

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

FIRSTNET INSURANCE CO.,

Plaintiff,

v.

ZHEN RUI BROTHER CORP.,

Defendant.

Case Number: 1:11-cv-00005

**MEMORANDUM OPINION AND
ORDER GRANTING PLAINTIFF'S
MOTION TO COMPEL DISCOVERY**

1 Before the court is a motion to compel discovery filed by Plaintiff FirstNet Insurance
2 Company ("FirstNet"). Docket No. ("DN") 19. After a hearing on October 6, 2011, the
3 court granted the motion and assessed costs against Defendant Zhen Rui Brother Corp.
4 ("Zhen Rui"). The court now explains the reasons for its decision and issues further orders.

5 **I. BACKGROUND**

6 **A. Complaint and Answer**

7 FirstNet is an insurer who entered into a policy with Zhen Rui to insure the contents
8 of BL Clothing Store against loss from fire. DN 1 ("Complaint"), ¶ IV, and DN 2
9 ("Answer"), ¶ 4. The total value of the policy is \$405,346.00, with the amount payable based
10 on an inventory supplied by Zhen Rui. *Id.* In late October of 2010, BL Clothing Store
11 burned down. DN 1, ¶ V. On December 27, 2011, Zhen Rui filed a claim under the policy
12 for \$404,718.53 against the loss. DN 1, ¶ VI, and DN 2, ¶ 6.

13 FirstNet asserts that Zhen Rui has failed to respond to FirstNet's diligent attempts
14 to secure adequate documentation of the value and quantity of inventory allegedly destroyed
15 in the fire. DN 1, ¶ VII. Zhen Rui responds that most of its business documents were

1 destroyed in the fire. DN 2, ¶ VII.

2 FirstNet alleges that it has evidence that Zhen Rui either intentionally started the fire
3 or recklessly increased the risk of fire by the introduction onto the premises of petroleum
4 products and heat sources. DN 1, ¶ IX. Because such facts would void the policy, FirstNet
5 has sought declaratory relief to determine its rights and obligations under the policy. *Id.* at
6 ¶¶ IX-X.

7 Zhen Rui has counterclaimed and seeks attorney's fees and costs. DN 2.

8
9 **B. Initial Discovery**

10 On June 15, 2011, FirstNet submitted to Zhen Rui a request for documents and
11 admissions and a set of interrogatories. DN 10. Included was a request for all documents
12 relating to Zhen Rui's contract to pay attorney's fees as alleged in the counterclaim. DN 19,
13 2:24–26. FirstNet also requested production of Zhen Rui's tax returns for the years 2004
14 through 2010. DN 19, 3:2–6.

15 Thirty days later, on July 15, Zhen Rui requested a two-week extension to respond
16 to the request. DN 20 at ¶ 17. FirstNet granted an extension of one week, until July 22. DN
17 19, 2:7; DN 20 at ¶ 18.

18 On July 22, Zhen Rui responded to the request for documents and admissions but not
19 to the interrogatories. DN 19, 2:7–9; DN 20 at ¶ 19. Zhen Rui resisted producing its retainer
20 agreement, asserting the protection of attorney-client privilege and the work-product
21 doctrine. DN 19, 2:27–3:1. Zhen Rui asked for an additional week to respond to
22 interrogatories because its representative, Mr. Zheng Biao, was temporarily away from the
23 CNMI, in China. DN 19, 2:11–13; DN 20 at ¶ 19.

24 On July 25, FirstNet contacted Zhen Rui and requested authority for Zhen Rui's
25 objections to the document requests. DN 19, 3:11–13.

26 On August 3, counsel for FirstNet sent counsel for Zhen Rui an e-mail with a letter
27 attached, and followed up with a phone call. DN 19-1, 2:10–16 (“Declaration of Richard W.
28 Pierce”); DN 20 at ¶ 21. In the letter, FirstNet's counsel noted that he had still not received

1 interrogatory answers and stated, “I want to move along with filing a motion to compel so
2 I will call you to confer on the discovery.” DN 19-1, 13. During the phone conversation,
3 counsel for the parties talked about discovery, including the effect of Mr. Biao’s travel
4 schedule and the request for tax returns. DN 19-1, 14.

