

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TRENWICK AMERICA REINSURANCE :
CORPORATION and UNUM LIFE :
INSURANCE COMPANY OF AMERICA, :

Plaintiffs, :

Civ. Action No. :
07 CA 12160 RCL :

v. :

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 C. SWASEY, :

Defendants. :

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO COMPEL DISCOVERY, PURSUANT TO
FED. R. CIV. P. 37, AND TO EXTEND DISCOVERY DEADLINES**

Plaintiffs Trenwick America Reinsurance Corporation (“Trenwick”) and UNUM Life Insurance Company of America (“UNUM”) submit this Memorandum of Law in support of their motion for entry of an Order: (1) pursuant to Rule 37 of the Federal Rules of Civil Procedure, compelling defendants Malcolm C. Swasey, IRC, Inc. (“IRC”) and IRC Re, Limited (“IRC Re”), to produce all documents responsive to plaintiffs’ requests for production of documents,

including but not limited to documents in the possession of defendant IRC Re's Bermuda manager and documents identified at defendant Swasey's deposition; (2) compelling defendants to provide complete answers to plaintiffs' interrogatories; and (3) extending plaintiffs' time to complete discovery and related deadlines for 90 days. Plaintiffs also seek an award of their reasonable attorneys' fees and expenses incurred in making this motion, pursuant to Rule 37(a)(5)(A).

PRELIMINARY STATEMENT

The right to full and fair discovery -- and the corresponding obligation to provide such discovery -- is a hallmark of our adversarial system. Despite defendants' disavowal of the existence of a retrocessional reinsurance agreement that they repeatedly acknowledged, and on account of which defendant IRC Re received over \$4 million in premium, defendants have failed to produce documents and to provide information relating to their defenses and almost every aspect of this case.

Defendants' initial interrogatory answers were virtually devoid of factual information and defendants produced no documents in response to plaintiffs' request for production of documents. Instead, defendants falsely represented that the entirety of their documents responsive to plaintiffs' requests were included in the one-half box of documents that defendants produced in connection with their Rule 26(a)(1) initial disclosures.

Then, on September 12, 2008, nearly three months after plaintiffs served their initial discovery requests and almost seven weeks after defendants represented that they had completed their search for all other responsive documents, defendants suddenly disclosed the existence of some twenty boxes of documents. This disclosure occurred on the eve of a two-day deposition of Swasey, individually and as the corporate defendants' custodian of records and sole

designated witness under Rule 30(b)(6). Defendants' eleventh-hour "document dump" caused Swasey's deposition to be adjourned to allow plaintiffs the opportunity to review the documents. The deposition has now been further delayed as a result of Swasey's recent arrest and incarceration.

Defendants have admitted that they did not even commence the search that led to the production of the twenty boxes until late-August 2008, two months after plaintiffs served their document demands. Most of the documents, including several entire boxes, are unresponsive to plaintiffs' document requests and irrelevant to this lawsuit. Defendants have produced no documents (or at best, only a few documents) that are responsive to most of plaintiffs' document requests. For example, defendants have produced none of their relevant banking records and no records relating to the letter of credit that IRC Re maintained for plaintiffs' benefit, nor have they produced documents relating to their many requests that plaintiffs confirm to IRC Re's auditors the retrocessional contract details.

Defendants also have failed to produce IRC Re's own business records. IRC Re, the main defendant in this case, is a captive Bermuda reinsurance company with no employees or office of its own. Its business records are kept by its Bermuda manager, Beecher Carlson. Despite defendants' prior representations that they had produced all responsive documents, Swasey testified that he did not even ask Beecher Carlson for IRC Re's business records until the last week of August 2008, weeks after their production was due. Defendants have not responded to numerous subsequent requests for information concerning the status of their efforts to obtain these documents. In addition, defendants have not provided copies of documents that plaintiffs requested over two months ago at Swasey's deposition, including the management contract between IRC Re and Beecher Carlson, despite defendants' representation more than six weeks

ago that defendants were “in the process of gathering” the documents .

Defendants’ have supplemented their interrogatory answers, but material deficiencies remain. Among other things, defendants have provided only sparse and incomplete information concerning the identity of the officers, directors and shareholders of the closely-held corporate defendants and their predecessors, information that is directly relevant to plaintiffs’ claim that IRC Re’s corporate veil should be pierced. Defendants have identified only four persons with knowledge of the facts of this matter -- all present or former IRC officers.

Plaintiffs’ good faith efforts to secure defendants’ compliance with their discovery obligations without Court intervention have been met with empty promises, delay, and last-minute surprises. Defendants’ constant foot-dragging and evasive and incomplete discovery responses have made compliance with the current case deadlines impractical, despite plaintiffs’ diligent efforts. Plaintiffs’ right to obtain relevant, discoverable evidence and their ability to prepare their case for trial will be unfairly prejudiced unless the Court compels defendants to comply with their discovery obligations and extends plaintiffs’ deadline to complete fact discovery (currently January 30, 2009) and related deadlines.

STATEMENT OF FACTS

Nature of the Case

This is an action for fraud, misrepresentation and breach of contract arising out of a managed workers’ compensation insurance program known as Compcare 2000. Complaint ¶¶ 1, 33. Swasey developed the Compcare 2000 program in or around 1994 and underwrote and administered it in through IRC and Occupational Health Underwriters, Inc. (“OHU”), two entities that he controlled. *Id.* at ¶¶ 1, 35. (OHU has merged with and is now known as IRC).

Initially, Swasey used Hanover Insurance Company (“Hanover”) as the direct insurer for

the Compcare 2000 program. Amended Answer ¶33. As structured by Swasey, Hanover was reinsured by several entities, including the American Accident Reinsurance Group (“AARG”), a reinsurance pool managed by Duncanson & Holt (“D&H”). Id. at ¶ 36. Swasey further structured the Hanover Compcare 2000 program such that a fixed portion of the risk ceded to AARG in connection with the program was in turn retroceded to Managed Compensation Insurance Company, Ltd. (“MCIC”), an entity owned and controlled by Swasey. Complaint ¶ 37. MCIC has merged with and is now known as IRC Re.

Later, commencing in 1996, Swasey changed the direct insurer from Hanover to Reliance National Insurance Company and several of its affiliates (collectively, “Reliance”). Id. at ¶ 40. Swasey, through IRC, procured reinsurance for the Reliance Compcare 2000 program and utilized a reinsurance structure similar to the one that had existed under the Hanover program. Amended Answer ¶ 41. In place of AARG, a D&H-managed reinsurance facility known as the Special Accident Reinsurance Facility (“SARF”) became the reinsurer. Plaintiff Trenwick, which was a “fronting company” of SARF that agreed to accept certain reinsurance risk on behalf of SARF, entered into a quota share reinsurance treaty with Reliance. Complaint ¶¶ 42, 50. A fronting company assumes the risk from the reinsured and cedes all or part of the risk to the other members of a reinsurance pool or facility and, sometimes, to other retrocessionaires. Complaint ¶ 29.

In formulating and implementing the reinsurance structure of the Reliance Compcare 2000 program, Swasey and his companies also carried over another key component of the Hanover program, namely, IRC Re’s participation as a retrocessionaire. Id. at ¶ 43. Through a retrocessional reinsurance contract (the “Reinsurance Contract”), 19% of the insurance issued by Reliance under the Compcare 2000 program ultimately was ceded to IRC Re. Amended Answer

¶¶ 6, 55.

D&H agreed on behalf of plaintiffs to participate in the Reliance Compcare 2000 program in reliance on the continued representations of Swasey and his companies that IRC Re would reinsure a portion of the risks ceded by Reliance to Trenwick. Complaint ¶ 67. During Trenwick's 4-year participation in the Compcare Program, over \$4 million in reinsurance premium was paid to IRC Re, allowing Swasey and his companies to reap significant financial benefits at the back end of the program as well as at its front end, where they received commissions and fees for producing and writing the direct policies. *Id.* at ¶¶ 6, 56. IRC Re also posted a letter of credit for the benefit of SARF and requested that D&H confirm to its external auditors the existence of the Reinsurance Contract and IRC Re's 19% share. *Id.* at ¶¶ 64, 65.

In 2004 and 2005, IRC Re was billed for its 19% share of losses then flowing from Trenwick's participation in the Reliance Compcare 2000 Program. Amended Answer ¶¶ 69-71. In February 2006, defendants abruptly disavowed any reinsurance relationship between plaintiffs and IRC Re, and have in bad faith refused to indemnify plaintiffs for the losses properly retroceded to IRC Re under the Reinsurance Contract. Complaint, ¶ 75.

Under the circumstances, either IRC Re is liable for the losses ceded to it and for its bad faith failure to pay, or Swasey, IRC, Inc, and IRC Re are liable for fraud.

