IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Lawrence Federico. Jr., Plaintiff	:	
v.	:	**PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO RESPOND TO DISCOVERY**
State Farm General Insurance Company and State Farm Fire and Casualty Company, Defendants	:	No. 06-4913 SECTION "B"

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL DEFENDANT STATE FARM, ACTING IN ITS CAPACITY AS INSURER UNDER AN APARTMENT POLICY, TO RESPOND TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS, AND 2ND REQUEST FOR PRODUCTION OF DOCUMENTS

Introduction and Relevant Facts

On or around August 21, 2008 Plaintiff delivered its First Set of Interrogatories and Request for Production of Documents (hereinafter "Discovery Requests") to the Defendant State Farm Fire and Casualty Company, acting in its capacity as a WYO insurer (hereinafter "Defendant" or "State Farm"). The discovery requests in controversy are enclosed with this memorandum as **Exhibit A**.

The Defendant thereafter provided a response on November 19, 2008 (hereinafter "Discovery Responses"). These responses are enclosed with the memorandum as **Exhibit B**.

Upon detailed review of the Discovery Responses, the Plaintiff found them to be wholly

deficient, and generally evasive. In an effort to resolve the dispute over these responses in an amicable fashion, the Plaintiff submitted to Defendant a detailed account of its dispute. This account was delivered via letter to the January 22, 2008, and is enclosed with this memorandum as **Exhibit C**.

For the interests of judicial economy, the Plaintiff will avoid repeating the entire contents of that January 22, 2009, correspondence, and instead states that all arguments made therein, and precedent cited, is repeated in this memorandum to detail the lack of proper response to Mr. Federico's first Discovery Requests.

A discovery conference was arranged with the Defendant and held in-person on January 29, 2009.

During that meeting the details of Plaintiff's complaint with the discovery responses was discussed, and the following general themes were conveyed:

(1) That the Defendant repeatedly made objections that lacked merit;

(2) That the Defendant provided a copy of its claim file and simply pointed to the same in response to the Plaintiff's interrogatories, as opposed to provided comprehensible responses to Interrogatories;

(3) That the Defendants failed to provide any electronic files in response to the Discovery Requests, despite the electronic documents being specifically requested in discovery, and despite the information produced on paper not qualifying as a "reasonably usable format" for the materials.

Defendants agreed to review the discovery responses in light of the Plaintiff's complaints. Since the January 29, 2009, discovery conference, however, the Defendant has not produced any supplement discovery responses except to provide to Plaintiff's State Farms

On March 2, 2009, the Plaintiff deposed Mr. Brandon Simoneaux, an independent adjuster who adjusted damages at the Plaintiff's property in August 2006. Mr. Simoneaux testified therein to the following, which is of consequence to the instant motion to compel[1]:

(1) That independent of the activity log produced by State Farm, that Mr. Simoneaux kept a separate log during his employ on an Excel spreadsheet, and that he printed this out and turned it into his State Farm "Team Manager" on a weekly basis;

(2) That he underwent a "LDI" training program with Worley Company, that according to his understanding, was a training program required by State Farm before adjusters could work on behalf of the company, and that he recalls likely receiving documentation during the classes;

(3) That immediately after Hurricane Katrina (in or around September 2005), that a Catastrophe office was set up by State Farm, and that the office offered routine classes presented by State Farm personnel that taught adjusters about wind policies, flood policies, adjusting and other matters, and that he participated in some of these classes, and recalls likely receiving documentation during the classes.

The deadline for completion of discovery and depositions in this matter is March 3, 2009. This case is currently scheduled for trial on May 4, 2009. Respectfully, the Court should enter an Order compelling Defendant to respond to Plaintiff's Discovery Requests without further delay.

[1] Since the deposition occurred on March 2, 2009, a deposition transcript is not yet available…however, if the Defendant disputes the content of Mr. Simoneaux's deposition testimony, the Plaintiff will supplement this Memorandum with the same as soon as practical.

