prejudiced by having to produce information regarding their claims analysis and defense strategy. However, after settling the Underlying Action and dismissing the appeal, Defendants then withdrew their request for a stay but still refuse to produce the relevant documents from the claims file.

[7] Defendants have provided a redacted version of Doc. No. 259 (Bates No. 1704), a copy of which is attached as Exhibit F, but the unredacted portion provides no reserve information, which is the relevant portion of the document.

The stated policies for handling claims and information regarding how this specific claim was handled, including reserve information, are directly relevant to Defendants' knowledge about liability being clear and whether Defendants knowingly engaged in wrongful acts. See generally, e.g., Clegg v. Butler, 424 Mass. 413 (1997) (discussing as relevant information held by insurer, opinion of insurer with respect to liability and reserve information); see also Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 559 (2001) (discussing reserve and recommendations to increase reserve as relevant to plaintiff's claim). How a claim was and should be handled directly relates to a case that involves the unfair handling of such a claim. Therefore, Defendants' objections are improper and Plaintiffs are entitled to the withheld documents.

**B. Whether or not documents constitute work product, Plaintiffs have a substantial need for the information that is not available elsewhere.**

Defendants assert that a majority of the withheld documents are protected as work-product. For the work-product doctrine to apply, Defendants must show that (1) there is a document or tangible thing, (2) prepared in anticipation of litigation, (3) by or for a party's representative. E.g., Sham v. Hyannis Heritage House Hotel, Inc., 118 F.R.D. 24, 26 (D. Mass. 1987). In evaluating whether the work-product doctrine applies, it should be considered in light of its purpose to "enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowing by other parties as he prepares for the contest." Ward v. Peabody, 380 Mass. 805, 817 (1980).

Even if the Defendants demonstrated that the documents constituted work product, they should nonetheless be disclosed because Plaintiffs have a substantial need for the information, which is not available from any other source. See, e.g., Ward v. Peabody, 380 Mass. 805, 817-18 (1980) (documents not protected under the work product doctrine where there was no

indication that they were prepared in anticipation of litigation, and even if had been, they were essential to matter and the information did not appear to be available from any other source); see also Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7, 17 (D. Mass. 1997) (ordering discovery of opinion work product because advice of counsel was directly at issue). As one Court stated:

> Bad-faith actions against an insurer . . . can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming . . . . The "substantial equivalent" of this material cannot be obtained through other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to be very important evidence on the issue of whether [the insurer] acted reasonably.

Yurick v. Liberty Mutual Ins. Co., 201 F.R.D. 465, 473 n.13 (D. Ariz. 2001) (finding documents to constitute work product, but allowing plaintiff opportunity to demonstrate "substantial need") (emphasis added); Sanchez v. Witham, 2003 Mass. App. Div. 48, 50 (2003) ("[T]he very documents that evidence work product are the documents that are the most central to a bad faith settlement claim.").

A vast majority of the Privilege Log documents fall into one, or more, of three categories: (1) Liability and Damages Issues/claim evaluation; (2) Coverage Issues/Duty to Defend; and/or (3) Underlying Defense Strategy/Procedural Issues.[8] Those documents comprise the relevant portions of the claims file and demonstrate Defendants' knowledge and opinion with respect to liability and whether their unfair practices were knowing and willful. As such plaintiffs have a substantial need for these documents. Additionally, the claims file and the information contained

[8] A categorization of the withheld documents is contained in the chart attached hereto as Exhibit G.

in it are not available from any other source. Therefore, Defendants should be required to produce all responsive documents contained in the claims file.

### C. The attorney-client privilege clearly does not apply to many documents contained in the Privilege Log.

To establish that the attorney-client privilege applies, Defendants must show that an attorney-client relationship existed and "all other elements involved in the determination of the existence of the privilege, including (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived." In re Reorganization of Electric Mut. Liab. Ins. Co., Ltd., 425 Mass. 419, 421 (1997) (internal citations omitted). Because privileges keep evidence from the Court, they are to be narrowly construed. E.g., Three Juveniles v. Commonwealth, 390 Mass. 357, 359-60 (1983).

It is clear that many of the Privilege Log documents are not subject to the attorney-client privilege because they are not even communications with counsel. For example, a number of communications from Crawford & Co. are claimed to be protected by the attorney-client privilege (Doc. Nos. 189, 193, 195, 196). Crawford & Co. is a claims management company, not a law firm, and neither of the Defendants sought legal representation from Crawford & Co. Because there was no attorney-client relationship with Crawford & Co., the attorney-client privilege cannot attach to those communications and the documents should be produced.

