[*1]

SCANNED ON 11/5/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE Justice

PART 10

WEISEL, RONALD

-v-

PROVIDENT LIFE AND CASUALTY INSURANCE COMPANY, ET AL.

INDEX NO. 600759/05

MOTION DATE

MOTION SEQ. NO. 06

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

compliance 12/11/08 @ 9:30 am

pt 10

FILED

NOV 05 2008

COUNTY CLERK'S OFFICE

Dated: Oct 30, 2008

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

RONALD WEISEL,

Plaintiff,

-against-

PROVIDENT LIFE AND CASUALTY INSURANCE COMPANY *et al*

Defendants.

----------x

Decision/Order
Index No.: 600759/05
Seq. Nos. : 006 & 007

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
RW's OSC #6 (compel) w/MSH affirms (2), exhs	1
Defs' OSC #7 (compel) w/SRM affirm, exhs	2
RW's reply and opp w/MSH and RSG affirms	3
Defs' reply w/SRM affirm, exh	4
Proof of service (RW's motion)	5

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff has asserted a number of claims against defendants who are, collectively, entities that provided him with disability insurance. The court has before it plaintiff's motion to compel defendants to provide more complete responses to his discovery demands. Defendants have cross moved to compel plaintiff's production of documents.

In connection with prior motions by defendants to dismiss this action and by plaintiff to amend his complaint, the court set forth in extensive detail the plaintiff's claims and the defenses asserted (Decision/Orders, Gische J., 2/14/06 and 3/5/07).

Since the motions at bar deal with the scope of discovery, those prior decisions/orders are incorporated by reference. Facts and arguments previously raised, addressed, and decided in those motions will only be restated as needed.

Arguments

Provident Life and Casualty Insurance Company ("Provident Casualty") issued two disability insurance policies to plaintiff (collectively "the policies"). The policies provide for monthly disability payments to him for the remainder of his life, should he become totally disabled before attaining age 55. It is undisputed that plaintiff began collecting disability payments in March 1983. The payments were terminated in 1999, however, following a physical examination by one of defendants' doctors.

Plaintiff claims he is "disabled" within the meaning of those policies and that his benefits were terminated not because his physical condition had improved, but because defendants were involved in a coordinated scheme to deny qualified claimants (like him) these benefits to maximize profits ("scheme"). Plaintiff alleges further that he is but one of many other claimants who were wrongfully denied disability benefits by the defendants who are an "enterprise," within the meaning of the Racketeering Influenced Corruption Organizations Act ("RICO") (discussed *infra*). According to plaintiff, the scheme was implemented by unscrupulous doctors, claims adjusters, and others, including executives in the highest echelons of the various companies that now comprise defendant UnumProvident Corporation ("UnumProvident"). It is unrefuted that a number of lawsuits have been commenced through the United States against some of the defendants involved in this case.

Based upon these factual claims, plaintiff has asserted several causes of action

against the defendants which withstood preanswer motions to dismiss (see prior orders dated February 14, 2006 and March 5, 2007). The claims include breach of contract, deceptive business practices within the meaning of GBL § 349, and under RICO (civil).

Defendants vigorously deny that there was (is) any such scheme or that they are an "enterprise." They contend that plaintiff's benefits were terminated simply because he proved himself to be unqualified, based upon medical evaluations by qualified doctors, not because of some imaginary "scheme." Thus, defendants object to the production of many documents based upon relevancy, privacy/confidentiality issues, attorney/client privilege, vagueness/over breadth, and inadmissibility. Defendants argue that other documents are publicly available and plaintiff should get them himself.

Although one branch of plaintiff's motion is that defendants did not provide him with a privilege log, they have and he acknowledges this omission from his papers. The log describes and identifies documents that defendants withheld.

In their cross motion, defendants seek discovery from plaintiff, including copies of his tax returns and proof of his living expenses and lifestyle.