Issues To Be Determined:

The Plaintiff represents to this Court that the following issues are required for determination under this Motion:

(1) Whether the herein identified objections are with or without merit, and accordingly should be sustained by this Court or stricken from the pleadings;

(2) Whether the herein identified Interrogatories are adequately responded to by the Defendants, or if they should be compelled to supplement their responses with non-evasive answers;

(3) Whether the herein identified documents produced by Defendant is in a "reasonably usable format;"

(4) Whether the herein identified documents produced by Defendants is in the native format, as requested by the Plaintiff;

(5) Whether certain documents exist as per the deposition testimony of Mr. Simoneaux that has not been produced by Defendant, and whether Defendant should be compelled to produce the same;

(6) Whether certain documents identified by the Defendant as "privileged" in its privilege log should be subject to an in-camera review, since there is evidence available that the documents may not be so privileged.

Evidence Relied Upon in This Motion

The evidence relied upon by the Plaintiff in this motion is as follows:

(A) Exhibit A – the Discovery Requests sent by the Plaintiff to Defendant on August 21, 2008

(B) Exhibit B – The Discovery Responses provided by Defendant on November 19, 2008;

(C) Exhibit C – the Discovery "inadequacy letter" sent by Plaintiff to Defendant on January 22, 2009;

(D) Exhibit D – Examples of items marked Privileged that is Not Privileged;

(E) Exhibit E – Photographs and Labels of Photographs;

(F) Exhibit F – Xactimate Estimate by Brandon Simoneaux

(G) The Deposition of Mr. Brandon Simoneaux;[2]

LAW AND ARGUMENT

I. Issue 1: Objections without Merit

General Discussion of "Objections" and the Consequence of Failing to Object

Rule 33(b)(4) provides that "[T]he grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure."

As this court is of course aware, the burden is upon objector to show that its objections to interrogatories should be sustained. *See generally Mall Tool Co. v Sterling Varnish Co*. (1951, DC Pa) 11 FRD 576, 91 USPQ 322; *Pappas v Loew's, Inc.* (1953, DC Pa) 13 FRD 471; *United States v Nysco Laboratories, Inc.* (1960, SD NY) 26 FRD 159, 4 FR Serv 2d 550; *Pressley v Boehlke* (1963, WD NC) 33 FRD 316, 7 FR Serv 2d 656; *Wirtz v Capitol Air Service, Inc.* (1967, DC Kan) 42 FRD 641, 11 FR Serv 2d 820*; United States v 58.16 Acres of Land* (1975, ED Ill) 66 FRD 570, 20 FR Serv 2d 1100.

[2] As mentioned in fn 1, this transcript is not yet available, and will be produced as soon as practical.

General Discussion of Objections Used by Defendant

The amount of objections used by the Defendant in its responses to Plaintiff's First Discovery Requests are so voluminous, that a discussion of the objections as they vary from request to request would likely require that this memorandum exceed the length restrictions of this Court. Instead, therefore, the objection types that can be discussed in a general fashion will be so discussed in this section, and the objections' most egregious use will be highlighted herein and elsewhere in this Memorandum:

- **Prematurity**

On a number of occasions, the Defendant replied to Plaintiff's discovery request with an objection that reads as follows:

"Defendant objects to this interrogatory as being premature. The Court has entered a Scheduling Order indicating its intent to consolidate cases and to develop a discovery protocol for common issues. The scope of the discovery protocol may include requests of this nature."

This objection was made in response to the following requests:

- Interrogatory No. 3, 17, 18, and 19
- Request for Production No. 5, 6, 7, 9, 10, 11, and 21

Despite requesting an explanation of this objection from the Defendant, none has been provided. With the deadline for discovery upon us, it is not clear how any request could be premature awaiting a Scheduling Order from the Court.

- **Relevancy**

Rule 26(b) provides that "[p]arties may obtain discovery regarding any matter, not

privileged, that is relevant to the claim or defense of any party." *See* FRCP 26(b)(1). The United States Supreme Court has said that the discovery provisions of the Federal Rules of Civil Procedure are to be broadly and liberally construed. *See Hickman v. Taylor*, 239 U.S. 295, 507 (1947); *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964). Relevance under Rule 26(b) has been construed to include information that encompasses any matter that bears on any issue that is or may be in the case. *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991).

