UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF THE CLASS' MOTION TO COMPEL RE RULE 30(B)(6) DEPOSITION ON HOUSEMAIL TOPIC

Lead plaintiffs and the Class respectfully move this Court for an order compelling defendant Household International, Inc. and Household Finance Corporation (collectively, "Household") to provide narrative responses under oath to designated questions and for sanctions. At issue is Household's failure to designate a knowledgeable witness on a topic within the Rule 30(b)(6) Housemail deposition notice, specifically on the topic of the general policy for retention of Housemail files in the case of litigation. Although Household agreed to designate and produce a witness on this topic, its witness (Christine Cunningham) was unable to answer basic questions about the policy, such as whether service of a summons triggered a document retention hold or whether there was a time frame in which a directive to hold documents should be issued after receipt of a summons. During the meet and confer, Household offered, and plaintiffs agreed to accept, narrative responses in a suitable evidentiary form instead of proceeding via deposition. Household has since gone back on this offer. Accordingly, plaintiffs bring this motion.

I. PRELIMINARY STATEMENT

At the October 26, 2005 status conference, the Court ordered a Rule 30(b)(6) deposition on the subject of Housemail in order to provide evidence on possible spoliation of Housemail files and Household's ability to produce such files in this litigation. On October 27, 2005, plaintiffs served their Rule 30(b)(6) deposition notice on the Housemail issues. *See* Exhibit A to the Declaration of D. Cameron Baker in Support of the Class' Motion to Compel Re Rule 30(b)(6) Deposition on Housemail Topic and Compliance with Local Rule 37.2 ("Baker Decl."). A topic within the notice was the subject of "holds" placed on the Housemail system as the result of litigation. *See id.*, Subject No. 1(k). In response to the notice, "Household designate[d] Christine Cunningham to testify regarding Subject Matter No. 1(k) with regards to the general policy(ies) on the preservation of Housemail documents as a result of pending litigation." Baker Decl., Ex. B at 12. By letter to the

Court dated November 22, 2005, Household represented to the Court that Ms. Cunningham "is prepared to testify as to these subjects on December 2, 2005." Baker Decl., Ex. C.

During the December 2, 2005 deposition, Ms. Cunningham was asked questions regarding the general policy, including whether service of a summons under the general policy for retaining documents triggers a directive to retain documents and the time frame in which a directive was to be issued upon receipt of a summons.

> Q: Under the policy for retaining documents as it pertained to Housemail, was there any time frame in which a directive was to be issued upon receipt of a summons?
>
> * * *
>
> Mr. Sloane: You're asking a general policy, right?
>
> Mr. Baker: Yes.
>
> Witness: I don't know what it means on receipt of a summons.
>
> * * *
>
> Q: Do you have any understanding as to whether the service of a summons under the general policy for retaining documents triggers a directive to retain documents?
>
> A: I'm not sure. No, I don't have an understanding of that.

Baker Decl., Ex. D at 77:3-78:8.

Following the deposition, plaintiffs via letter raised the issue of Ms. Cunningham's inability to provide other responsive information within the Housemail deposition notice. *See* Baker Decl., Ex. E. In response, Household proposed that if plaintiffs identified areas where Ms. Cunningham did not provide responsive information, Household would provide written answers in suitable evidentiary form. Baker Decl., Ex. F. Plaintiffs accepted this proposal as to the "summons" issue discussed above. *See* Baker Decl., Ex. G.

However, Household initially took the position that because plaintiffs refused this offer as to other topics, it would not provide the summons information in narrative form.[1] After further communications, Household on January 13, 2006 changed its position and offered to provide the following response: "There was no specific policy at Household that distinguished the service of a summons from the service of a complaint or other notification of pending litigation for purposes of document retention." Baker Decl., Ex. K.

As plaintiffs explained during the meet and confer, this proposed response is evasive and fails to provide the information sought by plaintiffs, namely whether or not service of a summons triggered a document retention hold. *See* Baker Decl., Ex. L. By letter dated January 17, 2006, plaintiffs proposed a compromise that included Household providing the following response: "Service of a summons upon Household triggers the document retention policy and thus, a hold on the relevant documents. Additionally, under Household's document retention policy, a summons is treated no differently than service of a complaint or other form of notification of pending litigation, which under that policy likewise trigger a retention hold on the relevant documents." Baker Decl., Ex. O. The compromise also included Household providing a simple narrative response on a) if there was a time frame in which a directive was to be issued upon receipt of a summons or other notification of pending litigation and b) if so, that time frame. *Id.* Plaintiffs requested that Household indicate by 5 p.m., January 18, 2006 whether this proposal was acceptable. *Id.*

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[1] Household has agreed to produce Carol Werner as a further witness pursuant to the 30(b)(6) Housemail deposition notice. Household has stated that it will limit Ms. Werner's testimony to those subjects where Ms. Cunningham could not respond ***and*** where she testified Ms. Werner knew the answer. Baker Decl., Ex. I at 1. At the same time, Household also stated that it would not designate another witness on the general policy subject at issue in this motion. Baker Decl., Ex. H at 1.

