UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

IN RE: USA GYMNASTICS, Debtor.	CHAPTER 11 CASE NO. 18-09108-RLM-11 ADV. PROCEEDING NO. 19-50012
USA GYMNASTICS, Plaintiff, vs. ACE AMERICAN INSURANCE COMPANY f/k/a CIGNA INSURANCE COMPANY, GREAT AMERICAN ASSURANCE COMPANY, LIBERTY INSURANCE UNDERWRITERS INC., NATIONAL CASUALTY COMPANY, RSUI INDEMNITY COMPANY, TIG INSURANCE COMPANY, VIRGINIA SURETY COMPANY, INC., f/k/a COMBINED SPECIALTY INSURANCE COMPANY, WESTERN WORLD INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, AMERICAN INTERNATIONAL GROUP, INC., AMERICAN HOME ASSURANCE COMPANY, and DOE INSURERS, Defendants.	**Hon. Robyn L. Moberly, Chief Judge**

VIRGINIA SURETY COMPANY, INC. f/k/a COMBINED SPECIALTY INSURANCE COMPANY'S AND JOINING INSURERS' BRIEF IN OPPOSITION TO USAG'S MOTION TO SUBMIT MEDIATION DOCUMENTS UNDER SEAL

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I. INTRODUCTION

Confidentiality is a hallmark of the mediation process. For the process to be effective, parties must speak freely without the fear that other parties will attempt to use their statements and communications against them in the matters being mediated. Yet USA Gymnastics' ("USAG") Motion To Maintain Documents Under Seal ("Motion") [Dkt. 312] seeks to disclose *to the Court*--as purported support for its forthcoming motion for partial summary judgment--documents that USAG acknowledges are protected by the parties' express mediation confidentiality agreements, as well as the absolute confidentiality provisions in this Court's Orders referring this case to mediation. [*See* Dkt. 313, pp. 1-2.] Those confidentiality provisions mandate nondisclosure of protected mediation documents to *all* third parties, *including the Court*. Indeed, it is axiomatic that parties do not hire a neutral to preside over their mediation with the expectation that portions of the substance of the mediation will be disclosed to the judge in their case.

USAG's tactic necessarily would embroil the Court in the mediation process. The confidentiality that is essential to the mediation process would unravel. In short, if USAG were permitted to use cherry-picked confidential mediation documents as a sword in support of its motion for partial summary judgment, USAG's insurers would be forced to disclose additional privileged communications of the mediators and other participants in order to place these mediation documents fairly in context. USAG's insurers have no desire to do so (and, in fact, are prohibited from doing so by the existing confidentiality agreements, this Court's Orders and Local Rule B-9019-2). *See* Declaration of Kevin P. Kamraczewski ("Kamraczewski Dec."), ¶ 12. USAG should not be permitted to back its insurers into a corner that requires them to do so.

USAG's insurers agreed to participate in mediation efforts with the understanding and expectation (as memorialized by the parties' written agreements and this Court's orders) that any mediation-related communications (whether oral or written) would remain absolutely protected and not be shared with third parties, including the Court. By filing a preemptive motion to seal, USAG asks this Court to implicitly "bless" its violation of the parties' confidentiality

agreements, the Court's orders, Local Rule B-9019-2, Rule 408, and/or the well-established mediation privilege, which must not be tolerated. Mediation and settlement discussion remain ongoing in this case. Granting USAG's Motion would have a profound chilling effect on future settlement discussions as all participants would be unwilling to speak freely knowing that their communications may be used as evidence in the course of litigation.

USAG may rely upon any relevant non-privileged/protected documents in support of its anticipated summary judgment motion, including several of the proposed exhibits referenced in its motion to seal as identified below with necessary and appropriate further redaction of confidential mediation information, which USAG's insurers do not oppose. *See* Kamraczewski Dec., ¶¶ 8-11.

Accordingly, Virginia Surety Company, Inc., formerly known as Combined Specialty Company ("Combined Specialty"), and the joining insurers[1] (hereinafter, collectively the "Insurers") request that the Court:

- Grant USAG's Motion as it concerns Exhibits 17 and 19.
- Grant USAG's Motion as to Exhibits 1-4 and 8, but enter an Order prohibiting USAG from submitting to this Court, under seal or otherwise, those portions of these Exhibits that reflect, reference and/or relate to protected mediation communications, which have been redacted by the Insurers and separately forwarded to USAG's counsel.
- Enter an Order prohibiting USAG from submitting Exhibits 5-7 and 9-16, as they only contain protected mediation communications.