Although the Defendant uses the objection of relevancy in response to nearly every discovery requests, for the purposes of this Compel, the Plaintiff points the Court to examine its use in regard to the following requests:

- Interrogatories 1 through 7, 17 through 20
- Request for Production Nos. 3, 5, 6, 7, 9, 10, 11, 13, 14, 16, 18, 19, 20, 21, 23, 24, 25, 26 and 27
- **Privacy Rights**.

On a number of occasions the Defendant responds to a discovery requests by averring that a response to the same would invade the privacy rights of people not parties to the action. Plaintiff presents that the objections are without merit, and that the Defendant cannot sustain and has not sustained its burden of demonstrating the applicability of the objection. This objection appears in response to the following discovery requests:

- Interrogatory 3, 5, 6, 7, 14, 16, 20
- Request for Production Nos. 7, 13,

- **Attorney / Client Privilege**

In many of its responses, the Defendant has simply stated an objection based on attorney

client privilege as a matter of course, evoking the privilege "to the extent" the request implicates it.

The Plaintiff submits that this does not meet the Defendant's burden in making the objection.

In *Moses v. State Farm Mut. Auto. Ins. Co.*, the court held that insurer who objected on the basis of attorney client privilege and work product rule must *specifically* identify the nature, but not contents, of the documents and communications sought to be protected from discovery.

At no time does Defendant so justify its objection based on attorney/client privilege and/or the work product rule, and accordingly, the Plaintiff moves this Court to strike said objections.

The attorney-client and/or work produce objection was improperly and meritlessly used by the Defendant in the response to the following requests:

- Interrogatories 1, 4, 6, 7
- Request for Production Nos. 1, 2, 3, 4, 8, 10, 13, 14, 18, 19, 20, 23, 27

II. Issue 2: Whether the herein identified Interrogatories are adequately responded to by the Defendants, or if they should be compelled to supplement their responses with non-evasive answers;

Generally

Generally, parties must provide true, explicit, responsive, complete, and candid answers to Interrogatories. *Hansel v. Shell Oil Corp.*, 169 FRD 303 (1996 ED Pa).

When a party recklessly resists efforts to secure answers to Interrogatories, or makes evasive answers to the same, that party may be punished as acting in contempt of court. *Crosley Radio Corp. v. Hieb*, 40 F Supp 261 (1941 DC Iowa).

When a defendant failed to specify, by category and location, records from which answers to interrogatories could be derived and instead produced a massive amount of documents and left plaintiffs to sift through them to find answers to interrogatories, they were in violation of FRCP 33(d). *In re Sulfuric Acid Antitrust Litig*., 231 FRD 320 (2005 ND Ill).

Furthermore, answers to interrogatories should be in such a form that they may be used upon trial, and incorporation by reference of deposition of witness or allegation of pleading is not responsive answer. *JJ Delaney Carpet Co. v. Forrest Mills, Inc.*, 34 FRD 152 (1963, SD NY). It has been made further clear by federal courts that "incorporation by reference of allegations of a pleading is not responsive and sufficient answer to interrogatory." *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 FRD 115 (1972, ND Ga). One court has gone so far as to hold that in addition to incorporating the terms of other answers and documents being improper responses, so too is "merely restating" the general terms of a party's allegations. *United States v. West Virginia Pulp & Paper Co.*, 1964 SD NY, 36 FRD 250.

Interrogatory No. 5

Interrogatory No. 5 provided as follows:

> Please state whether, in your investigation or evaluation of the facts, which form the basis of the claim of Plaintiff, you used any independent adjusting firm(s). If your answer is in the affirmative, please further set forth:
>
> (a) The identity of each such independent adjusting firm;
> (b) The identity of all persons within each independent adjusting firm associated with Plaintiff's claim; and
> (c) Any and all instructions, whether written, electronic or oral, given to the independent adjusting firm(s).