On January 18, 2006, Joshua Greenblatt of Cahill, Gordon & Reindel, LLP, counsel for Household, contacted counsel for plaintiffs and stated that Household would not provide a response to plaintiffs' proposed compromise by 5 p.m. as requested. Baker Decl., ¶9. Mr. Greenblatt requested that Household be given until close of business January 20th in order to consult with in-house counsel prior to providing a response to plaintiffs' proposal. *Id*. As a professional courtesy, plaintiffs agreed to extend the time for Household to respond to 3 p.m. Pacific Standard Time on January 19, 2006. *See* Baker Decl., Ex. P.

By letter dated January 19, 2006, Household rejected plaintiffs' proposed compromise language as inaccurate, but provided a proposed response to the time frame questions. Baker Decl., Ex. S. Again, plaintiffs sought to compromise by proposing new language on January 20th that carefully tracked Household's own language as set forth in the January 19, 2006 letter. Baker Decl., Ex. T. Plaintiffs further requested that Household provide the responses in a suitable evidentiary form as previously agreed. *Id*. Declaring "enough is enough," Household rejected plaintiffs' new language while studiously ignoring its failure to provide the narrative responses in suitable evidentiary format as previously agreed. Baker Decl., Ex. U. Plaintiffs made one final effort to resolve the matter, which was rejected by Mr. Sloane on January 24, 2006. Baker Decl., ¶14. Accordingly, this motion follows.

II. LEGAL ARGUMENT

Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Household has the obligation to designate and produce a witness fully prepared to testify as to all the topics specified within plaintiffs' deposition notice. 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* §2103 (2d ed. 2005) ("It is then the duty of the corporation to name one or more persons who consent to testify on its behalf and these persons must testify as to matters known or reasonably available to the corporation."). Indeed, Household on November 22,

2005, represented to the Court that its witness, Ms. Cunningham, was prepared to testify on the topics at issue, including the general policy of document holds on the Housemail system in the face of litigation. *See* Baker Decl., Ex. C at 1. Despite this representation, Ms. Cunningham was not prepared to testify on this subject nor on other subjects.

The testimony at issue is not only within the scope of the deposition notice, but is also highly probative as to the possible spoliation issues. As Ms. Cunningham testified, Household did not send a directive to retain documents, including Housemail files, in this case until September 20, 2002. Baker Decl., Ex. D at 76:23-77:2. September 20, 2002 is well after the date of service of the summons and complaint on Household. Because Household recycled its Housemail backup tapes on a three week cycle and employed a six month automatic purge program, the delay in the issuance of the directive caused the loss of live Housemail files and of relevant backup tapes. In these circumstances, plaintiffs are entitled to probe why there was a delay and whether it was consistent with Household's general policy. Thus, whether the service of a summons triggered a document retention directive and whether there was a time frame in which the directive was to be issued following service of a summons are highly relevant to issues before this Court.

During the meet and confer, Household contended this subject was a "legal" question as if that excused Ms. Cunningham's lack of knowledge. However, as is clear from the colloquy involving Mr. Sloane, Household's counsel, the question pertained to Household's general policy of document retention and not legal expertise. Baker Decl., Ex. D at 77:10-12. Thus, Household was required to prepare Ms. Cunningham to testify on the subject.

Nor can Household provide a glib, hyper-technical response to this issue as offered during the meet and confer. Throughout the meet and confer, Household proposed a response to the effect that there is no "specific" policy pertaining to service of a summons as distinguished from a complaint. *See* Baker Decl., Ex. K. As plaintiffs noted throughout the meet and confer, this

response does not provide plaintiffs with the information they need, *i.e.*, whether or not service of a summons triggered the issuance of a directive. Baker Decl., Ex. O. On January 19, 2006, Household contended it could not answer this question directly because the general policy related to service of a complaint, which contains the allegations necessary to frame what documents are to be retained, as opposed to service of a summons, which does not. Household's explanation, however, ignores that complaints and summons are served simultaneously and indeed, neither is effective without the other. To distinguish between the two is naught but an improper attempt to evade the thrust of plaintiffs' questions, which if given at the deposition, could have been followed up. Additionally, plaintiffs addressed this alleged concern by proposing new language that both tracks Household's January 19, 2006 letter and provides plaintiffs with the information that they seek. Household has rejected this new language and its prior agreement to provide its response in verified form.