Plaintiffs commenced this action on November 16, 2007. Anton Decl., Exh. A. Count 1 of the complaint seeks damages against IRC Re based on its breach of the Reinsurance Contract. Count 2 asserts a claim against IRC Re for unjust enrichment based on its receipt and retention of millions of dollars of reinsurance premium. Counts 3 and 4 seek damages against all defendants for fraud and negligent misrepresentation in inducing plaintiffs to participate in the Reliance Compcare 2000 Program, provide reinsurance to Reliance, and pay millions of dollars

of reinsurance premium to IRC Re. Count 5 asserts a claim against IRC for negligence based on its failure to prepare documentation reducing the Reinsurance Contract to a written document.

Count 6 of the complaint alleges that Swasey and IRC tortiously interfered with the Reinsurance Contract by causing IRC Re to fail to pay the amounts due to plaintiffs. Count 7 alleges that defendants' conduct, including their deceptiveness in inducing plaintiffs to participate in the Compcare 2000 program and to cede a portion of the premium and risk to IRC Re, and their disavowal of the Reinsurance Contract and bad faith refusal to pay ceded losses, constitutes unfair and deceptive acts or practices in violation of Massachusetts General Law Chapter 93A. Count 8 seeks to pierce IRC Re's corporate veil and to render Swasey and IRC liable for IRC Re's obligation to plaintiffs based on, among other things, their disregard of corporate formalities, their complete domination and control over IRC Re, and their undercapitalization of IRC Re.

Case Schedule

The Court held a Scheduling Conference on May 28, 2008, at which time the Court set the following deadlines:

Fact Discovery Completed	January 30, 2009
Expert Disclosures for Non-rebuttal Expert Witnesses	March 2, 2009
Expert Disclosure for Rebuttal Witnesses	March 30, 2009
End Date for All Discovery	April 17, 2008
Motions Due	May 8, 2009
Responses to Motions Due	June 12, 2009

The Court has not scheduled a final pretrial conference or set a trial date. Anton Decl., Exh. A.

Initial Disclosures

The parties agreed to make their Initial Disclosures pursuant to Rule 26(a)(1) on June 20, 2008. Id., Exh. B. At defendants' request, this date was extended to June 24, 2008. Id., Exh. C. By letter dated June 27, 2008, plaintiffs objected to various deficiencies in defendants' Initial Disclosures, including inadequacies in the identification of witnesses and the description of documents. Id., Exh. D. Defendants provided Supplemental Disclosures on June 30, 2008. Id., Exh. E.

On July 15, 2008, defendants produced, in accordance with Rule 26(a)(1), the documents that they may use to support their defenses. Id. Defendants produced a total of 1,664 pages documents at that time, and represented that this production included all documents responsive to plaintiffs' request for documents.

Plaintiffs' Discovery Demands and Defendants' Tardy and Deficient Responses

On June 20, 2008, plaintiffs served defendants with: (1) plaintiffs' First Request for Production of Documents (the "Document Requests"); and (2) plaintiffs' Initial Interrogatories (the "Interrogatories") (together, the "Discovery Demands"). Anton Decl., Exhs. F and G Defendants' answers to plaintiffs' Discovery Demands were due on July 20, 2008. On July 18, 2008, plaintiffs agreed to extend defendants' time respond to the Discovery Demands to July 28, 2008. Id., Exh. H.

Plaintiffs did not receive defendants' responses to the Discovery Demands on July 28, 2008. Accordingly, on July 29, plaintiffs sent an E-mail to defendants' counsel inquiring about the delay. Id., Exh. I. Later that day, defendants served, by E-mail, their answers to plaintiffs'

Interrogatories (the “Interrogatory Answers”) and responses to plaintiffs’ Document Requests (the “Document Responses”) (together, the “Discovery Responses”). Id., Exhs J and K.

Defendants’ Discovery Responses were incomplete and inaccurate and contained vague, generalized objections. Id., Exhs. J and K. For example, defendants asserted in the Document Responses that, with respect to most of the Document Requests, “Defendants have produced responsive documents” – a reference to the 1664 pages of documents defendants had produced on July 15, 2008 in connection with their Rule 26(a) disclosures. Id., Exh. K.

Defendants’ representation in the Document Responses that responsive documents had been produced was false with respect to almost every Request. For example, defendants failed to produce any documents concerning, among other things: IRC Re’s governmental filings (Request No. 6); the identity of the corporate defendants’ officers, directors and shareholders (Request Nos. 7-8); letters of credit posted by IRC Re (Request No. 13); Reliance’s audits of IRC (Request No. 14); audits of IRC Re by Deloitte & Touche or other accounting firms (Request No. 15); IRC Re’s premium registers, checks, and cash receipt journals) (Request No. 16); statements, accounts, and billing documents received from plaintiffs (Request No. 17); meetings and other communications concerning the Reliance Compcare 2000 program (Request Nos. 27-29); and documents concerning the negotiation of the reinsurance structure of the Reliance Compcare 2000 program (Request No. 34). Id., Exh. L.

Moreover, it appeared that defendants had produced only some, but not all, documents in response to other Document Requests despite their assertion that “[d]efendants have produced responsive documents.” These included Request No. 19 (correspondence between the parties concerning the Compcare 2000 program), Request No. 20 (correspondence between the parties concerning IRC Re), Request No. 21 (correspondence between defendants and Reliance

concerning Compcare 2000), Request No. 26 (communications between Swasey and Tracie Pencak of AUL Reinsurance Management Services (“AUL RMS”), and Request No. 31 (documents concerning any objections made by defendants to IRC Re’s status as a retrocessionaire in the Reliance Compcare 2000 Program). Id., Exh. L.

Defendants’ Interrogatory Answers likewise were grossly deficient and provided almost no pertinent factual information. For example, in response to Interrogatory No. 1, which requested the identity of all persons with knowledge of any facts concerning the subject matter of this action, defendants identified only two persons, one of whom is Swasey. Defendants refused to provide any facts in response to Interrogatory No. 6, which sought information concerning the defendants’ affirmative defenses, and instead invoked various boilerplate objections. By way of another example, in response to Interrogatory Nos. 7 and 8, which requested the identity of the corporate defendants’ officers, directors and shareholders, defendants raised the frivolous objection that the requested information is “proprietary, confidential and/or trade secret information.” Id., Exhs. J and L.

**The Parties’ Local Rule 37.1 Conferences
and Defendants’ Continued Failure to Provide Discovery**

On August 20, 2008, plaintiffs’ counsel wrote to defendants’ counsel concerning the gross inadequacies in defendants’ Discovery Responses. Anton Decl., Exh. L. The August 20, 2008 letter detailed, on an item-by-item basis, the glaring and pervasive deficiencies in the Discovery Responses. Id. The letter requested a Local Rule 37.1 conference and proposed several dates and times for the conference. Id., Exh. L.

On August 27, 2008, Christopher Anton of Budd Lerner spoke with Daniel Flynn of Bowditch & Dewey by telephone to arrange the Local Rule 37.1 conference. Flynn stated that he was not available for a conference until September 3, 2008, the deadline for such a conference

under Local Rule 37.1 Id., Exh. M. Anton and Flynn spoke by telephone on September 3, 2008 and numerous times thereafter. In the September 3 discussion, Flynn conceded that many of defendants' Interrogatory Answers were incomplete or otherwise deficient and he agreed that defendants would provide supplemental answers to Interrogatory Nos. 1, 2, 6-12, 16-19, and 21. Anton and Flynn discussed a due date of September 12, 2008 for the supplemental answers, subject to the approval of their respective clients. Id., Exh. N.

In the September 3 conference, Flynn also acknowledged that defendants' Document Responses were incomplete. He stated that defendants would produce additional documents that were in the possession of his office but that were initially withheld from production. Flynn indicated that those additional documents were not voluminous and that he was not aware of any other responsive, non-privileged documents that had not been produced, other than documents in the hands of IRC Re's Bermuda auditors and managers. According to Flynn, Swasey was responsible for obtaining the Bermuda documents. Id., Exh. N.

Anton and Flynn conferred again by telephone on September 9, 2008. Anton pointed out the enormous gaps in defendants' document production and identified a large number of specific document requests for which defendants had produced no documents. This time, Flynn stated that he was unaware of the existence of any other responsive documents, other than the documents that Swasey was endeavoring to obtain from IRC Re's Bermuda auditors and managers. Flynn was unable to provide any indication of when the Bermuda documents would be produced. Id., Exh. N.

Anton and Flynn spoke again on September 11, 2008, at which time Flynn stated that he would endeavor to produce the additional documents he described in the September 3 conference by September 12, as well as defendants' supplemental answers to Interrogatories. Id., Exh. N.

