

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

MICHAEL CARDIFF and :  
BARBARA CARDIFF, :  
Plaintiffs, :  
v. : CA 10-39 S  
NATIONAL GRANGE MUTUAL :  
INSURANCE COMPANY, :  
Defendant. :

**MEMORANDUM AND ORDER**  
**GRANTING IN PART**  
**MOTION TO COMPEL AND/OR STRIKE**

Before the Court is Michael and Barbara Cardiffs' Motion to Compel and/or Strike (Docket ("Dkt.") #34) ("Motion to Compel and/or Strike" or "Motion"). By the Motion, Plaintiffs Michael Cardiff and Barbara Cardiff ("Cardiffs" or "Plaintiffs") seek: (1) to strike coverage defenses asserted by National Grange Mutual Insurance Company ("NGM") in a supplemental response to interrogatories after the close of discovery; (2) to strike NGM's incomplete responses to interrogatories served after the close of discovery; and (3) to compel production of documents allegedly improperly withheld on the basis of work-product privilege and have the Court conduct an *in camera* inspection of documents related to NGM's belated defenses. See Motion at 1-2. NGM has filed an objection to the Motion. See Defendant, National Grange Mutual Insurance Company's Objection to Michael and Barbara Cardiff's

Motion to Compel and/or Strike and to Consolidate (Dkt. #42) ("Objection"). A hearing was held on January 19, 2012.

## **I. Background**

Plaintiffs own and operate a bed and breakfast in Westerly, Rhode Island. See Complaint (Dkt. #1) ¶ 2. In 2005 they engaged Albert Lorenzo, Jr. ("Lorenzo"), who at the time was doing business as L&G Construction Services, to renovate and construct an addition to the bed and breakfast. Id. ¶ 6. Plaintiffs allege that in performing this work Lorenzo negligently damaged work performed by others and also caused damage to the buildings outside and beyond the scope of his work. Id. ¶ 11. Plaintiffs further allege that Lorenzo, as "Albert Lorenzo Jr. d/b/a A. Lorenzo Masonry," id. ¶ 9, had a "Businessowners' Liability Policy" (the "Policy") with NGM, id.

In January 2007, Plaintiffs filed a property damage claim with their homeowners insurer. See Memorandum in Support of Michael and Barbara Cardiff's Motion to Compel and/or Strike, Motion to Consolidate, and Motion for Sanctions (Dkt. #36) ("Plaintiffs' Mem.") at 3. NGM, as subrogee, paid a portion of this claim pursuant to the Policy.<sup>1</sup> See id. Although NGM sent a reservation of rights letter to Lorenzo in March 2007, citing an exclusion for incorrectly performed work, see id., Ex. D (Letter from Brooks to

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<sup>1</sup> NGM representative Andrew Brooks testified that he paid \$8,000 on NGM's behalf on the subrogation claim. Motion, Ex. C (Transcript of Deposition of Andrew Brooks ("Brooks Tr.)) at 32.

Lorenzo of 3/8/07), NGM never raised a coverage defense with respect to Plaintiffs' 2007 claim, see Plaintiffs' Mem. at 3.

According to Plaintiffs, because much of the damage apparent at that time was within the scope of Lorenzo's work—and excluded by the Policy—Plaintiffs proceeded to litigate their claims against Lorenzo for the next year and a half. Id. However, on April 29, 2008, before that litigation was heard on the merits, see id., Lorenzo filed for bankruptcy in the United States Bankruptcy Court for the District of Rhode Island, see id.; see also Complaint ¶ 13.

Plaintiffs state that in November 2009, as the resulting damages from Lorenzo's substandard work were becoming more apparent, they notified NGM of a direct action they intended to file against NGM based on the Policy and R.I. Gen. Laws § 27-7-2.4 (2011). See Plaintiffs' Mem. at 3. On December 10, 2009, NGM sent Lorenzo a second reservation of rights letter, citing exclusions in the Policy but not mentioning coverage defenses. Id., Ex. E (Letter from Brooks to Lorenzo of 12/10/09). The instant action was filed on January 29, 2010. See Dkt.

## **II. Discussion**

### **A. Request to Strike Coverage Defenses**

#### **1. Plaintiffs' Argument Re First Request**

Plaintiffs complain that NGM has belatedly asserted coverage defenses after the close of discovery (June 30, 2011) and that they have been prejudiced as a result. They seek to have stricken the

coverage defenses asserted in supplemental answers to Plaintiffs' interrogatories which Plaintiffs received on July 5, 2011.

The interrogatories at issue, the original responses to those interrogatories, and the supplemental responses served by NGM after the close of discovery are reproduced below. The portions of the supplemental responses about which Plaintiffs complain and seek to have stricken are underlined.<sup>2</sup>

**Interrogatory No. 3:**

Please explain the factual basis for the denial in Your Answer of paragraph 16<sup>[3]</sup> in the Complaint.

**Answer No. 3 [Served Nov. 22, 2010]:**

Defendant Objects to Interrogatory No. 3 as it seeks a legal conclusion rather than a discoverable Answer based upon Defendant's factual knowledge.

**Supplemental Answer No. 3 [Served July 5, 2011]:**

Defendant further states that its denial to paragraph 16 of the Complaint is to the extent that the term "contractor" refers to A. Lorenzo Masonry as National Grange's insured. The contract with the plaintiffs was with an entity known as L&G Construction. To the extent that Al Lorenzo did any work on the project, defendant contends he did so in a non-negligent and workmanlike manner.

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<sup>2</sup> For clarity, other underlining appearing in the original has been omitted.

<sup>3</sup> Paragraph 16 of the Complaint alleges that: "Contractor [Lorenzo] owed a duty to Plaintiffs to complete the Project in a non negligent and workmanlike manner, and not damage work performed by others or portions of the building not within the Project scope." Complaint ¶ 16.