5
6 **C. Motion to Compel**

7 On August 26, 2011, FirstNet filed a motion to compel discovery. DN 19. In the
8 motion, FirstNet asked the court to order Zhen Rui to produce all documents, to overrule
9 Zhen Rui’s objections to producing its retainer agreement with counsel (“Document Request
10 No. 1”) and its tax returns (“Document Request No. 2”), and to answer the interrogatories.
11 *Id.* DN 19, 4:2–7, 5:15–17. FirstNet also sought to recover costs under Fed. R. Civ. P.
12 37(a)(5) but did not seek sanctions. DN 19, 5:18–22.

13 In its opposition, filed September 15, 2011, Zhen Rui asserted that the motion to
14 compel was premature because the parties had not yet met and conferred as required by
15 Local Rule 26.4. DN 20, 2:2-7. Zhen Rui argued that its delay in providing discovery was
16 excusable because of an unanticipated extended absence from the CNMI by Zhen Rui’s sole
17 representative, Mr. Zheng Biao, and counsel’s need for an interpreter to communicate with
18 Mr. Biao. DN 20, 2:8-13. Counsel stated that Mr. Biao returned to the CNMI on August
19 30, 2011 (DN 20, 5:7), and Zhen Rui would therefore be able to reply to interrogatories by
20 September 19, 2011. DN 7, 23.

21 As to Document Request No. 1, Zhen Rui asserted that the retainer agreement is
22 protected by the attorney-client privilege. DN 20, 6:11–7:4. With respect to Document
23 Request No. 2, Zhen Rui dropped its objection to producing the 2004–2010 tax returns but
24 noted it was having difficulty obtaining copies of the returns for the years 2004–2007 from
25 the CNMI Department of Finance. DN 20, 7:6-19. Zhen Rui represented that it would
26 produce interrogatory responses by September 19, 2011. DN 20, 7:21–24. Zhen Rui asked
27 for sanctions against FirstNet for violation of Local Rule 26.4’s “meet and confer”
28 requirement. DN 20, 9:1–14.

1 At the hearing on October 6, 2011, FirstNet agreed that since the filing of its motion
2 to compel discovery Zhen Rui has been responsive. Zhen Rui has provided most of the
3 requested documents. Zhen Rui gave permission for the CNMI government to release its
4 2004–2007 tax returns, and FirstNet was now awaiting action from the appropriate
5 government agency. Zhen Rui responded to FirstNet’s interrogatories and objected to
6 Interrogatories No. 7, 8, 9, and 10. FirstNet took the position that the objections were
7 untimely and should be waived.

8 The issues remaining for the court to address are: (1) whether FirstNet and Zhen Rui
9 conferred on outstanding discovery issues before FirstNet sought relief in court; (2) whether
10 the retainer agreement is privileged and therefore shielded from disclosure; (3) whether Zhen
11 Rui’s objections to Interrogatories No. 7–10 are waived, and (4) whether to assess costs and
12 sanctions against either side.

13 14 **II. APPLICABLE STANDARDS AND LAW**

15 Parties may obtain discovery regarding any matter, not privileged, which is relevant
16 to the subject matter involved in the pending action. Fed. R. Civ. P. 26(b)(1). Relevant
17 matter need not be admissible at trial so long as the discovery “appears reasonably calculated
18 to lead to the discovery of admissible evidence.” *Id.*

19 Discovery under the Federal Rules of Civil Procedure is “accorded a broad and
20 liberal treatment.” *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The rules should be
21 construed to permit “wide-ranging discovery of information necessary for parties to evaluate
22 and resolve their dispute.” *Sommer v. United States*, 2011 U.S. Dist. LEXIS 107724, 11
23 (S.D. Cal.), citing *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1995).
24 The party resisting discovery bears a heavy burden of showing why discovery should be
25 denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). Evasive or
26 incomplete discovery disclosures and responses must be treated as failures to disclose and
27 respond. Fed. R. Civ. P. 37(a)(4).

1 A party moving to compel must certify that it “has in good faith conferred or
2 attempted to confer with the person or party failing to make disclosure or discovery in an
3 effort to obtain it without court action.” Fed. R. Civ. P. 37(a)(1). Generally, either a face-to-
4 face meeting or a telephone conference suffices to comply even with local rules imposing
5 a “meet and confer” requirement. *Cf., e.g., Wilkins v. Maricopa Cty.*, 2010 U.S. Dist. LEXIS
6 61352 (D. Ariz), n.2 (comparing Rule 37(a)(1) compliance to stricter local rule requiring
7 “face-to-face or telephone conversations”); *Bennet v. Equitable Trust Mortgage Corp.*, 2010
8 U.S. Dist. LEXIS 53940, 11-12 (N.D.W.Va.) (comparing to local rule requiring effort to
9 “meet in person or by telephone”); *Bennett v. Interfor Pac., Inc.*, 2011 U.S. Dist. LEXIS
10 68497, 4 (W.D. Wash.) (local rule requires “a face-to-face meeting or a telephone
11 conference”).