The documents[1] that plaintiff has demanded, but defendants object to, include the following:

¶6 D&I seeks all communications between the plaintiff and defendant about the assignment, transfer, delegation of his policies from one defendant to another, or from one employee to another. Plaintiff argues this is material and useful to his claim that the defendants are an "enterprise." Defendants object on the grounds that plaintiff has

[1]Each demand is identified as "¶___ D&I".

no right to take discovery of every entity that might be affiliated with any of the defendants because they are separate entities, and in any event, they have provided a copy of the claims file which contains this information. In reply plaintiff argues that defendants have "cherry picked" some information they believe he should have, but excluded other documents that are material and relevant to his claims.

¶8 D&I seeks all information about the financial arrangement defendants had with Dr. Mindolovich who examined the plaintiff. Defendants have produced 1099's issued to the clinic and another doctor, Dr. Cloitre, with whom Dr. Mindolovich was associated with at the time payments were made. Defendants' counsel states his clients have informed him they searched their records for the information demanded but cannot locate any record of payment to directly to Dr. Mindolovich. Although plaintiff asks that this information be put into sworn affidavit, defendants have refused to do so and defendants' attorney states his clients are nonetheless "bound by their responses" even if there is no affidavit.

¶¶10 and 12 D&I - There have been several lawsuits brought against the defendants in other courts involving similar claims to those set forth by plaintiff. Two of these lawsuits are of particular interest to the plaintiff who claims they involve almost identical claims to his. The two cases are the Hangarter action [Hangarter v. Paul Revere Life Ins. Co. et al, 236 FSupp2d 1069 (N.D. Ca., 2002)] and the Saldi action [Saldi v. Paul Revere Life Ins Co., et al, 224 FRD 169 (E.D. Pa., 2004)]. Plaintiff claims that the discovery provided in those cases is more complete than what they can ever achieve in this case because sanctions are freely imposed by the Federal Courts. Plaintiff argues that he will have to bring successive motions in this court to extract

information he can get in one fell swoop. Furthermore, he argues the information is material, relevant and useful in developing his claim that defendants engaged in a national scheme to deprive qualified claimants of benefits. Defendants object on the basis of relevancy.

¶13 D&I - Plaintiffs seeks a verified statement that defendants have in fact lost the documents he has demanded "relating to any national strategy, design or other plan to handle disability claims relating to individual policies or group plans . . ." Plaintiff suggests the documents were until very recently available, but have "disappeared." Defendants once again claim that a sworn affidavit, that the documents are missing, is unnecessary.

¶19 D&I - Plaintiff demands copies of the "Blue Memos" referenced in other documents that defendants produced. According to plaintiff the memos allowed and even encouraged the adjusters to administer the disability policies so literally that even *bona fide* claims were disallowed. Defendants object because the documents were created by Unum Corporation before it merged with the Provident companies and became UnumProvident. In reply, plaintiff agrees to accept a sworn affidavit to that effect and withdraw that branch of its motion.

¶23 D&I seeks documents related to the termination of Dr. McSharry, defendants' medical advisor. Plaintiff claims this doctor was fired because he resisted pressures to make "insurance friendly" findings for the defendant. Dr. McSharry sued defendants for wrongful termination. Defendants object to production of these documents because he was not hired by UnumProvident until after plaintiff's disability benefits were terminated. They contend Dr. McSharry played no role in the processing

or denial of his claim. While plaintiff agrees the doctor was hired after his benefits were terminated, he states the termination is evidence of defendants' overall scheme.

¶24 D&I - Plaintiff seeks information about defendants' corporate infrastructure because there have been mergers among the companies coming under the UnumProvident Corporation umbrella. Defendants object on the basis that this information is publicly available. In reply plaintiff acknowledges that some of these documents may be public, but it is defendants' burden, nevertheless, to produce them in discovery and it is far more burdensome for him to ferret the information out.

