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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OLD REPUBLIC INSURANCE
COMPANY,

Plaintiff,

v.

XL INSURANCE AMERICA, INC.,

Defendant.

Case No.: 22-cv-00394-WQH-BGS

ORDER:
(1) GRANTING JOINT MOTION
[ECF 10]; AND

(2) CONTINUING EARLY
NEUTRAL EVALUATION
CONFERENCE AND CASE
MANAGEMENT CONFERENCE

On April 20, 2022, the parties filed a Joint Motion requesting to continue the dates and deadlines in the Court’s Order Resetting the Early Neutral Evaluation Conference and Case Management Conference (“ENE/CMC”). (ECF No. 10.) The parties represented that “Counsel for both Parties have conferred and agree upon this continuance, which is based upon Defendant’s counsel’s unavailability to attend the mandatory ENE/CMC given a pre-planned international vacation from June 13 through June 24, 2022.” (*Id.* at 2.)

Accordingly, the Court **GRANTS** the parties Joint Motion (ECF No. 10) and **CONTINUES** the ENE/CMC from June 15, 2022 until **July 1, 2022** at **2:00 PM** before Magistrate Judge Bernard G. Skomal. The conference will be held by **video conference**.

1 Instructions regarding the videoconference are included below. To facilitate this
2 modification, the Court hereby ORDERS as follows:

3 **The following are mandatory guidelines for the parties preparing for the Early**
4 **Neutral Evaluation Conference.**

5 1. **Purpose of Conference:** The purpose of the Early Neutral Evaluation
6 Conference (“ENE”) is to hold a serious discussion of every aspect of the lawsuit in an
7 effort to achieve an early resolution of the case. All conference discussions will be off the
8 record, privileged and confidential. Counsel for any non-English speaking parties is
9 responsible for arranging for the appearance of an interpreter at the conference.

10 2. **Personal Appearance of Parties Is Required:** All parties, adjusters for
11 insured defendants, and client representatives must be present and have full and complete
12 authority to enter into a binding settlement at the ENE.¹ The purpose of this requirement
13 is to have representatives present who can settle the case during the course of the
14 conference without consulting a superior. Counsel for a government entity may be excused
15 from this requirement so long as the government attorney who attends the ENE conference
16 (1) has primary responsibility for handling the case; and (2) may negotiate settlement offers
17 which the attorney is willing to recommend to the government official having ultimate
18 settlement authority. Other parties seeking permission to be excused from attending the
19 ENE must follow the procedures outlined in Judge Skomal’s Chambers’ Rules. (*See* Judge
20 Skomal’s Chambers’ Rules II.C.) Failure of any of the above parties to appear at the ENE
21 conference without the Court’s permission will be grounds for sanctions. The principal
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24 ¹ “Full authority to settle” means that the individuals at the settlement conference must be authorized to
25 fully explore settlement options and to agree at that time to any settlement terms acceptable to the parties.
26 *Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). The person needs to have
27 “unfettered discretion and authority” to change the settlement position of a party. *Pitman v. Brinker Intl.,*
28 *Inc.*, 216 F.R.D. 481, 485-486 (D. Ariz. 2003). The person must be able to bind the party without the
need to call others not present at the conference for authority or approval. The purpose of requiring a
person with unlimited settlement authority to attend the conference includes that the person’s view of the
case may be altered during the face to face conference. *Id.* at 486. A limited or a sum certain of authority
is not adequate. *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001).

1 attorneys responsible for the litigation must also be present and prepared to discuss all of
2 the **legal and factual** issues in the case.

3 3. **Confidential ENE Statements Required:** No later than **June 17, 2022**, the
4 parties must submit confidential statements of seven pages or less directly to Judge Skomal.
5 Please also attach relevant exhibits. The statement must address the legal and factual issues
6 in the case and should focus on issues most pertinent to settling the matter. Statements do
7 not need to be filed or served on opposing counsel. The statement must also include any
8 prior settlement offer or demand, as well as the offer or demand the party will make at the
9 ENE. The Court will keep this information confidential unless the party authorizes the
10 Court to share the information with opposing counsel. **ENE statements must be emailed**
11 **to efile_Skomal@casd.uscourts.gov.**

12 4. **New Parties Must Be Notified by Plaintiff's Counsel:** Plaintiff's counsel
13 shall give notice of the ENE to parties responding to the complaint after the date of this
14 notice.

