

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT McADAM,

Plaintiff,

v.

STATE NATIONAL
INSURANCE COMPANY, INC.,

Defendant.

CASE NO. 12cv1333-BTM (MDD)

ORDER GRANTING
PLAINTIFF'S MOTION TO
COMPEL BETTER RESPONSES
TO DISCOVERY

[ECF NO. 32]

On September 3, 2013, Plaintiff filed the instant Motion to Compel Better Responses to Discovery. (ECF No. 32). Defendant responded in opposition on September 18, 2013. (ECF No. 37). The Court held a hearing on the motion on September 27, 2013. (ECF No. 39). Following the hearing the Court ordered as follows:

(1) Defendants shall review all documents, currently withheld, listed in any privilege log previously provided to Plaintiff. On or before October 2, 2013, Defendants shall produce any document previously withheld for the protection of work product, and any document that upon review Defendants deem are not subject to privilege. Defendants will, at that time, also produce a revised privilege log listing any documents that they intend to continue to withhold. (2) On October 7, 2013, Parties shall meet and confer regarding any documents that are not produced by Defendants on October 2. (3) Any document produced either formally, or informally at the meet and confer, will be subject to Fed. R. Evid. 502(d). Thus, any document produced will not constitute a waiver of privilege. (4) Should a dispute remain, regarding withheld

1 documents, the Parties shall file a joint motion regarding such
2 dispute on or before October 14, 2013. (5) Any documents that
3 remain in dispute shall be delivered to chambers for in
4 camera review on October 15, 2013.

4 (*Id.*)

5 On October 15, 2013, the parties filed a joint brief regarding items
6 remaining in dispute. (ECF No. 40). Defendant submitted to chambers
7 for *in camera* review documents withheld from production. Defendant
8 asserted attorney-client privilege for some documents and also withheld
9 documents regarding its re-insurance policy and policy reserves as
10 “proprietary” and based upon relevance. On October 16, 2013, the Court
11 held a telephonic conference with counsel for the parties inviting
12 additional briefing regarding the withholding of the remaining
13 documents. On October 28, 2013, each party submitted additional
14 briefing. (ECF Nos. 42, 43).

15 At this juncture, Defendant has agreed to produce the policy it
16 holds with its re-insurer, Wind River Reinsurance Company, agreed to
17 produce reports between its claims administrator, Optimum Claims
18 Service, Inc., and Wind River, and agreed to produce Optimum’s claim
19 handling guidelines. (ECF No. 43). Defendant redacted from the reports
20 between Optimum and Wind River information regarding loss reserves.
21 Defendant continues to assert attorney-client privilege for
22 communications between it and attorneys from the law firm of Gordon &
23 Rees, LLP, and between Gordon & Rees and marine surveyor Arnold &
24 Arnold.

25 What remains is for the Court to rule upon the propriety of the
26 assertion of attorney-client privilege regarding the withheld
27 communications and the propriety of the withholding of information
28 regarding the reserve established by Wind River regarding Plaintiff’s

1 claims.

2 Factual Summary

3 The following factual summary is from the Order of District Judge
4 Barry Ted Moskowitz, on Defendant's Motion for Judgment on the
5 Pleadings.

6 This action arises out of a "Hull and
7 Machinery/Protection and Indemnity" Policy ("Policy") issued
8 by Defendant to Plaintiff Robert McAdam for the term May 5,
9 2011 to May 5, 2012.

10 Plaintiff is the owner of the vessels Jessica M and
11 Shirley B, both of which are insured under the Policy. In late
12 2011, Master Marine, Inc. ("MMI"), in Bayou La Batre,
13 Alabama, performed repairs and upgrades on Jessica M and
14 Shirley B to convert the vessels from shrimp trawlers to deep
15 sea fishing boats. The repairs included work on the vessels'
16 rudder and shaft assemblies.

17 On February 24, 2012, Shirley B's rudder snapped off
18 while the vessel was fishing near New Zealand. Jessica M,
19 which was 70 miles away, came to provide assistance and
20 towed Shirley B to port in Tauranga, New Zealand. Defendant
21 directed the Shirley B to a repair yard in Whangarei, New
22 Zealand.

23 Repairs totaling \$162,283.74 were made on the Shirley
24 B. Defendant's surveyor determined that the loss of the
25 rudder was caused by faulty work of MMI. Defendant
26 reimbursed Plaintiff \$114,375.07 for the repairs, deducting
27 amounts for repairs that it deemed betterment.