12 The party asserting attorney-client privilege has the burden to establish that the
13 privilege applies. *Kammerer v. City of Vancouver*, 2008 U.S. Dist. LEXIS 77993, 4, *citing*
14 *United States v. Austin*, 416 F.3d 1016, 1019 (9th Cir. 2005). Documents “are not shielded
15 from discovery merely because they are confidential.” *Sommer*, 2011 U.S. Dist LEXIS
16 107724, 11, *quoting DIRECTV, Inc. V. Puccinelli*, 224 F.R.D. 677, 685 (D. Kan. 2004).

17 Interrogatories must be answered or objected to within 30 days after being served
18 with the interrogatories. Fed. R. Civ. P. 33(b)(2). Grounds for objection must be stated with
19 specificity. Fed. R. Civ. P. 33(b)(4). Any ground not stated in a timely objection is waived
20 unless the court excuses the failure for good cause. *Id.*

21 If a motion to compel is granted, the court must require the party whose conduct
22 necessitated the motion to pay the moving party the reasonable expenses incurred in making
23 the motion, including reasonable attorney’s fees, unless it finds the opposition was
24 “substantially justified” or other circumstances make such award “unjust.” Fed. R. Civ. P.
25 37(a)(5)(A).

26 Local discovery procedures are “now governed in large measure by Fed. R. Civ. P.
27 26(a) and L.R. 16.2CJ.” United States District Court for the Northern Mariana Islands, Civil
28 Local Rules, Part V, note (Jan. 1, 2004, as amended and updated through Feb. 1, 2010). The

1 local rules direct attention “to the provisions of LR 26, which requires counsel to meet and
 2 confer before a discovery motion is filed.” L.R. 16.2CJ(d)(1). However, the local rule that
 3 used to require a conference, L.R.26.10,¹ was not incorporated in the 2004 revision and is
 4 no longer in force.

5 **III. DISCUSSION**

6 **A. FirstNet Conferred in Good Faith Before Moving to Compel Discovery**

7 In his Declaration, counsel for FirstNet certified that he conferred in good faith with
 8 defense counsel before filing the instant motion. DN 19-1, 2:18–24. Before reaching the
 9 merits of FirstNet’s motion to compel, the court must determine whether FirstNet in fact
 10 conferred with Zhen Rui in good faith to try to resolve discovery issues without involving
 11 the court.

12 Because in 2004 this district discarded a more particularized “meet and confer”
 13 requirement (former L.R. 26.10(a)), FirstNet need only have demonstrated compliance with
 14 the mandate of Fed. R. Civ. P. 37(a)(1) to confer in good faith. FirstNet does not assert it
 15 met face-to-face to confer with Zhen Rui. But Firstnet and Zhen Rui agree that on August
 16 3, FirstNet’s counsel called counsel for Zhen Rui and they discussed discovery matters. DN
 17 19-1, 2:10–16; DN 20 at ¶ 21. The only question, then, is whether this telephone
 18 conversation was substantial enough to constitute a good-faith effort on the part of FirstNet
 19 to confer.

20 The record shows that it was. At about noon on August 3, FirstNet’s counsel e-

¹ “The court will entertain no motion under Federal Rules of Civil Procedure 26 through 37 unless counsel have previously met and conferred concerning all disputed issues. If counsel for the moving party seeks to arrange a conference and counsel for the party against whom the motion is made refuses or fails to meet and confer, the court may order the payment of reasonable expenses, including attorney fees, pursuant to Fed.R.Civ.P. 37(a)(4) and LR 1.3.” L.R. 26.10(a) (January 1, 1997, as amended through January 1, 2003), *available at* http://www.nmid.uscourts.gov/documents/publications/booklet-usdcnmi_local_rules_010103.pdf. This appears to be the text that defense counsel relied on in his Opposition to the Motion to Compel but cited as L.R. 26.4, not L.R. 26.10. DN 20, 5:12–17. It is possible that defense counsel was referencing an even earlier version of the local rules.

