UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TRENWICK AMERICA REINSURANCE CORPORATION and UNUM LIFE INSURANCE COMPANY OF AMERICA, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 07-CA-12160-RCL
IRC, INC. (individually and as successor by merger of IRC, INC. and OCCUPATIONAL HEALTH UNDERWRITERS, INC.), IRC RE, LIMITED (individually and as successor by merger of IRC RE, LIMITED and MANAGED COMPENSATION INSURANCE CO. LTD.) and MALCOLM L. SWASEY, Defendants.	)	

DEFENDANTS OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DOCUMENTS AND TO EXTEND TIME TO COMPLETE DISCOVERY

Defendants respectfully submit this opposition to Plaintiffs' Motion to Compel Discovery, Pursuant to Fed. R. Civ. P. 37, and to Extend Plaintiff's Time to Complete Discovery. Plaintiffs' Motion Should be denied because (1) Plaintiffs failed to comply with Local Rule 37.1 in filing the motion without arranging for or holding a discovery conference; (2) Defendants have responded in good faith to Plaintiffs' discovery requests and continue to do so; and (3) Plaintiffs motion improperly seeks to burden Defendants with obligations outside the scope of the Federal Rules of Civil Procedure.[1] Accordingly, Plaintiffs' motion should be denied with prejudice.

[1] Defendants do not oppose Plaintiffs' request to extend time to complete discovery. Due to the logistical difficulties caused by the recent incarceration of Defendant Malcolm L. Swasey on charges unrelated to the present dispute, Defendants have also filed a motion to extend time to complete their discovery simultaneous with the filing of this Opposition.

PRELIMINARY STATEMENT

This is an action brought by Plaintiffs Trenwick America Reinsurance Corporation and Unum Life Insurance Company of America (collectively, "Plaintiffs") against Defendants IRC, Inc., IRC Re, Limited, and Malcolm L. Swasey (collectively, "Defendants") in which Plaintiffs allege the existence of a contract concerning retrocessional reinsurance between themselves and IRC, Re Limited (the "Alleged Reinsurance Contract"). Plaintiffs contend that such a contract was entered into on or about 1996. Although Plaintiffs produced 8,705 documents with their initial disclosures, they have failed to produce the Alleged Reinsurance Contract, much less any contract between the parties. Moreover, Plaintiffs have been unable or unwilling even to describe the material terms of the contract they allege or to identify its signatories. Instead, Plaintiffs have engaged in an attempt to obtain any and all documents having even remote or tangential connection to two insurance programs in which Defendants were involved during the mid to late 1990's. Plaintiffs approach has served only to dramatically increase the cost of the litigation and to transform a straight-forward dispute over an alleged insurance contract into a protracted and wasteful discovery contest.

FACTUAL BACKGROUND

Plaintiffs claim that, pursuant to the Alleged Reinsurance Agreement, Defendant IRC Re, Limited ("IRC Re") agreed to reinsure a portion of Plaintiffs' reinsurance obligations in connection with a managed workers' compensation insurance program known as the Reliance Compcare 2000 program. (Complaint, ¶ 6.) Plaintiffs claim the Alleged Reinsurance Agreement was renewed and in effect from 1996 through 2000. (Id., ¶ 67.)

Plaintiffs further allege that, despite that their participation in the Reliance Compcare 2000 program ended before 2001, they did not issue a statement to IRC Reclaiming to be owed monies for unpaid losses under the Alleged Reinsurance Agreement until 2004. (Id., ¶¶ 67, 69.)

Defendants, after being contacted by Plaintiffs after such a long period, requested that Plaintiffs provide a copy of the Alleged Reinsurance Agreement in order to verify the existence or the terms of the agreement under which Plaintiffs were demanding payment. (Affidavit of Daniel P. Flynn, Esq. ("Flynn Aff."), Exh. A.) Plaintiffs refused to do so.