¶36 D&I - Production of information related to the transfer of funds earmarked for reserves to defendants' general operating accounts. Defendants cite a number of cases in which disclosure of such information has been denied. They argue that reserves are set in accordance with statutory requirements, actual averages and historical experiences, not by claims examiners. Furthermore, since there is no evaluation of the bona fides of a claim, the department setting the reserves never sees an actual claims file. Thus, according to defendants, the reserves are an aggregate pool and not based upon individual claims. In reply plaintiff argues that the cases cited involve a single claim that was denied, and not a pattern or scheme as he alleges. He relies on the decisions in the Hangarter and Saldi cases as persuasive authority.

¶37 D&I - Transcripts of the deposition testimony in other cases of certain named individuals who plaintiff contends played pivotal roles in the scheme. Defendants object on the basis that those cases are unrelated, and it is unfair for the plaintiff to "piggyback himself onto the work of the plaintiffs" in those other cases. Defendants also contend the request is over broad, burdensome, and a fishing

expedition. According to defendants, some of these documents are privileged. In reply, and as an alternative, plaintiff seeks an affidavit by defendants' counsel identifying each case in which those named persons have testified so that plaintiff can contact their attorneys directly.

¶¶42 and 43 D&I - Information about bonuses and other compensation paid to defendants' President and Vice President of claims. Defendants contend this information is for executives who work for six (6) separate corporate entities. Not all the entities are named parties. Furthermore defendants argue going back fifteen (15) years is burdensome. In reply, plaintiff argues that he is willing to enter into a confidentiality agreement and that the information sought is about employees and principals, not third parties.

The defendants have identified a number of documents as privileged. They provide a log of these documents. They include memos between Dean Jackson of the Law Department and R. Douglas Freytag for the period 1988-89. The subject matter is "status of claims." Other documents include a memo on the status of forms and progress of claims, also from the Law Department, various "Best Screen Prints," made in 2006, and several letters identified as "legal advice" from a law firm in 1993. Plaintiff argues the court should inspect these documents *in camera* because the privilege is not readily apparent for their description. Plaintiff also argues that someone with knowledge has to attest that these documents have not been disseminated to third parties, and therefore, that the privilege asserted is valid.

Turning to defendants' cross motion, they seek copies of plaintiff's filed tax returns for the period 1983 to present to prove their defense, that plaintiff did not suffer

a total disability, within the meaning of his policy, and that he may have started a business. Plaintiff has provided Schedule Cs for tax years 1987 though 1992 but refuses to provide any returns, let alone for the years 1983-1986 or 1993-present. He objects on a number of bases, including that his tax returns are private and therefore not discoverable. Plaintiff argues the Schedule Cs he has provided would show any business income, but the rest of his returns would only show passive income from stock ownership, etc. He argues the period of time demanded is unreasonable (i.e 25 years worth of returns). He contends the defendants served blunderbuss demands but should have asked him questions at his deposition to narrow the scope of what they need from him. Plaintiff has also agreed to voluntarily withdraw his residual disability claim; this would have required him to prove he suffered a loss of at least 20% of his pre-disability income.

Defendants also seek documentation of plaintiff's "way of life," including expenses related to his residence(s), boat(s), any transfers, sales or conveyances of residences, homes, etc., from 1985 to present, loan applications, lines of credit, mortgages, etc., purchases of planes, boats, etc., and documentation of any travel outside of the United States. Defendants argue plaintiff claims he suffered damages, including the loss of his home, and therefore, they have a right to discovery of this information. Plaintiff objects on the basis that defendant did not depose him about his lifestyle and therefore these documents are over broad.

Discussion

CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of

proof . . ." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 (1968). The words, "material and necessary," are interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." Allen v. Crowell-Collier Pub. Co., supra at 407. The test is one of "usefulness and reason." Id. The burden of showing that the disclosure sought is improper is upon the party seeking the protective order. Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1st Dept 1994).