**Interrogatory No. 4:**

Please explain the factual basis for the denial in Your Answer of paragraph 17<sup>[4]</sup> in the Complaint.

**Answer No. 4 [Served Nov. 22, 2010]:**

Defendant states that discovery and investigative efforts are still ongoing. Defendant refers Plaintiff to Correspondence from C.A. Pretzer Associates, Inc. dated 3/26/07 and 6/17/10, which were produced in connection with Defendant's Responses to Plaintiffs' Request for Production of Documents.

**Supplemental Answer No. 4 [Served July 5, 2011]:**

Michael Cardiff and John Gordon controlled the job as of June 1, 2006. Significant work was done after that date. National Grange is not responsible for any work done on the project after June 1, 2006. Defendant further states that the work product of John Gordon as principal of L&G Construction is not the responsibility of National Grange. Lastly, defendant points to the deposition testimony of David Grandpre to support the contention that Mr. Lorenzo completed work pursuant to the plans and that the structural plans provided by architect, Lloyd Baker were deficient.

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**Interrogatory No. 14:**

Please state the factual basis of the "Fourth Defense" in Your Answer, stating that "Count I is barred by the doctrine of waiver."

**Answer No. 14 [Served Nov. 22, 2010]:**

Defendant states that while discovery and investigative efforts are still ongoing, it appears that the Plaintiffs' alleged damages have already been addressed by their own insurance carrier, Vermont Mutual. By accepting payment for repairs under their own insurance policy, Plaintiffs' have waived their right to any

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<sup>4</sup> Paragraph 17 of the Complaint alleges that "Contractor failed to complete its work in a non negligent and workmanlike manner." Id. ¶ 17.

coverage under the contractor's policy with the Defendant Insurance Carrier.

**Supplemental Answer No. 14 [Served July 5, 2011]:**

Defendant points to the file notes from 2007 and 2008 whereby Mr. Brooks continually requested that plaintiffs provide supports for any ongoing losses and plaintiffs failed to provide same. Plaintiffs did not put National Grange on notice of on-going leaks or on-going property damage issues after February of 2008. Secondly, plaintiffs provided notice to their insurance agent in November of 2006 of a claim that was worth about \$800,000; those documents were not provided to National Grange until discovery requests in this case and until subpoenas and depositions of plaintiffs' insurance agent. Lastly, plaintiffs have not asserted a claim against L&G Construction but only against National Grange as insurer of A. Lorenzo Masonry.

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**Interrogatory No. 15:**

Please state the factual basis of the "Fifth Defense" in Your Answer. Stating that "Count I is barred by the doctrine of estoppel."

**Answer No. 15 [Served Nov. 22, 2010]:**

Defendant states that while discovery and investigative efforts are still ongoing, it appears that the Plaintiffs' alleged damages have already been addressed by their own insurance carrier, Vermont Mutual. Plaintiffs' have already been made whole, and are therefore estopped from recovering a second time from the Defendant Insurance Carrier.

**Supplemental Answer No. 15 [Served July 5, 2011]:**

Defendant points to the file notes from 2007 and 2008 whereby Mr. Brooks continually requested that plaintiffs provide supports for any ongoing losses and plaintiffs failed to provide same. Plaintiffs did not put National Grange on notice of on-going leaks or on-going property damage issues after February of 2008. Secondly, plaintiffs provided notice to their insurance agent in November of 2006 of a claim that was worth about

\$800,000; those documents were not provided to National Grange until discovery requests in this case and until subpoenas and depositions of plaintiffs' insurance agent. Lastly, plaintiffs have not asserted a claim against L&G Construction but only against National Grange as insurer of A. Lorenzo Masonry.

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**Interrogatory No. 20:**

Please state the factual basis of the "Tenth Defense" in Your Answer, stating that Count I "fails to state a claim upon which relief can be granted because a condition precedent to the obligation to make payment on the alleged faulty construction work had not occurred."

**Answer No. 20 [Served Nov. 22, 2010]:**

Pursuant to the insurance claims process, Defendant has asked the Plaintiffs to support their claims with documentation. This documentation has not been not timely produced. To date, Defendant has still received no documentation that supports the causal connection between the alleged damages and the actual work done by the insured contractor or its sub-contractors.

**Supplemental Answer No. 20 [Served July 5, 2011]:**

Defendants assert that plaintiffs have not provided contemporaneous photographs of damages along with repair invoices for each leak and the alleged source of same. There is no clear causal connection to work performed by Al Lorenzo that led to the resulting damages as alleged. Mr. Lorenzo was off the job as of 2006 and the evidence suggests that John Gordon, not A. Lorenzo Masonry, was the general contractor on this job, managed the job, ran the job, worked on the job. L&G Construction was not the entity insured by National Grange.

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**Interrogatory No. 21:**

Please state the factual basis of the "Eleventh Defense" in Your Answer, stating that Count II "fails to state a

claim upon which relief can be granted because a condition precedent to the obligation to make payment had not occurred."

**Answer No. 21 [Served Nov. 22, 2010]:**

Pursuant to the insurance claims process, Defendant has asked the Plaintiffs to support their claims with documentation. This documentation has not been not timely produced. To date, Defendant has still received no documentation that supports the causal connection between the alleged damages and the actual work done by the insured contractor or its sub-contractors.

**Supplemental Answer No. 21 [Served July 5, 2011]:**

Defendants assert that plaintiffs have not provided contemporaneous photographs of damages along with repair invoices for each leak and the alleged source of same. There is no clear causal connection to work performed by Al Lorenzo that led to the resulting damages as alleged. Mr. Lorenzo was off the job as of 2006 and the evidence suggests that John Gordon, not A. Lorenzo Masonry, was the general contractor on this job, managed the job, ran the job, worked on the job. L&G Construction was not the entity insured by National Grange.