Objections to this Interrogatory are without merit

In response to this Interrogatory, Defendant objects that it is:

(i) Not relevant;

(ii) Vague, ambiguous, and overly broad in its request for any and all oral instructions

(iii) Seeks information that is confidential, proprietary and/or trade secret privileged

(iv) Vague and Ambiguous because "investigation" and "evaluation" is vague and ambiguous in this context

(v) Has the potential of invading the privacy rights of persons or entities not party to the lawsuit

Subject to the objection, the Defendant answers this Interrogatory simply by stating "Steve Dobbins was employed with Eberl's at the time of his involvement in this claim."

The Plaintiff avers that the Defendant has the burden of proving the applicability of its objections, and that it cannot make objections for the sake of making them. Accordingly, Plaintiff avers that these objections should be stricken.

A plain reading of this Interrogatory, and especially a reading of the interrogatory with consideration for the Defendant's duty to comply with the spirit and letter of discovery, leaves little to the imagination with regard to what the Plaintiff seeks. Moreover, the Plaintiff is not being vague, overbroad, unreasonable or irrelevant with its request.

Additionally, with respect to the response to this inquiry, from other discovery completed by the Plaintiff we know that at least the following adjusters and firms were involved with the Plaintiff's claim: (1) Eberl's Claims Services; (2) Worley Company; (3) Brandon Simoneaux; (4) Rod Jerkins; and (5) Steve Dobbins. We believe that a proper identification of these individuals and firms, their relationship with one another, and the existence of other

firms/adjusters is relevant and a required response.

Moreover, from the deposition of Mr. Simoneaux, we were informed that he was "IDL" certified and/or trained by Worley Company, and its his understanding that this is a training process that is required by State Farm for adjusters working on its claim. We believe that, at the minimum, this IDL training program should have been identified (and still needs to be identified) by Defendant.

Interrogatories 9, 10, 11, 12 and 13

In all of these Interrogatories, the Plaintiff makes direct and non-ambiguous requests about the Defendant's contentions in this case. Specifically, the requests are summarized as follows:

(i) #9 requests the Defendant's basis for believing that Plaintiff's damages are the result of Plaintiff's failure to mitigate its losses;

(ii) #10 requests Defendant's basis for believing that Plaintiff's damages were caused by the action or inaction of third parties;

(iii) #11 requests Defendant's basis for believing that it adjusted the claims in good faith, in accordance with terms and conditions of the applicable policy, and in compliance with laws;

(iv) #12 requests that Defendant set forth its basis for believing that it has not been provided with satisfactory proof of loss from the Plaintiff.

(v) #13 requests for specific reasons why Defendant contends that the inspection of the Canal Street property on Oct. 20, 2005 was not a sufficient and satisfactory proof of loss.

All of the above-requests relate directly to the Defendant's answer, whereby it asserts affirmatively that (i) Plaintiff's damages were result of Plaintiff's failure to mitigate; (ii) Plaintiffs damages were caused by inaction or action of 3rd parties; (iii) Defendant adjusted the claim in good faith; and (iv) Defendant was not provided with satisfactory proof of loss.

The Defendant's objections to these Interrogatories included (a) that they are vague, ambiguous, overbroad and unduly burdensome; and (b) they call for legal conclusions. Subject to the objections, the Defendant's only responses were virtually limited to "see previously produced non-privileged portions of the claim file"

It is clear from jurisprudence on FRCP 33 that "one purpose of interrogatories under Rule 33 is to ascertain facts and to procure evidence or secure information as to where pertinent evidence exists and can be obtained." *Hercules Powder Co. v. Rohm & Haas Co.*, 3 FRD 328 (1944, DC Del). Interrogatories can also be used to "narrow issues," *Truck Drivers & Helpers v. Grosshans & Peterson, Inc.*, 209 F.Supp 161 (1962 DC Kan), reduce the possibility of surprise, *Federal Cartridge Corp. v. Olin Mathieson Chemical Corp*, 41 FRD 531 (1967 DC Minn), and/or facilitate disposition of case prior to trial, *United States use of Weston & Brooker Co. v. Continential Casualty Co.*, 303 F2d 91 (1962, CA4 SC).