Plaintiff's motion to compel

Most of the discovery demands that defendants object to relate to plaintiff's RICO claim. The elements of a RICO claim are: [1] conduct [2] of an enterprise [3] through a pattern [4] of racketeering activity. 18 USCA §§ 1961, 1962, 1964; Podraza v. Carriero, 212 AD2d 331 *lv dism* 86 NY2d 885 (1995). Any individual who sustains injuries to her or his business or property by reason of a violation of 18 U.S.C. § 1962 can pursue a claim for civil damages under RICO. 18 U.S.C. § 1964 (c). Thus, a plaintiff must plead (and prove at trial): [1] the defendant's violation of 18 U.S.C. § 1962, [2] an injury to the plaintiff's business or property, and [3] causation of the injury by the defendant's violation. *see* First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 767 (2d Cir. 1994).

Plaintiff seeks to prove in this case that the defendants were involved in a long term, nationwide, organized pattern or "scheme" of denying *bona fide* disability claims made by their insureds. This "scheme" was allegedly implemented by a network of people, including doctors whom defendants expected would make "insurance friendly"

findings. Doctors who did not meet this expectation were terminated. Claims adjusters were allegedly given "Blue Memos" instructing the adjusters how they could deny claims benefits, even to qualified claimants. Reportedly the defendants used financial incentives, like bonuses.

Under the insurance law, an insurer must "maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable . . ." Ins Law § 1303. According to plaintiff, defendants' circumvented these requirements by denying claims, keeping very low reserves, and transferring this money into their operating accounts to appear more profitable.

The documents demanded in ¶6 D&I are material and relevant to plaintiff's claim that the defendants operated as an enterprise. Although the defendants object because there are so many affiliates and the policies were issued before the defendants merged, this is not a basis to deny plaintiff's request for these documents. The request is limited to assignments, transfers and delegation of the policies among the defendants and also among the defendants' employees.

Plaintiff is also entitled to a sworn affidavit by a person with knowledge that defendants have searched for, but cannot find, any record of direct payments to Dr. Mindolovich (¶8 D&I). Donner v. 50 Tom Corp., 99 A.D.2d 504 (2nd Dept 1984).

The court will require defendants to provide copies of any documents they have already turned over in the Hangarten and Saldi cases (¶¶10 and 12 D&I), other than medical records of the particular plaintiffs in those actions. Production of those

documents are not only material and relevant to the plaintiff's claims in this case, it is also anticipated the documents will sharpen the issues in this case and speed up the discovery process. *see* Allen v. Crowell-Collier Pub. Co., *supra* at 407. The court has also taken into consideration that the claims of the plaintiffs in those cases bear similarities to those asserted in the case at bar, there was a plaintiff's verdict in the Hangarter case, and there were disputes about the scope of discovery in the Saldi case.

If defendant has not located any documents "relating to any strategy, design, or other plan to handle individual policies or group plans. . ." (¶13 D&I) they must provide a sworn affidavit indicating that a search was undertaken and that they do not have such documents within their custody, control or possession.

Defendant opened the door to the "Blue Memos" by providing other documents that make reference to them (¶19 D&I). The memos are material and relevant to plaintiff's claim that the defendants had an organized plan or "scheme" for denying disability benefits and that this scheme was facilitated and implemented by its employees as well as others. The Blue Memos must be provided.

The court will not, however, enforce plaintiff's demand for disclosure related to Dr. McSharry's termination (¶23 D&I). Though he was defendants' medical advisor, he was not hired until after plaintiff's benefits were denied consequently he played no role in the revocation of plaintiffs' benefits. Therefore his issues with his former employer (the defendants) is tangential to plaintiff's claims. Plaintiff has not adequately explained how this information would prove the existence of a scheme at the relevant period of time.