1 mailed a letter to defense counsel announcing that he was taking the necessary steps before
2 filing a motion to compel and would be calling “to confer on the discovery.” DN 19-1, 13.
3 About four hours later, FirstNet’s counsel sent defense counsel an e-mail memorializing the
4 telephone conversation they had just had. DN 19-1, 14. He thanked defense counsel “for
5 talking with me today about discovery.” *Id.* He acknowledged that they had discussed Mr.
6 Biao’s return from China and defense counsel’s undertaking to “work with him [Mr. Biao]
7 about the discovery responses.” *Id.* He alerted defense counsel that he was particularly
8 concerned about objections to producing the tax returns because to obtain them from the
9 government would be “time consuming.” *Id.* “Therefore,” FirstNet’s counsel wrote, “I
10 would like to *tee up the issue with the court sooner rather than later* if you intend to
11 maintain the privacy objection.” *Id.* (emphasis added). Defense counsel did not reply to this
12 confirmatory e-mail or by other means dispute the nature or details of the phone
13 conversation. Defense counsel did not request a face-to-face conference.

14 Defense counsel asserts in his Declaration that the August 3 phone call contained “no
15 mention of a meet and confer regarding disputed discovery issues at any time.” DN 20-1,
16 2:25-26. Yet the letter FirstNet e-mailed to defense counsel just before calling made it
17 absolutely clear that FirstNet’s purpose was to confer on discovery disputes as a last step
18 before resorting to a Rule 37 motion to compel. FirstNet’s memorialization of the
19 conversation is credible and indicates a good-faith effort to settle the parties’ disagreements
20 over disclosures. Therefore FirstNet’s motion to compel is proper.

21 . **B. Zhen Rui Must Produce the Retainer Agreement**

22 Zhen Rui must comply with Document Request No. 1 and produce its retainer
23 agreement with defense counsel. Zhen Rui has counter-claimed for attorneys’ fees. Zhen
24 Rui’s retainer agreement with its attorney is relevant to deciding such a claim and therefore
25 is discoverable. *See* Fed. R. Civ. P. 26(b)(1). Zhen Rui resists disclosure on grounds that
26 the retainer agreement is privileged. The party asserting a privilege, including the attorney-
27 client privilege, bears the burden of demonstrating that the privilege applies. *Weil v.*

1 *Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 2005).

2 Neither in its opposition brief nor in oral argument did Zhen Rui cite any case,
3 statute, rule, or regulation in support of privileging retainer agreements. Instead, Zhen Rui
4 has asserted that cases which FirstNet cites do not approve wholesale disclosure of retainer
5 agreements but limit disclosure to client identity and fee information (*In re Grand Jury*
6 *Subpoena Served Upon John Doe*, 781 F.2d 238, 247 (2nd Cir. 1986)), fee payment, billings,
7 and time expenditures (*Bank Hapoalim, B.M. v. American Home Assurance Co.*, 1993 WL
8 37506 (S.D.N.Y. 1993)), attorneys' bills and communications regarding retainer agreements
9 (*Duttle v. Bandler & Kass*, 127 F.R.D. 46, 52 (S.D.N.Y. 1989)). DN 20, 6:12-23. Zhen Rui
10 urges the court to restrict any disclosure it may order accordingly and to conduct an in
11 camera review of the retainer agreement before making any disclosure. DN 20, 6:24-7:2 and
12 n.2.

13 The problem for Zhen Rui is that it has steadfastly refused, even upon prodding from
14 the court at oral argument, to try to carry its burden of proving, and not merely asserting, that
15 the attorney-client privilege encompasses retainer agreements. Zhen Rui has made no prima
16 facie showing of privilege to which FirstNet must respond. Moreover, Zhen Rui has failed
17 to identify a class of information that one might expect a retainer agreement to contain which
18 might arguably be covered by the attorney-client privilege. Therefore, the blanket objection
19 to Document Request No. 1 is overruled and the retainer agreement is ordered to be
20 disclosed.

21
22 **C. Zhen Rui Must Answer All Interrogatories**

23 Zhen Rui objects to Interrogatories 7-10. These objections were first made at oral
24 argument on the motion on October 6, 2011. FirstNet served interrogatories on Zhen Rui
25 on June 15, 2011. DN 20, 4:1-7. Any objections must be made within 30 days after being
26 served with the interrogatories. Fed. R. Civ. P. 33(b)(2). Any ground not stated in a timely
27 objection is waived unless the court excuses the failure for good cause. Fed. R. Civ. P.
28 33(b)(4).

