

Dana L. Hofstetter in Support of Response for Expenses ("Affidavit of Dana L. Hofstetter"), the Memorandum below and the record.

MEMORANDUM

1. Procedural Background Summary

Claimant served Respondent's counsel with its First Set of Interrogatories and Requests for Production on or about July 1, 2010. On or about August 2, 2010, with settlement discussions making progress, Respondent's counsel requested and obtained an extension of time to respond to the Discovery Requests until August 16, 2010. *Affidavit of Dana L. Hofstetter*, Exhibit A. Claimant's counsel later granted a further one week extension of time until August 23, 2010, subject to Respondent counsel's agreement to "allow corresponding additional time if necessary for [Claimant's counsel] to file a Motion to Compel." *Id.*, Exhibit B. Claimant's counsel filed and served Discovery Responses on August 23, 2010. *Id.*

On or about August 24, 2010, Claimant's counsel called Respondent's counsel and demanded supplemental responses by August 31, 2010. *Affidavit of Dana L. Hofstetter*. Claimant's counsel did not inquire when Respondent would be able to provide supplemental Discovery Responses or otherwise confer with Respondent's counsel about the matter. *Id.* Claimant's counsel followed up with a August 25, 2010, letter reiterating the demand to receive supplemental Discovery Responses by August 31, 2010. *Affidavit of Dana L. Hofstetter*, Exhibit C.

On September 1, 2010, Respondent's counsel emailed Claimant's counsel requesting agreement to extend trial scheduling. *Affidavit of Dana L. Hofstetter*, Exhibit D. Nevertheless, that same day, Claimant's counsel apparently proceeded to make arrangements to file and serve the subject Motion to Compel. By the Court's July 9, 2010, Order Granting Motion to File Amended Notice of Claim, the discovery deadline in the Subcase had been extended to September 13, 2010.¹ Thus, based on the agreement of counsel to extend this deadline by one week if necessary for a Motion to Compel, Respondent's Motion to Compel could have been filed as late as September 6, 2010 for a regularly scheduled hearing on September 20, 2010, or even later, if an expedited hearing would have been requested. Thus, at the time he proceeded with the Motion to Compel, Claimant's counsel was not under a deadline to do so and was aware that an extension of the trial date would be sought and that, in any event, the Discovery Responses could be timely supplemented even under current scheduling up to September 13, 2010.

In summary, the procedural history establishes that Claimant's counsel submitted its Motion to Compel and associated Motion for Expenses, well before the effective deadline for such Motions and after receiving a request to stipulate to extend the trial scheduling, which was subsequently agreed to. Accordingly, Claimant's counsel proceeded to file the Motion to Compel with the full realization that it ultimately might (and did) prove unnecessary.

¹ Apparently, Claimant's counsel forgot that the extension of the discovery deadline by 2 weeks to September 13, 2010, was made to address prejudice to Respondent as a result of the Amended SRBA Claim being introduced in the case at a procedurally late stage.

2. The threshold requirement for the award of expenses under I.R.C.P. 37(a)(4) of "conduct necessitating the Motion to Compel" is not satisfied as the Motion to Compel could have been avoided and, in the end, did not accomplish anything.

I.R.C.P., 37(a)(4) provides for the award of expenses in connection with a Motion to Compel against the party or counsel whose "conduct necessitated the motion." For several reasons, the subject Motion to Compel was unnecessary and could have been avoided by Claimant's counsel.

The entire need for the Motion to Compel could have been avoided in the first instance if, Claimant's counsel had "in good faith conferred or attempted to confer with the party ... in an effort to secure the disclosure without court action." I.R.C.P. 37(a)(2). Claimant counsel's efforts in this regard, as reflected in his letter of August 25, 2010, constituted more of a "demand" than a good faith attempt to secure the information without court action. *Affidavit of Dana L. Hofstetter*. If the matter had been discussed, perhaps a date certain could have been agreed upon for the disclosure or even the eventual agreement to extend case scheduling could have been realized earlier. *Id.* In any event, supplementation would have been required under the existing scheduling by September 13, 2010. In the circumstances presented here, first efforts were not undertaken by Claimant's counsel, as required, to secure the disclosure through agreement without court action.

Respondent's proposal of extension of the trial date and case scheduling, a proposal that Claimant eventually accepted, also raises questions about the ultimate necessity of the Motion to Compel. Why did Claimant's counsel proceed with the

Motion to Compel once the proposal to extend the trial date was made? The eventual agreement to extend the trial date mooted any need for the Motion to Compel.

The ultimate outcome of Claimant's Motion to Compel also establishes its ill-conceived nature and lack of necessity. While the Court granted the Motion to Compel, the deadline for the required supplemental disclosure is December 31, 2010 in view of stipulated case re-scheduling. This deadline is also the same as the discovery deadline under the new scheduling. In view of Claimant's agreement to case re-scheduling and this new discovery deadline, it appears that the Motion to Compel actually did not accomplish anything and was wholly unnecessary. Claimant counsel's use of the Motion to Compel process to accomplish apparently nothing other than the imposition of sanctions is entirely inappropriate.

3. Since opposition to the Motion to Compel was substantially justified and other circumstances make an award of expenses unjust, expenses under Rule 37(a)(4) should not be granted.

Respondent's counsel filed a Motion to Vacate and Reset Trial when after about a week no response to the trial extension proposal had been received. *Affidavit of Dana L. Hofstetter*. In light of the pending Motion to Vacate and Reset Trial, Respondent's opposition to the Motion to Compel was wholly justified. As was borne out, trial rescheduling mooted any urgent need for discovery supplementation.

Further, even without the trial rescheduling, the discovery deadline of September 13, 2010, scheduled to accommodate Respondent's discovery needs in light of the Amended Claim, had not yet passed in the case and supplementation by this deadline was still possible. As discussed at hearing, to the extent that the trial date was

not extended, Respondent's counsel fully intended to pursue the necessary information and supplement discovery responses in accordance with applicable deadlines. *Affidavit of Dana L. Hofstetter*. In light of the intention to seek case rescheduling or, alternatively, supplement by applicable deadlines, Respondent's opposition to the Motion to Compel was justified.

Claimant's decision to proceed with the Motion to Compel before the September 13, 2010 discovery deadline had passed, after trial re-scheduling was proposed, and, even after Respondent decided to agree to trial re-scheduling also make an award of expenses "unjustified under the circumstances" and precluded by Rule 37(1)(4), I.R.C.P.

4. Conclusion

For the foregoing reasons, Respondent respectfully requests that Claimant's Motion for Expenses be denied.

DATED this 8th day of October, 2010.

HOFSTETTER LAW OFFICE, LLC

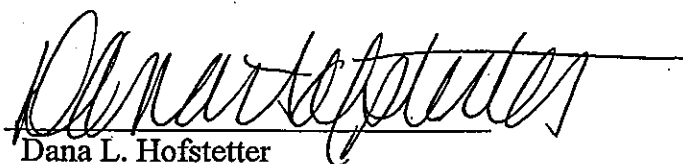

Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2010, I caused to be served a copy of the foregoing on the following person(s) by the method(s) indicated below:

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