II. PROCEDURAL BACKGROUND.

In the latter part of 2016, female gymnasts began filing personal injury lawsuits in multiple jurisdictions against USAG and other defendants claiming they were sexually abused by

[1] ACE American Insurance Company, Great American Assurance Company, National Casualty Company and TIG Insurance Company have informed Combined Casualty that they will file joinders to this Opposition.

Larry Nassar under the guise of medical treatment, including *Denhollander, et al. v. Michigan State University, et al*., No. 17-cv-0029 (W.D. Mich.) and *In re Nassar Cases*, JCCP 4943 (Sup. Ct. Orange Cty. Cal.) ("Abuse Suits").

On April 6, 2018, while Combined Specialty and other Insurers were defending USAG in the Abuse Suits under a reservation of rights, USAG filed an insurance coverage action in Indiana state court against the Insurers and others, Case No. 49D01-1804-PL-013423. That action was subsequently removed to federal court as Case No. 1:18-cv-01306 in the Southern District of Indiana. *See* Kamraczewski Dec., ¶ 3, Ex. B (copy of USAG's Complaint, without exhibits).

Beginning in April 2018, USAG and the Insurers agreed to participate in mediation with the plaintiffs in the Abuse Suits. *See* Kamraczewski Dec., ¶ 4. Retired Judge Layn Phillips was selected as the mediator. *Id*. As a precondition to participating in the mediation, the participants, including USAG, signed a confidentiality agreement that provided *absolute* protection against disclosure of statements made in the mediation or any documents generated for it. *Id*., ¶¶ 2, 6, Ex. A. The parties participated in three in-person mediation sessions before Judge Phillips beginning in April 2018, while also engaging in continuing communications, but reached no resolution. Kamraczewski Dec., ¶ 4.

On December 5, 2018, USAG filed this Chapter 11 bankruptcy. Thereafter, on February 1, 2019, USAG filed its coverage action in this Court as Adversary Case No. 19-50012. *See* Kamraczewski Dec., ¶ 3, Ex. C (copy of USAG's Complaint in Adv. Case. 19-50012).

About six months later, on May 2, 2019, USAG filed its unopposed Motion To Refer Sexual Abuse Claims And Insurance Coverage Disputes To Mediation And To Appoint The Honorable Gregg W. Zive As Mediator [Dkt. 452]. This Court issued its Order referring this case to mediation on May 17, 2019, subject to absolute confidentiality as stated in the Order. [Dkt. 514, p. 3 (providing "no statement made during the course of the mediation or any materials generated for the purpose of the mediation may be offered into evidence, disseminated,

published in any way, or otherwise publicly disclosed").] The Insurers relied on the Court's Orders protecting the confidentiality of the mediation. Kamraczewski Dec., ¶ 6.

After several mediation sessions before Judge Zive during the course of 2019, as well as continuing discussions, all without any resolution, USAG, Judge Zive and the involved parties requested that the Court appoint a second mediator to assist with insurance coverage and related issues. The Court's Order entered on September 26, 2019 appointed attorney Paul J. Van Osselaer in that role. The Order expressly provides the same absolute confidentiality for the mediation. [Dkt. 798, p. 2 (providing "[a]ll other provisions of the May 17, 2019, Order Appointing Judge Zive as Mediator shall remain in full force and effect including, without limitation, paragraph 5 thereof regarding confidentiality").] The parties participated in subsequent confidential mediation before Mr. Van Osselaer, but have reached no resolution. Kamraczewski Dec., ¶ 5.

On January 17, 2020, with no prior notice to the Insurers, USAG filed its Motion seeking leave to submit under seal certain documents identified only as "Exhibits 2-17 and 19." [Dkt. 312, p. 1.] USAG states in its Notice for the Motion, though, that "[p]rotection of these documents is warranted to preserve their confidential and/or privileged nature, to honor the confidentiality agreements USAG signed, and to preserve the integrity of the mediation process." [Dkt. 312, p. 2.] Thereafter, at the Insurers' request, USAG provided Exhibits 1-17 and 19 to the Insurers so that they could properly evaluate and respond to the Motion to Seal. Kamraczewski Dec., ¶ 7.[2] As discussed below, what USAG ignores is that its disclosure of protected mediation documents *to the Court* flies in the face of those very objectives.

