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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-62411-CIV-DIMITROULEAS

WYNMOOR COMMUNITY COUNCIL, INC.,  
et al,

Plaintiffs,

vs.

QBE INSURANCE CORPORATION,

Defendant.

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**MOTION TO COMPEL PRODUCTION AND FORENSIC EXAMINATION AND  
INCORPORATED MEMORANDUM OF LAW**

Defendant, QBE Insurance Corporation (“QBE”), by and through its attorneys, Wicker, Smith, O’Hara, McCoy & Ford, P.A., pursuant to Rule 37 of the Federal Rules of Civil Procedure and Rule 26.1(h)(2) of Local Rules for the United States District Court for the Southern District of Florida, moves this Court for the entry of an order compelling the Plaintiffs Wynmoor Community Council, Inc. et. al. to produce all documents responsive to QBE’s Second Request to Produce and allow QBE to obtain a forensic image of Plaintiffs’ computer system. In support thereof, QBE states as follows:

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**INTRODUCTION**

**A. Background: Complaint and Affirmative Defenses**

As a result of a compromise settlement in November 2006, QBE previously paid nearly six million dollars for damage to Plaintiffs' property from Hurricane Wilma. However, Plaintiffs allege that QBE breached its contractual obligation to pay for Plaintiffs' purported "covered losses" resulting from Hurricane Wilma, and that QBE is obligated to cover the cost to repair, restore, and/or replace the property damage resulting from Hurricane Wilma. Plaintiffs are now seeking to recover in excess of one hundred million dollars. QBE raises several affirmative defenses including, *inter alia*, Plaintiffs' failure to cooperate with QBE in the investigation of the claim, and that certain damages are excluded as the true cause of the damage was defective repair, construction and maintenance. QBE has also asserted that coverage is void based upon fraud, misrepresentation or concealment due, in part, to certain damages being included in this insurance claim despite not being caused by the hurricane. QBE has been attempting to conduct discovery on Plaintiffs' claims and its affirmative defenses for months, but Plaintiffs have stone-walled and attempted to frustrate the discovery process at every turn.

**B. QBE's Second Request for Production and Plaintiffs' Failure to Respond**

QBE served its Second Request for Production on October 14, 2011. (Exhibit "A") In general terms, this Request sought the production of documents on discoverable issues including the prior maintenance and repair of the property, estimates related to damages, payments made on damages, previous damage, previous insurance claims, and

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the condition, maintenance, repair or replacement of any components of the buildings.

QBE is entitled to this discovery.

The scope of permissible discovery is set forth at Rule 26(b)(1) of the Federal Rules of Civil Procedure which provides, in pertinent part, as follows:

Parties may obtain discovery regarding *any nonprivileged matter that is relevant to any party's claim or defense*, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. . . . *Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.*

Fed. R. Civ. P. 26(b)(1) (emphasis added.) Relevancy, for discovery purposes, is substantially broader than simply what would be admissible at trial; “relevancy under Rule 26(b)(1) is ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). As noted by numerous courts, “the Federal Rules of Civil Procedure strongly favor full discovery whenever possible.” *Farnsworth v. Procter & Gamble Co.*, 425 F.2d 1545, 1547 (11<sup>th</sup> Cir. 1985); citing Fed. R. Civ. P. 26(b)(1); *Regency of Palm Beach, Inc. v. QBE Insurance Corp.*, 259 F.R.D. 645, 648 (S.D. Fla. 2009).

As discussed in further detail, *infra*, a number of the Requests specifically sought the production of documents and/or data from electronic media (including hard-drives, floppy drives, etc. of computers) including # 3 (recordings of meetings), 4 (recording of meetings since January 1992), 9 (maintenance and repair), 10 (maintenance and repair

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since January 1992), 13 (estimates supporting proof of loss), 14 (reasons for changing insurance coverage), 15 (building components), 16 (building components since January 1992), 17 (payments made for damages), 21 (hurricane damage of building components), 22 (hurricane damage of building components since 1992), 23 (condition of building components before or after 2004-2005 hurricanes), 24 (condition of building components before or after 2004-2005 hurricanes since 1992), 25 (damage to building components before or after 2004-2005 hurricanes), 26 (damage to building components before or after 2004-2005 hurricanes), 30 (communication to unit owners regarding maintenance/repairs), 31 (communication to unit owners regarding maintenance/repairs since January 1992), 46 (financial records), 47 (financial records since 1992), 50 (e-mails regarding maintenance/repairs), 51 (e-mails regarding maintenance/repairs since January 1992), 52 (electronic media containing e-mails regarding maintenance/repairs), 53 (electronic media containing e-mails regarding maintenance/repairs since January 1992), 54 (e-mails regarding 2004-2005 hurricane damage), 55 (electronic media containing e-mails regarding 2004-2005 hurricane damage), 56 (e-mails regarding loss or damage), 57 (e-mails regarding loss or damage since January 1992), 58 (electronic media containing e-mails regarding loss or damage), 59 (electronic media containing e-mails regarding loss or damage since January 1992), 60 (e-mails regarding insurance claims), 61 (e-mails regarding insurance claims since January 1992), 62 (electronic media containing e-mails regarding insurance claims), 63 (electronic media containing e-mails regarding insurance claims since January 1992), and 72 (website postings regarding damages or maintenance/repairs). **Plaintiffs have failed to even respond to this Request.** Rather,