### D. A majority of entries contain insufficient information to evaluate the claimed protection.

Many of the Privilege Log's remaining entries simply do not provide sufficient information to establish the asserted protection.[9] It is fundamental that a party resisting discovery pursuant to the attorney-client privilege or the work product doctrine, bears the burden of establishing that the rule applies. In re Reorganization, 425 Mass. at 421 (burden with respect to attorney-client privilege); Colonial Gas Co. v. Aetna Cas. & Sur. Co., 144 F.R.D. 600, 605 (D. Mass. 1992) (burden with respect to work-product protection). "[T]he indispensable requirement of a Privilege Log remains that it must contain enough information to permit the party seeking discovery and the court to assess the applicability of the privilege or protection." Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London, 17 Mass. L. Reptr. 665, 2004 Mass. Super. LEXIS 182, * 8 (Mass. Super. Ct. 2004) (internal quotations omitted) (ordering production of documents or adequate Privilege Log).

Although AIGDC and National Union produced a Privilege Log along with their responses, it does not help determine which documents are actually privileged and which documents were improperly withheld. For example, Doc. No. 12 is an Excess Claim Note drafted by James Joanos. Defendants claim the attorney-client privilege protects this document but do not explain how or why. Defendants do not assert that Mr. Joanos is an attorney, was providing any legal advice, or anything else required to demonstrate that an attorney-client privilege exists. See Medical Waste Techs. v. Alexian Bros. Med. Ctr., Inc., 1998 U.S. Dist.

[9] An exception to this statement could potentially be Entry No. 1, which constitutes "All correspondence of any type between McCormack & Epstein and AIGDC and National Union related to the Rhodes matter." Because Plaintiffs know that McCormack & Epstein represent AIGDC and National Union in the present action, this Entry apparently encompasses attorney-client communications with respect to the present case. However, even this seemingly simple entry is not conclusive because there are no dates or descriptions of the documents, nor is there any discussion of whether the privilege has been broken by revealing these communications to a third-party.

LEXIS 10069 * 8-9 (N.D. Ill. 1998) (specificity with respect to identity of recipients and role they played is essential in determining whether the attorney-client privilege applies).[10]

Even where known attorneys are involved, Defendants do not indicate that an attorney-client relationship existed, from which a privilege could arise. Specifically, Defendants never state that they engaged Nixon Peabody, LLP, Corrigan Johnson & Tutor or Morrison, Mahoney & Miller, and therefore there is no alleged attorney-client relationship. (See, e.g., Doc. Nos. 38, 47, 173). The same is true for internal documents distributed within AIGDC (see, e.g., Doc. Nos. 57, 58) and drafted by an AIGDC claims handler (Doc. No. 118); Defendants simply do not demonstrate any attorney-client relationship, and therefore there is no privilege.[11]

Similarly, the entries claiming work product protection do not contain sufficient information to determine whether the work-product doctrine applies. For example, it is not clear from descriptions as "Defense strategy" (when describing a document drafted three months after the accident and three months before suit was filed), "damages and liability analysis" or "coverage issues" whether the Excess Claim Notes (Doc. Nos. 12, 213-257) were prepared in anticipation of litigation, rather than in the ordinary course of business. This distinction is particularly important because "[t]he field of operation of the work-product rule is . . . preparation for litigation." Ward v. Peabody, 380 Mass. 805, 817 (1980). Reports prepared "in the ordinary line of business and duty" for the purpose of gathering and using relevant

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[10] The same is true for many of the Excess Claim Notes that make up Doc. Nos. 213 – 257. Although there is more than one author for those 44 documents, nowhere is it claimed that any of them are attorneys, nor do the Defendants indicate that any of those individuals were dispensing any legal advice. See also Doc. No. 196 (communication to Ed Shoulkin without any explanation of role he played).

[11] Defendants may try to claim that Warren Nitti is an attorney and therefore his communications are privileged. However, Mr. Nitti is not employed as an attorney, but rather is a "Complex Director" and does not present himself as an attorney for Defendants. Furthermore, inexplicably, some of the documents created by Warren Nitti are listed as being protected as attorney-client privileged, but others are not (compare Entry Nos. 227-231). Without any explanation as to the role played by Mr. Nitti, or others for that matter, it is impossible to tell whether the documents are privileged.

information, while ultimately "useful to one or another party in case of future litigation, do not fall within the scope of Mass. Rule Civ. P. 26(b)(3)". Shotwell v. Winthrop Community Hospital, 26 Mass. App. Ct. 1014, 1016 (1988) (holding that "Incidents/Deviation/Unusual Occurrence Reports" prepared by hospital employees whenever there was an "untoward event or occurrence" were not prepared in anticipation of litigation); see Sham v. Hyannis Heritage House Hotel, Inc., 118 F.R.D. 24, 26 (D. Mass. 1987) (granting motion to compel production of notes and statements transcribed by a representative of the defendant's insurer even though defendant claimed there was a substantial probability of litigation, because the investigation conducted by insurer was in the ordinary course of business).

The documents created at or around the time of the accident, could not have been in anticipation of litigation, but rather must have been in the ordinary course of the insurance business. For example, Doc. Nos. 194-195 were created in January, 2002, very shortly after the accident.[12] To say that those documents were prepared in anticipation of litigation rather than in the ordinary course of business suggests that Defendants immediately prepared for litigation rather than planning to fairly and equitably settle a legitimate claim in which liability was reasonably clear. That point is especially relevant when considered in light of the adverse inference that arises from the Defendants' attempts to hide evidence of their bad faith. See Phillips v. Chase, 201 Mass. 444, 450 (1909) (factfinder may infer from assertion of privilege that party believes the evidence is prejudicial); see also Frizado v. Frizado, 420 Mass. 592, 596 (1995) (adverse inference can be drawn from assertion of privilege against self incrimination).