While certain documents about the defendants' corporate structure (¶24 D&I) may be available publicly, this does not relieve defendants of their obligation to provide discovery. *see* 72A Realty Associates v. Merlo, 2001 WL 1602682 (NY.Sup.App.Term,2001) (*n.o.r.*); Alfaro v. Schwartz, 233 AD2d 281 (2nd Dept. 1996); Long v. State, 33 AD2d 621 (3rd Dept. 1969); Rooney v. Hunter, 26 AD2d 891 (4th Dept. 1966). Furthermore, the tangle of affiliates, subsidiaries, etc., is far easier for defendants to address than it is for plaintiff to figure out. Defendants are, therefore, required to produce the documents he has demanded.

Defendants object to any disclosure about their reserves (¶36 D&I). Reserves are an estimated sum of money set aside or "reserved" as a fund from which to pay all losses, whether reported or unreported, for which the insurer may be liable in the future. Ins Law § 1303; Morales v. Gross, 230 A.D.2d 7 (2nd Dept 1997).

It is well established law that the payment or rejection of claims is a part of the regular business of an insurance company. Karta Industries v. The Insurance Company of the State of Pennsylvania, 258 AD2d 375 (1st Dept 1999). Thus, reports prepared by an insurer before it decides an insured's claim are discoverable. Karta Industries v. The Insurance Company of the State of Pennsylvania, supra. However, as a general matter, information about "reserves," is not discoverable where the issue is whether a claimant is entitled to insurance coverage. Id; 40 Rector Holdings, LLC v. Travelers Indemnity Co., 40 AD3d 482 (1st Dept 2007); Sundance Cruises Corp. v. American Bureau of Shipping, 1992 WL 75097 (S.D.N.Y 1992) (*n.o.r.*). To allow information about the reserves set aside for a particular claim would engage the court in needless litigation about why a certain sum was set aside. see Sundance Cruises

Corp. v. American Bureau of Shipping, *supra* at 1. This is to avoid the need for "mini-hearings."

Although plaintiff seeks to distinguish the facts of this case by emphasizing that his claims are far broader than those in Karta, etc. because he seeks to prove there was a pattern of scheme of setting and/or maintaining low reserves, ultimately what he seeks to prove is that *his* benefits claims wrongfully terminated because of the (alleged) scheme or pattern of activity the defendants undertook. The information about reserves in this case is no more meaningful or useful than in other cases where such information has been demanded, but not ordered disclosed by the court. Karta Industries v. The Insurance Company of the State of Pennsylvania, supra; 40 Rector Holdings, LLC v. Travelers Indemnity Co., 40 AD3d 482 (1st Dept 2007); Sundance Cruises Corp. v. American Bureau of Shipping, 1992 WL 75097 (S.D.N.Y 1992) (*n.o.r.)*. The information about reserves will not appreciably sharpen the issues for trial. Therefore, plaintiff's demand for information about reserves, whether for his claims, or others, will not be enforced. Defendants' motion to strike that demand is granted.

The reason that plaintiff seeks the deposition transcripts of certain individuals who have testified on behalf of defendants in "any case involving (i) a claim for disability benefits; or (2) securities fraud . . ." (¶37 D&I) is simply that the defendants have this information catalogued in such a way that it is easy for them to provide it. Plaintiff's demand is way over broad. He has not identified who these people are, why the testimony is relevant in this case, why he cannot seek to depose them in this action, if under defendants' control, or if they are non-parties, why he cannot serve them with subpoenas. The court will only require that defendant provide plaintiff with their

deposition testimony, if any, in the Hangarter and Saldi cases. This is consistent with the court's decision that plaintiff is entitled to certain documents in both those cases (*see* discussion above).

Plaintiff's demand for the documents and communications that were used to calculate and compute the compensation for UnumProvident's President and Vice President of claims is material and relevant (¶¶42 and 43 D&I). Defendants' objection based upon relevancy and remoteness is self-serving. The relevancy is apparent: if these executives had a financial incentive to deny claims, and these incentives were documented, plaintiff has a right to examine this information as it will help him prove his claims. Arguments that these documents are confidential, and that fifteen (15) years worth of returns is over inclusive, have been considered by the court. The court will require that production of such documents is limited to the for the six (6) year period commencing 1994 through and including 1999. Furthermore, the documents produced shall not be used by plaintiff for any other purpose, except this litigation. If the parties cannot agree on the language to be included as part of any confidentiality agreement or order, then each party may submit on Notice a proposed order to the court no later than Thirty (30) Days hereof.