15 5. **Case Management Conference:**² Any objections made to initial disclosures
16 pursuant to Federal Rule of Civil Procedure, Rule 26(a)(1)(A)-(D) are overruled, and the
17 parties are ordered to proceed with the initial disclosure process. Any further objections
18 to initial disclosures will be resolved as required by Rule 26 and Judge Skomal's
19 Chambers' Rules regarding discovery disputes. Accordingly:

20 a. The date of initial disclosure pursuant to Rule 26(a)(1)(A-D) shall
21 occur before **June 10, 2022**;

22 b. A Joint Discovery Plan shall be filed on the CM/ECF system as well as
23 lodged with Magistrate Judge Skomal by delivering the plan directly to chambers or by
24 emailing it to efile_skomal@casd.uscourts.gov, on or before **June 17, 2022**. The plan must
25 be one document and must explicitly cover the parties' views and proposals for each item
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28 ² The Court does not reset the deadline to complete the Rule 26(f) conference, since that deadline has
already passed on April 8, 2022. (ECF No. 5 at 5.)

1 identified in Fed. R. Civ. P. 26(f)(3). Agreements made in the Discovery Plan will be
2 treated as binding stipulations that are effectively incorporated into the Court's Case
3 Management Order.

4 In cases involving significant document production or any electronic discovery, the
5 parties must also include the process and procedure for "claw back" or "quick peek"
6 agreements as contemplated by Fed. R. Evid. 502(d). The parties should also address
7 whether an order providing for protection under Rule 502(e) is needed.

8 Finally, the parties must thoughtfully meet and confer about electronic discovery
9 and include answers to the following questions in the Discovery Plan:

- 10 i. Are there any preservation issues? If so, what are they and how are the
11 parties addressing the issues;
- 12 ii. What form of production have the parties agreed to? Are there any
13 disputes with respect to the parties' preferred form of production?
14 What is the parties' positions respecting Metadata;
- 15 iii. Are there any proportionality issues? Specifically address Rule
16 26(b)(2)(B) relating to inaccessible electronically stored information
17 ("ESI");
- 18 iv. What have the parties decided regarding the methodologies for
19 identifying ESI for production? For instance, will the parties conduct
20 key word searching, use predictive coding, or other advanced culling
21 techniques.

22 In the event the case does not settle at the ENE, a Case Management Conference,
23 pursuant to Federal Rule of Civil Procedure 16(b) will be held at the conclusion of the
24 settlement conference.

25 **6. Requests to Continue an ENE Conference:** Requests to continue ENEs are
26 rarely granted. The Court will, however, consider formal motions to continue an ENE
27 when extraordinary circumstances exist and the other party has no objection. If another
28 party objects to the continuance, counsel for both parties must call chambers and discuss

1 the matter with the research attorney/law clerk assigned to the case before any motion may
2 be filed. **Any request for a continuance must be made as soon as counsel is aware of**
3 **the circumstances that warrant rescheduling the conference. Requests to continue**
4 **the ENE based on preexisting scheduling conflicts must be raised within 10 days of**
5 **the Court's issuance of this Order.**

6 7. **Settlement Prior to ENE Conference:** The Court encourages the parties to
7 work on settling the matter in advance of the ENE Conference. In the event that the parties
8 resolve the matter prior to the day of the conference, the following procedures must be
9 followed before the Court will vacate the ENE and excuse the parties from appearing:

10 A. The parties may file a Joint Motion to Dismiss and submit a proposed
11 order to the assigned district judge. If a Joint Motion to Dismiss is filed, the Court will
12 immediately vacate the ENE;

13 B. If the parties settle more than 24 hours before the conference but are
14 not able to file a Joint Motion to Dismiss, they must file a Joint Notice of Settlement
15 containing the electronic signatures of counsel for all settling parties and must also identify
16 a date by which the Joint Motion to Dismiss will be filed;

17 C. If the parties settle less than 24 hours before the conference, counsel for
18 the settling parties must JOINTLY call chambers and inform the Court of the settlement
19 and receive Court permission to not appear at the ENE.

