

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

CHARLES PLACE ASSOCIATES,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 09-535M
	:	
CARRIER CORPORATION, individually	:	
and doing business as "CARRIER	:	
COMMERCIAL SERVICE, a Division	:	
of Carrier Corporation,"	:	
Defendant.	:	

**MEMORANDUM AND ORDER**

Before the Court for determination (28 U.S.C. § 636(b)(1)(A), DRI LR Cv 72(a)) are the following discovery motions:

1. Plaintiff's Motion to Strike Objections, Compel Full Answers to Interrogatories, and for Attorneys Fees (ECF No. 44);
2. Plaintiff's Motion to Strike Objections & Compel Full Answers to Plaintiff's Second Set of Interrogatories (ECF No. 45);
3. Plaintiff's Motion to Strike Objections & Compel Full Responses to Plaintiff's Second Set of Production Requests (ECF No. 46).

A hearing on these Motions was held on December 10, 2012.

Plaintiff Charles Place Associates ("Charles Place") is a residential facility located on Charles Street, Providence, that has had an ongoing contractual dispute with Defendant Carrier Corporation ("Carrier") over the performance of a cogeneration system purchased from Carrier pursuant to a contract dated July 12, 2005 – the system was supposed to provide the electricity, heat and cooling essential to the operation of Charles Place. The litigation between Charles Place and Carrier over the cogeneration system has had a tortured history, including an aborted settlement of litigation initiated in 2007 and the institution of new litigation (the current case) to

enforce the settlement agreement, as well as delays and changes in the judicial personnel assigned to handle the matter.

On April 8, 2011, this Court entered its Standard Pretrial Order in the current matter, establishing a close of fact discovery on September 30, 2011, and providing that no new motions may be filed except by leave of Court after October 14, 2011. Prior to the close of discovery, Charles Place propounded discovery appropriately focused on developing the factual support for Carrier's affirmative defenses. After various twists and turns,<sup>1</sup> these motions ultimately were denied as moot in anticipation that a new Answer would be filed that might not assert the same affirmative defenses, leading to a wait-and-see approach; the clear implication was that Plaintiff's motion could be revived if the new Answer asserted affirmative defenses as to which discovery was required.

That is exactly what happened next. On February 1, 2012, the new Answer asserted the same affirmative defenses, as well as new ones not previously part of the litigation. Plaintiff reserved the original discovery, together with new discovery aimed at the new defenses. Defendant objected based on timeliness and the work product doctrine. No privilege log was provided to support the latter objection.

At this point, larger forces again confuse the travel of the case. The case was transferred from United State District Judge William E. Smith to United State District Judge John J. McConnell, Jr. Soon after, the parties entered into new settlement negotiations that they had expectations would be fruitful. In the optimistic atmosphere of these settlement discussions, Charles Place refrained from refileing its motions to compel.

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<sup>1</sup> An unobjected-to motion to amend the Complaint had been pending without action by the Court since June 9, 2011. At argument, Carrier suggested that its new Answer would moot the motions to compel. As a result the Court granted the long-pending motion to amend and denied the motions as moot on January 13, 2012. ECF No. 34.

More recently, the case has changed course again and is back on the path to trial, likely in January 2013. As a result, Charles Place has reasserted its motions to compel. In response, however, Carrier argues that the original Standard Pretrial Order must be enforced literally to bar Charles Place from developing factual information regarding Carrier's affirmative defenses. As a practical matter, the denial of these motions would result in "trial by ambush" in that Charles Place would go forward to face facts in support of Carrier's affirmative defenses that were never aired during the discovery phase despite the timely efforts of Charles Place to develop those precise facts. See Macaulay v. Anas, 321 F.3d 45, 50 (1st Cir. 2003) (pretrial discovery rules exist to prevent trial by ambush); Taylor v. Woods, 241 F.R.D. 421, 424 (D.R.I. 2006) ("The Federal Rules of Civil Procedure prevent trial by ambush, and so does this Court.").

Carrier argues that it will be prejudiced by the distraction from its trial preparation created by the need to respond to these modest interrogatories and document requests after the close of fact discovery.

The Court finds that the travel of the case well excuses the failure of Plaintiff to move for leave of Court to proceed with these motions to compel, particularly because leave to file them is implicit in Magistrate Judge Martin's ruling of January 13, 2012. The Court also finds Carrier's arguments of prejudice are hollow. These interrogatories and document requests are simple and straightforward. While Carrier is engaged in its trial preparation regarding a specific affirmative defense, it also necessarily will be focused on the facts that it plans to present in support of that defense. These interrogatories and document requests simply ask for a brief summary of the facts and documents that will be presented at trial to buttress those defenses.

To the extent that the Standard Pretrial Order required leave of Court to file these motions to compel, this Court grants leave to file them and overrules Carrier's objection based

on the language of the Standard Pretrial Order. The Court further grants the motions to compel and orders that Defendant's responses will be provided on or before January 4, 2013, with the specific directive that any documents or information withheld based on the assertion of either the attorney-client privilege or the work product doctrine will be accompanied by a log prepared in compliance with Fed. R. Civ. P. 26(b)(5)(A).

So ordered.

ENTER:

/s/ Patricia A. Sullivan  
PATRICIA A. SULLIVAN  
United States Magistrate Judge  
December 10, 2012