**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| LEXINGTON INSURANCE COMPANY, as subrogee of Shorenstein Properties, LLC d/b/a Shorenstein Realty Services, L.P. | ) | |
| Plaintiff, | ) | Case No.1:10-cv-2719 |
| v. | ) | Honorable Joan H. Lefkow |
| CROWN ENERGY SERVICES, INC. d/b/a Able Engineering Services | ) | |
| Defendant. | ) | |

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT BASED ON LACK OF JURISDICTION, FOR FAILURE TO ADD AN INDISPENSABLE PARTIES AND TO DISMISS COUNT I FOR FAILURE TO STATE A CAUSE OF ACTION**

Defendant, CROWN ENERGY SERVICES, INC. d/b/a Able Engineering Services, (hereafter, 'CROWN ENERGY') by and through its attorney, LAW OFFICES LOWELL D. SNORF, III, submits this Memorandum in Support to Defendant's Motion to Dismiss the Complaint Based on lack of jurisdiction, for failure to add an indispensable parties and to dismiss Count I for failure to state a cause of action.

**I**
**UNDER 28 U.S.C. 1332 AND 12(b)1 THIS COURT MAY NOT HAVE SUBJECT MATTER JURISDICTION FOR LEXINGTON'S SUBROGATION ACTION**

Movant has a strong interest in allowing this case to proceed in this court. However, all litigants are required to immediately ensure the District Court has subject matter jurisdiction to hear the case. Here, 28 U.S.C. 1332 jurisdiction may be absent. **Lexington Insurance Company** filed a First Amended Complaint seeking damages of $338,389.74. The **March 28, 2007** damages are based on an **Lexington's April 1, 2007** Proof of Loss (Exhibit 'F') of $238,389.74 and the $100,000.00 deductible of **Shorenstein Properties, L.L.C.**

**Lexington** sues as subrogee of **Shorenstein Properties, LLC d/b/a Shorenstein Realty Services, L.P.** **Lexington** has a claim of $238,389.74 and **Shorenstein** has a claim of $100,000.00. This shows the First Amended Complaint is brought on behalf of both **Lexington** and **Shorenstein Properties, LLC d/b/a Shorenstein Realty Services, L.P.** Under F.R.C.P. 17(a) **Shorenstein Properties, LLC d/b/a Shorenstein Realty Services, L.P.** are real parties to this incident and must be named as plaintiffs. If they are named as plaintiffs, it is clear they are California

residents and the parties are not diverse under 28 U.S.C. 1332 (a) or (c)(1).

In insurance subrogation cases, the insured's citizenship must be considered in determining whether 28 U.S.C. 1332(a) diversity exists. In *Federal Insurance Company v. Your Homework, Inc.*, 280 F.Supp.2d 844 (N.D. Ill. 2003), Senior Judge Milton Shadur questioned the right of Federal Insurance Company as subrogee of Stephen and Lynn Cohen to maintain a diversity action.[1] In *Federal Insurance Company*, it was clear to Senior Judge Milton Shadur Federal Insurance Company brought the subrogation action for its own interest and also for the separate interest of Stephen and Lynn Cohen. *id.*, 280 F.Supp.2d at 844.

Citing *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 380-81, 70 S.Ct 207, 94 L.Ed 171 (1949), *Wadsworth v. United States Postal Service*, 511 F.2d 64, 65 (7th Circ. 1975) and *State Security Insurance Company v. Frank B. Hall & Co.*, 109 F.R.D. 95 (N.D. Ill. 1986) Senior Judge Shadur questioned the right of Federal Insurance Company to maintain its subrogation action without naming Stephen and Lynn Cohen as real parties in interest. In its Memorandum Order, the court ordered Federal to disclose amounts paid to the Cohens, whether the Federal policy had a deductibility clause and whether the Cohens were seeking relief beyond Federals', *id.* Senior Judge Shadur's Memorandum Order convinced Federal's subrogation counsel to voluntarily dismiss the case under F.R.C.P. 41(a)(1), which occurred on **August 1, 2003.**

For the reasons discussed above, this court does not appear to have subject matter jurisdiction of this subrogation action and a dismissal and under F.R.C.P. 12(b)(1) may be required.

## II
## THIS ACTION CANNOT PROCEED FURTHER WITHOUT JOINING ALL SUBROGATING INSURANCE CARRIERS AS PLAINTIFFS

On July 27, 2007, four proofs of loss were signed. Two by Underwriters at Lloyds, London, United Kingdom, one by **Munich RE** and one by **Lexington Insurance Company** (see motion exhibits 'C-F'). All subrogating insurance companies are aware of **Lexington's** subrogation efforts. **Munich RE** and **Underwriters at Lloyds, London, United Kingdom** could each file a separate lawsuits. To that end without the participation of all subrogating carriers. **CROWN** faces potentially three other lawsuits.