20 **Zoom Video Conference Instructions:**

21 8. The Court will use its official Zoom video conferencing account to hold the
22 ENE. IF YOU ARE UNFAMILIAR WITH ZOOM: Zoom is available on computers
23 through a download on the Zoom website (<https://zoom.us/meetings>) or on mobile devices
24 through the installation of a free app.³ Joining a Zoom conference does not require creating
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27 ³ If possible, participants are encouraged to use laptops or desktop computers for the video conference,
28 rather than mobile devices.

1 a Zoom account, but it does require downloading the .exe file (if using a computer) or the
2 app (if using a mobile device). Participants are encouraged to create an account, install
3 Zoom and familiarize themselves with Zoom in advance of the ENE.⁴ There is a cost-free
4 option for creating a Zoom account.

5 9. Prior to the start of the ENE, the Court will email counsel for each party an
6 invitation to join a Zoom video conference that they must provide to participating client(s).
7 The Court will send the invitation to the email addresses listed for counsel in the case
8 docket. If counsel does not receive an invitation to join the Zoom video conference by
9 **June 30, 2022**, please email chambers at **efile_skomal@casd.uscourts.gov**. Again, if
10 possible, participants are encouraged to use laptops or desktop computers for the video
11 conference, as mobile devices often offer inferior performance. Participants shall join the
12 video conference by following the ZoomGov Meeting hyperlink in the invitation.
13 Participants who do not have Zoom already installed on their device when they click on
14 the ZoomGov Meeting hyperlink will be prompted to download and install Zoom before
15 proceeding. Zoom may then prompt participants to enter the password included in the
16 invitation.⁵ All participants will be placed in a waiting room until the ENE begins.

17 10. Each participant should plan to join the Zoom video conference at least five
18 minutes before the start of the ENE to ensure that the ENE begins promptly at 2:00 PM.
19 The Zoom e-mail invitation may indicate an earlier start time, but the ENE will begin at
20 the Court-scheduled time.

21 11. Zoom's functionalities will allow the Court to conduct the ENE as it ordinarily
22 would conduct an in-person ENE. The Court may divide participants into separate,
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26 ⁴ For help getting started with Zoom, visit: <https://support.zoom.us/hc/en-us/categories/200101697-Getting-Started>.

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28 ⁵ A Meeting ID will also be included and may be used along with the password to access the conference if necessary.

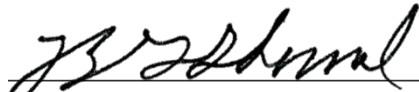
1 confidential sessions, which Zoom calls Breakout Rooms.⁶ In a Breakout Room, the Court
2 will be able to communicate with participants from a single party in confidence. Breakout
3 Rooms will also allow parties and counsel to communicate confidentially without the
4 Court.

5 12. All participants shall display the same level of professionalism during the
6 ENE and be prepared to devote their full attention to the ENE as if they were attending in
7 person, *i.e.*, cannot be driving while speaking to the Court. Because Zoom may quickly
8 deplete the battery of a participant's device, each participant should ensure that their device
9 is plugged in or that a charging cable is readily available during the video conference.

10 Questions regarding this case or the mandatory guidelines set forth herein may be
11 directed to Judge Skomal's research attorney at (619) 557-2993. Please consult Judge
12 Skomal's rules, available on the Court's website, before contacting chambers with your
13 questions.

14 **IT IS SO ORDERED.**

15 Dated: April 25, 2022

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17 Hon. Bernard G. Skomal
18 United States Magistrate Judge
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28 ⁶ For more information on what to expect when participating in a Zoom Breakout Room, visit:
<https://support.zoom.us/hc/en-us/articles/115005769646>