On the morning of September 12, 2008, Flynn called Anton and reported that his office expected to receive later that day from Mr. Swasey some twenty boxes of documents, which would be available for inspection and copying after Flynn's firm reviewed them. Id., Exh. N. Flynn was unable to say whether the documents contained in the twenty boxes were responsive to any of plaintiffs' specific document requests, e.g., documents relating to IRC Re's letters of credit, audit documents, government filings, and banking records. Nor did Flynn provide any reason why defendants had not earlier produced documents. Mr. Flynn also stated on September 12, 2008 that defendants would not be serving their supplemental interrogatory answers on that date. He agreed that the defendants would serve the supplemental answers by 5:00 p.m. on September 15, 2008. Id., Exh. N.

Defendants' revelation of the twenty additional boxes of documents occurred just several days before plaintiffs' two-day deposition of Swasey was to commence and almost seven weeks after defendants' document production was due. As discussed further below, Swasey was scheduled to be deposed on September 17 and 18, 2008, individually and as the corporate defendants' Rule 30(b)(6) designee under deposition notices served on August 8 and August 21, 2008. Id., Exh. O.

Defendants' additional boxes of documents were made available to plaintiffs for copying and Bates-stamping on September 26, 2008, over one week after the initial September 17 session of Swasey's deposition. Id., Exh. P. Although the boxes contained approximately 49,000 pages of documents, many of the documents, including several whole boxes, were unrelated to the Compcare 2000 program and were otherwise unresponsive. At the same time, the boxes did not include any documents responsive to a large number of plaintiffs' outstanding document requests, including IRC Re's government filings, the defendants' banking records, documents

relating to letters of credit posted by IRC Re to secure its reinsurance obligations to plaintiffs, documents relating to Reliance's audits of the Compcare 2000 program, and documents concerning requests to D&H to confirm IRC Re's participation in the Compcare 2000 program to IRC Re's Bermuda auditors.

Defendants also served a written supplemental response to plaintiffs' Document Requests (the "Supplemental Document Responses") on September 26, 2008. Id., Exh. Q. In those Responses, defendants stated that they were producing documents as kept in the regular course of business, but they failed to identify the source of the produced documents, i.e., were all of the documents kept in the regular course of IRC's business, or were some of them kept in the regular course of IRC Re's business, and if the latter, which documents were kept in the regular course of IRC Re's business. Defendants have continued to fail to provide this basic information despite plaintiffs' request. Id., Exh. R.

In the E-mail forwarding the Supplemental Document Responses, counsel for defendants requested an additional extension of time to serve supplemental answers to Interrogatories, from September 26 to October 1, 2008. Id., Exh. P. On October 2, 2008, defendants served supplemental answers to plaintiff's Interrogatories (the "Supplemental Interrogatory Answers"). Defendants' Supplemental Interrogatory Answers contain numerous boilerplate objections and the factual content of those answers is only slightly more detailed than defendants' original Interrogatory Answers. Defendants responded to ten Interrogatories (Nos. 6, 7, 8, 9, 10, 11, 12, 16, 19 and 21) by relying, in whole or in part, on Rule 33(d) and asserting that plaintiffs may ascertain the answers from defendants' business records. Id., Exh. S.

With the exception of several documents that are identified in the Supplemental Interrogatory Answers by Bates number, defendants have not complied with Rule 33(d) by

specifying with any detail the documents that they assert may be reviewed to determine an answer. Moreover, despite defendants' reliance on Rule 33(d) in the Supplemental Interrogatory Answers, plaintiffs have located no documents (or at best insufficient documents) from which answers to most of the Interrogatories in which defendants invoked Rule 33(d) may be ascertained.

As of this date, defendants have not produced the documents in the possession of Beecher Carlson. Defendants have not provided any information concerning the status of their efforts to obtain these documents despite numerous written requests. Id., Exhs. R, T, U, V, W, and X.

The Swasey Deposition

On June 20, 2008, plaintiffs served a notice to take Swasey's deposition on July 8, 2008. Id., Exh. Y. The deposition was postponed at defendants' request. Id., Exh. Z. On August 8, 2008, plaintiffs served a notice for the deposition of defendants IRC and IRC Re, pursuant to Rule 30(b)(6), with respect to a number of specific areas of inquiry. Id., Exh. AA. On August 21, 2008, plaintiffs served a notice for the Rule 30(b)(6) deposition of the document custodians of IRC and IRC Re with regard to, among other things, the maintenance, preservation and storage of defendants' business records, and defendants' efforts to locate documents in response to plaintiffs' Document Demands (including documents in the possession of defendants' Bermuda auditors and managers). Id., Exh. BB.

IRC and IRC Re designated Swasey to testify on their behalf as to each of the matters described in the two Rule 30(b)(6) deposition notices. Id., Exh. CC. The parties ultimately agreed that Swasey's depositions under the June 20, August 8, and August 21, 2008 deposition notices would jointly occur over a two-day period, on September 17 and 18, 2008. Id., Exh. DD.

As a result of defendant's belated disclosure on September 12, 2008 of the twenty boxes of additional documents, the Swasey deposition was re-scheduled for September 17, 2008 and October 16, 2008, to allow time for the defendants to produce and plaintiffs to review the additional documents prior to completing the deposition. Id., Exh. EE.

The initial session of Swasey's deposition individually and as the designee for IRC and IRC Re under both Rule 30(b)(6) deposition notices was held on September 17, 2008. The session yielded only approximately four hours of testimony due to Swasey's tardiness, need for frequent breaks, and inability to continue past 4:40 p.m. Swasey September 17, 2008 deposition, Anton Decl., Exh. FF. Swasey testified, among other things, that he is the President of both IRC entities (id. at 6, 156), that IRC, Inc. has just 11 employees (id. at 162), and that IRC Re, Limited is a captive insurance company having no employees or office of its own (id. at 102-103). Anton Decl., Exh. FF.

Swasey also testified that defendants' search of the offices of IRC for documents responsive to plaintiffs' Document Demands, which resulted in the September 26, 2008 production of more than 20 boxes of documents, did not begin until three or four weeks prior to September 17, 2008 (i.e., between August 20 and 27) (id. at 124-125). In other words, the search for these documents did not begin until at least one month after defendants' discovery responses were due. Further, he testified that defendants' search for electronically stored information was "minimal," and that no effort was made to search even his own electronic mailbox for responsive documents (id. at 159 and 162).

Swasey further testified that Beecher Carlson (or its successor) is the Bermuda manager for IRC Re (id. at 40-43), that IRC Re's business records are in the possession of Beecher Carlson (id. at 98-99), and that he first asked Beecher Carlson for documents responsive to

plaintiffs' Document Demands between August 20 and August 27 (id. at 144-146) -- two months after plaintiffs served their Document Requests.

At the deposition, counsel for plaintiffs requested defendants to produce two categories of documents: (1) the contract between IRC Re and Beecher Carlson, including any amendments; and (2) the minutes of IRC Re's board meetings. (id. at 113-114). Counsel for defendants agreed at the deposition to produce the requested documents. (id. at 114). By letter dated September 19, 2008, counsel for plaintiffs confirmed defendants' agreement to produce the IRC Re/Beecher Carlson contract and the IRC Re board meeting minutes and requested that defendants also produce the contract and any other agreements under which Swasey sold IRC to an entity called National Financial Partners. Id., Exh. T. Counsel for plaintiffs requested that defendants produce these documents at least seven days before the next session of Swasey's deposition, which was at that time scheduled for October 16, 2008. Id., Exh. T.

On October 2, 2008, plaintiffs' counsel requested confirmation from defendants' counsel that defendants would produce the documents requested in plaintiffs' September 19, 2008 letter. Id., Exh. U. On October 8, 2008, plaintiffs' counsel, having received no response, wrote to defendants' counsel to again ask defendants to confirm that they would produce the documents requested in plaintiffs' September 19, 2008 letter. Id., Exh. R.

By E-mail dated October 8, 2008, defendants' counsel simply replied that "[w]e are in the process of gathering the contract between IRC Re and Beecher Carlson, including any amendments, and the minutes for IRC Re's Board Meetings from 1996 to the present." Id., Exh. GG. Plaintiffs' counsel added that "[w]e will forward these documents to you as soon as possible." Id., Exh. GG. By E-mail dated October 10, 2008, plaintiffs' counsel inquired as to when defendants intended to produce those items and requested a response concerning the

agreements by which IRC was sold and the source of the documents produced on September 26, 2008. Id., Exh. V.

Plaintiffs did not receive a response to the October 10 E-mail and, by E-Mail dated October 14, 2008, plaintiffs advised defendants that if defendants were unwilling or purport to be unable to produce all of the requested information, plaintiffs would bring the matter before the Court. Id., Exh. W. Defendants still have not produced any of the documents identified in plaintiffs' September 19, 2008 (and follow-up correspondence). Nor have they identified the source of the documents they produced on September 26, 2008.