[2] On January 22, 2020, USAG provided the Insurers with copies of Exhibits 2-7, 9-17, and 19, which USAG stated are what "USAG expects to file under seal at this time." *Id.* A week later, on January 29, 2020, USAG provided the Insurers with redacted and unredacted copies of the Gotwald and Panos Declarations, respectively Exhibits 1 and 8, both dated January 29, 2020. *Id.* As to Exhibit 18, USAG and its counsel have refused to provide it to the Insurers, claiming it is "not being filed under seal and does not relate to any of the issues being briefed at the moment." *Id.*

As for Exhibits 1 and 8, they are, respectively, Declarations of Gregory M. Gotwald and Dean N. Panos, both dated January 29, 2020. Kamraczewski Dec., ¶ 7. USAG provided redacted and unredacted copies of those declarations to the Insurers. *Id.* The unredacted versions of the Panos and Gotwald Declarations show that *all* the redacted information are communications made in the course of mediation. *Id.*, ¶ 10. As such, the information that USAG has redacted from Exhibits 1 and 8 also is protected by the mediation privilege, and the unredacted versions of Exhibits 1 and 8 therefore should not be submitted to the Court, even under seal.

In connection with this Opposition, the Insurers have informed USAG that they do not object to Exhibits 17 and 19 being submitted under seal. *Id.*, ¶ 8. The Insurers also provided USAG's counsel with redacted versions of Exhibits 2-4. *Id.*, ¶ 9. The Insurers' redactions to Exhibits 2-4 protect information referring, referencing, and/or relating to protected mediation communications. *Id.* If USAG accepts the Insurers' redactions to Exhibits 2-4, the Insurers have no objection to their submission to this Court, under seal. The Insurers object to the submission of Exhibits 2-4 to the Court without the Insurers' redactions.

As to Exhibits 5-7 and 9-16, they only contain protected mediation communications and therefore should not be submitted to the Court, even under seal. *Id.*, ¶ 11.

III. ARGUMENT

A. USAG's Disclosure Of Protected Mediation Documents To The Court Is Barred By The Parties' Mediation Agreement.

As discussed above, a mediation confidentiality agreement ("Agreement") was signed by the parties as a precondition to the mediation conducted by Judge Phillips. Kamraczewski Dec., ¶ 2, Ex. A. USAG's Notice and Motion represent that the documents it seeks to submit to this Court under seal are within the scope the parties' confidentiality agreement. [Dkt. 312, p. 2 (Protection of these documents is warranted "to honor the confidentiality agreements USAG signed, and to preserve the integrity of the mediation process"); 313, p. 5 ("Exhibits 1-9, 10-17 , and 19 … implicate the mediation/settlement doctrine.")]

At the same time, however, USAG ignores that the Agreement provides *absolute, unqualified* protection for confidential mediation documents that USAG nonetheless seeks to disclose to the Court as support for its motion for partial summary judgment. The Agreement states:

> The parties hereby agree that all statements of the parties, counsel, and mediators, as well as the materials generated solely for purposes of the mediation, shall constitute conduct or statements made in compromise negotiations and, shall therefore, not be admissible pursuant to Rule 408 of the Federal Rules of Evidence, and shall not be disseminated or published in any way. In short, *no statement made during the course of the mediation or any materials generated for the purpose of the mediation may be offered into evidence, disseminated, published in any way, or otherwise publicly disclosed*. [Emphasis supplied.]

The above language also makes plain that the Agreement's protection is far broader than Rule 408 of the Federal Rules of Civil Procedure. It expressly eliminates any exception stated in Rule 408 from applying to override the Agreement's protection. *See, e.g., Silicon Storage Tech., Inc. v. National Union Fire Ins. Co. of Pittsburgh*, PA., No. 5:13–cv–05658–LHK, 2015 U.S. Dist. LEXIS 92775, at * 6 (N.D. Cal. July 15, 2015) (denying *in camera* review of documents withheld under California mediation privilege in a diversity action on a motion to compel).