Among these and other uses of the Interrogatory tool is the use of an interrogatory to ascertain a party's contentions.

In fact, in *McElroy v. United Air Lines, Inc.*, the court indicated that ascertaining contentions of an adverse party was one of the "primary purposes" of interrogatories. 21 FRD 100, (1957, DC Mo).

A contention interrogatory generally requests that the other party explain the factual basis

for its allegations, and this is clearly within the scope of allowable interrogatories under Fed. R. Civ. P. 33(c). *See generally Strauss v. Credit Lyonnais, S.A.* 242 FRD 199 (2007 ED NY).

While the Defendant has contended in its objections that the requests improperly ask it to draw a legal conclusion, the Plaintiff submits that these interrogatories do not make this request, and instead require the Defendant to point out directly the matters to which its defense is directed. When considering similar objections to similar interrogatories, it has been held that "there is a valid and recognized distinction between requiring defendant to state opinion and requiring him to point out directly matter to which defense is directed; latter is *basic purpose* of Rule 33." *Emphases added. See Liquidometer Corp. v. Capital Airlines, Inc.,* 24 FRD 319 (1959 DC Del).

Furthermore, even if the matters were asking for a legal conclusion, under FRCP 33© there is "no automatic rule that interrogatory must be disallowed merely because it calls for opinion or contentions." *Cable & Computer Tech. v. Lockheed Sanders, Inc.*, 175 FRD 646 (1997 CD Cal). Accordingly, the Defendant would have the burden on demonstrating why its objection was applicable under the circumstances of the Interrogatory, which it has not and cannot do.

For the foregoing reasons, the Plaintiff avers that its Interrogatories 9 – 13 should be ordered answered and that Defendant's objections should be stricken.

III. Issue 3 and 4: Whether the herein identified documents produced by Defendant is in a "reasonably usable format;" and Whether the herein identified documents produced by Defendants is in the native format, as requested by the Plaintiff;

FRCP 34(b)(2)(E) provides as follows with respect to the production of documents or electronically stored information:

> Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
> (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably useable form or forms; and
> (iii) A party need not produce the same electronically stored information in more than one form.

The Plaintiff did make a request to the Defendant that documents would be produced in a certain format, and specifically requested that the documents be produced to Plaintiff in their native format. The instructions to Plaintiff's Request for Production of Documents provided as follows:

> ***Please be advised that any and all electronic documents, files, or data which are requested herein must be provided to the Plaintiff in the native format. This requires that you provide the originally created data in the format utilized by the software originally used to create the data. For example, if the data was originally recorded or drafted using Microsoft Word, please provide us with the Word formatted document, otherwise indicated as a "*.doc" file. If a document is requested that was originally drafted, sent and/or otherwise existing in an electronic format, we request that the document be provided to us in the native electronic format.***

The language in 34(b) was altered in 2006 amendments which the Notes from its Advisory Committee provided that the amendments "permits the requesting party to designate the form or forms in which it wants electronically stored information produced."

Despite its request for the documents in their native electronic format, its reiteration of its request in its January 22, 2009 letter and during its January 29, 2009, Rule 37 Discovery

Conference…to date, the Defendant has yet to produce a single electronic file in this case.

Not only is the non-production in contrast with the Plaintiff's specific request, and therefore with the Plaintiff's ability to make said request under Rule 34(b), but the Defendant's failure to produce electronically stored information in electronic format is equivalent to its production of the documents in contrast to 34(b)(2)(E)(ii), which requires that documents be produced "in a form or forms in which it is ordinarily maintained or in a reasonably useable form or forms."