On October 21, 2008, counsel for defendants informed plaintiffs' counsel that the Swasey depositions would not take place on October 28 and 29, as then scheduled, because Swasey had been arrested and is in jail pending trial on charges of driving while under the influence of alcohol. Id., Exh. HH. On October 28, 2008, plaintiffs filed a motion for leave to depose Swasey in prison, pursuant to Rule 30(a)(2)(B) and the motion is pending.

Defendants have not produced the documents identified at Swasey's deposition and identified in plaintiffs' September 19, 2008 letter, despite the passage of over six weeks from the time of the request. Nor have defendants produced IRC Re's documents in the possession of IRC Re's Bermuda manager, Beecher Carlson. Id., Exhs. R, T, U, V, W, and X.

Other Pending Discovery

On October 14, 2008, plaintiffs served a 30(b)(6) notice to take the deposition of a representative of Beecher Carlson, IRC Re's agent, and a notice to take the deposition of Amanda Baird of Beecher Carlson. Id., Exhs. II and JJ. In response, counsel for defendants has asserted that Ms. Baird and Beecher Carlson are not within defendants' control. Id., Exh. KK. In support of this position, counsel for defendants has alluded to the contractual relationship

between Beecher Carlson and IRC Re. However, defendants have failed to produce the management contract between those entities, which was specifically requested at Swasey's deposition and confirmed in plaintiffs' September 19, 2008 letter. Id., Exhs. T and FF.

ARGUMENT

POINT I

DEFENDANTS SHOULD BE COMPELLED TO PRODUCE ALL NON-PRIVILEGED DOCUMENTS RESPONSIVE TO PLAINTIFFS' DOCUMENT REQUESTS

A. Defendants Have Not Responded to Plaintiffs' Document Requests in Good Faith

Defendants have made little genuine effort to satisfy plaintiffs' document requests, and even far less effort to do so in a timely fashion. Defendants erroneously asserted in their Document Responses that they had produced all responsive documents in response to most of plaintiffs' Document Demands when, in most instances, no responsive documents whatsoever had been produced. Their initial assertions that they had exhausted their search for documents also proved to be false. Swasey testified at his deposition that defendants did not even begin the search for documents that resulted in the production of twenty additional boxes of documents on September 26, 2008 until a month after their responses to plaintiffs' Document Requests were due. He also testified that defendants conducted only a "minimal" search of electronically stored information, failing, for example, to conduct any search whatsoever of Swasey's E-mails. Swasey dep. at 159 and 162, Anton Decl., Exh. FF.

Where defendants have provided some documents, they have done so in a manner that does not comport with the applicable rules. Their September 2008 "document dump" purports to consist of business records, but defendants have failed to identify the source of those records

among the several defendants. Also, the so-called business records contain huge gaps in terms of relevant correspondence, financial records and other documentation.

Rule 34(b) permits defendants to produce documents as they are kept in the ordinary course of business, but “simply placing documents in boxes and making them available does not conform to the rule.” CooperVision, Inc. v. CIBA Vision Corp., 2007 WL 2264848, *5 (E.D. Tex. 2007) (Anton Decl., Exh. NN). Defendants bear the burden of demonstrating that the documents were produced as maintained. Johnson v. Kraft Foods North America, Inc., 236 F.R.D. 535, 540-541 (D. Kan. 2006).

There are multiple defendants in this case and plaintiffs are entitled to know the source of defendants’ document production. Defendants should be required to amend their Document Responses to identify which defendant’s documents have been produced. If the documents belong to more than one defendant, then defendants should be required to identify by Bates range the documents that were produced by each defendant. Pass & Seymour, Inc. v. Hubbell Inc., 2008 WL 4240490, *3, 6 (N.D.N.Y. 2008) (Anton Decl. Exh. OO).

B. Document Requests: Specific Deficiencies

Request No. 1:

Documents identified or referred to in your answers to Plaintiffs’ interrogatories.

Defendants’ Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs’ Position:

As discussed below in Point IV(B), defendants answered a number of Interrogatories by referring to their document production. Plaintiffs have been unable to locate any responsive

documents containing information responsive to the Interrogatories. Specifically, plaintiffs refer this Court to the discussion in Point IV(C) regarding interrogatories 7, 16 and 19. Defendants' response that they "will produce" responsive documents is therefore, at minimum, misleading.

Request No. 7:

Documents identifying the shareholders, owners and members of each of the following entities from January 1, 1996 to the present: (a) OHU, (b) IRC, Inc, (c) MCIC, (d) IRC Re.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants only provided responsive documents for MCIC for the years 1996-1998 and for IRC Re for the year 1998. Defendants provided no other responsive documents for those two entities. Defendants produced no documents identifying the shareholders, owners and members of OHU or IRC, Inc. The ownership of the corporate defendants and their predecessors is highly relevant to plaintiffs' veil-piercing claim (Count 8) and is reasonably likely to assist plaintiffs in identifying potential witnesses and others with information relevant to the case.

Request No. 8:

Documents identifying the officers and directors of each of the following entities from January 1, 1996 to the present: (a) OHU, (b) IRC, Inc, (c) MCIC, (d) IRC Re.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants only provided responsive documents for IRC Re for 1998 and MCIC for 1996. Defendants provided no other responsive documents for those two entities. Defendants provided no documents identifying the officers and directors of OHU or IRC, Inc. The requested documents are highly relevant to plaintiffs' veil-piercing claim and are reasonably likely to assist plaintiffs in identifying potential witnesses and others with information relevant to the case.

Request No. 6:

Documents filed by or on behalf of IRC Re with any governmental or regulatory entity, including but not limited to audited financial statements.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Despite their Amended Response, defendants have not produced their annual filings with the Bermuda Monetary Authority or their audited financial statements. These documents can be expected to reflect the existence of the Reinsurance Contract and also are relevant to plaintiffs' veil piercing claim, because they will document financial transfers to and from IRC and Swasey.

Request No. 13:

Documents concerning letters of credit posted by IRC Re in connection with the Hanover Compcare 2000 program or the Reliance Compcare 2000 program.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants have not produced a single document responsive to this request. The letter of credit documents called for in this request are evidence of, among other things, IRC Re's agreement to reinsure plaintiffs. As set forth in the complaint, IRC Re posted a \$1 million irrevocable standby letter of credit (the "Letter of Credit") in connection with the Compcare 2000 program in 1999. Complaint, ¶¶ 63-64. The Letter of Credit initially was issued on December 3, 1998 for the benefit of D&H, as agents for AARG. Complaint, ¶ 63. On March 24, 1999, defendants changed the beneficiary of the Letter of Credit to D&H, as agents for SARF, to reflect the change in the reinsurance structure of Compcare 2000 following the transition of the program from Hanover to Reliance. Complaint, ¶ 64. A letter of credit is not something that is taken lightly or that is obtained in a cavalier fashion. As Swasey recognized in his deposition, the party posting a letter of credit (here, IRC Re) must provide collateral to the issuing financial institution, thus tying up its own capital. Swasey dep. at 39-40, Anton Decl., Exh. FF. The documents are relevant to plaintiffs' breach of contract, fraud, and bad faith claims; defendants should be compelled to produce them.

Request No. 15:

Documents, notes, reports, memoranda, financial statements, correspondence and any other communications concerning audits conducted of IRC Re by Deloitte & Touche or any other accounting firm between January 1, 1994 and the present.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

The documents will reflect the existence of the retrocessional reinsurance contract between plaintiffs and IRC Re. Defendants' communications with their auditors and the auditors' reports can be expected to document the Reinsurance Contract, because it was the auditors responsibility to obtain information from the defendants necessary to prepare financial statements accurately showing IRC Re's assets, liabilities, and income. The documents also will show defendants' communications with plaintiffs' agents, D&H and AUL RMS, in which defendants requested that plaintiffs confirm to IRC Re's auditors the details of the Reinsurance Contract, namely IRC Re's 19% participation on the Reliance Compcare 2000 program.

Request No. 16:

Documents concerning IRC Re's receipt of premium during the period from January 1, 1996 to December 31, 2002, including, but not limited to, premium registers, copies of checks, and cash receipt journals.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants provided only three pages of responsive documents: a cover letter from Duncanson & Holt and two copies of a check enclosed with that letter. No ledgers, registers or cash receipt journals have been produced. The documents concerning IRC Re's receipt of premium and how it accounted for that premium in its records are relevant to plaintiffs claims in this matter, including but not limited to its claims for breach of contract (Count 1), unjust enrichment (Count 2) and violations of Chapter 93A (Count 7).

Request No. 17:

Statements, accounts and billing documents received from Plaintiffs in connection with the Reliance Compcare 2000 program.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants provided no responsive documents. The requested billing documents are plainly relevant to this matter, in which plaintiffs are seeking to recover reinsurance receivables due from IRC Re.

