SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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xxxxxxxxxxx,

Plaintiff,

-against-

xxxxxxxxxx,

Defendant.

Index No.: xxxxxxx/07

NOTICE OF MOTION

Assigned to:
Hon. Margaret Garvey

PLEASE TAKE NOTICE, that upon the annexed good faith affirmation and affirmation of MAURICE J. RECCHIA, dated the 1st day of July, 2008, the exhibits annexed thereto and upon all of the pleadings and proceedings hereto had herein the undersigned will move this Court at an I.A.S. Part before the Hon. Margaret Garvey to be held at the Rockland County Courthouse located in New City, New York on the 25th day of July 2008, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order to compel discovery or in the alternative to strike the answer of defendant together with such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering papers, if any, are required to be served upon the undersigned attorneys at least seven (7) days prior to the return date hereof.

Dated: Suffern, New York
July 1, 2008

KORNFELD, REW,
NEWMAN & SIMEONE
ATTORNEYS AT LAW
46 WASHINGTON AVENUE
SUFFERN, NEW YORK 10901

Yours etc.,

By:_____
Maurice J. Recchia
KORNFELD, REW, NEWMAN & SIMEONE
Attorneys for Plaintiff
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P.O. Box 177
Suffern, New York 10901
(845) 357-2660

TO:

PENINO & MOYNIHAN, LLP
Attorneys for Defendant
180 East Post Road, Suite 300
White Plains, New York 10601
(914) 949-6996

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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xxxxxxx,

Plaintiff,

-against-

xxxxxxx,

Defendant.

Index No.:
xxxxx/07

AFFIRMATION

MAURICE J. RECCHIA, an attorney at law duly admitted to practice before the Courts of the State of New York, hereby affirms as follows under penalties of perjury:

1. I am an associate of the firm of KORNFELD, REW, NEWMAN & SIMEONE, attorneys for plaintiff, xxxxxxxx, and as such am fully familiar with the facts and circumstances of this case.

2. I make this affirmation in support of plaintiff xxxxxx's motion to strike the answer of defendant or, in the alternative, compel disclosure of a statement made by defendant xxxxxxxx to claims as she testified at her deposition.

3. This is an action for personal injuries suffered by plaintiff Xxxxx when he was knocked off his bicycle by a car driven by defendant V in an accident occurring on June 8, 2007. As a result of that knockdown, xxxxxx suffered a right elbow fracture.

4. Plaintiff served his summons and complaint on or about October 3, 2007 (a copy of the summons and complaint is attached here as **Exhibit "A"**).

5. Defendant duly interposed an answer on or about October 18, 2007 (attached here as **Exhibit "B"**).

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6. A deposition of defendant xxxxxx was held on April 7, 2008. At her deposition xxxxxx testified in response to my question: "Do you think you talked to somebody over the phone and made a statement about this accident?" that "I absolutely called the insurance company" (transcript excerpt attached as **Exhibit "C"**). In response to my question: "Do you recall if whoever you spoke with on the phone said they were going to record the conversation?", xxxxx testified "I think they did" (**Exhibit "C"**).

7. Following her deposition, I served a Supplemental Demand for Discovery and Inspection on April 30, 2008, requesting a copy of the transcript of the statement made by defendant xxxxx to her insurance company (attached as **Exhibit "D"**).

8. On May 29, 2008, I received a response to my supplemental demand which declined to provide the requested transcript (attached as **Exhibit "E"**). I called defense attorney Vincent xxxxxx on May 29, 2008, after receiving the denial response to request that he provide the transcript of xxxxx's statement and he declined to do so, stating that the statement was protected by privilege.

9. Defendant cannot claim either privilege or immunity for any statement made by xxxxx to her insurer's claims department. The law is well settled that statements made to an insurance company's claims department for more than one purpose cannot be considered immune from disclosure. As the Second Department held in *Agovino v. Taco Bell, et. al.*, 225 A.D. 2d 569 (2nd Dept. 1996):

> In applying this rule [CPLR 3101(d)(2) providing qualified immunity for materials prepared in anticipation of litigation], statements given by a party to his insurer are conditionally immune from disclosure if they were given *exclusively* in anticipation of litigation. Conversely, the mere fact that accident reports are compiled by a liability insurer does not *ipso facto* render the reports immune from disclosure . . . . Moreover, *when statements are given to a liability insurer's claims department as*

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> *part of an internal investigation or for internal business purposes, as well as for defense purposes, they are not immune from discovery* as material prepared solely in anticipation of litigation.

id at 570 [emphasis added].