In November of 2007, Plaintiffs filed the Complaint. On January 7, 2008, and again on May 23, 2008, Defendants requested that Plaintiffs provide them with the Alleged Reinsurance Agreement, or, at the very least, with the terms of such agreement. (Id., Exhs. B and C.) Defendants again continued to refuse to disclose the terms of the Alleged Reinsurance Agreement that constitutes the basis for their lawsuit, and commenced discovery.

After being served with Plaintiff's Requests for Production and Interrogatories, Defendants responded with objections and substantive responses to Plaintiffs' discovery requests on July 29, 2008. (Declaration of Christopher P. Anton, Esq. ("Anton Decl."), Exhs. J and K.) Defendants objected to the overly broad scope of Plaintiffs' requests, which sought information pertaining to, among other things, an insurance program pre-dating the Reliance Compcare 2000 program and with which Plaintiffs had no involvement, i.e., the Hanover Compcare 2000 insurance program. (Id.) Plaintiffs disagreed with the basis for Defendants' objections to their discovery requests and requested a discovery conference to attempt to narrow or resolve the areas of dispute. (Anton Decl., Exh. L.) A discovery conference was held on or about September 3, 2008, and the parties reached a resolution of their disputes. (Flynn Aff., Exh. D.) A major aspect of this compromised resolution was that Defendants would produce documents concerning the Hanover Compcare 2000 program despite having previously objected to producing such documents and maintaining that the scope of discovery sought by Plaintiffs was overly broad and wasteful. (Id.)

The inclusion of the Hanover Compcare 2000 involved the production of a large amount of documents from the early and mid 1990's and was a significant undertaking. On September 12, 2008, Defendants informed Plaintiffs that the additional documents that were being produced as a result of the compromise reached in the discovery conference were voluminous and suggested that Plaintiffs might wish to postpone the scheduled deposition of Defendant Malcolm L. Swasey ("Swasey") until after Plaintiffs had opportunity to review the additional documents, which filled approximately 16 bankers' boxes.

The production of the additional documents was further delayed by Plaintiffs' refusal to provide any assurance of confidentiality concerning the Hanover Compcare 2000 documents. (Flynn Aff., Exhs. E and F.) It was not until Plaintiffs finally relented and agreed to use the documents only for the purpose of this litigation that Defendants were able to provide the documents.

Also as a result of the discovery conference, Defendants agreed to provide supplemental answers to interrogatories to Plaintiffs. These supplemental answers were served on October 2, 2008. (Anton Decl., Exh. 21.) Defendants thereafter received no communications from Plaintiffs indicating that there were any disputes concerning the supplemental answers until Plaintiffs filed their Motion to Compel.

At 1:57 P.M. on November 26, 2008, the Wednesday before Thanksgiving, Plaintiffs' Attorney, Christopher P. Anton, sent an email correspondence to Plaintiffs' counsel, Michael P. Angelini, stating that he intended to file a motion to compel discovery and to extend the discovery deadline for plaintiffs unless he was reached by Attorney Angelini within 35 minutes. (Flynn Aff., Exh. G.) Attorney Anton did not describe in his email the particular discovery disputes contained in the motion to compel and did not provide a draft of the motion. (Id.)

At approximately 4:30 P.M., Plaintiffs filed the Motion to Compel.

ARGUMENT

1. Plaintiffs' Motion to Compel Should Be Denied Because Plaintiffs' Counsel Did Not Arrange for a Discovery Conference.

Local Rule 37.1 of the United States District Court for the District of Massachusetts states, in relevant part:

> (A) Before filing any discovery motion, including any motion for sanctions or for a protective order, counsel for each of the parties shall confer in good faith to narrow the areas of disagreement to the greatest possible extent. It shall be the responsibility of counsel for the moving party to arrange for the conference….Conferences may be conducted over the telephone. Failure of opposing counsel to respond to a request for a discovery conference within seven (7) days of the request shall be grounds for sanctions, which may include automatic allowance of the motion. L. Rule 37.1(A).