28 The Jessica M also underwent repairs in New Zealand.
The Captain of the Jessica M noticed "play" in the rudder
while towing the Shirley B, and according to Plaintiff,
subsequent testing and inspection showed that Jessica M
suffered from the same repair defects as the Shirley B – i.e.,
welds that were not full-penetration and provided no strength
or stability to the rudder area.

When Plaintiff tendered a claim for the repair of Jessica
M, Defendant denied coverage. Defendant took the position
that the "play" in the rudder was due to lack of maintenance
of the rudder stock and bearings, not faulty welds.

(ECF No. 9). It appears the claim was denied in May 2012. Plaintiff filed
suit on June 4, 2012. (ECF No. 1).

//

1 Attorney-Client Privilege

2 Legal Standard

3 The Ninth Circuit consistently has described the attorney-client
4 privilege as protecting communications: (a) where legal advice of any
5 kind is sought; (b) from a professional legal advisor in his capacity as
6 such; (c) relating to that purpose; (d) made in confidence; (e) by the client;
7 (f) that are at the client's insistence permanently protected; (g) from
8 disclosure by himself or the legal advisor; (h) unless the protection be
9 waived. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009);
10 *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). The party
11 asserting the privilege has the burden of establishing all of its elements
12 and, even if established, the privilege is strictly construed. *Id.* at 999-
13 1000.

14 In *Ivy Hotel San Diego, LLC v. Houston Casualty Co.*, 2011 WL
15 4914941, *3-4 (S.D.Cal. 2011), District Judge Sabraw of this Court
16 described the manner in which state law governing privilege is applied in
17 a federal court sitting in diversity, stating:

18
19 In a federal action based on diversity jurisdiction, state
20 law governs attorney-client privilege claims. Fed.R.Evid. 501;
21 *Star Editorial, Inc. v. United States District Court for the*
22 *Central District of California (Dangerfield)*, 7 F.3d 856, 859
23 (9th Cir.1993); *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D.
24 281, 284 (C.D.Cal.1998). Under California law, "evidentiary
25 privileges such as the attorney-client privilege are governed
26 by statute. *HLC Props., Ltd. v. Superior Court*, 35 Cal.4th 54,
27 59, 24 Cal.Rptr.3d 199, 202, 105 P.3d 560 (2005); *Moeller v.*
28 *Superior Court*, 16 Cal.4th 1124, 1129, 69 Cal.Rptr.2d 317,
320, 947 P.2d 279 (1997). California Evidence Code section
954, confers a privilege on the client "to refuse to disclose, and
to prevent another from disclosing, a confidential
communication between client and lawyer... Cal.Evid.Code §
954. "Confidential communications include information
transmitted between attorney and client, and 'a legal opinion
formed and the advice given by the lawyer in the course of
that relationship.'" *Calvert v. State Bar*, 54 Cal.3d 765, 779, 1
Cal.Rptr.2d 684, 691, 819 P.2d 424 (1991) (quoting Cal.
Evid.Code § 952). "The attorney-client privilege attaches to a

1 confidential communication between the attorney and the
2 client and bars discovery of the communication irrespective of
3 whether it includes unprivileged material.” *Costco Wholesale*
4 *Corp. v. Superior Court*, 47 Cal.4th 725, 734, 101 Cal.Rptr.3d
5 758, 219 P.3d 736 (2009). In determining whether the
6 attorney-client privilege attaches to communications,
7 California courts look to the “dominant purpose of the
8 relationship” between the client and the attorney. *Id.* at 739,
9 101 Cal.Rptr.3d 758, 219 P.3d 736.

6 “The party claiming the privilege has the burden of
7 establishing the preliminary facts necessary to support its
8 exercise, *i.e.*, a communication made in the course of the
9 attorney-client relationship.” *Id.* at 733, 101 Cal.Rptr.3d 758,
10 219 P.3d 736. “Once that party establishes facts necessary to
11 support a prima facie claim of privilege, the communication is
12 presumed to have been made in confidence and the opponent
13 of the claim of privilege has the burden of proof to establish
14 the communication was not confidential or that the privilege
15 does not for other reasons apply.” *Costco*, 47 Cal.4th at 733,
16 101 Cal.Rptr.3d 758, 219 P.3d 736 (citing Cal. Evid.Code §
17 917(a)); *Wellpoint Health Networks, Inc. v. Superior Court*, 59
18 Cal.App.4th 110, 68 Cal.Rptr.2d 844 (1997)).