10. *Agovino* is certainly not an isolated case, but is part of a line of cases standing for the same principle. In *Landmark Insurance Company v. Beaurivage Restaurant, Inc.*, 121 A.D. 2d 98 (2nd Dept. 1986) a declaratory judgment action, the Second Department explored this issue and found that it was apparent that the insurance company had hired a claims adjuster as well as an arson expert to conduct an investigation to aid the insurance company in deciding whether to accept or reject the defendant's insurance claim and not "solely for the purpose of preparing for possible litigation, it thus held that "[s]ince mixed purpose reports are not exempt from disclosure under CPLR 3101(d)(2), the reports of the adjuster and arson investigator are subject to disclosure" *id.* at 102.

11. In *Sigelakis v. Washington Group, LLC*, 46 A.D. 3d 800 (2nd Dept. 2007), the Court held that "when statements are given to a liability insurer's claims department as part of an internal investigation or for internal business purposes, as well as for defense purposes, they are not immune from discovery as material prepared solely in anticipation of litigation" *id*. See also *Galyas v. Ruggiero*, 241 A.D. 2d 539 (2nd Dept. 1997); *Matos v. Akram & Jamal Meat Corp.*, 99 A.D. 2d 527 (2nd Dept. 1984).

12. On June 11, 2007, xxxxx xxxxxx, a claims handler for xyz Insurance Company, the defendant's insurer, took a statement from plaintiff Xxxxx (cover letter from defense attorney and first page of recorded statement attached as **Exhibit "F"**). It is respectfully submitted that the insurance company, in taking statements within three days of the accident, was conducting the sort of investigation discussed by the Appellate Division in *Agovino* and the

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other cited cases, that is, a statement possibly and potentially in anticipation of litigation, but also clearly as part of an internal investigation or for internal business purposes. It is respectfully submitted that if the insurer took a statement from plaintiff Xxxxx on June 11, 2007, it is reasonable to assume that they also took a statement from defendant xxxxx within a few days of the accident and xxxxx testified that she thought a statement she made to claims was being recorded. Since defendant insurer paid no-fault benefits to plaintiff, clearly one of the business purposes of their recording of statements from the involved parties was to determine eligibility for no-fault benefits. As can be seen from the summons and complaint attached here as **Exhibit "A"**, the lawsuit was commenced in this matter on or about September 4, 2007, some four months following the time that both statements were presumably taken by the insurer. Thus, it seems reasonably clear that the statements taken by the insurance company were certainly not exclusively for, or exclusively in anticipation of litigation, but also for internal business or investigation purposes. As such they are not and should not be considered immune from disclosure.

13. Striking defendant's answer would be an appropriate remedy as defendant's refusal to provide the required discovery is clearly willful. While it is true that striking a pleading is considered a drastic remedy, it is appropriate in the face of a willful non-compliance with discovery. As the Second Department held in *Martin v. City of New York*, 46 A.D. 3d 635 (2nd Dept. 2007) the "drastic remedy of striking a pleading . . . for failure to comply with Court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful and contumacious" *id* at 622. See also *Montgomery v. City of New York*, 296 A.D. 2d 386 (2nd Dept. 2002). It is respectfully submitted that the defendant's clear denial of plaintiff's discovery request should be interpreted as willful.

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WHEREFORE, it is respectfully requested that this Court grant plaintiff's request to compel defendant to provide the requested statement made by the defendant to claims by issuing an order to that effect or, in the alternative, to strike the answer of defendant for defendant's willful non-compliance with discovery pursuant to the CPLR, and that this Court grants such other and further relief which it deems just and proper.

Dated: Suffern, New York
July 1, 2008

Maurice J. Recchia

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

XXXXX,

Plaintiff,

-against-

DEBORAH V,

Defendant.

Index No.: 08172/07

GOOD FAITH AFFIRMATION

MAURICE J. RECCHIA being duly sworn deposes and states:

1. As noted in the main affirmation to this motion, I served a discovery demand requesting copies of any statement made to defendant's insurer's claims department, as she had testified at her deposition. On May 29, 2008, by a formal response, defendant denied the request. In a follow-up phone call I made to defense attorney Vincent xxxxx, he confirmed his denial of the discovery request stating that the material I sought was protected by privilege. After the conversation of May 29, 2008 I called Mr. xxxxx's office three more times leaving messages requesting that he call me back in an attempt to once more request his compliance with my discovery demand. Unfortunately my attempts to resolve this matter before filing this motion were unsuccessful thus necessitating this motion.

Dated: July 1, 2008

_____

MAURICE J. RECCHIA

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