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Plaintiffs made a non-specific request for “more time” back on October 28, 2011, and have since ignored all subsequent requests for these documents. (E-mail from Opposing Counsel Requesting More Time, Exhibit “B”; Meet and Confer Letter, Exhibit “C”). Plaintiffs’ request for “more time” bears a striking similarity to their response to QBE’s request to conduct an inspection of Plaintiffs’ hard copy documents: Plaintiffs used that additional time to intentionally destroy hard copy documents. Due to their absolute failure to substantively respond to QBE’s Second Request to Produce, all potential objections are deemed waived. *See generally Bank of Mongolia v. M & P Global Financial Services, Inc.*, 258 F.R.D. 514, 518 (S.D. Fla. 2009).

Accordingly, QBE respectfully requests that this Honorable Court compel Plaintiffs to immediately provide full and complete responses to each and every request contained within QBE’s Second Request for production.

**C. QBE’s Request for a Forensic Examination**

As outlined in QBE’s Motion for Entry of Preservation Order, Plaintiffs have evidenced an utter and complete disregard for their discovery obligations, including their obligation to preserve discoverable documents and information. This includes Plaintiffs continued, and recently amplified, hard-copy document shredding campaign, as well as their absolute failure to respond to QBE’s Second Request for Production **or produce a single piece of electronically stored information (ESI)**. Plaintiffs have also represented – with no evidentiary support – that their computer system was “destroyed” as a result of a power failure, such that no ESI pre-dating Hurricane Wilma in October of 2005 can be produced. (Kubasek Deposition, Exhibit “D”). Respectfully, QBE has a fundamental

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right to test this assertion which goes to the core of discovery in this case: Plaintiffs seek damages for alleged Hurricane Wilma related damage and QBE, in turn, is entitled to obtain broad discovery of documents and information which may shed light on the prior condition of the property for which Plaintiffs seek damages.

In addition, Plaintiffs have indicated that they will be “changing out” their computer system on or after January 1, 2012. As suggested in QBE’s Motion for Entry of Preservation Order, creation of a forensic copy<sup>1</sup> of Plaintiffs’ computer system now could alleviate any concerns regarding the potential loss of data in connection with the planned computer “change out.” Given Plaintiffs’ prior failures to meaningfully participate in discovery, including their failure to produce a single piece of ESI, QBE is entitled to conduct a forensic examination of Plaintiffs’ computer systems. As noted above, QBE requested Plaintiffs agreement to conduct an examination of their computer system pursuant to Rule 34. (Plaintiff Request to Examine, Exhibit “C”) Plaintiffs, again, failed to respond.

This discovery sought by QBE is plainly contemplated by the Federal Rules.

- (a) In General, A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit **the requesting party or its representative to inspect, copy, test, or sample** the following items in the responding party’s possession, custody, or control: (A) any designated documents or **electronically stored information** – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other **data or data compilations** – stored in any medium from which **information can be obtained...**

Fed. R. Civ. P. 34(emphasis supplied).

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<sup>1</sup> A forensic image or “mirror image” of a hard drive “replicates bit for bit, sector for sector, all allocated and unallocated space, including slack space, on a computer hard drive. *See Bennett v. Martin*, 928 N.E.2d 763, 773 (Ohio Ct. App. 2009).

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The Honorable Robin Rosenbaum's reported opinion for this Court in *Bank of Mongolia* is instructive. The Defendant in *Bank of Mongolia* failed to provide timely responses to Plaintiffs' discovery requests and, in turn, their objections were deemed waived. *Bank of Mongolia*, 258 F.R.D. at 518. The Court found that Defendants were unable to provide a valid excuse for not timely responding to the discovery requests, that all of the responsive documents in the possession of the Defendants had not been produced, and that Defendants could not offer a "reasonable basis" for their lack of production of certain documents. The Court explicitly chastised Plaintiffs for failing to search for deleted computer records which were clearly discoverable. *Id.* citing *Wells v. Xpedx*, 2007 WL 1200955, \*1-2 (M.D.Fla. April 23, 2007)("producing party has the obligation to search available electronic systems for deleted emails and files"). The Court determined that an expert should be appointed to retrieve any deleted responsive files from Defendants' computers. *Id.* at 520 citing *U & I Corp. v. Advanced Medical Design, Inc.*, 251 F.R.D. 667, 676-77 (M.D.Fla. 2008); *see also Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652-53 (D.Minn. 2002)(holding Plaintiff was entitled to "attempt to resurrect data which has been deleted from the Defendants' computer equipment"); *Simon Property Group, L.P., v. mySimon, Inc.*, 194 F.R.D. 639, 641-42 (S.D.Ind. 2000)(holding Plaintiff was entitled to attempt the task of recovering deleted files from computers used by Defendants' employees).