Motion at 2-5; see also id., Ex. A (Defendant's Second Supplemental Answers to Plaintiffs' Interrogatories).

Plaintiffs argue that the underlined portions of the above responses "assert defenses never before asserted during the course of discovery." Id. at 5. In particular, Plaintiffs complain that for the first time NGM:

(a) denied responsibility for the Cardiffs' claims because it alleged that L&G Construction, not Lorenzo, was the general contractor and L&G Construction was not insured by NGM, see Plaintiffs' Mem. at 5 (citing supplemental answers to Interrogatories 3, 4, 14, 15, 20, and 21); and

(b) asserted that John Gordon, one of Lorenzo's subcontractors, ran the project and was an L&G principal, and therefore NGM was not responsible for Gordon's work product, see id. (citing supplemental answers to Interrogatories 4, 20, and 21).

Plaintiffs contend that NGM has known directly since December 2009, and least constructively since January 2007, of facts that should have prompted investigation of the coverage defenses it now raises. See Motion at 5-6. Plaintiffs argue that there is no substantial justification for NGM's delay or failure to investigate. Id. Moreover, Plaintiffs claim that they have been prejudiced for two reasons. First, they are left after the close of discovery with no means to explore or challenge the basis of NGM's coverage defenses. Motion at 6 (citing AVX Corp. v. Cabot Corp., 251 F.R.D. 70, 78 (D. Mass. 2008) ("The late disclosure after the close of discovery leaves [defendant] without the means to explore and challenge the basis of the recent calculations.")). Second, Plaintiffs note that they spent time and money conducting discovery "without the benefit of knowing that NGM may deny coverage altogether and thereby preventing the Cardiffs<sup>[1]</sup> from being able to 'judge its monetary exposure and marshal resources accordingly.'" Id. (quoting AVX Corp., 251 F.R.D. at 79). In particular, Plaintiffs represent that they have attended fifteen depositions, hired five experts, engaged in extensive written discovery, and participated in three mediations. Id. Plaintiffs

emphasize that:

The Cardiffs have already taken NGM's deposition twice and NGM still has not completed its investigation or responded to areas noticed for inquiry, including coverage defenses. Reopening discovery, or allowing discovery in the DJ Action,<sup>[5]</sup> would cause further delay and prejudice to the Cardiffs.

Id. (citing AVX Corp., 251 F.R.D. at 79-80; Tobias v. Davidson Plywood, 241 F.R.D. 590, 593-94 (E.D. Tex. 2007) (concluding that continuance would not cure the prejudice resulting from late disclosure of insurance policy where plaintiff had incurred extensive expenses, including hiring expert witnesses and conducting depositions where date for filing dispositive motions had already passed)).

Plaintiffs note that here, as in Tobias, the deadline for filing dispositive motions (August 12, 2011) has already passed and that they had no opportunity to investigate and file summary judgment motions on the coverage defenses that NGM now raises. Motion at 7. Plaintiffs additionally note that the pretrial memoranda have already been filed and but for these discovery issues the case is now ready for trial. Id.

In sum, Plaintiffs contend that NGM had a duty to supplement

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<sup>5</sup> On July 18, 2011, after the close of discovery in the instant case, NGM filed a declaratory judgment action in this Court, NGM Insurance Company v. Albert Lorenzo, Jr. DBA A Lorenzo Masonry, Michael Cardiff, and Barbara Cardiff, CA 11 292 S (the "DJ Action"), seeking, among other things, a declaration that the Policy does not provide coverage for the subject losses. See DJ Action, Complaint (Dkt. #1), prayer for relief; see also id., Amended Complaint (Dkt. #5), prayer for relief ¶¶ 1 4.

its discovery responses "in a timely manner," Fed. R. Civ. P. 26(e),<sup>6</sup> and that NGM's failure to do so has severely prejudiced Plaintiffs. Motion at 5. Accordingly, Plaintiffs seek to have the defenses reflected in the underlined portions of the above responses stricken and all evidence related to these defenses (including Lorenzo's testimony) also stricken.<sup>7</sup> Id.

## 2. NGM's Arguments

NGM combines its arguments relative to the relief sought by the first and second requests contained in the Motion.

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<sup>6</sup> Fed. R. Civ. P. 26(e) provides in relevant part:

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a) or who has responded to an interrogatory, request for production, or request for admission must supplement or correct its disclosure or response:

(A) **in a timely manner** if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing ....

Fed. R. Civ. P. 26(e) (bold added).

<sup>7</sup> In addition to striking the underlined portions of the supplemental answers, Plaintiffs have clarified (in response to an inquiry from the Court) that they also seek to have stricken:

- the remaining portions of the responses, referring to "work done by *Al Lorenzo*," to the extent that they assert that NGM's insured was not L&G Construction or the entity who signed the Villa Construction Contract; and
- all evidence related to stricken responses including Lorenzo's testimony.

Letter from Bottaro to Martin, M.J., of 1/19/12.

Accordingly, NGM's arguments are set forth after Plaintiffs' arguments concerning NGM's incomplete responses to interrogatories served after the close of discovery.

**B. Request to Strike Incomplete Responses**

**1. Plaintiffs' Argument Re Second Request**

By their second request, Plaintiffs seek to strike pursuant to Fed. R. Civ. P. 37(c)(1)<sup>8</sup> and 37(b)(2)<sup>9</sup> the underlined portions of

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<sup>8</sup> Fed. R. Civ. P. 37(c)(1) provides in relevant part:

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless ....

Fed. R. Civ. P. 37(c)(1).

<sup>9</sup> Fed. R. Civ. P. 37(b) provides in relevant part:

(b) Failure to Comply with a Court Order.