In *Silicon Storage Tech., Inc. v. National Union Fire Ins. Co. of Pittsburgh*, the district court explained that "Rule 408 functions as a floor for mediation protections in federal court rather than as a bar precluding application of more protective state mediation statutes." 2015 U.S. Dist. LEXIS 92775 at *9. In declining *in camera* review to determine whether the mediation privilege applied, the district court noted that in *United States v. Zolin*, 491 U.S. 554, 570-71 (1989), "the Supreme Court recognized excessive court inspection of privileged documents may discourage the very communications such privileges are designed to protect." *Silicon Storage Tech* Similarly, 2015 U.S. Dist. LEXIS 92775 at *14. Addressing the attorney-client privilege, the Court in *Zolin* held that *in camera* review is only appropriate if the party moving for inspection presents evidence that supports a reasonable belief that *in camera* review may establish that the privilege does not apply, 491 U.S. at 574-75, and that, even after such a

showing, a court retains discretion to determine whether *in camera* review is appropriate based on the "facts and circumstances of the particular case." *Id*. at 572. In *Silicon Storage Tech*, the party seeking *in camera* review made no showing that the claim of the mediation privilege was improper and the district court thus refused *in camera* review of the documents. 2015 U.S. Dist. LEXIS 92775 at *14-15. Similarly, USAG's Motion, unaccompanied by any declaration, makes no showing that would support disclosing Exhibits 1-16 *in camera* to the Court, and instead acknowledges the privileged nature of the documents in question.[3]

Thus, the Agreement, as quoted above, is enforceable and provides unqualified confidentiality for protected mediation documents that exceeds Rule 408's protection. *See Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011) (enforcing mediation confidentiality agreement); *Brown v. San Diego State Univ. Found*., Case No. 3:13-cv-2294-GPC-NLS, 2014 U.S. Dist. LEXIS 142846, at *9-10 (S.D. Cal. October 7, 2014) (enforcing mediation confidentiality agreement to exclude evidence submitted in opposition to a summary judgment motion and concluding that as the agreement bars mediation evidence, the Court need not reach California or federal evidentiary rules regarding the admissibility of mediation evidence).

USAG's Motion confirms the privileged nature of the documents in question by stating that these documents "implicate the mediation/settlement doctrine" and that disclosure of such communications in USAG's forthcoming motion for partial summary judgment "may violate Rule 408 or other settlement privileges." [Dkt. 313, pp. 2, 5.] Accordingly, except as carved

[3] *See also, MPT Inc. v. Marathon Labels, Inc.*, No. 1:04 CV 2357, 2006 WL 314435, at *5 (N.D. Ohio Feb. 9, 2006) (court refused to conduct an *in camera* review of documents protected by the attorney-client privilege, explaining that "[o]nce the privilege applies, 'it is [not] necessary to dissect the document to separately evaluate each of its components. It is enough that the overall tenor of the document indicates that it is a request for legal advice or services"); *Dura Corp. v. Milwaukee Hydraulic Products, Inc.*, 37 F.R.D. 470, (E.D. Wis. 1965) (court refused to conduct an *in camera* review of documents protected by the attorney-client privilege, finding that "[a]lthough, in practice, it is an acceptable procedure for parties by agreement, to submit disputed documents for *in camera* inspection, where, as here, a party is unwilling, and has made a sufficient showing of privilege, it would be unwarranted 'prying' for the court to inspect the documents.")

out by the Insurers in this opposition, there is no dispute that USAG's proposed exhibits constitute privileged communications. Documents and/or statements reflecting, referring, or relating to mediation and settlement communications (whether oral or written) should be prohibited from disclosure. However, to the extent there remains any dispute as to whether a particular Exhibit, or portions thereof, falls within the scope of the Agreement's confidentiality provision, USAG should be ordered to refrain from submitting disputed privileged information to this Court, and the parties should be directed to consult with Judge Phillips, Judge Zive and/or Mr. Van Osselaer to resolve the disputes.

B. This Court's Mediation Orders And Local Rule B-9019-2 Also Bar USAG's Disclosure Of Protected Mediation Documents To The Court.

This Court's initial May 17, 2019 Order [Dkt. 514, p. 3] referring the tort claimants' claims and the insurance coverage issues to mediation similarly provides an absolute privilege for protected mediation documents:

> 5. *All communications, information and evidence exchanged within the mediation shall be treated confidentially by all parties and shall remain confidential following the mediation's conclusion*. To the extent any information or evidence disclosed within the course of the mediation is privileged, its disclosure amongst the parties to the mediation and Judge Zive does not waive or adversely affect the privileged nature of such information or evidence. *Any party who improperly discloses communications, information, and evidence exchanged confidentially during the mediation may be subject to sanctions*. [Emphasis supplied.]