Request No. 19

Correspondence between Defendants and Plaintiffs concerning the Reliance Compcare 2000 Program and the Hanover Compcare 2000 program.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants produced very few documents, limited to correspondence enclosing premium bordereaux and correspondence detailing the cost breakdown by participant for a third party administrator. Correspondence between the parties concerning the Compcare 2000 program is relevant to the parties' respective roles in the program, including IRC Re's role as plaintiffs' retrocessionaire. Plaintiffs have produced numerous E-mails between plaintiffs and defendants

for which corresponding copies do not appear in defendants' production. Anton Decl., ¶41, Exh. LL.

Request No. 21:

Correspondence between Defendants and Reliance concerning the Reliance Compcare 2000 Program and the Hanover 2000 Program.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants produced only limited correspondence. Correspondence between Defendants and Reliance concerning the Reliance Compcare 2000 Program and the Hanover 2000 Program is relevant to the parties' respective roles in the program, including IRC Re's role as plaintiffs' retrocessionaire. A glaring example of a responsive document that defendants failed to produce (and that the plaintiffs produced from their agent's files) is a letter dated November 21, 1996 from Cecelia Abraham of Reliance to Dennis Luc of D&H, with a copy to Swasey, in which Abraham recites the parties' understanding that D&H's share of the Reliance Compcare 2000 program is 54%, "with 19% retroceded to MCIC." *Id.*, Exh. MM.

Request No. 23:

Correspondence between Defendants and Beecher Carlson concerning the Reliance Compcare 2000 program and the Hanover Compcare 2000 program.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants provided no responsive documents. Beecher Carlson is IRC Re's Bermuda manager. Swasey testified at his deposition that IRC Re has no employees in Bermuda and that Beecher Carlson conducts its business in Bermuda. Correspondence between defendants and Beecher Carlson concerning the Reliance Compcare 2000 program can be expected to contain relevant, discoverable evidence regarding, among other things, IRC Re's role as plaintiffs' retrocessionaire in connection with the Compcare 2000 program, defendants' receipt of plaintiffs' billing statements and their decision not to pay them, and the extent of the control of Swasey and IRC over the affairs of IRC Re.

Request No. 24:

Account statements, cancelled checks and drafts (front and back), and check books and registers for each and every bank account owned or used by the following entities from January 1, 1996 to the present: (a) OHU, (b) IRC, Inc., (c) MCIC, (d) IRC Re.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants' response is typical of the games played by defendants throughout the discovery process. The twenty boxes of documents tardily produced by defendants in late-September 2008 include an overwhelming amount of registers and checks relating to irrelevant programs having nothing to do with Compcare 2000, including a medical stop loss program run by defendants. The only information regarding bank accounts involving Compcare 2000 was an undated Bank Account authorization form listing accounts set up by IRC, Inc. for the purpose of

CompCare 2000 and two miscellaneous and incomplete general ledgers of MCIC totaling 3 pages.

The bank records of the corporate defendants and their predecessors are relevant to plaintiffs' claims for fraud, breach of contract and unjust enrichment and are necessary to show IRC Re's receipt of premium payments and its disposition of those payments. The bank records also are highly relevant to plaintiffs' veil-piercing claim, as they will shed light on IRC Re's lack of control over its own financial affairs and the manner in which it was dominated by Swasey and IRC Re.

Request No. 25:

Documents concerning the discussions referred to in Swasey's November 7, 2007 letter (see Complaint, ¶77) including, but not limited to correspondence, notes and memoranda.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants provided no responsive documents. As set forth in the complaint, prior to filing this action, plaintiffs demanded payment of the sums due. By letter dated November 7, 2007, Swasey, in a letter forwarded to plaintiffs' agent by Beecher Carlson, refused on behalf of defendants to make payment. Swasey asserted, as to the Reinsurance Contract, that "discussions were had but were never agreed upon, therefore, a signed Retrocessional Agreement does not exist." Complaint, ¶ 77. Documents relating to the discussions referred to in Swasey's November 7, 2007 letter are highly probative of Swasey's claim that a reinsurance contract does not exist.

Request No. 26

Documents concerning all communications between Swasey and Tracie Pencak of AUL RMS.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

This request relates to communications (primarily by E-mail) that took place during January and February 2006 between Tracie Pencak of AUL RMS and Malcolm Swasey concerning the sums due to plaintiffs under the Reinsurance Contract. These communications, referenced in ¶¶ 73-75 of the Complaint, continued until Swasey abruptly disavowed the existence of an agreement between the parties by letter dated February 28, 2006.

Defendants made no effort to comply with this request. As admitted by Swasey, only a minimal search of electronically stored information was conducted by defendants; indeed, no search at all was made of Swasey's E-mail account. Swasey dep. at 162, Anton Decl., Exh. FF. Defendants produced the February 28 letter along with three E-mails (one without the attachment) and one facsimile transmission as their total production of the communications between Pencak and Swasey. In contrast, plaintiffs produced nearly 30 items of correspondence (the majority of which are E-mails with attachments) between Pencak and Swasey that did not appear in defendants' production. These E-mails show that Swasey's sudden disavowal of the Reinsurance Contract followed a lengthy series of exchanges in which Swasey requested information from Pencak and quibbled with her calculations as to the amount due from IRC Re under the Reinsurance Contract, without ever disputing the existence of the Contract.

Request No. 30:

All communications and correspondence between Defendants and all banks or other financial institutions, including, but not limited to Harris Trust and Savings Bank, bank of Montreal, and Bank of N.T. Butterfield, concerning any letter of credit for the benefit of any of the following: (a) Duncanson & Holt, Agents for American Accident Reinsurance Group; (b) Duncanson & Holt, Agents for Special Accident reinsurance Group; or (c) Duncanson & Holt, Agents for American United Life Insurance Company.

Defendants' Amended Response:

Notwithstanding and without waiving the General Objections, Defendants will produce responsive documents, if any, as they are kept in the ordinary course of business, and not arranged in accordance with the numbered requests.

Plaintiffs' Position:

Defendants provided no responsive documents. Communications concerning the letters of credit are highly relevant. IRC Re's posting of a \$1 million irrevocable standby letter of credit to secure its retrocessional obligations under the Reliance Compcare 2000 program is evidence of, among other things, IRC Re's agreement to reinsure plaintiffs.

POINT II

**DEFENDANTS SHOULD BE COMPELLED TO
PRODUCE DOCUMENTS IN THE POSSESSION OF
IRC RE'S BERMUDA MANAGER**

Defendants' counsel represented in September 2008 that defendants were undertaking efforts to obtain for production documents from IRC Re's Bermuda manager, Beecher Carlson. Anton Decl., Exh. GG. Shortly thereafter, Swasey testified that all of IRC Re's business records are in the Beecher Carlson's possession (*id.* at 99) and that he first asked Beecher Carlson for documents responsive to plaintiffs' Document Demands between August 20 and August 27 (*id.* at 144-146), two months after plaintiffs served their Document Requests. To date, defendants still have not produced Beecher Carlson's documents.

A party responding to a request for production of documents under Rule 34 must produce all responsive documents in its “possession, custody or control.” Fed. R. Civ. Proc. 34(a)(1). A party need not have actual possession of documents in order to be deemed in control of them; it is sufficient that the party has a legal right to obtain them. See In re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (D.C. Ill. 1977). The fact that documents are located in a foreign country does not place them out of a party’s control. See Pacific Far East Line, Inc. v. R.J. Reynolds Industries, Inc., 1981 WL 2517 (N.D.Cal. 1981) (compelling production of documents in foreign agent’s possession); McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70 (D.D.C. 1999) (presence of principal/agent relationship establishes control).

Defendants have not asserted let alone established that IRC Re’s business records are outside of their control for purposes of Rule 34 simply because they are in the hands of its Bermuda manager. Defendants have failed to produce IRC’s contract with Beecher Carlson, which may or may not contain provisions regarding access to IRC Re’s books and records. Nevertheless, it would be preposterous to suppose that IRC Re does not have control over those records. Accordingly, defendants should be compelled to produce all documents in Beecher Carlson’s possession that are responsive to plaintiffs’ Document Requests or that are identified or referred to in defendants’ Interrogatory Answers.

POINT III

DEFENDANTS SHOULD BE COMPELLED TO PRODUCE THE DOCUMENTS IDENTIFIED AT SWASEY’S DEPOSITION AND CONFIRMED IN PLAINTIFFS’ SEPTEMBER 19, 2008 LETTER

Defendants should also be compelled to produce the three documents or categories of documents specifically requested during or shortly after Swasey’s September 17, 2008 deposition, namely: (1) the contract between IRC Re and Beecher Carlson (including any

amendments), (2) IRC Re's board meeting minutes from 1996 to present, and (3) any agreements under which IRC, Inc. was sold to National Financial Partners ("NFP"). Swasey Dep. at 154, Anton Decl., Exh. FF. By letter dated September 19, 2008, counsel for plaintiffs confirmed defendants' agreement to produce the IRC Re/Beecher Carlson contract and the IRC Re board meeting minutes and requested that defendants also produce the contract and any other agreements under which Swasey sold IRC to NFP. Id., Exh. T. Defendants have failed to produce these documents despite the passage of over two months since they were specifically requested and despite their assurances that they were "in the process of gathering" them.