....

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent or a witness designated under Rule 30(b)(6) or 31(a)(4) fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

...

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

the following supplemental responses. See Motion at 9. In particular, Plaintiffs contend that NGM's failure to provide complete responses to the interrogatories below during discovery violates Rule 26(e), has prejudiced Plaintiffs' ability to conduct thorough discovery, and will continue to prejudice Plaintiffs' ability to prepare for trial. Id.

**Interrogatory No. 9:**

To the extent that You deny, in whole or in part, that the Insurance Policy provides coverage for the Plaintiffs' Claim, please explain:

- a. Which aspects of the Claim that You contend are not covered by the Insurance Policy; and
- b. Why You contend that each of the identified aspects of the Claim are not covered by the Insurance Policy.

**Answer No. 9 [Served Nov. 22, 2010]:**

Defendant Objects to Interrogatory No. 9 as it seeks a legal conclusion rather than a discoverable Answer based upon Defendant's factual knowledge. Defendant further states that discovery and investigation is still ongoing as to whether or not the Insurance Policy issued by the Defendant provides coverage for the Plaintiff's claims.

**Supplemental Answer No. 9 [Served July 5, 2011]:**

Defendant is in the process of making determinations regarding its coverage portions and has assigned Lynda Costa and separate coverage counsel, Attorney Faith LaSalle.

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(iii) striking pleadings in whole or in part ....

Fed. R. Civ. P. 37(b) (2) (A) .

**Interrogatory No. 10:**

To the extent that You agree that certain aspects of the Claim are covered by the Insurance Policy but disagree with the value of those aspects of the Claim as set forth in the Damages Report, please explain:

- a. Which aspects of the Claim that You contend do not reflect the reasonable cost of restoration or replacement; and
- b. The basis of Your judgment for each identified aspect of the Claim.

**Answer No. 10 [Served Nov. 22, 2010]:**

Defendant Objects to Interrogatory No. 9<sup>[10]</sup> as it seeks a legal conclusion rather than a discoverable Answer based upon Defendant's factual knowledge. Defendant further states that discovery and investigation is still ongoing as to whether or not the Insurance Policy issued by the Defendant provides coverage for the Plaintiff's claims.

**Supplemental Answer No. 10 [Served July 5, 2011]:**

Defendant is in the process of making determinations regarding its coverage portions and has assigned Lynda Costa and separate coverage counsel, Attorney Faith LaSalle. Defendant relies on the extensive report and deposition testimony of David Grandpre and the reports of Chris Anderson. Mr. Anderson is also scheduled to be deposed to elaborate on the damages analysis.

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**Interrogatory No. 12:**

Please state the factual basis of the "Second Defense" in Your Answer, stating that the Complaint "fails to state a claim upon which relief may be granted as it sounds in breach of contract, not negligence."

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<sup>10</sup> Although Answer No. 10 states that Defendant objects to Interrogatory No. 9, it is clear from the context that Interrogatory No. 10 is the intended reference.

**Answer No. 12 [Served Nov. 22, 2010]:**

The Defendant was not negligent and in no way contributed to the Plaintiffs' alleged damages. The coverage sought through the Insurance Policy of A. Lorenzo Masonry, if proven, would be granted on breach of contract grounds, not based in<sup>[11]</sup> negligence.

**Supplemental Answer No. 12 [Served July 5, 2011]:**

Defendant is in the process of making determinations regarding its coverage portions and has assigned Lynda Costa and separate coverage counsel, Attorney Faith LaSalle.

Motion at 8-9; see also id., Ex. A (Defendant's Second Supplemental Answers to Plaintiffs' Interrogatories).

The essence of Plaintiffs' complaint about the above supplemental answers is that the case is ready for trial and that NGM is not entitled to leave a placeholder for additional investigation and defenses. See Motion at 9. Accordingly, Plaintiffs seek to have the underlined portions of the supplemental responses stricken. See id.

**2. NGM's Argument Re First and Second Requests**

NGM initially argues that the Motion, which was filed on September 29, 2011, is untimely. Objection at 1. NGM asserts, without citing any supporting authority, that "all motions ... were to have been filed within 14 days after the close of discovery." Id. It contends, again without citation to authority, that if

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<sup>11</sup> In the Motion, this word appears as "on," but in Defendant's Second Supplemental Answers to Plaintiffs' Interrogatories the word is "in," see Motion, Ex. A at 6.

Plaintiffs took issue with NGM's supplemental answers the Motion should have been filed by July 19, 2011, or, at the latest, by August 26, 2011, fourteen days after receipt of NGM's pretrial memorandum. Id.

NGM next argues that the supplemental answers were timely because its counsel was court excused from June 27 through July 1, 2011, for an out-of-state vacation and that its supplemental answers were filed on July 5, 2011, the first business day that counsel was back in the office. Id. at 1-2. NGM cites no authority for the proposition that a court excuse extends deadlines established by a scheduling order.

NGM's primary argument, however, is that the supplemental answers should not be stricken because they relate to liability, not coverage, and that they address Plaintiffs' burden of proof. See Defendant, National Grange Mutual Insurance Company's Memorandum in Support of Its Objection to Michael and Barbara Cardiff's Motion to Compel and/or Strike and to Consolidate ("NGM's Mem.") at 1-6. NGM contends that the supplemental answers "merely codify[] in written discovery what had been transpiring over a year and a half of litigation." Id. at 1. It asserts that if Plaintiffs "did not realize that their burden of proof including showing liability of the named insured in a direct action, NGM should not be penalized for not highlighting that obvious connection to plaintiffs in a supplemental answer to interrogatory

that merely refers back to the evidence brought out in discovery.”  
Id. at 3.