Because **Lexington Insurance Company** and **Munich Reinsurance Company of America** are Delaware

[1] The complaint filed in Federal Insurance Company, as subrogee of Stephen and Lynn Cohen v. Your Homework, Inc., Frank D'Astici, Individually, and Frank D'Astici, d/b/a Your Homework, Inc., 03-C-5092 Document #1 is remarkably similar to that filed here.

Insurance Companies, under F.R.C.P. 19(a) it does not appear possible for **Munich Re** to be joined under F.R.C.P. 19(a) as a subrogation plaintiff. Further, since **Underwriters at Lloyds** issued separate insurance policies, then **Underwriters at Lloyds** is a separate plaintiff for each policy and 28 U.S.C. 1332 diversity could also be absent. Here too, if the insurance policies of **Underwriters at Lloyds and/or Munich** contained a deducible interest or an interest of **Shorenstein** was being prosecuted beyond that of either **Munich Re** or **Underwriters at Lloyds**, the prior analysis of *Federal Insurance Company v. Your Homework, Inc.*, 280 F.Supp.2d 844 (N.D. Ill. 2003) applies.

F.R.C.P. 19 sets forth the procedure for joining a party to a pending case. Because F.R.C.P. 19(a) only allows joinder if it will not deprive the court of jurisdiction, then, here, F.R.C.P. 19(b) applies because the subrogation carriers to be joined destroy diversity. Since it is doubtful the three additional subrogation carriers can be joined under F.R.C.P. 19(a), then under F.R.C.P. 19 (b) the court can find the absent subrogating insurance carrier are indispensable parties, find no jurisdiction and dismiss the case. *Estate of Alvarez v. Donaldson Co., Inc.*, 213 F.3d 993 (7th Cir. 2000).

Under F.R.C.P. 19(a), the first step to determine whether **Underwriters at Lloyds and/or Munich Re** are necessary parties is whether "complete relief" can be given to the current parties, without including **Underwriters at Lloyds and/or Munich**, *Scottsdale Insurance v. Subscription Plus, Inc.* 195 F.R.D. 640 (W.D. WIS, 2006). On its subrogation claim, **Lexington** can be given complete relief as it prosecutes 50% of the $546,548.00 subrogation claim. Complete relief cannot be given to **Crown** because **Crown** faces duplicate litigation with **Underwriters at Lloyds and/or Munich.**

The second question is whether this litigation without **Underwriters at Lloyds and/or Munich** will have a direct impact on **Underwriters at Lloyds and/or Munich. Underwriters at Lloyds and/or Munich** have allegedly paid **Shorenstein** $238,000 in damages. If **Underwriters at Lloyds and/or Munich** do not participate, they potentially face adverse fact testimony on causation, a potential finding of comparative fault for removal and loss of key evidence by their retained insurance investigators, and adverse testimony on damages. Also, damages calculations on the 1991 HVAC towers do not include depreciation.

Finally, it is necessary to determine whether adjudication without **Underwriters at Lloyds and/or Munich** subjects **Crown** to inconsistent obligations or multiple liability. For reasons discussed earlier, **Crown** faces multiple claims potentially causing all parties unnecessary expense and costs. An absentee whose nonjunder results in any of the above problems identified by F.R.C.P. 19(a) is a necessary party. See also *Public Service Company of Oklahoma v.*

*Black & Veatch* 467 F.22d 1143 (10th Cir, 1972) [holding: all four subrogating insurance carriers necessary parties and joined F.R.C.P. 17(a) and 19]. See also *Wright v. Miller*, Federal Practice and Procedure Chapter 5, §1619, *e.t. seq.*

**Underwriters at Lloyds and/or Munich** meets the second two factors of F.R.C.P. 19(a) establishing they are "necessary." **Underwriters at Lloyds and/or Munich** are all necessary parties to this action, and indispensable under 19(b). **Underwriters at Lloyds and/or Munich** cannot be joined without destroying diversity jurisdiction, and as indispensable parties the next inquiry is whether their nonjoinder should result in a dismissal.

A two step process is employed to determine whether the failure to join and indispensable party will result in dismissal of the lawsuit. *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999); *GTC International Holdings, Inc. v. Burns*, 2004 WL 2211621 *2, Case No. 1::04-cv-00570, Doc. 17 (N.D.Ill. 2004). First, the court must determine whether the party is necessary based on "whether: (1) complete relief can be had without joinder, (2) the absent party's ability to protect its interest will be impaired, and/or (3) the existing parties will face a substantial risk of inconsistent obligations unless the absent party is joined". *Id. citing Thomas*. If the court determines that a party is necessary, then it must determine whether the party is indispensable. *Thomas*, 189 F.3d at 667. The factors to be considered are: "(1) the extent to which a judgment entered in the absence of a party will be prejudicial to those currently before the court; (2) the extent to which such prejudice can be lessened or avoided by reshaping the judgment; (3) whether a judgment entered in a party's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed". *GTC International Holdings, Inc. v. Burns*, 2004 WL 2211621 *2, Case No. 1::04-cv-00570, Doc. 17 (N.D.Ill. 2004).

