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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Liberty Life Insurance Company,
Plaintiff,
v.
Eric L. Myers, et al.,
Defendants.

No. CV 10-2024-PHX-JAT

ORDER

Pending before the Court is Defendant Eric L. Myers’ Motion Seeking Ruling by Judge Teilborg Regarding the Court’s Rule 16 Scheduling Order (Doc. 236). Plaintiff Liberty Life has filed a Response (Doc. 238) and Defendant has filed a Reply (Doc. 241).

Defendant requests that the Court deny Plaintiff’s use of three items of discovery because Defendant contends that these three items were “sought” after the February 29, 2012, discovery deadline. (Doc. 236 at 2).

I. BACKGROUND

On December 12, 2010, in the Rule 16 Scheduling Order, the Court set the discovery deadline for September 30, 2011. (Doc. 52 at 2). In that Order, this Court made it clear that,

the Court will not entertain discovery disputes after the close of

1 discovery barring extraordinary circumstances. Therefore, the
2 parties shall complete all discovery by the deadline . . . (complete
3 being defined as including the time to propound discovery, the
4 time to answer all propounded discovery, the time for the Court
5 to resolve all discovery disputes, and the time to complete any
6 final discovery necessitated by the Court’s ruling on any
7 discovery disputes). Thus, “last minute” or “eleventh hour”
8 discovery which results in insufficient time to undertake
additional discovery and which requires an extension of the
discovery deadline will be met with disfavor, and may result in
denial of an extension, exclusion of evidence, or the imposition
of other sanctions.

9 (*Id.* at 3 n. 3). On October 24, 2011, in response to the parties’ Motion to Extend
10 Discovery and Disclosure Deadlines (Doc. 160), the Court moved the discovery deadline
11 back to February 29, 2012. (Doc. 164 at 2).

12 Defendant wants the Court to deny Plaintiff the use of Defendant’s account
13 records from Bank of America, the indemnification agreement between Eric Myers,
14 Brooke Myers Wilson, Erin Myers Stoloff, and Kirsten Anne Reggiano and any
15 communications leading to the execution of the indemnification agreement, and the
16 deposition of Robert Comeau. (Doc. 236 at 2).

17 **II. The Bank of America Account Records**

18 Liberty Life first served Bank of America with its subpoena duces tecum (the
19 “Subpoena”) for Defendant’s account records on January 7, 2011. On January 24, 2011,
20 Defendant added to his motion to stay discovery (Doc. 67) and objected to the Subpoena
21 arguing that his account records were not relevant to any claims. (Doc. 76 at 1). On
22 February 25, 2011, the Court denied Defendant’s motion to stay discovery and ordered
23 Defendant to respond to any outstanding discovery within twenty days of the order. (Doc.
24 87). Evidently this Order by the Court was not clear enough. Almost one year later, on
25 January 31, 2012, with the request for the account information still outstanding, Plaintiff
26 sent a letter to Defendant inquiring about the Subpoena. (Doc. 238-1 at 3). On February
27 21, 2012, the parties conducted another hearing before the Court regarding the Subpoena.
28 The Court again overruled Defendant’s objections and explicitly ordered Bank of America

1 to respond to the Subpoena. (Doc. 214). On February 23, 2012, Plaintiff sent a copy of
2 the order to Bank of America to produce documents responsive to the Subpoena. Bank of
3 America's responsive documents were received by Plaintiff on March 9, 2012.

4 Defendant proffers no argument why he did not comply with this Court's order in
5 February 2011 (Doc. 87) denying his motion to stay discovery and therefore his addition
6 to his motion to discovery (Doc. 76) (arguing against the Subpoena). The Order explicitly
7 instructed Defendant to respond to any outstanding discovery within twenty days of the
8 order. (Doc. 87). Instead, Defendant continued to object to the discovery request until the
9 Court had to deny the objection a second time. (*See* Doc. 214). Defendant's actions were
10 the overwhelming reason the account records were not turned over prior to the discovery
11 deadline. Accordingly, the Court denies Defendant's motion to suppress the account
12 records.

13 **III. The Indemnification Agreement**

14 Similar to the Bank of America records, the sole reason the Indemnification
15 Agreement (the "Agreement") was not turned over prior to the discovery deadline was
16 Defendant's actions. Plaintiff requested the Agreement on January 30, 2012. Defendant
17 objected to the request and appeared telephonically before the Court to argue his objection
18 on February 21, 2012. The Court overruled Defendant's objection to producing the
19 Agreement. (Doc. 214). Apparently this did not make it clear to Defendant to
20 immediately produce the Agreement. Defendant continued to object on other grounds to
21 production. Defendant appeared before the Court again on March 6, 2012, arguing why
22 he should not have to produce the Agreement. For the second time, the Court overruled
23 Defendant's objections and ordered him to produce the Agreement. (Doc. 222).
24 Defendant turned over the Agreement on March 6, 2012.

25 For the same reasons the Court denied Defendant's request regarding the account
26 records, the Court denies Defendant's request to suppress the Indemnification Agreement.
27 Defendant's actions were the reason the account records were not turned over prior to the
28 discovery deadline.

1 **IV. Robert Comeau Deposition**

2 Defendants Donald and Joan Myers disclosed that they intended to call Robert
3 Comeau as an expert witness at trial on December 2, 2011. Plaintiff's counsel waited over
4 two months, until February 16, 2012, to schedule Mr. Comeau's deposition. The first
5 available date for the deposition was March 5, 2012, five days after the deadline.
6 Contrary to Defendant's argument that this item of discovery was not "sought" until after
7 the deadline, Plaintiff tried to address the deposition prior to the deadline. However,
8 under the definition of complete that this Court made both parties aware of in the Rule 16
9 Scheduling Order, Plaintiff failed to ensure that discovery was complete prior to the
10 discovery deadline. Accordingly, the Court grants Defendant Eric L. Myer's request to
11 deny Plaintiff the use of this item of discovery.

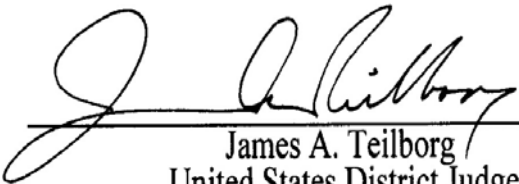
12 **V. CONCLUSION**

13 Based on the foregoing,

14 **IT IS ORDERED** denying in part and granting in part Defendant Eric L. Myer's
15 Motion Seeking Ruling Re: the Rule 16 Scheduling Order (Doc. 236). Specifically, the
16 Court denies Defendant's request to deny Plaintiff the use of the account records and the
17 Indemnity Agreement. The Court grants Defendant's request to deny Plaintiff the use of
18 the Robert Comeau deposition.

19 Dated this 11th day of February, 2013.

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James A. Teilborg
United States District Judge