With respect to Plaintiffs’ claim that they “had no reason to explore any issues concerning L&G Construction or John Gordon’s role on the project with [three of Lorenzo’s subcontractors when they were deposed] since the Cardiffs had no knowledge of the coverage defenses,” Plaintiffs’ Mem. at 11, NGM retorts that “Plaintiffs should have explored those issues based on their burden of proof in this case,” NGM’s Mem. at 5. Moreover, NGM claims that Plaintiffs did explore those issues. Id. (citing excerpt from the May 17, 2011, deposition of Larry Nantais).

NGM also states that it is undisputed that Plaintiffs did not put NGM on notice of their alleged ongoing resulting damages until December of 2009 which was three and one half years after Lorenzo was last on Plaintiffs’ property. Id. at 3. NGM further claims that it “was at a disadvantage in trying to fully investigate this complicated construction matter with multiple alleged dates of loss.” Id. Moreover, NGM notes that the alleged resulting damages escalated from \$286,000 to \$648,000 over the course of the litigation. Id. at 4.

Summarizing its arguments, NGM asserts that:

The crux of plaintiffs’ case against NGM is to prove that the named insured, Al Lorenzo d/b/a A. Lorenzo Masonry, did the allegedly negligent work. The contract was with a different entity and the bulk of the work done by a different individual [John Gordon]. Those are facts that have come out throughout discovery and that will come out

at trial. Striking the supplemental answers will not change those facts or plaintiffs' burden of proof.

NGM's Mem. at 6-7.

### **3. Court's Ruling Re First and Second Requests**

The Court is not persuaded by NGM's contention that the Motion is untimely. As already noted, NGM cites no authority in support of this claim, and the Court fails to find support for it in the Pretrial Order (Dkt. #6) or any of the extensions thereof. To the extent that NGM may have in mind the deadline for filing dispositive motions, the instant Motion is not a dispositive motion. Moreover, as Plaintiffs point out, NGM's claim that "all motions (but for motions in limine) were to have been filed within 14 days after the close of discovery," Objection at 1, would render Defendant's Motion to Compel Satisfaction of Expert Fees (Dkt. #43), which the Court recently granted in part, see Memorandum and Order Granting in Part Defendant's Motion to Compel (Dkt. #46), untimely as well.

Similarly unpersuasive is NGM's argument that the supplemental responses were timely filed because its counsel was court excused for four days, including June 30, 2011, when fact discovery closed. The mere fact that an attorney receives a court excuse to take a vacation does not mean that s/he is also excused from complying with scheduling orders and the deadlines contained in those orders. To the contrary, an attorney has a responsibility to ensure that the deadlines are complied with notwithstanding the vacation,

either by doing what is necessary before departing for vacation or by arranging for someone else to do it in the absence of the attorney.

Accordingly, the Court finds that the supplemental answers were not filed prior to the deadline for the completion of fact discovery and that they are untimely. Thus, NGM has violated Rule 26(e). In reaching this conclusion, the Court is strongly influenced by the fact that the discovery requests at issue were served on NGM almost a full year earlier, on August 2, 2010, and the facts contained in the supplemental answers were known (or should have been known) to NGM well in advance of the June 30, 2011, deadline for completion of fact discovery.

Rule 26(e) (1) (A) requires a party to supplement its responses to discovery "promptly 'if the party learns that in some material respect the disclosure or response is incomplete or incorrect.'" Harriman v. Hancock Cnty., 627 F.3d 22, 29 (1<sup>st</sup> Cir. 2010) (quoting rule). "[T]he duty to supplement is a continuing duty and a 'party may not free itself of the burden to fully comply' by placing 'a heretofore unrecognized duty of repeated requests for information on its adversary.'" AVX Corp., 251 F.R.D. at 76 (quoting Arthur v. Atkinson Freight Lines Corp., 164 F.R.D. 19, 20 (S.D.N.Y. 1995)).

Rule 37 authorizes district courts to sanction non-complying parties. Harriman, 627 F.3d at 29. The sanction can vary depending on the circumstances, but "[t]he baseline rule is that

'the required sanction in the ordinary case is mandatory preclusion.'" Id. (quoting Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este, 456 F.3d 272, 276 (1<sup>st</sup> Cir. 2006)); see also AVX Corp., 251 F.R.D. at 78 ("the required sanction in the ordinary case is mandatory preclusion") (quoting Klonoski v. Mahlab, 156 F.3d 255, 269 (1<sup>st</sup> Cir. 1998)); Fed. R. Civ. P. 37(c)(1) (providing that if a party fails to disclose under Rule 26, that "party is not allowed to use that information or witness to supply evidence ... at a trial, unless the failure was substantially justified or is harmless").

Thus, the question before the Court is whether NGM's failure to disclose the information "was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). The Court concludes that it is neither.

NGM's argument that the supplemental answers relate to liability, not coverage, and that they address Plaintiffs' burden of proof, is unpersuasive. Even accepting this characterization, NGM still had an obligation to timely supplement its answers so that Plaintiffs would have fair notice of NGM's defenses and could conduct discovery relevant to them. Moreover, NGM's plea that it should not be penalized because Plaintiffs allegedly failed "to realize that their burden of proof including showing liability of the named insured in a direct action," NGM's Mem. at 3, ignores the substantial efforts which Plaintiffs made to ascertain what, if

any, coverage defenses NGM intended to assert regarding their claim. Interrogatory No. 9 which was propounded on August 2, 2010, sought this precise information. More than three months later, NGM answered that "discovery and investigation is still ongoing as to whether or not the Insurance Policy issued by the Defendant provides coverage for Plaintiff's claims." Motion at 8 (quoting NGM's November 22, 2010, response).