Documents at Controversy

With regard to the Plaintiff's argument that the documents were not produced as required by Rule 34(b), the Plaintiff is concerned about production of the following documents:

(i) Xactimate estimates by Steve Dobbins and Brandon Simoneaux;

(ii) All emails produced;

(iii) All photographs produced;

(iv) All expert reports;

(v) Training guidelines and manuals (the "Operating Guides," among other documents);

The issue for this Court's Determination

Documents classified as above were all already produced by the Defendant, but were at all times produced on paper.

Moreover, Plaintiff does not believe there is any dispute that the Xacatimate estimates, emails, photographs, expert reports and training guidelines and manuals were all created electronically, or that they were and are stored electronically.

The issue for this court to determine, therefore, is whether:

1) The Plaintiff properly requested that the documents be provided in their native electronic format, and whether the Defendant complied with the request; or alternatively
2) Whether the documents produced are in a format that they are ordinarily maintained or a reasonably usable format.

Plaintiff properly requested that the Documents be Provided in their Native Electronic Format

As shown through the above-quoted instructions, the Plaintiff properly requested that the Defendant provide documents "in the format utilized by the software originally used to create the data."

The Xactimate estimates, emails, photographs, expert reports and training manuals were all not originally created in paper – as even the Defendant will admit. Therefore, by providing the documents in paper format, the Defendant has failed to provide the documents as requested by the Plaintiff's instructions and required by Rule 34.

The Plaintiff has attempted to remedy this non-production by sending a letter describing the problem, as well as discussing the same with Defendant's counsel through the January 29, 2009, Rule 37 Discovery Conference. All attempts to acquire the documents in electronic format, however, were to no avail.

The Plaintiff respectfully requests an order compelling the Defendants to produce said documents in its native electronic format.

Alternatively, the paper documents produced are not how the documents are ordinarily maintained or a reasonably useable format

The Advisory Committee notes related to the 2006 amendments to Rule 36 provide as

follows with respect to Rule 34(b)(2)(E)(2);

> If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it which it is ordinarily maintained, as long as it is produced in a reasonably usable form. *But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature*

In the alternative this Court considers the Plaintiff's request for the documents in its native format as ambiguous or otherwise not properly instructional, the Plaintiff avers that the production of the data-in-controversy by the Defendant is in violation of the default Rule 36(b)(2)(E)(2).

The Xactimate estimate files are searchable, and allow a party utilizing the file to review change logs, user logs and other data that is not reviewable by the paper form of the Xactimate estimate. Emails in their native electronic format are searchable. Furthermore, the training / operating guides produced by the Defendant are nearly 600 pages in length, and contain dense explanations of State Farm's large volume of operating guidelines. The operating guidelines in its original native format, however, would be searchable.

The photographs produced by Defendants would be similarly searchable, would contain META data that reveal details about the photographs such as who took the picture, when, and

other items. Furthermore, the photographs produced on paper lack even the quality that the original digital files would possess.[3]

The expert reports produced by the Defendants on paper have similar deficiencies, as they too contain photographs that lack quality, meta data and searchability, as this information is also missing from the reports themselves in paper form.

While the provision of Rule 34(b) currently in controversy is rather new, in addition to the Advisory Committee's notes, the matter has come before a district federal court for interpretation in *White v. Graceland Coll. For Lifelong Learning, Inc.*, 2008 WL 3271924 (D. Kan. Aug. 7 2008). In that case, the Honorable Waxse of the District of Kansas addressed the question of whether paper is a "reasonably usable format" in which to produce electronically stored information. In that wrongful termination case, the defendant produced e-mails and attachments in paper. The plaintiff moved to compel production of the records in their native format arguing that it could not otherwise determine when particular records were created or sent, or whether the records had been modified. Judge Waxse agreed, finding that the defendant "failed to produce the emails and attachments in either the form in which they are ordinarily maintained, or in a 'reasonably usable form,' as required by Rule 34(b)(2)(E)(ii).

The documents in the instant case are similar to the e-mails in *White*, and according to FRCP Rule 34(b)(2)(E), they were not produced as required.