The Court's September 26, 2019 Order appointing Mr. Van Osselaer as an additional mediator to assist with insurance coverage issues provides the same absolute confidentiality. [Dkt. 798, p. 2.]

Protection of privileged information is also consistent with this Court's local rule S.D. Ind. Bankr. R. B-9019-2 ("Local Rule B-9019-2"). It separately confirms that confidentiality shall be strictly observed. For example, Subsection (i)(1) of Local Rule B-9019-2 provides: "Any written or oral communication made during mediation is confidential unless otherwise agreed by the parties. The unauthorized disclosure of confidential communication by any person

may result in the imposition of sanctions under subparagraph (j) of this rule. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions, mediation, or other alternative dispute resolution procedure shall apply." Subsection (i)(3) of Local Rule B-9019-2 provides that information should be protected by all parties: "The parties, the mediator, and all mediation participants shall protect proprietary information during and after the mediation." And Subsection (i)(4) of Local Rule B-9019-2 provides that disclosure of privileged information in mediation does not waive the privilege: "The disclosure by a party of privileged information to the mediator or to another party during the mediation process does not waive or otherwise adversely affect the privileged nature of the information."

Just as the Agreement does, the Orders and Local Rule B-9019-2 also make plain that their mediation protection is broader than Rule 408. The Orders and Local Rule B-9019-2 also foreclose disclosure of protected mediation documents for any purpose, including for any exception stated in Rule 408. Therefore, communications concerning mediation efforts during the pendency of this bankruptcy are protected from disclosure. To the extent there remains any dispute as to Exhibits reflecting, referring, or relating to mediation communications protected by this Court's Orders, the parties should be directed to Judge Phillips, Judge Zive and/or Mr. Van Osselaer to resolve the disputes.

C. Indiana Law Promotes Confidentiality As Essential To The Mediation Process.

The Indiana Supreme Court recognizes that confidentiality is essential to the effectiveness of mediation and "thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation." *Horner v. Carter*, 981 N.E.2d 1210, 1212 (Ind. 2013); *see also Heckler & Koch, Inc. v. German Sport Guns GmbH*, No. 1:11–cv–1108–SEB–TAB, 2014 U.S. Dist. LEXIS 15482, *6-7 (S.D. Ind. Feb. 7, 2014) ("Settlement negotiations encourage candor among participants so as to facilitate and promote settlement.

Permitting discovery of communications that occurred during the mediation process would chill any potential candor and cooperation among parties.")[4]

USAG's attempt to support its contemplated motion for partial summary judgment by relying on protected mediation documents is impermissible for good reason. The Insurers effectively would be forced to further invade the mediation protection to present the full picture to correct USAG's one-sided description of what occurred in the mediation. That is impermissible under Indiana law. *See also Marchal v. Craig*, 681 N.E. 2d 1160, 1163 (Ind. Ct. App. 1997) (holding that "[a]ll matters discussed in mediation are strictly confidential and privileged"). In *Marchal*, the parties had stipulated that the mediator who presided over a failed mediation of their dispute would be a trial witness. When one party reneged on the deal at trial, the court overruled his objections based on the parties' stipulation. The Court of Appeal reversed, and held that Indiana law precluding a mediator from being a witness was not waivable. *Id*. at 1163 ("We must conclude that these provisions are designed to protect the integrity of the mediation process itself and that they are operational despite any attempt by the parties to override them.")

So, too, Subsection (i)(2) of this Court's Local Rule B-9019-2 provides the same: "The mediator shall not be compelled to disclose to the Court or to any person outside the mediation conference any information received or distributed by a mediator while serving in such capacity. The mediator shall not testify or be compelled to testify concerning the mediation in any other proceeding. The mediator shall not be a necessary party in any proceeding relating to the mediation."

D. Rule 408 Of The Federal Rules Of Evidence Also Bars USAG's Disclosure Of Protected Mediation Documents To The Court.

[4] In *Doe v. Archdiocese of Milwaukee*, 772 F.3d 437, 440 (7th Cir. 2014), a bankruptcy case involving a claimant's state law claim, the Seventh Circuit applied the state mediation privilege law. Here, the claimants' state law claims arise under the state law of several different states in which their suits are pending, such as Michigan and California. In *Doe v. Archdiocese*, the Seventh Circuit held that Wisconsin mediation law precluded the claimant from relying on communications made during mediation to support his claim that the Archdiocese had fraudulently induced him to settle his sexual abuse claim. *Id*. at 440-44.