Plaintiffs' efforts to obtain a direct answer to this question five months later at the first Rule 30(b)(6) deposition of NGM on April 14, 2011, were unsuccessful. See Plaintiffs' Mem., Ex. F (Transcript of Deposition of Amy Malo ("Malo Tr.)) at 25-27, 30-32, 46-51. NGM's representative repeatedly responded to questions regarding whether it was asserting defenses other than those which it had already identified by stating that the matter was still "under investigation," id. at 26, 27, 32, or that NGM "reserved," id. at 31, the right to expand defenses relating to coverage, see id. Indeed, later in the deposition, when Plaintiffs' counsel attempted to approach the issue from a different direction, NGM's responses suggested that coverage might not be an issue:

Q. Number 3 requests that you appear to testify on behalf of National Grange as to all bases and information supporting your contention that National Grange cannot or will not provide coverage to the Cardiffs' claims in this action. Do you see that?

A. Yes.

Q. And what did you do to prepare to testify on that

category?

- A. We have not stated that we are not going to provide coverage, or that we cannot provide coverage.
- Q. My question is, what have you done to prepare for that category Number 3?
- A. I provided you with a reservation of rights in regard to the coverage issues, but we have not formally made a denial on the claim.
- Q. What have you done to prepare for Number 3 of Schedule A for your testimony today?
- MS. LAMONTAGNE: She just answered that.
- A. I provided you with the reservation of rights.
- Q. So you pulled a document out of your file that was issued, I understand, sometime in 2010 and 2007; is that correct?
- A. Correct.
- Q. And you did not do anything further to educate yourself about whether National Grange cannot or will not provide coverage to the Cardiffs' claims; is that correct?
- A. We never said that we cannot or will not.
- Q. So what information do you need in order to issue a determination as to whether coverage will or will not be provided to the Cardiffs' claims in this case?
- A. We are at different aspects of the claim now.
- Q. Is there anything that the Cardiffs have not provided to you that you need in order to give a determination on their claims in this case?
- A. A specific time line causally relating all of the damages to our insured.
- Q. Anything else?

A. We have the other issue now, too.

Q. And the other issue being?

A. With the agent.

Q. But does that relate to any information that the Cardiffs have not provided to you?

A. No.

Malo Tr. at 49-51.

Indeed, even at the second Rule 30(b)(6) deposition on August 2, 2011, more than a month after the close of fact discovery, NGM maintained that it still had not completed its determination with respect to coverage:

Q. And have you completed making determinations regarding National Grange's coverage positions with regard to Interrogatory Number 9?

A. We have not. That's why we filed the DJ action so we can seek guidance from the court in their interpretation of the policy language as it pertains to the complaint.

Q. So it's your testimony today that you have not made a final determination of your coverage position as to the question asked in Interrogatory Number 9; is that correct?

MS. LaSALLE: Objection. Asked and answered. You asked it twice.

Q. You can answer.

A. Could you repeat the question.

(QUESTION READ BACK)

A. That's correct.

Q. And why have you not made a final determination as to National Grange's coverage position?

A. Again, we're seeking the court's intervention as far as assistance on interpretation of the policy. Ultimately it will be the court's determination what's covered and what's not covered.

Plaintiffs' Mem., Ex. J (Transcript of Deposition of Lynda Costa ("Costa Tr.)) at 48-49.

NGM's related argument that it should not be required to supplement answers that summarize information known throughout the discovery process and go to the Cardiffs' burden of proof, see Objection at 3, is unconvincing. In making this argument NGM implicitly admits that the information at issue was known to NGM prior to the close of discovery, yet it failed to supplement its answers. The Court rejects NGM's implied argument that it has no obligation to disclose the factual basis for its claimed defenses in response to specific interrogatories and deposition questions seeking that information merely because the information was arguably known to Plaintiffs.

Also unconvincing is NGM's argument that because this is a direct action and it stands in the shoes of its insured, "[i]t is not appropriate for counsel for NGM in this case to assert coverage defenses that could impact Mr. Lorenzo's credibility or the coverage he is entitled to under the policy that was issued to him." Objection at 3. The named Defendant in this action is NGM, and NGM is obligated to disclose, in response to specific discovery requests seeking such information, coverage defenses. NGM may not avoid this obligation by contending that its counsel of record in

this action is representing Lorenzo and that discovery responses signed by NGM's representative are not to be treated as binding on NGM.

In sum, NGM's justification for the late disclosure is not persuasive. NGM had at least some familiarity with facts giving rise to Plaintiffs' claim given that NGM paid the prior claim in 2008. Even disregarding this circumstance, NGM admits that Plaintiffs put NGM on notice that they had additional damages in December 2009. See NGM's Mem. at 3. NGM had ample time to investigate the matter and advise Plaintiffs of the coverage defense it now belatedly seeks to assert. In fact, NGM's agent Andrew Brooks had direct knowledge in December 2009 of Lorenzo's use of L&G Construction as his d/b/a fictitious name. See Plaintiffs' Mem., Ex. G (Recorded Statement of Mr. and Mrs. Cardiff) at 2-3. Plaintiffs also validly point out that NGM's attorney asked questions about this topic during a May 2010 inspection of the bed and breakfast. See id., Ex. H at 1 (Letter from Lamontagne to Dubrovsky of 6/11/10); id., Ex. H. at 2 (Letter from Dubrovsky to Lamontagne of 6/3/10). NGM has not justified its failure to raise this issue for another 13 months during discovery.

NGM complains that because Plaintiffs' damage claim kept rising this hindered its ability to obtain information, but this circumstance only goes to the amount of damages—not whether the loss was covered. Indeed, the excerpt from the April 14, 2011, Rule 30(b)(6) deposition, which the Court has reproduced, makes

clear that, at least by that date, NGM's failure to make a determination regarding the claim was not attributable to anything Plaintiffs had done or had failed to do.