In determining whether the circumstances justify forensic imaging, courts can consider (1) whether the responding party has withheld requested information, (2) the

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responding party's ability or willingness to search for the requested information, and (3) the extent to which the responding party has complied with discovery requests. *Bennett v. Martin*, 928 N.E.2d 763, 774 (Ohio Ct. App. 2009)(applying Federal Rules). Where there are either discrepancies in the responding party's response or the responding party has failed to produce requested information, "the scales tip in favor of compelling forensic imaging." *Id.* The scales are overwhelmingly tipped in favor of compelling the subject request for forensic imaging of Plaintiffs' computers. Plaintiffs (1) have withheld and/or destroyed information, (2) have not evidenced a serious willingness or ability to search for the requested information, and (3) have failed to even respond to certain of QBE's discovery requests. In addition, creation of a forensic copy of Plaintiffs' computers will ensure that no discoverable documents or information is lost in connection with the imminent "change out" of their computer system.

QBE appreciates that a request for a forensic image of Plaintiffs' computer systems, in theory, raises potential privacy and confidentiality concerns. Accordingly, QBE respectfully submits that this Court adopt a collection and review protocol similar to that utilized by this Court in *Bank of Mongolia*. See *Bank of Mongolia*, 258 F.R.D. at 520-21. First, an expert should be appointed by the Court to create a mirror image of Plaintiffs' computer system. QBE respectfully submits that Robert Moody, J.D. of Forensic Data Systems be appointed by the Court for purposes of creating the forensic image of Plaintiffs' computer system. See Affidavit of Robert Moody, J.D. at Exhibit E; see also *Antioch Co.*, 210 F.R.D. at 653 (providing requesting party could select an expert of its choice in the field of computer forensics to produce a "mirror image" of the

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responding party's computer equipment). This Court appointed expert – whether Mr. Moody or some other forensic expert – would sign a confidentiality order and would then serve as an officer of the Court; thus, to the extent the expert would be provided access to information potentially protected by the attorney-client privilege, that “disclosure” would not act as a waiver.<sup>2</sup> The expert would then create a mirror image of Plaintiffs’ computer system. QBE would then provide the Court with a list of proposed search terms, which Plaintiffs would have an opportunity to object to. Any disputes would be adjudicated by the Court and the final Court approved search term list would be provided by the Court to the expert. The expert would then apply the approved search terms to the mirror image. The returned documents would then be provided to Plaintiffs and the Court. Plaintiffs would have an opportunity to object to the production of documents as non-responsive; a log would be provided to QBE providing certain general information concerning the objected-to documents, and QBE would in turn be provided an opportunity to seek an adjudication from the Court as to the discoverability of any objected-to document. The costs of this forensic collection and review process would initially be borne by QBE.<sup>3</sup>

Conclusion

For the foregoing reasons, QBE respectfully requests that this Court enter an Order compelling Plaintiffs Wynmoor Community Council, Inc. et. al. to produce all

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<sup>2</sup> Appreciating that attorney client privileged information should typically be protected, QBE maintains that Plaintiffs have waived privilege, as well as all other objections, where they have entirely failed to respond to QBE’s Second Request to Produce.

<sup>3</sup> QBE reserves its right to seek cost shifting as a sanction under Rule 37 depending on the results of the forensic search.

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documents responsive to QBE's Second Request to Produce and allowing QBE to obtain a forensic image of Plaintiffs' computer system.

**CERTIFICATE OF GOOD FAITH CONFERENCE**

Pursuant to Local Rule 7.1(a)(3)(B), I hereby certify that counsel for the movant has made reasonable efforts to confer with all parties and non-parties who may be affected by the relief sought in the motion but has been unable to do so. The reasonable efforts made were specifically as follows: A letter was sent to opposing counsel, to which counsel did not respond. See attached Exhibit "C".

I HEREBY CERTIFY that on December 27<sup>th</sup>, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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WICKER, SMITH, O'HARA, MCCOY &  
FORD, P.A.  
Attorney for QBE Insurance Corporation  
Regions Bank Building  
2800 Ponce de Leon Boulevard  
Suite 800  
Coral Gables, FL 33134  
Ph: (305) 448-3939  
Fx: (305) 441-1745

By: /s/ Jordan S. Cohen  
William Fink  
Florida Bar No.  
wfink@wickersmith.com  
Jordan S. Cohen  
Florida Bar No. 551872  
jcohen@wickersmith.com

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Service List

Mark Bogen, Esquire  
Law Offices of Mark Bogen  
621 NW 53rd St., #240  
Boca Raton, FL 33487

Christopher N. Mammel, Esquire  
Childress Duffy, Ltd., Inc.  
12000 Biscayne Blvd., Suite 415  
Miami, FL 33181

C. Deborah Bain, Esquire  
C. Deborah Bain, P.A.  
840 U. S. Highway 1, Suite 305  
North Palm Beach, FL 33408

William S. Berk, Esquire  
Berk, Merchant & Sims, PLC  
2 Alhambra Plaza, Suite 700  
Coral Gables, FL 33134