Accordingly, not only was Ms. Cunningham not properly prepared to provide answers to questions within the topics identified by the Housemail deposition notice, but Household has refused all of plaintiffs' efforts to reach a mutually acceptable resolution of the issue without motion. *See* Baker Decl., Ex. D at 77:3-78:8 (Ms. Cunningham had no understanding as to whether service of a summons triggered a document retention directive and did not know the answer to the question whether there was a time frame for issuance of directive after the service of a summons). Ordinarily, Household's failure to produce a witness on topics within the notice would require it to designate a new witness for a subsequent deposition on the topics at issue. "If in the course of taking the deposition it becomes apparent that the person or persons designated are not able to provide testimony on the matters specified in the notice, it is the duty of the corporation immediately to make a new designation substituting someone who can give the needed testimony." 8A *Federal Practice & Procedure*, *supra,* §2103; *MCI Worldcom Network Servs. v. Atlas Excavating, Inc.,* No. 02 C

4394, 2004 U.S. Dist. LEXIS 2736, at *6 (N.D.Ill. Feb. 23, 2004) ("Even though [the Rule 30(b)(6) witness] was mostly qualified and the deposition was by no means futile, defendant's failure to fully prepare him to testify violates Rule 30(b)(6).").

However, as a means to avoid the expense involved with a deposition, the Court should order Household to provide narrative responses in suitable evidentiary form to the following questions: a) whether service of a summons or a complaint triggers a directive to retain documents; b) whether under the policy for retaining documents as it pertained to Housemail there was any time frame in which a directive was to be issued upon receipt of a summons or a complaint; and c) if so, what was that time frame. To ensure Household has the proper incentives to provide full and complete responses to these questions, the Court should also permit plaintiffs at their option to depose the individual verifying the responses at Household's expense and without this deposition counting against plaintiffs' limit.

III. CONCLUSION

For the reasons stated above, this motion to compel should be granted. Further, because there is no substantial justification for Household's position, sanctions should be awarded against it. *MCI Worldcom,* 2004 U.S. Dist. LEXIS 2736 (awarding sanctions in the form of attorneys' fees and the costs of the additional deposition based on the party's failure to fully prepare the Rule 30(b)(6) witness).

DATED: January 24, 2006

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LEXSEE 2004 US DIST LEXIS 2736

MCI WORLDCOM NETWORK SERVICES, Plaintiff/Counter-Defendant, vs. ATLAS EXCAVATING, INC., Defendant/Counter-Plaintiff.

No. 02 C 4394

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2004 U.S. Dist. LEXIS 2736

February 23, 2004, Decided
February 24, 2004, Docketed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *MCI Worldcom Network Servs. v. Atlas Excavating, 2004 U.S. Dist. LEXIS 9582 (N.D. Ill., Apr. 8, 2004)*

PRIOR HISTORY: *MCI WorldCom Network Servs. v. Atlas Excavating, Inc., 2003 U.S. Dist. LEXIS 9197 (N.D. Ill., June 2, 2003)*

DISPOSITION: [*1] Defendant Atlas' motion for leave to file a counterclaim, a third party claim and affirmative defense, and its motion to compel, granted, and defendant MCI's motion for sanctions granted.

COUNSEL: For MCI WORLDCOM NETWORK SERVICES, INC., plaintiff: John Peirce Morrison, Robert Raymond Brown, Bell, Boyd & Lloyd, Chicago, IL. James J. Proszek, Kimberly Biedler, Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, OK.

For ATLAS EXCAVATING, INC., defendant: James Kenneth Borcia, Michael John Fusz, David O Yuen, Tressler, Soderstrom, Maloney & Priess, Chicago, IL.

JUDGES: JAMES B. MORAN, Senior Judge, U.S. District Judge.

OPINIONBY: JAMES B. MORAN

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiff MCI Worldcom Network Services, Inc. (MCI) brought this action against Atlas Excavating, Inc. (Atlas) alleging trespass, negligence and statutory strict liability. Defendant Atlas now seeks leave to file an amended answer containing the affirmative defense of comparative fault, along with a counterclaim against MCI and a third party complaint against AT&T Corporation (AT&T). Atlas also filed a motion to compel the deposition of Brian Tooley as MCI's *Federal Rule of Civil Procedure 30(b)(6)* [*2] witness in Chicago. MCI filed a motion seeking sanctions against Atlas for a series of discovery violations. For the following reasons, plaintiff's motions and defendant's motion are granted.

Atlas' Motion for Leave to File Counterclaim and Third party Claim, and to Amend Answer

This case arises from an incident in Bensonville, Illinois, in December 2001, in which Atlas severed an underground cable belonging to MCI while installing fiber-optic cable lines for XO Communications. Atlas also damaged utility lines belonging to AT&T Broadband (now known as Comcast). In its complaint, MCI alleges that it properly marked the location of the cable line pursuant to Illinois law and regulations. During discovery, Atlas learned that AT&T may have marked the line and seeks to amend its complaint.