The contract between IRC Re and Beecher Carlson is necessary to establish, among other things, the scope of the agency relationship between Beecher Carlson and IRC Re, the nature of Beecher Carlson's duties, and Beecher Carlson's policies and procedures with respect to the storage and maintenance of IRC Re's documents. The IRC Re board meeting minutes may contain information concerning IRC Re's participation in the Reliance Compcare 2000 program, and may reflect the extent to which IRC Re was controlled and dominated by Swasey or IRC. (id. at 60, 105-106). Counsel for defendants agreed at Swasey's deposition to produce the requested documents. (id. at 114). The NFP contract is relevant to the circumstances under which Swasey sold IRC, Inc. It may show that Swasey was well aware of his potential exposure to the claims in this lawsuit, and that he is a biased witness because he may ultimately be liable to NFP for any judgment in this action against IRC.

Over two months have passed since plaintiffs requested copies of these specific documents. Defendants should be compelled to produce them.

POINT IV

DEFENDANTS SHOULD BE COMPELLED TO PROVIDE COMPLETE ANSWERS TO PLAINTIFFS' INTERROGATORIES

Defendants' answers to interrogatories suffer from two flaws that require the Court to deem the interrogatories unanswered: (1) impermissible use of general objections in violation of Rule 33(b)(4); and (2) failure to identify with specificity responsive documents in violation of Rule 33(d). These deficiencies are discussed in Points IV(A) and I(B) below. As required by Local Rule 37.1(b)(4)-(5), Point IV(C) sets forth for each Interrogatory raising an issue to be decided by the Court the text of the Interrogatory, defendants' supplemental response, and plaintiffs' position.

A. Defendants Have Failed To State Objections With Specificity As Required By Rule 33(b)(4)

Rule 33(b)(4) of the Federal Rules of Civil Procedure states that "[t]he grounds for objecting to an interrogatory must be stated with specificity." Fed. R. Civ. P. 33(b)(4). Defendants' boilerplate objections in response to various interrogatories are "obstructionist, . . . frivolous and contrary to federal law." St. Paul Reinsurance Co. Ltd. v. Commercial Financial Corp., 198 F.R.D. 508 (N.D. Iowa 2000).

Bald objections like those made by defendant do not satisfy the requirements of Rule 33(b)(4) and subvert its very purpose. See, e.g., Joseph v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982) ("mere statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection"); Momah v. Albert Einstein Medical Center, 164 F.R.D. 412, 417 (E.D.Pa. 1996) (prefacing every answer with the familiar recitation of boilerplate objections does not satisfy the requirement to state the grounds for an objection with specificity and does not permit the requesting party or the court to ascertain

why or how the request is improper). Where defendants have set forth such general objections, the Court must consider them as not having been made at all, and thus waived. See, e.g., Sabol v. Brooks, 469 F. Supp.2d 324, 328-329 (D.Md. 2006) (failure to make particularized objections constitutes a waiver of those objections).

Defendants' repeated invocation of a litany of boilerplate objections goes beyond mere ignorance of Rule 33(b)(4). Their pervasive use of generalized objections must be recognized as nothing more than an evasive tactic aimed at hindering and delaying plaintiffs' discovery efforts. Such behavior is "deplorable" and has "a virus like potential to corrupt the fairness of our civil justice system." St. Paul Reinsurance Co., 198 F.R.D. at 517.

Equally as troublesome is defendants' practice of both asserting multiple objections but "notwithstanding those objections," providing an answer. This practice is improper and only serves to mislead both plaintiffs and the Court. See Guzman v. Irmadan, Inc., 249 F.R.D. 399 (S.D.Fla. 2008). Like defendants' failure to make particularized objections, defendants' practice of objecting and yet answering interrogatories is another improper tactic employed by defendants to render discovery meaningless.

B. Defendants Have Failed To Identify With Specificity Responsive Documents As Required By Rule 33(d)

Defendants also have blatantly ignored the plain language of Rule 33(d) in their responses to interrogatories 7, 8, 16, and 19. Rule 33(d) permits a party to refer to documents in response to an interrogatory, but only if they meet the rule's requirements including their obligation to identify with sufficient detail the responsive documents. Defendants may not under the rule simply refer to business records en masse, leaving it to plaintiffs to sift through the nearly 50,000 documents defendants produced for the answer to each individual interrogatory where the Rule was invoked. Morin v. Nationwide Federal Credit Union, 229 F.R.D. 364, 366

(D. Conn. 2005) (reference to documents that were voluminous in number, were not Bates-labeled, and that contained a range of categories and correspondence, records, notes, documentation on numerous topics was inadequate response under Rule 33(d)). Referring to business records “without specifying particular documents is ‘an abuse of the option’” provided by Rule 33(d) and must not be tolerated. Bonds v. District of Columbia, 93 F.3d 801, 811 (D.C. Cir. 1996) (citing Fed. R. Civ. P. 33(c) Advisory Committee’s Notes (1980 Amendment)).

C. Specific Interrogatories: Deficiencies

Interrogatory No. 2:

Identify all persons who have knowledge of any facts concerning the subject matter of this action, set forth a brief summary of facts claimed by defendants to be known by each such person and identify any documents concerning the substance of each such person’s knowledge.

Defendants’ Supplemental Answer:

Malcolm C. Swasey, President, IRC, Inc. Mr. Swasey has knowledge of the following subject matter and documents: IRC, Inc.’s management of the OHU CompCare 2000 program; treaties associated with the OHU CompCare 2000 program; IRC Inc.’s communications regarding the OHU CompCare 2000 program, with the Reliance National Insurance Company, Duncanson & Holt, Inc., Special Accident Reinsurance Facility, AUL Reinsurance Management Services, and American Accident Reinsurance Group; IRC, Inc.’s communications, if any, with Plaintiffs; IRC, Inc.’s negotiations, if any, with Plaintiffs; the corporate structure of IRC, Inc. and IRC Re, Limited; and IRC Re, Limited’s participation in the OHU CompCare 2000 program.

Michael S. McGrath, Treasurer, IRC, Inc. Mr. McGrath has knowledge of the following subject matter and documents: IRC, Inc.’s management of the OHU CompCare 2000 program; treaties associated with the OHU CompCare 2000 program; IRC Inc.’s communications regarding the OHU CompCare 2000 program with Reliance National Insurance Company, Duncanson & Holt, Inc., Special Accident Reinsurance Facility, AUL Reinsurance Management Services, and American Accident Reinsurance Group; IRC, Inc.’s negotiations, if any, with Plaintiffs; and the corporate structure of IRC, Inc.

Donna Bowden, Assistant Vice President, IRC, Inc. until October 25, 2005. Ms. Bowden has knowledge of the following subject matters: IRC Inc.’s management of the OHU CompCare 2000 program; some of IRC, Inc.’s communications regarding the Reliance CompCare 2000 program with Reliance National Insurance Company and Duncanson & Holt, Inc.; and the corporate structure of IRC, Inc. Ms. Bowden’s last known address is 29 Harbor Street, Manchester, Massachusetts 01944.

Joseph Cifuni, Chief Financial Officer, IRC, Inc. Mr. Cifuni has knowledge of the following subject matters: financial aspects of IRC, Inc.'s management of the OHU CompCare 2000 program; financial aspects of treaties associated with the OHU CompCare 2000 program; some of IRC, Inc.'s communications regarding the OHU CompCare 2000 program with Reliance National Insurance Company, Duncanson & Holt, Inc. and American Accident Reinsurance Group; and the corporate structure of IRC, Inc.

Plaintiffs' Position:

Defendants' answer is incomplete and evasive. Defendants have named only four persons having knowledge of any of the facts of this case. All four individuals are identified as current or former officers of IRC, Inc. Their relationship if any with IRC Re is not stated. Swasey testified at his deposition that MCIC and IRC Re used Bermuda managers to perform various tasks in connection with the CompCare 2000 program, yet neither the managers nor any of their employees are mentioned. See Swasey Dep. p. 41, Anton Decl. Exh. FF. Swasey also named other individuals at his deposition whom do not appear in the answer to this interrogatory. See Swasey Dep. pp. 90, 94-95, Anton Decl. Exh. FF.

Defendants' failure to identify any present or former employees at Hanover, Reliance, or Deloitte & Touche and other entities identified in the complaint and who are well known to defendants is further evidence of defendants' failure to respond in good faith to this interrogatory. Plaintiffs require a complete answer to this interrogatory to assist them in identifying potential witnesses and individuals who may have discoverable information.