The Court also finds that the late disclosure is not harmless for the reasons claimed by Plaintiffs. Discovery is now closed. Reopening discovery is not an appropriate remedy because it would further delay this 2010 case in which the deadline for completion of discovery has been extended three times<sup>12</sup> and the deadlines for dispositive motions and pretrial memoranda have been extended four times.<sup>13</sup> The case is now ready for trial. Plaintiffs' claims of prejudice are well founded.

Accordingly, Plaintiffs' first and second requests are **GRANTED**. Cf. Damiani v. Rhode Island Hosp., 704 F.2d 12, 16 (1<sup>st</sup> Cir. 1983) ("If such conduct were condoned by a slap on the wrist, the District Court of Rhode Island might well find the lawyers calling the tune on discovery schedules.") (footnote omitted); id.

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<sup>12</sup> The Standard Pretrial Order (Dkt. #6) required that all fact discovery be completed by November 30, 2010. The parties filed a Joint Motion to Extend Pretrial Order Deadlines (Dkt. #8) on November 22, 2010, which the Court granted by text order on December 3, 2010. On March 2, 2011, NGM moved for a further extension, see Defendant's Motion to Extend Discovery Deadline (Dkt. #12), which the Court granted, see Order Granting in Part Motion to Extend Discovery Deadline (Dkt. #22). The parties then jointly moved for another extension of time on May 24, 2011, see Joint Motion to Extend Pretrial Order Deadlines (Dkt. #26), which was granted on June 13, 2011, and resulted in the deadline for the close of fact discovery becoming June 30, 2011.

<sup>13</sup> In addition to the extension recounted in n.12, NGM filed an assented to motion on July 22, 2011, to extend the time to serve pre trial memoranda. See Defendant's Motion to Extend Time to Serve Pre Trial Memoranda (Assented To) (Dkt. #29). This motion was granted by the Court by a July 27, 2011, text order.

("The day has long since passed when we can indulge lawyers the luxury of conducting lawsuits in a manner and at a pace that best suits their convenience."). The underlined portion of NGM's supplemental responses and incomplete responses to interrogatories identified at pages 4-8 and 13-15 are stricken. To the extent that the Motion seeks to preclude the testimony of Lorenzo, the Motion is denied but NGM is precluded from arguing that Lorenzo was not insured by it or that his work was not covered by the Policy except to the extent that NGM gave written notice of such defense (and the facts supporting such defense) prior to the close of discovery.

### **C. Request to Compel Production**

#### **1. Plaintiffs' Arguments**

In their reply memorandum, Plaintiffs indicate that there are only two items still being sought by them: (a) an unredacted copy of NGM's GuideWire Claim Center communications in 2007 and 2008<sup>14</sup> and (b) Lorenzo's recorded statement to Albert Brooks on March 20, 2007. See Michael and Barbara Cardiffs' Reply in Support of Motion to Compel and/or Strike and Motion to Consolidate (Dkt. #44) ("Plaintiffs' Reply") at 1. Regarding the GuideWire Claim Center communications, Plaintiffs note that when NGM originally withheld the documents it did so without stating a privilege and that when

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<sup>14</sup> NGM has redacted from the copy provided to Plaintiffs communications by its representatives and its insured, Lorenzo, and also internal communications not involving Lorenzo. See Michael and Barbara Cardiffs' Reply in Support of Motion to Compel and/or Strike and Motion to Consolidate (Dkt. #44) ("Plaintiffs' Reply") at 1.

Plaintiffs asked for the basis NGM stated that it was asserting the work-product privilege. See Plaintiffs' Reply at 1; see also id., Ex. B (Letter from Bottaro to Lamontagne of 11/18/10); id., Ex. C (Letter from Bottaro to Lamontagne of 11/22/10). As for the March 20, 2007, recorded statement by Lorenzo, Plaintiffs note that NGM failed to assert any specific privilege. See Plaintiffs' Reply at 3. Accordingly, Plaintiffs contend that NGM has waived the attorney-client privilege as to both items by not asserting it. See id. Plaintiffs additionally contend that even if the attorney-client privilege has not been waived, NGM has failed to establish that the withheld communications concern confidential communications between a client and his attorney seeking professional advice. Id. Finally, Plaintiffs argue that the work-product privilege cannot apply to communications prior to late 2009. Id. at 2.

## **2. NGM's Arguments**

NGM does not respond directly to Plaintiffs' argument that it has waived the claim of attorney-client privilege by not specifically invoking it prior to filing the instant Objection. Rather, NGM states that "[t]he work-product doctrine is derived from the attorney-client privilege," NGM's Mem. at 8, and appears to argue that NGM's claim of privilege based on the work-product doctrine was sufficient to allow NGM to invoke both privileges now.

To the extent that NGM is suggesting that there is no

difference between the two privileges and that the assertion of a work-product privilege is sufficient to defeat Plaintiffs' argument that NGM has waived its right to assert an attorney-client privilege as to GuideWire Claim Center communications and the recorded statement, the Court is not so persuaded. The two privileges are distinct. See In re Grand Jury Subpoena, 274 F.3d 563, 571 (1<sup>st</sup> Cir. 2001) ("Because the attorney-client and work product privileges differ, we treat them separately."); see also In Re Chevron Corp., 633 F.3d 153, 164 (3<sup>rd</sup> Cir. 2011) ("Though they both operate to protect information from discovery, the work-product doctrine and the attorney-client privilege serve different purposes."); Shields v. Sturm, Ruger & Co., 864 F.2d 379, 382 (5<sup>th</sup> Cir. 1989) ("The work product privilege is very different from the attorney-client privilege. The attorney-client privilege exists to protect confidential communications and to protect the attorney-client relationship and is waived by disclosure of confidential communications to third parties. The work product privilege, however, does not exist to protect a confidential relationship but to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent."); cf. United States v. Roxworthy, 457 F.3d 590, 593 (6<sup>th</sup> Cir. 2006) (noting that different standards of review apply to attorney-client privilege claims and work product privilege claims); id. (explaining that "in establishing the abuse-of-