[12] Attorney Pritzker had notified Crawford & Co. in January 2002 that Mrs. Rhodes had a claim, but being notified of a claim does not necessitate preparing for litigation.

Because Defendants failed to provide sufficient information to demonstrate that the asserted privileges apply, they should be required to produce unredacted versions of all responsive documents. United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996) ("[I]f the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of the legal requirements for application of the privilege, his claim will be rejected.").

**E. The joint litigation privilege does not protect Defendants' documents.**

The Defendants further attempt to assert the joint litigation or common interest privilege[13] to protect many of the Privilege Log documents. The common interest privilege is not an independent basis for privilege, rather it is an exception to the general rule that disclosing privileged information or work product to a third party waives the protection. Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002). Thus, without an independent privilege, Defendants cannot withhold responsive documents based on the joint defense exception.

Furthermore, Defendants have not even demonstrated that the common interest rule applies. To establish that the doctrine should apply, Defendants must demonstrate that (1) communications were made in the course of a joint defense effort; (2) the statements were designed to further the effort; and (3) the privilege was not waived. United States v. Bay State Ambulance and Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989). Defendants have not shown that there was any cooperation, that the communications furthered the effort, and simply have not asserted that the joint litigation exception applies. Fed. Deposit Ins. Corp. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("[T]he proponent of the exception must establish cooperation in fact toward the achievement of a common objective.").

[13] With respect to certain documents, both joint defense and common interest privileges are asserted, but in reality the two are synonymous. In re Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001).

Finally, parties conferring amongst themselves, outside the confines of the group, and not for the purpose of collecting information in order to obtain legal advice, do not preserve the privilege because in that event, they are not seeking legal advice or sharing information to receive legal advice. Lugosch v. Congel, 219 F.R.D. 220, 237 (N.D.N.Y. 2003). Thus, documents solely illustrating communications between parties are not entitled to protection and must be produced.[14]

**F. Defendants' should be required to pay the costs of bringing this Motion.**

Given AIGDC's and National Union's utter disregard for the Rules of Civil Procedure, improper general objections and blanket assertions of privilege, Plaintiffs request that the Defendants be required to pay the costs of this motion pursuant to Mass. R. Civ. P. 37(a)(4). Requiring AIGDC and National Union to pay the costs of this motion will serve to deter further attempts to violate the Rules and will hopefully prevent further attempts to hinder the Plaintiffs' legitimate attempts at conducting discovery. See Corsetti v. Stone Co., 396 Mass. 1, 26 (1985) ("The sanctions provided by rule 37 are designed not only to compel compliance with discovery requests; they also act as a deterrent to unwarranted evasions of discovery.").

## CONCLUSION

Given the improper objections and blanket assertions of privilege, Plaintiffs respectfully request that this Court order AIGDC and National Union to produce unredacted copies of all documents responsive to Plaintiffs' Requests, including all documents contained in the Privilege Log and those documents that were already produced in redacted form. Additionally, Plaintiffs request that AIGDC and National Union be required to pay the costs, including attorneys' fees, of bringing this Motion.

[14] E.g., Entry Nos. 17, 18, 20, 22, 31, 35, 151, 176, 187, 188, 190, 191, 195, 196, 200, 201, 203, 211, 212.

Respectfully submitted,

MARCIA RHODES, HAROLD RHODES,
INDIVIDUALLY, HAROLD RHODES,
ON BEHALF OF HIS MINOR CHILD
AND NEXT FRIEND, REBECCA RHODES,

By their attorneys,

M. Frederick Pritzker (BBO #406940)
Margaret M. Pinkham (BBO #561920)
Daniel J. Brown (BBO #654459)
Jennifer M. Ryan (BBO #661498)
BROWN RUDNICK BERLACK ISRAELS LLP
One Financial Center
Boston, MA 02111
Telephone: (617) 856-8200
Fax: (617) 856-8201

DATED: July 18, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, a true and accurate copy of the above document was served via hand delivery on the attorney of record for each party at:

Robert J. Maselek, Jr., Esq.
McCormack & Epstein
One International Place
Boston, Massachusetts 02110

Stephen J. Abarbanel, Esq.
Robinson & Cole LLP
One Boston Place
Boston, Massachusetts 01208-4404

Daniel J. Brown

**Rule 9C Certificate**

I hereby certify that a Rule 9C conference was held in the morning of July 11, 2005, between Margaret M. Pinkham, Esq. and Attorney Robert J. Maselek, Jr., counsel for Defendants, and the morning of July 18, 2005, in a good faith attempt to narrow the areas of disagreement, but to no avail.

Daniel J. Brown