Here there is allegedly a $546,000 subrogation claim divided between **Shorenstein**, **Lexington**, **Munich Re** and **Lloyds of London**. Only 50% of the claim is now before the court, leaving outstanding the claims of **Underwriters** and **Munich**. **Underwriters at Lloyds and/or Munich** is exposed to a multiplicity of actions which can only be argued through consolidation of all claims in one case. Finally, the Plaintiff has an adequate remedy in Cook County, Illinois, First District, Law Division.

Movants respectfully request dismissal under F.R.C.P. 12(b)(7) and (19), and allow Plaintiff to re-file in Illinois State Court after joining all subrogation insurance companies.

## III
## COUNT I OF PLAINTIFF'S FIRST AMENDED COMPLAINT FOR BREACH OF CONTRACT SHOULD BE DISMISSED UNDER F.R.C.P. 12(b)(6).

Crown Energy moves for F.R.C.P. 12(b)(6) dismissal based on the allegations of Count I of the First Amended Complaint and Exhibit 1 to the complaint, **Shorenstein Realty Services, L.P. ENGINEERING SERVICES AGREEMENT**(Doc. 9). *Schwarz v. Loyola University Medical Center*, 659 F.Supp.2d 988 (N.D.Ill. 2009). Here, the **Shorenstein Realty Services, L.P. ENGINEERING SERVICES AGREEMENT** is not ambiguous, nor inexplicable and **Lexington Insurance Company** as subrogee of **Shorenstein Properties, LLC d/b/a Shorenstein Realty Services, L.P.** are not parties to the agreement and have no party status to enforce same. *Reger Development, LLC v. National City Bank*, 592 F.3d 759 (7th Cir. 2010).

Plaintiff says at ¶1 that **Lexington** is the Plaintiff (Amended Complaint p.1). **Lexington** is subrogating on behalf of the services contract of **Shorenstein** against **Able**. **Lexington** is not a party to the services contract. **Shorenstein Properties, LLC d/b/a Shorenstein Realty Services, L.P.** are also not parties to the contract. Count I is not prosecuted in the name of the real party in interest, SRI Monroe Street Venture, and is improper under F.R.C.P. 17.

Given requirements of 735 ILCS 5/2-403(c), there is no showing in Count I how **Lexington**, or **Shorenstein** have subrogation rights on the services agreement between **Able** and SRI Monroe Street Venture. See ¶ 4.1.

The other parties at ¶15.4 do not include **Shorenstein Properties, LLC d/b/a Shorenstein Realty, L.P.** For that matter, ¶14.6 does not confer any named plaintiffs, but they have no rights to sue for breach of contract.

The allegations of plaintiff contained in Count I of the First Amended Complaint do not plead elements necessary to establish Lexington's rights to subrogate on a contract to which **Lexington** is not a party. If Count I is based on 735 ILCS 5/2-403(c) Count I, inadequately shows how or when Lexington because a subrogee on the services contract between Able and Shorenstein.

While Lexington attaches the **Shorenstein Realty Services, L.P. ENGINEERING SERVICES AGREEMENT, Lexington** does not properly plead the Illinois elements for breach of contract, *i.e.*, contract existence, performance by Plaintiff, defendants breach and damages to Plaintiff. *Benge v. State Farm Mutual Insurance Company*, 297 Ill.App.3d 1062, 697 N.E.2d 914 (1st Dis. 1998). If, as Plaintiff alleges in ¶1 that **Lexington Insurance** is Plaintiff, **Lexington** cannot plead contract performance by **Lexington** because **Lexington** did not perform under the **Shorenstein Realty Services, L.P. ENGINEERING SERVICES AGREEMENT** and **Lexington** was not a party to that agreement and has no rights to enforce the agreement. If it is **Shorenstein Properties, LLC d/b/a Shorenstein Realty, L.P.** that

seeks to enforce the **Shorenstein Realty Services, L.P. ENGINEERING SERVICES AGREEMENT**, they cannot enforce the agreement as they are not parties to the contract.

WHEREFORE, movant respectfully seeks F.R.C.P. 12(b)(6) dismissal of Count I of Plaintiff's First Amended Complaint for failure to state a cause of action.

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Respectfully Submitted,

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