discretion standard of review for work product privilege claims, we focused on the fact that privilege issues are discovery-related, and applied the deferential review typically accorded to district court decisions about the scope of discovery, whereas in establishing the standard of review for attorney-client privilege claims, we focused on whether privilege was a question of law or fact, and, upon concluding it was a question of law, applied de novo review") (internal citations omitted). Accordingly, NGM has waived its right to invoke attorney-client privilege by failing to assert it earlier. See United States v. Neill, 952 F.Supp. 834, 842 (D.D.C. 1997) ("The proponent of the privilege bears the burden to establish its existence, and absent the timely assertion of attorney-client privilege for each specific communication or document, no privilege will be recognized.") (internal citations omitted).

NGM's remaining claim is that the GuideWire Claim Center communications are protected by the work-product privilege. In support of this argument, NGM notes that the communications in their redacted form reflect that Ms. Cardiff told NGM's representative on February 1, 2007, "clmt will be retaining an attorney to represent them." NGM's Mem. at 8 (quoting Ex. 6 (GuideWire Claim Center communications in redacted form) at 70).<sup>15</sup>

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<sup>15</sup> Ex. 6 to NGM's Mem. does not bear a title. The Court assumes that it is the GuideWire Claim Center communications at issue in redacted form.

The same entry also contains the statement that “clmt has contacted the RI contractors boar[r]d but the board refused to take the case due to amount over 100k to repair damages ....” Id., Ex. 6.<sup>16</sup>

### **3. Court’s Ruling Re Motion to Compel**

As explained above, NGM has waived its claim of attorney-client privilege by failing to invoke it earlier with respect to either the GuideWire Claim Center communications or Lorenzo’s recorded statement. See Motion, Ex. B (Privilege Log). With regard to NGM’s claim of work-product for the redacted GuideWire Claim Center communications, the Court applies the standard utilized by Magistrate Judge Almond in Milder v. Farm Family Casualty Insurance Co., C.A. No. 08-310S, 2008 WL 4671003 (D.R.I. Oct. 21, 2008):

[U]nless and until an insurance company can demonstrate that it reasonably considered a claim to be more likely than not headed for litigation, the natural inference is that the documents in its claim file that predate this realization were prepared in the ordinary course of business, *i.e.*, the business of providing insurance coverage to insureds.

Id. at \*1 (quoting Warren Co. v. Eastern Elec. Corp., 201 F.R.D. 280, 285 (D. Me. 2001)).

Although it is a close question, especially because the

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<sup>16</sup> NGM also contends that “[w]hen Andy Brooks talked with Albert Lorenzo on March 20, 2007, it was to get Mr. Lorenzo’s version of events because it was reasonable to assume that litigation was forthcoming.” NGM’s Mem. at 8 9. The Court, however, has found that NGM waived any claim of privilege with respect to Lorenzo’s recorded statement by not asserting it earlier. See Motion, Ex. B (Privilege Log).

statements at issue were made more than two years prior to the filing of the instant action, the Court concludes that the entries "clmt will be retaining an attorney to represent them," NGM's Mem., Ex. 6 at 70, and "clmt has contacted the RI contractors boa[r]d but the board refused to take *the case* due to amount over 100k to repair damages," *id.* (italics added), are sufficient to demonstrate that as of February 1, 2007, NGM reasonably believed it more likely than not that litigation would result from Plaintiffs' claim.

Accordingly, to the extent that the Motion seeks to compel the production of the redacted portions of the GuideWire Claim Center communications, the Motion is DENIED except with respect to any entry reflecting statements made by Plaintiffs.<sup>17</sup> As to Plaintiffs' statements, the Motion is GRANTED because statements made by Plaintiffs are not protected by the work-product privilege and must be provided to Plaintiffs. NGM shall provide such statements to Plaintiffs within ten days of the date of this Order.

### **III. Summary**

As a result of the rulings made above, the Motion is granted in the following respects: (1) the coverage defenses asserted by NGM in the supplemental answers served on July 5, 2011, are stricken; (2) the incomplete responses to interrogatories served by

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<sup>17</sup> Plaintiffs suggest that the redaction appearing on page 70 of the GuideWire Claim Center communications (to right of the words "contact with clmt") contains a statement made by Plaintiffs. See Plaintiffs' Reply at 1. If so, NGM must produce it.

NGM after the close of discovery are stricken; and (3) the March 30, 2007, recorded statement of Lorenzo must be produced to Plaintiffs. NGM is precluded from arguing that NGM's insured was not L&G Construction or the entity who signed the Villa Construction Contract. NGM is further precluded from arguing that work performed by John Gordon is not the responsibility of NGM. Given these preclusions, the Court deems it unnecessary to attempt to carve out in advance areas about which Lorenzo or Gordon should be precluded from testifying. The trial justice will be in a better position to determine whether particular testimony should be excluded to give effect to the preclusions established by this Memorandum and Order.

The Motion is denied in the following respect: the redacted portions of the GuideWire Claim Center communications do not have to be produced to Plaintiffs unless the redaction is of a statement made by Plaintiffs. To the extent that this Memorandum and Order requires a document or recording to be produced to Plaintiffs, such production shall be accomplished within ten days of the date of this Order.

#### **IV. Conclusion**

For the reasons stated above, the Motion to Compel and/or Strike is GRANTED in part and DENIED in part.

ENTER:

*/s/ David L. Martin* \_\_\_\_\_

DAVID L. MARTIN  
United States Magistrate Judge  
February 24, 2012