Defendants also ignored the portion of the interrogatory which asked them to "identify any documents concerning the substance of each such person's knowledge." If the reason no response is given is that no such documents exist (a highly doubtful supposition), defendants should have stated as much.

Interrogatory No. 7:

Identify the shareholders, owners and members of each of the following entities from January 1, 1996 to the present: (a) OHU; (b) IRC; and (c) IRC Re.

Defendants' Supplemental Answer

Defendants object to this interrogatory to the extent that it is compound. Defendants further object to this interrogatory to the extent that it seeks information which is neither relevant nor reasonably likely to lead to the discovery of admissible evidence. Notwithstanding and without waiving the foregoing objections, Defendants state as follows:

Shareholders, owners and members of OHU: Malcolm Swasey; Donna Bowden; Michael McGrath.

Shareholders, owners and members of IRC, Inc.: Malcolm Swasey; National Financial Partners, 340 Madison Avenue, 19th Floor, New York, NY 10173, Phone: (212) 301-4000.

Shareholders, owners and members of MCIC: Malcolm Swasey; Donna Bowden; Michael McGrath; Joseph Cifuni.

Shareholders, owners and members of IRC, Re: Malcolm Swasey; Michael McGrath; Joseph Cifuni; Donna Naugler, 29 Harbor Street, Manchester, MA 01944; Bob Soleau, Diversified Group Brokerage, 369 North Main Street, Marlborough, CT 06447; Donald Van Dyke, DW Van Dyke Company, Inc., 195 Danbury Rd. #B200, Wilton, CT 06897; Donald Dreilich, DW Van Dyke Company, Inc., 195 Danbury Rd #B200, Wilton, CT 06897; Frederick Miller, DW Van Dyke Company, Inc., 195 Danbury Rd. #B200, Wilton, CT06897.

Defendants further state that as the answer to this interrogatory can be ascertained from the business records of Defendants and the burden of ascertaining this information is substantially the same for Plaintiffs, pursuant to Fed. R. Civ. P. 33(d) Defendants will produce their files relating to the subject matter of this lawsuit.

Plaintiffs' Position

Defendants impermissibly (1) set forth general objections without providing explanation as to why those objections apply, (2) provide answers notwithstanding their objections, and (3) fail to specify the documents that may be reviewed to determine an answer, as required by Rule 33(d).

Defendants' answer is also incomplete on its face. Plaintiffs asked defendants for the identity of shareholders, owners and members from 1996 to present. This information is highly

relevant to plaintiffs' veil-piercing claim (Count 8) and may also assist plaintiffs in identifying potential witnesses and others with relevant information. Defendants' answer provides only one list per entity, resulting in confusion as to whether defendants are providing one list of all shareholders from 1996 to present, a list of current shareholders, or a list of shareholders from some year other than the current one.

Requiring plaintiffs to search through nearly 49,000 pages to determine the answer to the within interrogatory can hardly be considered "substantially the same burden" as defendants providing lists of their shareholders, owners and members, information that should be readily available to the corporate defendants. Moreover, upon reviewing the documents, plaintiffs located shareholder lists for MCIC only for the years 1996-1998 and for IRC Re only for the year 1998. Aton Decl. ¶ 44. Plaintiffs found no other documents responsive to this interrogatory in defendants' production.

Interrogatory No. 8:

Identify the officers and directors of each of the following entities from January 1, 1996 to the present: (a) OHU; (b) IRC, Inc.; (c) MCIC; and (d) IRC Re.

Defendants' Supplemental Answer:

Officers and directors of OHU: Malcolm Swasey; Donna Bowden; Michael McGrath.

Officers and directors of IRC, Inc.: Malcolm Swasey; Donna Bowden; Michael McGrath; Joseph Cifuni; Lori M. Leiser, 500 W. Madison Street, Chicago, Illinois 6066; Elliot M. Holtz, 340 Madison Avenue, New York, New York 10173; Salvatore K. D'Amato, One Corporation Way, Peabody, Massachusetts 01960; Robert S. Zuccaro, 787 Seventh Avenue, New York, New York 10019.

Officers and directors of MCIC: Malcolm Swasey; Donna Bowden; Michael McGrath; Joseph Cifuni.

Officers and directors of IRC Re: Malcolm Swasey; Donna Bowden; Michael McGrath; Joseph Cifuni.

Defendants further state that as the answer to this interrogatory can be ascertained from the business records of Defendants and the burden of ascertaining this information is substantially the same for Plaintiffs, pursuant to Fed. R. Civ. P. 33(d) Defendants will produce their files relating to the subject matter of this lawsuit.

Plaintiffs' Position

Plaintiffs are entitled to know the identity of the corporate defendants' officers and shareholders from the commencement of the Reliance Compcare 2000 program through the present. It is reasonably likely that members of the corporate defendants' management will have knowledge and information concerning this matter. Moreover, the identity of the officers and directors is relevant to plaintiffs' veil-piercing claim. Defendants' answer fails to differentiate between the years 1996-2008. Swasey testified at his deposition that IRC Re's board members have changed over the years, but defendants' answer does not reflect that fact. See Swasey Dep 61: 11-13; 100:13-16, Anton Decl., Exh. FF.

Again, plaintiffs attempted to locate documents responsive to this interrogatory by searching the nearly 50,000 documents produced by defendants. Plaintiffs found information regarding only officers and directors for IRC Re only for 1996 and 1998 and MCIC for 1996. Aton Decl. ¶ 44.

Interrogatory No. 16:

State the basis for the denial in Defendants' Amended Answer of the allegation in paragraph 58 of the Complaint that "[n]either Swasey nor any other participants in the [Reliance] Compcare [2000] program objected to the description of MCIC as retrocessionaire." In your answer to this interrogatory, set forth the identity of the person(s) who objected to MCIC's status as a retrocessionaire, the date, time and place of the objection, the substance of the objection that was made, and the identity of the person to whom the objection was communicated.

Defendants' Supplemental Answer:

Defendants object to this interrogatory to the extent that it seeks information which is privileged from discovery pursuant to the attorney-client privilege and/or the work-product doctrine. Notwithstanding and without waiving the foregoing objections, Defendants state as follows:

Defendants objected to MCIC's status as a retrocessionaire in telephone conversations with and correspondence to AUL/RMS and to Christopher Anton, Esquire. Documents relevant to Defendants' objection include, but are not limited to, documents Bates Labeled IRC 00354-00355; 00358-00392. Defendants do not have knowledge at this time whether any other participants in the Reliance program objected to the description and will supplement their answer to this interrogatory as information becomes available.

Defendants further state that as the answer to this interrogatory can be ascertained from the business records of Defendants and the burden of ascertaining this information is substantially the same for Plaintiffs, pursuant to Fed. R. Civ. P. 33(d) Defendants will produce their files relating to the subject matter of this lawsuit.

Plaintiffs' Position:

Defendants impermissibly (1) set forth general objections without providing explanation as to why those objections apply, (2) provide answers notwithstanding their objections and (3) fail to specify the documents that may be reviewed to determine an answer, as required by Rule 33(d). Defendants also assert the attorney-client privilege and/or the work-product doctrine, but have failed to provide a privilege log, despite their agreement to do so. Anton Decl., Exh. H. Such failure to timely provide a privilege log constitutes waiver of any privilege. Lugosch v. Congel, 219 F.R.D. 220, 239 (N.D.N.Y. 2003).

Defendants' assertion that there is no reinsurance contract is a central issue in this case. Plaintiffs are unaware of any objections to IRC Re's status as a retrocessionaire until long after IRC Re accepted and retained the full reinsurance premium, IRC Re changed the beneficiary of the letter of credit at plaintiffs' request, IRC Re requested plaintiffs to confirm the basic contract terms to IRC Re's Bermuda auditors, and plaintiffs demanded payment. Plaintiffs are entitled to know the basis for defendants' denial that neither Swasey nor anyone else ever objected to MCIC's status as a retrocessionaire. If such denials are reflected in documents (other than the post-demand correspondence referenced in the interrogatory answer), defendants should be required to identify those documents.

Interrogatory No. 19:

State the basis for the denial in Defendants' Amended Answer of the allegation in paragraph 72 of the Complaint that "IRC Re received AUL RMS's statements and did not object to them or to the amounts shown on those statements as due." In your answer to this interrogatory, set forth the identity of any person(s) who objected, the date, time and place of the objection, the substance of the objection that was made and the identity of the person to whom the objection was communicated.

Defendants' Supplemental Answer:

Defendants object to this interrogatory to the extent that it seeks information which is privileged from discovery pursuant to the attorney-client privilege and/or the work-product doctrine. Notwithstanding and without waiving the foregoing objections, Defendants state as follows:

Defendants objected to AUL RMS's statements in numerous telephone conversations with and correspondence to AUL/RMS and to Christopher Anton, Esquire. Defendants cannot recall the specific time and place of such calls. Documents relevant to Defendants' objection include, but are not limited to, documents Bates labeled IRC00354-00355; 00358-00392.