Local Rule 37.1 establishes that before filing any discovery motion, counsel for the moving party must arrange a conference in order to attempt in good faith to narrow the areas of disagreement. Id. Only if the parties fail to agree to hold a conference within seven days, or if the opposing counsel fails to appear at a requested discovery conference, can a moving party file a motion to compel. Id. If such a motion is filed, it must include a certification that Local Rule 37.1(A) was complied with, together with a statement of the reasons why a discovery conference was not held or was not successful. L. Rule 37.1. See also Fed.R.Civ.P. 37(a)(2)(B). Because Plaintiffs did not comply with Local Rule 37.1 prior to filing their Motion to Compel, the motion should be denied with prejudice. See Hasbro, Inc. v. Serafino, 168 F.R.D. 99 (D.Mass. 1996)(motion to compel production of documents denied because of failure to comply with federal or local rules regarding consultation with opposing counsel prior to filing motion to compel production of documents); Syrjala v. Total Healthcare Solutions, Inc., 186 F.R.D. 251 (D.Mass. 1999) (sanctions levied against attorney who filed a premature motion for protective order contrary to Local Rule 37.1).

A. Plaintiffs' Counsel Failed to Attempt to Arrange a Discovery Conference Pursuant to Local Rule 37.1.

At 1:57 P.M. on November 26, 2008, the Wednesday before Thanksgiving, Plaintiffs' counsel, Christopher P. Anton, sent an email correspondence to Defendants' counsel, Michael P. Angelini, stating that he had tried to reach Attorney Angelini by telephone yesterday and today and that Plaintiffs intended to file a motion to compel discovery and to extend the discovery deadline for plaintiffs. (Flynn Aff., Exh. G.) Attorney Anton did not describe in his email the particular disputes contained in the motions and did not provide a draft of the motions. (Id.) Instead, Attorney Anton set forth an ultimatum that failed to provide the required seven days for which Defendants' to agree to a conference. He wrote:

> Please contact me by no later than 2:30 p.m. today if you wish to discuss these matters; otherwise, this E-mail and my attempts to reach you by telephone (as well as my several Local Rule 37.1 conferences with Dan Flynn) will discharge plaintiffs' obligations under the court rules to confer with defendants prior to filing these motions. (Id.)

At approximately 4:30 P.M. that same day, Plaintiffs filed the Motion to Compel. Even if this email can be characterized as an invitation to hold a discovery conference, Defendants' counsel was given only 33 minutes to respond to the request. As such, the email fails to satisfy the requirements of Local Rule 37.1. Because Plaintiffs' counsel did not request a discovery conference and wait seven days for a response from Defendants and did not "confer in good faith to narrow the areas of disagreement to the greatest possible extent," the Court should deny Plaintiffs' Motion to Compel for failure to comply with Local Rule 37.1(b)(2). See Hasbro, Inc., 168 F.R.D. at 102; Syrjala, 186 F.R.D. at 255.

B. Certification

Local Rule 37.1 further states:

> (B) If (I) opposing counsel has failed to respond to a request for a discovery conference within the seven day period set forth in subdivision (A), (II) opposing counsel has failed to attend a discovery conference within fourteen (14) calendar days of the request, or (III) if disputed issues are not resolved at the discovery conference, a dissatisfied party may file a motion and supporting memorandum. The motion shall include a certificate in the margin of the last page that the provisions of this rule have been complied with. The memorandum shall state with particularity the following:
>
> > (1) If a discovery conference was not held, the reasons why it was not;
> >
> > (2) If a discovery conference was held, the time, date, location and duration of the conference; who was present for each party; the matters on which the parties reached agreement; and the issues remaining to be decided by the court. L. Rule 37.1(B), emphasis added.