Despite noting at the outset of its motion that filing of the proposed exhibits may violate Rule 408, USAG later suggests in a footnote [Dkt. 313, p. 4 n. 2] that Rule 408 does not bar it from disclosing protected mediation documents to the Court by way of a purported exception. As demonstrated above, the Court need not reach that argument because the Agreement and this Court's Orders make Rule 408's exceptions inapplicable. In any event, USAG makes no showing that any exception to Rule 408 applies.

USAG asserts, for example, that "the current dispute" of whether the Insurers have a duty to pay the costs of this bankruptcy arose after documents that it seeks to disclose to the Court were "generated during mediation." [Dkt. 313, p. 4 n. 2] In fact, USAG indisputably put the scope of the Insurers' duty to defend in dispute *before* any mediation took place when it filed its coverage action against them in April 2018. The communications at issue are all part of an effort to resolve the entire coverage dispute, including certain post-petition costs of counsel retained pursuant to this Court's order. That dispute, including as to defense obligations, will be resolved based on each Insurer's policy language and the applicable law.

The two Combined Specialty policies issued to USAG, for example, provide in part that it has the duty to defend an insured against a "'suit' seeking damages for 'bodily injury' …." The term "suit" is defined in the policies as "a civil proceeding in which damages because of 'bodily injury' … to which this insurance applies are alleged." Combined Specialty and other Insurers have paid for USAG's defense of the Abuse Suits, including certain post-petition costs of defense counsel. However, USAG's voluntary Chapter 11 reorganization plainly is not a "suit" which seeks the recovery of damages for bodily injury within the meaning of the Combined Specialty policies. Nor does its Chapter 11 filing allow USAG to use protected mediation documents to attempt to negate express policy terms or to use protected confidential mediation documents to argue that the entire expense of its Chapter 11 process is a defense cost for the Abuse Suits. And, there are additional policy terms which preclude coverage for the costs of this bankruptcy, which will be fully addressed on the merits in due course.

Likewise, USAG's suggestion that Rule 408(b) "allows admission of mediation evidence to prove estoppel, to explain a party's post-mediation conduct, or to vindicate a claim generated by an adverse party's conduct in mediation" [Dkt. 313, p. 4 n. 2] also provides no support for its contemplated violation of the confidentiality protection afforded by Rule 408 and the parties' Agreement and the Court's Orders. *Bankcard Am., Inc. v. Universal Bancard Sys.*, 203 F.3d 477, 484 (7th Cir. 2000), the case on which USAG relies [Dkt. 313, p. 4 n. 2] bears no resemblance to this case. In *Bankcard*, the defendant countersued for breach of contract, and asserted as a defense that it thought it had reached a settlement with the plaintiff during mediation that allowed it to take the course of conduct that it did. *Id*. at 484. Here, no breach of contract claim has been asserted against USAG by any Insurer. To the contrary, USAG seeks leave to disclose protected mediation documents as a sword to assert claims against the Insurers as to their insurance obligations -- which is what they have been negotiating to fully and finally resolve in mediation.

E. USAG's Disclosure Of Protected Mediation Documents Would Warrant Sanctions.

As quoted above, this Court's Order referring this case to mediation provides that "[a]ny party who improperly discloses communications, information, and evidence exchanged confidentially during the mediation may be subject to sanctions." [Dkt. 14, p. 3.] Sanctions are also available under Local RuleB-9019-2(j). This Order and Local Rule B-9019-2 underscore the gravity of a breach of the confidentiality that protects the mediation process.

IV. CONCLUSION

For all of the foregoing reasons, the Court should:

- Grant USAG's Motion as it concerns Exhibits 17 and 19.
- Grant USAG's Motion as to Exhibits 1-4 and 8, but enter an Order prohibiting USAG from submitting to this Court, under seal or otherwise, those portions of these Exhibits that reflect, reference and/or relate to protected mediation

communications, which have been redacted by the Insurers and separately forwarded to USAG's counsel.

- Enter an Order prohibiting USAG from submitting Exhibits 5-7 and 9-16, as they only contain protected mediation communications.

Dated: February 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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I further certify that on the 7th day of February, 2020, a copy of the foregoing was mailed by first-class U.S. Mail, postage prepaid, and properly addressed to the following:

None

/s/ *James P. Moloy*
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