Defendants further state that as the answer to this interrogatory can be ascertained from the business records of Defendants and the burden of ascertaining this information is substantially the same for Plaintiffs, pursuant to Fed. R. Civ. P. 33(d) Defendants will produce their files relating to the subject matter of this lawsuit.

Plaintiffs' Position:

Defendants impermissibly (1) set forth general objections without providing explanation as to why those objections apply, (2) provide answers notwithstanding their objections and (3) fail to specify the documents that may be reviewed to determine an answer, as required by Rule 33(d). Although defendants state that they cannot recall the time and place of calls, they say nothing about the substance of those calls. Defendants' answer to this interrogatory is incomplete.

Defendants' assertion that such information can be obtained from defendants' business is misleading. Plaintiffs are unable to locate any responsive documents in defendants' production

in addition to those identified by Bates number in their interrogatory answer. The Bates-numbered documents consist of nothing more than correspondence to plaintiffs' attorneys.

POINT V

THE TIME FOR PLAINTIFFS TO COMPLETE DISCOVERY AND RELATED DEADLINES SHOULD BE EXTENDED.

Local Rule 16.1(g) permits modification of the discovery order upon a showing of good cause. Cause exists to extend the January 30, 2009 discovery deadline and related deadlines for 90 days for several reasons. First, the defendants' delays in meeting their discovery obligations have made plaintiffs' compliance with the existing case schedule impractical. For example, after advising plaintiffs on July 28, 2008 that defendants' production of approximately 1,500 pages of documents as part of their Initial Disclosures constituted the entirety of their production, defendants informed plaintiffs almost seven weeks later, on September 12, 2008, that they would be producing another 20 boxes of documents.

As discussed above, defendants still have failed to identify the owners, officers and directors of the corporate defendants and their predecessor companies, have yet to produce their banking records and documents relating to the letters of credit, have yet to produce many other categories of documents and fully answer the Interrogatories, and still have not produced IRC Re's documents, which Swasey maintains are in the possession of Beecher Carlson. Swasey's deposition currently is delayed due to his incarceration. Even if defendants were to finally and suddenly comply with their document and interrogatory discovery obligations, it is unrealistic and potentially prejudicial for plaintiffs to have to complete depositions in the very compressed time frame created by defendants' intransigence.

Second, plaintiffs have been attempting in good faith to persuade the defendants to comply with their discovery obligations and have been diligently pursuing discovery in spite of the defendants' delays. Third, the requested extension will cause no prejudice to defendants. Finally, plaintiffs do not believe that the extension will significantly delay the disposition of this case. A final pretrial conference has not been scheduled and no trial date has been set.

POINT VI

PLAINTIFFS ARE ENTITLED TO REASONABLE EXPENSES INCURRED IN MAKING THIS MOTION

Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure requires the Court to award to a successful movant its reasonable expenses incurred in making the motion, including attorneys' fees:

(5) Payment of Expenses; Protective Orders

(A) If the motion is granted - or if the disclosure or requested discovery is provided after the motion was filed - the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party of attorney advising the conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorneys' fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosures, response or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. Proc. 37(a)(5)(A) (emphasis added). An award of attorneys' fees and expenses is mandatory under the rule unless defendants can demonstrate that one of the enumerated exceptions applies.

There is no justification for defendants' failure to meet their basic discovery obligations. They have had five months from the time plaintiffs served their Discovery Demands to provide complete responses. They misrepresented that they produced all responsive documents in connection with their initial Rule 26(a)(1) disclosures, only to dump twenty boxes of random business records on plaintiffs on the eve of Swasey's deposition. Defendants made almost no effort to locate and produce electronically stored information, and did not even make an effort to locate documents in their own possession and in the possession of IRC Re's Bermuda manager until weeks after the production of those documents was due. Plaintiffs have attempted in good faith to secure defendants' compliance with their discovery obligations but those efforts have been met with obfuscation and delay. An award of plaintiffs' reasonable attorneys' fees and expenses in making this motion is just and appropriate under the circumstances of this case.

In the event the Court grant plaintiffs' motion, plaintiffs respectfully request that they be awarded their reasonable attorneys fees and expenses and be permitted to submit to the Court, on notice to defendants, an affidavit of services rendered to assist the Court in determining the appropriate amount of the award, and a proposed form of Order awarding fees and expenses.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court enter an Order in the form submitted herewith:

(1) compelling defendants to produce the following documents in response to plaintiffs' Document Requests within 14 days:

(a) Documents identified or referred to in any Interrogatory Answer (Request No. 1);

(b) Documents identifying all shareholders, owners and members of each of the following entities from January 1, 1996 to the present: (i) OHU, (ii) IRC, Inc, (iii) MCIC, and (iv) IRC Re (Request No. 7);

- (c) Documents identifying all officers and directors of each of the following entities from January 1, 1996 to the present: (i) OHU, (ii) IRC, Inc, (iii) MCIC, and (iv) IRC Re (Request No. 8);
- (d) IRC Re's filings with governmental and regulatory authorities for the period from 1996 to the present (Request No. 6);
- (e) Documents concerning letters of credit posted by IRC Re in connection with the Hanover Compcare 2000 program or the Reliance Compcare 2000 program (Request No. 13);
- (f) Documents and communications concerning the audits of IRC Re by Deloitte & Touche, from 1996 to the present (Request No. 15);
- (g) IRC Re's premium registers, copies of checks, and cash receipt journals reflecting its receipt of premium during the period from January 1, 1996 to December 31, 2002 (Request No. 16);
- (h) Statements, accounts and billing documents received from plaintiffs or their agents in connection with the Reliance Compcare 2000 program (Request No. 17);
- (i) Correspondence between defendants and plaintiffs concerning the Reliance Compcare 2000 Program and the Hanover Compcare 2000 program (Request No. 19);
- (j) Correspondence between defendants and Reliance concerning the Reliance Compcare 2000 Program and the Hanover 2000 Program (Request No. 21);
- (k) Correspondence between defendants and Beecher Carlson concerning the Reliance Compcare 2000 program and the Hanover Compcare 2000 program (Request No. 23);
- (l) Account statements, cancelled checks and drafts (front and back), and check books and registers for each and every bank account owned or used by the following entities from January 1, 1996 to the present: (i) OHU, (ii) IRC, Inc., (iii) MCIC, and (iv) IRC Re (Request No. 24);
- (m) Documents concerning the discussions referred to in Swasey's November 7, 2007 letter to Christopher P. Anton, Esq. (Request No. 25);
- (n) Documents and communications between Swasey and Tracie Pencak of AUL RMS including attachments (Request No. 26); and

(o) Communications between defendants and any financial institutions concerning any letter of credit for the benefit of Duncanson & Holt as agents for the American Accident Reinsurance Group or the Special Accident Reinsurance Facility (Request No. 30).

(2) Directing defendants to supplement their written Document Responses within 14 days to identify the source of all documents produced by defendants, including the documents contained in the twenty boxes of documents produced by defendants on or about September 26, 2008.

(3) Compelling defendants to produce within 14 days all documents in the possession of Beecher Carlson (or any successor) that are responsive to plaintiffs' Document Requests or that are identified or referred to in any Interrogatory Answer.

(4) Compelling defendants to produce within 14 days the following documents:

(a) The contract between IRC Re and Beecher Carlson (including any amendments);

(b) IRC Re's board meeting minutes from 1996 to the present; and

(c) The agreements under which IRC, Inc. was sold to National Financial Partners.

(5) Compelling Defendants to provide full and accurate answers to the following Interrogatories within 14 days: Interrogatory No. 2; Interrogatory No. 7; Interrogatory No. 8; Interrogatory No. 16 and Interrogatory No. 19.

(6) Extending plaintiffs' time to complete discovery and related deadlines for 90 days.

(7) Granting plaintiffs' request for attorneys' fees and expenses in an amount to be determined upon plaintiffs' submission of an affidavit of services rendered.

(8) Granting such other and further relief as is just and proper.

Respectfully submitted,

TRENWICK AMERICA REINSURANCE
CORPORATION AND UNUM LIFE
INSURANCE COMPANY OF AMERICA

By their attorneys,

/s/ Christopher M. Tauro
Lawrence G. Cetrulo BBO #080000
Christopher M. Tauro BBO #565086
Michael J. Cahalane BBO# 664872
CETRULO & CAPONE, LLP
Two Seaport Lane, 10th Floor
Boston, MA 02210
(617) 217-5500 (telephone)
(617) 217-5200 (facsimile)

Joseph J. Schiavone
Jeffrey S. Leonard
Christopher P. Anton
BUDD LARNER, P.C.
150 John F. Kennedy Parkway
Short Hills, NJ 07078
(973) 379-4800 (telephone)
(973) 379-7734 (facsimile)

Dated: November 26, 2008
Boston, Massachusetts