As set forth above, Plaintiffs' counsel's certification in the Motion to Compel that he has "conferred with defendant's counsel on multiple occasions in an effort to obtain discovery that is the subject of this motion" is factually incorrect and misleading. Moreover, Plaintiffs failed to comply with the certification requirements of Local Rule 37.1 because the Memorandum of Law does not identify "time, date, location, duration of the conference, who was present, [and] matters on which parties reached agreement," specifically required by Local Rule 37.1(b)(2). In sum, Defendants' certification pursuant to Local Rule 37.1 is fatally deficient as no discovery conference was offered or held concerning the overall sum, substance and scope of Plaintiffs' Motion or the extensive particular disputes set forth in Plaintiffs' forty-five (45) page Memorandum of Law. See L. Rule 37.1; Hasbro, Inc., 168 F.R.D. at 102; Syrjala, 186 F.R.D. at 255.

Plaintiffs' only apparent attempt to fulfill the certification requirements of L. Rule 37.1 is the mention of a September 3, 2008 discovery conference between Attorneys Anton and Flynn in Plaintiffs' Memorandum of Law. (Plaintiffs' Memorandum, pp. 9-10.) This conference resulted

in Defendants' serving a Supplemental and Amended Response to Plaintiffs' Requests for Documents on September 26, 2008, the production of approximately 49,000 additional documents to Plaintiffs, and the service of Defendants' Supplemental and Amended Answers to Plaintiffs' Interrogatories on October 2, 2008. No further conference has been proposed or held concerning the issues raised and resolved in the September 3, 2008, discovery conference. Accordingly, the September 3, 2008, conference does not satisfy the requirements of L. Rule 37.1 because of its staleness, because the parties reached a compromise of disputes at the conference and produced additional discovery, and because the scope of the present Motion to Compel and 45-page Memorandum of Law far exceeds the matters discussed and resolved on September 3, 2008.

2. Defendants Have Responded In Good Faith To Plaintiffs' Discovery Requests.

Defendants have at all times acted in good faith in responding to Defendants' discovery requests. Despite Defendants' attempts to assign sinister and dilatory motives to Plaintiffs' actions, the record of events shows that this is not the case. The sequence of events prior to filing of this motion is as follows

- On June 27, 2008, Defendants made its Rule 26(a)(1) Initial Disclosures to Plaintiffs. The disclosures were amended by Defendants on June 30, 2008, after discussion with Plaintiffs' counsel.
- On July 15, 2008, Defendants produced 1,664 pages of documents to Plaintiffs as part of their Initial Disclosure.
- On July 29, 2008, Defendants served responses and objections to Plaintiffs' Request for Production of Documents and Interrogatories.
- On August 20, 2008, Plaintiffs' counsel wrote to Defendants' counsel outlining their disputes concerning Defendants' responses to Interrogatories and Requests for Production. Plaintiffs' requested a Local Rule 37.1 conference and the parties agreed to hold a discovery conference.

- On September 3, 2008, counsel for the parties conferred to narrow the disputes over Defendants responses and objections to discovery requests. Defendants agreed, as a compromise resolution to the disputes, to expand the scope of discovery to which they had objected.

- As a result of the compromise reached regarding the scope of discovery, Defendants expanded their search for documents responsive to Plaintiffs Request. Ultimately this expanded search resulted in the disclosure to Plaintiffs of a large quantity of documents that where previously objected to and considered outside the scope of discovery.

- On September 12, 2008, Defendants' counsel notified Plaintiffs' counsel immediately upon becoming aware that the additional documents to be produced as a result of the discovery conference were voluminous so that Defendants' could, if they chose, postpone the deposition of Swasey scheduled for September 17 and 18, 2008. Defendants declined to postpone the deposition and Swasey was deposed on September 17, 2008. His deposition was continued by agreement of the parties after one day of testimony.

- Also as a result of the compromise reached regarding the scope of discovery, Defendants served Amended and Supplemental Interrogatory Answers on Plaintiffs on October 2, 2008. (Anton Decl., Exh. S.)