Issue 5: Whether certain documents exist as per the deposition testimony of Mr. Simoneaux that has not been produced by Defendant, and whether Defendant should be

[3] Additionally, Mr. Simoneaux testified that he notated each photograph with comments about the photograph…but these notations were only delivered on a separately produced page, and it would be a laborious task (and not necessarily a reliable task) to assign each comment to the associated photograph. A production of these photographs in its native format would relieve this problem.

compelled to produce the same;

The deposition transcript of Mr. Simoneaux is not yet available, but the Plaintiff will supplement this memorandum when it becomes so. Notwithstanding this, it is the Plaintiff's contention that the following documents, things and events were mentioned as existing during Mr. Simoneaux's deposition that has not been produced by the Defendant, despite Plaintiff's request:

1) That independent of the activity log produced by State Farm, that Mr. Simoneaux kept a separate log during his employ on an Excel spreadsheet, and that he printed this out and turned it into his State Farm "Team Manager" on a weekly basis;
2) That he underwent a "LDI" training program with Worley Company, that according to his understanding, was a training program required by State Farm before adjusters could work on behalf of the company, and that he recalls likely receiving documentation during the classes;
3) That immediately after Hurricane Katrina (in or around September 2005), that a Catastrophe office was set up by State Farm, and that the office offered routine classes presented by State Farm personnel that taught adjusters about wind policies, flood policies, adjusting and other matters, and that he participated in some of these classes, and recalls likely receiving documentation during the classes.

The Plaintiff contends that it requested item #1 in its Request for Production of Documents No. 1, 3 and 13; that it requested the identification of the training program suggested in #2 within its Interrogatory 5(c); that it requested information about #3 within its Interrogatories 3 and 19, and Request for Production No. 6 and 19.

The Plaitniff submits that the Defendant does not have objections to these requests that have merit or otherwise that Defendant cannot meet its burden with respect to any objections that would allow them to not produce the above-identified documents. Plaintiff requests an order compelling these documents produced in their native electronic format.

Issue 6: Whether certain documents identified by the Defendant as "privileged" in its privilege log should be subject to an in-camera review, since there is evidence available that the documents may not be so privileged.

The final issue presented in Plaintiff's Motion to Compel relates the Defendant's use of the attorney-client privilege. As suggested earlier in this Memorandum, in *Moses v. State Farm Mut. Auto. Ins. Co.*, the court held that insurer who objected on the basis of attorney client privilege and work product rule must *specifically* identify the nature, but not contents, of the documents and communications sought to be protected from discovery.

Without repeating the earlier portions of this memorandum, along with Defendant's production of documents in its "initial disclosures," the Defendant produced a "Privilege Log" made a part of Exhibit D herein. Upon a review of the privilege log, however, the Plaintiff became aware that at least two of the documents noted as "privileged" had been previously produced by the Defendant.[4]

PC 028 and PC 036 are classified as "log entries created in anticipation of "litigation." However, upon review of the documents themselves (also a part of Exhibit D herein), it is clear that the documents do not so contain such "privileged" material.

As a result of this inconsistency, and the general overuse of the attorney/client and work-

[4] Production was part of Defendant's original Initial Disclosures at the geniuses of this action, and not the supplemental disclosure on October 29, 2008.

product privilege contained within the instant Discovery responses, the Plaintiff requests that the items marked as "privileged" in the Privilege Log, as well as any other documents purporting to be privileged, be subject to an in-camera review.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on all counsel of record to this proceeding through the CM/ECF system that will send notice of an electronic filing to all counsel of record, and sent to same counsel via US First Class Mail, postage prepaid, this 3rd of March, 2009.

s/ Scott G. Wolfe, Jr.
SCOTT G. WOLFE

Respectfully Submitted,

s/ Scott G. Wolfe, Jr.
Scott G. Wolfe, Jr. (Bar Roll 30122)
THE WOLFE LAW OFFICES, L.L.C.
4821 Prytania Street
New Orleans, LA 70115
P: 504-894-9653
F: 866-761-8934
Attorney for Plaintiffs