1 Zhen Rui's objections, made more than three months after being served with the
2 interrogatories, are untimely. Defense counsel urges that Mr. Biao's prolonged absence from
3 the CNMI, and the language difficulties in that defense counsel does not speak Chinese,
4 should excuse the extreme untimeliness. They do not. Many foreigners, including Chinese,
5 have business interests in the CNMI. Local lawyers who take on foreign businessmen as
6 clients can be expected to develop an appropriate network of translators and interpreters to
7 assist them in the representation, not only for transactional work but in the foreseeable event
8 they may be sued.

9 Moreover, the interrogatories are in English, not Chinese. The defense's objections
10 that some of the interrogatories are vague, overbroad, and unduly burdensome would have
11 been apparent on inspection by English-speaking defense counsel and could have been raised
12 with FirstNet months ago. In any event, Mr. Biao returned to the CNMI on August 30, 2011.
13 More than two weeks later, on September 15, in its opposition to the motion to compel (DN
14 20), Zhen Rui still failed to object to interrogatories.

15 For these reasons, Zhen Rui has failed to demonstrate good cause to excuse the
16 failure to object. The objections are waived.

17 **D. Zhen Rui Must Pay Costs**

18 Having granted FirstNet's motion to compel, the court must impose reasonable
19 expenses, including attorney's fees, on the party or attorney, or both, who resisted disclosure,
20 unless exceptional circumstances exist. Fed. R. Civ. P. 37(a)(5)(A). Those circumstances
21 are (i) lack of good-faith effort by the movant to obtain discovery without court intervention,
22 (ii) substantial justification to oppose disclosure, or (iii) other circumstances that would
23 make an award of costs unjust. *Id.* As explained earlier, FirstNet made good-faith efforts
24 to confer to resolve the parties' discovery disputes before filing a motion to compel. The
25 court finds that Zhen Rui's failure even to attempt to carry its burden on its claim of
26 attorney-client privilege, its dilatoriness in responding to reasonable requests for action by
27 FirstNet, and its last-minute objection to interrogatories do not substantially justify Zhen

1 Rui's resistance to FirstNet's request for disclosures. The court finds that making Zhen Rui
2 pay for FirstNet's reasonable expenses and attorney's fees is just. The court therefore
3 assesses costs against Zhen Rui pursuant to Fed. R. Civ. P. 37(a)(5)(A).

4 Because Zhen Rui did not prevail in its opposition to the motion to compel, its
5 motion for sanctions pursuant to Fed. R. Civ. P. 37(a)(5)(B) must be denied.
6

7 **IV. CONCLUSION**

8 For the foregoing reasons, the court finds and orders as follows:

- 9 1. FirstNet complied with the requirement of federal and local procedure rules
10 to confer in good faith to obtain discovery without court action.
- 11 2. Zhen Rui is ordered to produce the retainer agreement. In an abundance of
12 caution, the court will allow Zhen Rui to submit the retainer agreement for
13 in camera inspection. When submitting the agreement to the court, Zhen Rui
14 must identify *with particularity* the item or items it asserts are privileged and
15 not subject to disclosure, and the legal grounds on which the assertions of
16 privilege are based. The court will then apply the Ninth Circuit's eight-part
17 test, as set forth in *Weil*, 647 F.2d at 25, to determine whether the items are
18 privileged. Zhen Rui is reminded that client identity, fee information, fee
19 payment, billings, time expenditures, attorneys' bills, and communications
20 regarding retainer agreements are not subject to attorney-client privilege.
21 Zhen Rui is not required to avail itself of an in camera inspection and may,
22 if it so chooses, disclose the retainer agreement to FirstNet directly.
- 23 3. Zhen Rui's objections to Interrogatories No. 7–10 are waived. Defendant's
24 answers to these interrogatories are due, as the court announced at the end of
25 the October 6 hearing, by close of business on **October 13, 2011**.
- 26 4. Zhen Rui is ordered to pay FirstNet's reasonable expenses and attorney's
27 fees. FirstNet shall submit an accounting of those expenses and fees to the
28 court and serve the accounting on Zhen Rui by close of business on **October**

1 **28, 2011.** Zhen Rui may file and serve any objection to the accounting by
2 close of business on **November 4, 2011.** FirstNet may file and serve a
3 response by close of business on **November 8, 2011.** The court will then,
4 without a hearing, issue an order for costs in an amount certain.

5 5. Zhen Rui's request for sanctions is denied.

SO ORDERED on October 24, 2011.



RAMONA V. MANGLONA, Chief Judge