- The documents produced after the September 3, 2008 discovery conference were produced as they were kept in the ordinary course of business and were not arranged by numbered responses pursuant to Rule 33(d). Defendants made this clear in their Amended Responses to Plaintiffs' Requests for Production. (Id., Exh. Q.)

- In October of 2008, Swasey was arrested on charges relating to his alleged driving under the influence and has been held in custody since that time. Defendants' counsel notified Plaintiffs of this development on October 21, 2008, and indicated that Swasey would not be available for deposition on October 28 and 29, dates on which the parties had agreed upon. (Id., Exh. HH.)

As set forth above, Defendants have responded in good faith to Plaintiffs' discovery requests. Plaintiffs' allegations of delay and bad faith are misguided. Rather, the parties had legitimate differences on the scope of discovery in this case, the positions of the parties were fleshed out through conference between counsel, and, as a result, the scope of discovery was enlarged. (Flynn Aff., Exhs. D and E.) Accordingly, Defendants provided additional documents which were not considered relevant to the dispute initially. Remarkably, Defendants now complain that this supplemental production amounts to a "document dump" after initially pillorying Defendants for withholding these very same documents. The Plaintiffs cannot have it

both ways. Through their efforts they have enlarged the scope of discovery and forced Defendants to produce large amounts of documents that Defendants view as excessive and wasteful, particularly in light of Plaintiffs' refusal to address the central issue in this case, the terms of the Alleged Reinsurance Agreement. Plaintiffs cannot now seek redress for having to deal with the large amount of documents they themselves insisted on receiving.

Defendants' Motion to Compel also seeks documents from IRC Re's management and administrative services provider, Beecher Carlson, a Bermuda company. Defendants have been attempting to obtain documents from Beecher Carlson and have requested documents responsive to Plaintiffs' Request for Production of Documents. Although such documents may arguably be under IRC Re's control, practically speaking there is little that IRC Re can do to force Beecher Carlson to comply with IRC Re's demands for documents in a timely manner. Notwithstanding this, since the filing of Plaintiffs' Motion to Compel, Beecher Carlson has represented that documents will be delivered to IRC Re by the week of December 15, 2008. In light of this development, it is clear that, had Plaintiffs provided Defendants with the opportunity to participate in a discovery conference pursuant to Local Rule 37.1, this issue could have been resolved by the counsel for the parties without bringing it before this Court.

3. Plaintiffs Motion Improperly Seeks To Burden Defendants With Obligations Outside The Scope Of The Federal Rules Of Civil Procedure.

Plaintiffs' Memorandum of Law sets forth a long list of individual Requests for Production and Interrogatories to which they contend Defendants have failed to adequately respond. As an initial matter, because Plaintiffs have not attempted to conference these specific discovery disputes, they should be barred from raising them in their Motion to Compel pursuant to Local Rule 37.1. See L. Rule 37.1; Hasbro, Inc., 168 F.R.D. at 102; Syrjala, 186 F.R.D. at

255. Apart from this fatal procedural flaw, Plaintiffs' contention that Defendants improperly reference documents in response to Interrogatories under Rule 33(d) is without merit.

Plaintiffs argue that Defendants' responses to Interrogatories 7, 8, 16, and 19 violate the requirements of Rule 33(d) in that they do not identify responsive documents with sufficient detail. (See Plaintiffs' Memorandum, p. 32). The interrogating party "bears the burden of proving that [responding party] failed to respond to [the Interrogatories] and therefore must make a prima facie showing that the use of Rule 33(d) is somehow inadequate, whether because the information is not fully contained in the documents or because it is too difficult to extract." Sadofsky v. Fiesta Products, LLC, 252 F.R.D. 143, 148 (E.D.N.Y 2008) citing Moore's Federal Practice § 33.105. "The language of Rule 33(d) requires the burden among the producing and reviewing parties to be equal and that there be a sufficiently detailed specification so that the interrogating party is able to locate and identify the responsive documents." Id. "Where an unequal burden does not exist between the parties, the court will allow the responding party to produce business records, even if the interrogating party must examine multiple documents to ascertain the answers to its interrogatories." Id.

