UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
MICHAEL A. SHIPP
UNITED STATES MAGISTRATE JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST. ROOM 2042
NEWARK, NJ 07102
973-645-3827

Not for Publication

LETTER OPINION AND ORDER

October 26, 2010

VIA CM/ECF
All counsel of record

Re: Electric Insurance Co. v. Electrolux North America, Inc.
09-cv-3792 (FSH)(MAS)

Dear Counsel:

This matter comes before the Court by way of Defendant Electrolux North America's ("Electrolux" or "Defendant") application to compel production of certain e-mail messages among Electric Insurance Company ("EIC" or "Plaintiff") employees and counsel regarding a dryer fire incident. (Doc. No. 32.) Defendant e-filed the e-mail messages at issue under seal for the Court's review. (*Id.*) Plaintiff opposes Electrolux's request, arguing that the e-mail messages are protected by the attorney-client privilege. (Doc. No. 33.) At the Court's request, Plaintiff submitted a supplemental certification that provided the title and position of each sender and recipient of the subject e-mail messages. (Doc. No. 60.) In response, Defendant filed a request to strike, arguing that legal arguments and extended factual allegations contained in the certifications went beyond the Court's request and amounted to an unauthorized sur-reply under Local Rule 7.1(d)(6). (Doc. No. 61.)

The attorney-client privilege is designed to encourage "full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

However, "[w]here a lawyer provides non-legal business advice, the communication is not privileged." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007) (citing 8 J. Wigmore, Evidence § 2303 (McNaughton rev. 1961)). The attorney-client privilege applies only where (1) a communication is made by or to an attorney, (2) who is acting as a lawyer with respect to the communication, and (3) the communication was made for the purpose of primarily securing an opinion of law, legal services or assistance in a legal proceeding. *See In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979).

The Court reviewed each of the disputed e-mail messages and finds that most of the subject e-mail messages consist of non-legal business advice that is characteristic of the day-to-day claims investigation that any insurance company must conduct. Such communications are not legitimately protected by the attorney-client privilege as the communications would have been made in the absence of pending litigation. Therefore, the Court finds that the following e-mail messages are not privileged:

Date	**Time**	**From**	**To**	**CC**	**Subject**
1/20/09	10:42 AM	S. Silva	M. Leventhal		FW: EIC as subrogee of Beringer
1/20/09	10:48 AM	T. Shevlin	S. Levin; B. Lessard; S. Silva	M. Leventhal	RE: EIC as subrogee of Beringer
1/20/09	10:49 AM	S. Levin	B. Lessard	M. Leventhal; S. Silva; T. Shevlin	RE: EIC as subrogee of Beringer
1/20/09	10:54 AM	B. Lessard	S. Levin	M. Leventhal; S. Silva; T. Shevlin	RE: EIC as subrogee of Beringer
1/26/09	3:48 PM	S. Levin	M. Leventhal		CMS Plus Claim: Beringer, Steven, M 20090115044
1/27/09	9:56 AM	S. Levin	M. Hegarty	T. Shevlin; L. Pierce; B. Lessard; M. Leventhal	RE: CMS Plus Claim: Beringer, Steven, M 20090115044
1/27/09	2:57 PM	S. Levin	M. Leventhal		RE: CMS Plus Claim: Beringer, Steven, M 20090115044

However, the Court finds that several of the subject e-mail messages go beyond day-to-day claims investigation, reflect consideration of legal issues by counsel, and meet each prong of the *In re Grand Jury Investigation* test. Specifically, the Court finds that several communications: (1) are made to or by an attorney, (2) who is acting as an attorney with respect to the communication, and (3) the e-mail messages contain opinions of law and/or legal advice. Therefore, the Court finds that the following e-mail messages are privileged:

Date	**Time**	**From**	**To**	**CC**	**Subject**
1/28/09	8:02 AM	S. Levin	M. Leventhal	T. Shevlin; B. Lessard; D. Nelson	RE: CMS Plus Claim: Beringer, Steven, M 20090115044
1/28/09	9:02 AM	S. Levin	M. Leventhal		RE: CMS Plus Claim: Beringer, Steven, M 20090115044
1/28/09	8:36 AM	T. Shevlin	M. Leventhal	S. Levin; B. Lessard; D. Nelson	RE: CMS Plus Claim: Beringer, Steven, M 20090115044

Finally, the Defendant requests that the Court strike Plaintiff's recent certifications in this matter. Local Rule 7.1(d)(6) forbids the filing of a sur-reply without consent from the Magistrate Judge. The purpose of this rule is two-fold: first, to preserve the Court's time and to ensure expedited resolution of cases; second, to prevent attorneys from engaging in a battle for the last word of any argument. Plaintiff submitted two certifications. The first certification listed the name, title and job description of each participant in the subject e-mail messages and is directly responsive to the Court's request. The second certification was a copy of a previously submitted certification regarding the same e-mail messages and detailed the title and job description of one of the senders. This second certification does not advance any novel legal arguments, present new facts or provide a response to a reply in violation of the rules. Therefore, the Court denies Defendant's request to strike.

For the foregoing reasons and for good cause shown, it is **ORDERED THAT:**

1. Plaintiff must produce unredacted copies of the e-mail messages dated 1/20/09 through 1/27/09 by **10/29/10**.
2. Defendant's Request to Strike Plaintiff's Supplemental Certification is denied.
3. This matter is scheduled for a telephone status conference on **11/1/10** at **2:00 p.m.** Counsel for Plaintiff shall initiate the call to (973) 645-3827. Counsel shall e-file a joint proposed amended scheduling order as an attachment to a letter by **10/29/10**.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES MAGISTRATE JUDGE