Under *Rule 15(a)* we should allow pleading amendments "in the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)*; [*3] *King v. Cooke, 26 F.3d 720, 723 (7th Cir. 1994)*. Delay alone is generally not sufficient to justify denial of leave to amend.

In its response, MCI argues that we should deny the motion because Atlas improperly delayed the amendment resulting in prejudice and because it improperly states a claim against AT&T rather than AT&T Broadband or Comcast. We disagree. First, Atlas claims to have only

learned of its potential claim through discovery, in late 2003. Moreover, delay alone is not enough to deny the motion and there is no evidence that MCI will be prejudiced in any meaningful way. It should have been clear from the commencement of this litigation that the marking of the lines is a crucial issue that will be addressed through discovery. We believe that it will be most efficient to have this issue fully litigated in this action. Finally, it seems that AT&T was the legal owner of AT&T Broadband in December 2001, and is therefore the proper third party defendant in this action.

Atlas' Motion to Compel

On October 24, 2003, Atlas attempted to set the deposition of Brian Tooley, MCI's *Rule 30(b)(6)* witness, in Chicago, where he was expected to testify as to a [*4] number of matters on behalf of the corporation. Defendant denied, instead stating that Tooley would only be made available in Texas, his home state and the corporate home of MCI.

The general rule is that plaintiff, even if a non-resident, must appear at depositions in the forum of its choosing. *Orrison v. Balcor Co., 132 F.R.D. 202, 203 (N.D. Ill. 1990)*. That is, because MCI brought suit in the Northern District of Illinois, it must make party witnesses available in Chicago, even if these witnesses live elsewhere. The cases relied on by MCI do not contradict this rule; instead, they deal either with *non-party* witnesses or with corporate *defendants. See Yaskawa Elec. Corp. v. Kollmorgen Corp., 201 F.R.D. 443 (N.D. Ill. 2001); Zuckert v. Berkliff Corp., 96 F.R.D. 161 (N.D. Ill. 1982)*.

MCI's Motion for Sanctions

On November 11, 2002, MCI served its interrogatories and document production requests upon Atlas. After Atlas failed to respond, MCI filed a motion to compel, which was granted on June 2, 2003. Atlas, however has still failed to comply with that order by producing the documents or answers. Also, Atlas was required [*5] to produce a *Rule 30(b)(6)* witness who was qualified to testify as to a list of 24 issues. Terry Dillon was named as Atlas' witness, but at his deposition on November 19, 2003, he was unable to testify as to past damage by Atlas to other underground utility lines, also the subject of the earlier discovery dispute.

While defendant changed counsel after we issued the June 2, 2003 order, this does not provide it with an excuse to ignore that order. Atlas admits in its response that it has not provided all of the required information, yet fails to provide an adequate justification for this failure. *Rule 37(b)(2)* allows us to impose reasonable sanctions (such as costs and fees) in the case of such failure to comply with discovery orders. *See also Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 670-71 (7th Cir. 1996)*. Atlas is directed to follow the order of June 2, 2003, and to pay MCI's costs and fees incurred in the filing of this motion.

Atlas likewise offers no justification for its failure to adequately produce its *30(b)(6)* witness. It does not deny that Dillon was unqualified to testify as to the past damage, but instead claims that Dillon was partially [*6] prepared and it will make another witness available to discuss the remaining issue. This is not enough to avoid sanctions for its failure. Even though Dillon was mostly qualified and the deposition was by no means futile, defendant's failure to fully prepare him to testify violates *Rule 30(b)(6). See Buycks-Roberson v. CitiBank Federal Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995)*. In addition to making available a qualified witness, defendants are ordered to pay attorney's fees and the costs of the deposition of that witness to the extent it relates to past incidents, That sanction is not so much a penalty as it is a recognition that the sequence of events has increased MCI's expense unnecessarily n1

N1 Defendant also claims that plaintiff's motion must fail because it did not fully comply with *Rule 37(d)* by providing a certification of good faith contact with defendant. *Rule 37*, however, states that such a certification, while required for certain discovery violations, is not necessary when imposing sanctions for failure to provide a *Rule 30(b)(6)* witness here regarding past incidents. We further note that the failure relates to the same subject area as the prior order compelling disclosure.

[*7]

CONCLUSION

For the foregoing reasons, defendant Atlas' motion for leave to file a counterclaim, a third party claim and affirmative defense, and its motion to compel, are granted, and defendant MCI's motion for sanctions is granted.

Feb. 23, 2004.

JAMES B. MORAN

Senior Judge, U.S. District Court