The court has examined the privilege log. Although the documents are described, and the parties identified, the court has to physically inspect the documents to determine whether they are privileged. They are to be submitted by defendants to the court within Thirty (30) Days of the date of this decision for an in camera inspection.

Defendants' (cross) motion to compel

Plaintiff's policy defines "total disability" as "your [the insured's] inability to

perform the duties of your occupation." Total disability is further defined, where the person is under age 55, as "1. [being] unable to perform the substantial and material duties of your occupation . . . " A "residual disability" is, however, defined as "(a) your [the insured's] inability to perform one or more of your important daily duties, or (b) your inability to perform your ususal daily business duties. . . " Whereas a residual disability provides for benefits to be paid according to a mathematical formula set forth in the policy, payments based upon a total disability are a fixed amount.

As a general matter, tax returns are not subject to discovery unless there is a strong showing the information relates to an issue in the action and is unavailable from other sources. *see* Matthews Industrial Piping Co. v. Mobil Oil Corp., 114 A.D.2d 772 (1st Dept 1985). Since plaintiff has discontinued his claim for residual disability benefits under his policy, the issue is whether defendants have to examine his tax returns to mount a defense to his claims of total disability. *see* Picinich v. Provident Companies, Inc., 2000 WL 1047668 (W.D.N.Y.,2000) (*n.o.r.)*

Plaintiff's personal income tax returns for the years preceding his disability (i.e. before 1986) are not relevant. The issue is not whether plaintiff lied on his application for disability benefits in 1986, but whether he is still totally disabled, within the meaning of his policy. Altidor v. State-Wide Ins. Co., 22 AD3d 435 (2nd Dept 2005); Manzella v. Provident Life and Cas. Co., 273 A.D.2d 923 (4th Dept 2000). Defendants are therefore entitled to discovery about whether plaintiff has resumed "the duties of his occupation."

According to his application for disability benefits, plaintiff's occupation was "executive-business owner." Their defense is that he was no longer "totally disabled" and therefore ineligible for the continuation of benefits payments. The defendants have

a right to examine portions of plaintiff's filed tax returns for a reasonable period of time preceding the date they terminated his benefits payments in 1999 so they can determine for themselves whether plaintiff resumed "the duties of his occupation." Plaintiff shall provide copies of his tax returns for the six (6) year period commencing 1994 through and including 1999.

While plaintiff has now withdrawn his claim, that defendants caused him to suffer consequential damages related to the loss of his home, he still has a claim for consequential damages based upon the loss of his lifestyle or "way of life." Acquista v. New York Life Ins. Co. 285 A.D.2d 73 (1st Dept 2001). What this means is unclear. Although plaintiff faults defendants for not asking him questions to narrow the scope of his demands, he bears the initial responsibility for articulating them. Therefore, the court will order that plaintiff provide defendant with a bill of particulars setting forth his lifestyle claim in greater detail. Defendants' motion to compel plaintiff to comply with their outstanding discover demand is denied without prejudice at this time so that they can serve a more tailored demand for documents

Deadlines

The documents that have been identified herein for production shall be delivered by each side no later than Forty Five (45) Days hereof. With respect to any document that is not within the possession, custody or control of the party charged with production, that party must provide a sworn affidavit to that effect, and if appropriate, a signed authorization allowing the party demanding the information to obtain from the appropriate non-party (e.g. authorizations for tax returns). Expenses attendant to such production by non-parties (like copying costs) are to be borne by the party demanding

the disclosure.

Conclusion

Plaintiff's motion and defendant's cross motion to compel disclosure are each granted to the extent provided.

A compliance conference is presently scheduled for December 11, 2008 at 9:30 a.m. in Part 10.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 30, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.