Plaintiffs have made no showing that the burden is greater on themselves in locating responsive documents than it is on Defendants. Indeed, it is Plaintiffs who have insisted on obtaining documents from the early 1990's that relate to the Hanover Compcare 2000 insurance program. Defendants have no advantage in ease of locating documents responsive to Plaintiffs' broad interrogatories within these 10-15 year old documents. Moreover, it was Plaintiffs who waited until 2007 to file a lawsuit in this matter, despite their claims being based on the Alleged Reinsurance Agreement, which they allege they ceased being a party to in 2000. Due to Plaintiffs own excessive demands for marginally discoverable documents and their own delay in

asserting claims, Plaintiffs have created the very difficulty in locating the documents they wish to find.

Additionally, the individual Interrogatory Answers about which Plaintiffs complain contain full and complete answers, identify specific documents responsive to the questions, and provide additional narrative responses. Plaintiffs complain that the answers to Interrogatories 7 and 8 do not set forth the identities of the owners, officers and directors of the Defendants from 1996 to the present. (Plaintiffs' Memorandum, pp. 35-37.) However, Defendants Supplemental Answers to Interrogatories 7 and 8 show the opposite, as they set forth lists of the requested persons organized by company. (Anton Decl., Exh. S.) Plaintiffs complain that the years during which each person was an owner, officer, or director of each company are not stated. This complaint is baseless however, as the plain language of Interrogatories 7 and 8 fails to ask for this information. (Id.) Interrogatory 7 states: "Identify the shareholders and members of the following entities from January 1, 1996 to the present: (a) OHU; (b) IRC, Inc.; (c) MCIC; and (d) IRC Re." (Id., Exh. G). Nowhere in this interrogatory are the particular years of each persons' ownership requested. (Id.) As such, Plaintiffs cannot now move, without even conferencing this purported dispute, to compel answers to a questions not posed.

Additionally, Interrogatories 16 and 19 have also been completely answered by Defendants. Defendants' Supplemental and Amended Answers to Interrogatories 16 and 19 describe, as requested, the persons (Christopher Anton, Esquire) to whom Defendants objected concerning statements regarding MCIC's status as a retrocessionaire and concerning AUL RMS statements and specifically directs Plaintiffs to documents Bates Labeled "IC 00354-00355; 00358-00392). (Plainitffs' Memorandum, pp. 37-40.) Accordingly, Plaintiffs' contention that Defendants have somehow inadequately answered this interrogatory is baseless. Again,

Plaintiffs have sought Court intervention for groundless discovery disputes that should have been handled in a discovery conference pursuant to the Local Rules.

CONCLUSION

Plaintiffs' Motion to Compel should be summarily denied with prejudice. Alone, Plaintiffs' failure to comply Local Rule 37.1 is sufficient basis to deny the motion. Moreover, the Motion to Compel lacks substantive merit in all respects.

WHEREFORE, Defendants respectfully requests that this Court deny Plaintiffs' Motion to Compel with prejudice in its entirety, and grant any and all other relief this Court deems equitable and just.

IRC, INC., IRC RE, LIMITED, and
MALCOLM L. SWASEY,

By their attorneys,

/s/ Daniel P. Flynn

Michael P. Angelini (BBO# 019340)
Daniel P. Flynn (BBO # 655180)
Bowditch & Dewey
311 Main Street
P.O. Box 15156
Worcester, MA 01615-0156
Tel. No.: (508) 791-3511
dflynn@bowditch.com

Date: December 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on December 10, 2008.

/s/ Daniel P. Flynn
Daniel P. Flynn