14 As in *Ivy Hotel*, the Court must determine whether Defendant’s
15 “dominant purpose” in retaining Gordon & Rees was to receive legal
16 advice. The privilege would not apply if the dominant purpose was to
17 have Gordon & Rees provide business advice or act as a claims adjuster.
18 *Id.* at *4. The answer may be that Defendant hired Gordon & Rees to
19 give legal advice and to act as a claims adjuster. In that case, the Court
20 must determine which purpose was primary. *Id.*

21 Analysis

22 In *Ivy Hotels*, Judge Sabraw had the benefit of declarations from
23 the attorney and the client regarding the fact and scope of the
24 engagement. *Id.* In the instant case, the Court requested declarations
25 from counsel regarding the fact and scope of the attorney-client
26 relationship between Gordon & Rees and its purported clients, Defendant
27 State National and maritime surveyor Arnold & Arnold. Defendant
28 acknowledged the Court’s request and stated that the necessary

1 declarations would be filed on October 15, 2013. (See ECF No. 40, p. 4, fn
2 2). No such declarations were filed. Hundreds of pages of withheld
3 documents, however, were provided to the Court for review.

4 Regarding Arnold & Arnold, the Court finds that Defendant has not
5 carried its burden of establishing the preliminary facts necessary to
6 support the exercise of the privilege. No evidence of an attorney-client
7 relationship has been provided to the Court. In an abundance of caution,
8 the Court reviewed the Arnold & Arnold documents submitted *in camera*.
9 Arnold & Arnold is a maritime surveyor and adjuster. The
10 communications between it and Gordon & Rees were predominantly
11 regarding the investigation of Plaintiff's claims. Many of the
12 communications were between Optimum, the claims administrator, and
13 Arnold & Arnold in which Gordon & Rees merely was copied. The Court
14 could not identify any documents or communications referring to a
15 privileged relationship between Gordon & Rees and Arnold & Arnold.
16 The Court has received no evidence nor found any documents suggesting
17 that communications with Arnold & Arnold are protected by virtue of the
18 attorney-client relationship between Gordon & Rees and Defendant State
19 National. In communications with Plaintiff, some of which were
20 contained within the withheld documents, Arnold & Arnold identified
21 itself as an independent marine surveyor and adjuster assigned by the
22 underwriter to investigate Plaintiff's claims. The assertion of
23 independence belies the claim that Arnold & Arnold's activities could be
24 subsumed within the attorney-client relationship between Gordon & Rees
25 and Defendant State National.

26 Accordingly, the Court finds that all documents withheld from
27 Arnold & Arnold based upon an assertion of attorney-client privilege are
28 to be provided to Plaintiff. The privilege has not been established. As a

1 consequence, any such communications between Gordon & Rees and
2 Defendant State National which were disclosed to Arnold & Arnold also
3 must be provided to Plaintiff.

4 Regarding Defendant State National, the Court is satisfied that an
5 attorney-client relationship existed with Gordon & Rees despite the fact
6 that no supporting declaration was filed. Among the withheld documents
7 are letters to counsel for Plaintiff in which Gordon & Rees claims to have
8 been retained as coverage counsel for Defendant. Gordon & Rees is
9 attorney of record for Defendant in this action. Other than that, there is
10 no evidence presented regarding when the relationship commenced and
11 scope of the engagement. The Court has reviewed the documents
12 withheld on the basis of privilege to glean the “dominant purpose” of the
13 engagement. If the dominant purpose of the engagement was claims
14 adjustment, there is no privilege. *See Ivy Hotels* at *4.

15 The Court finds that until the filing of this lawsuit, on June 4, 2012,
16 the dominant purpose of the engagement between Gordon & Rees and
17 Defendant State National was claims adjustment. Accordingly, all
18 communications between Defendant State National and Gordon & Rees
19 up to June 4, 2012, are not privileged and must be disclosed. The Court
20 agrees that communications on and after June 4, 2012, exclusively
21 between Gordon & Rees and Defendant State National are privileged and
22 may continue to be withheld.

23 Many of the communications withheld by Defendant State National
24 are between Gordon & Rees and Optimum Claims Service, Inc. -
25 apparently the claims administrator used by Defendant State National.
26 The Court is not aware of any expression by Gordon & Rees that it
27 represents Optimum. The Court has not been provided any evidence nor
28

1 discovered any documents in its review reflecting that Optimum is a
2 client of Gordon & Rees. There is no evidence that Optimum, as a claims
3 administrator, is covered by any attorney-client relationship between
4 Gordon & Rees and Defendant State National. Accordingly, the Court
5 finds that documents withheld by Defendant State National which
6 consist of communications withheld on the basis of privilege between
7 Gordon & Rees and Optimum must be disclosed. Also, any
8 communications withheld on the basis of privilege between Gordon &
9 Rees and Defendant State National which includes representatives of
10 Optimum similarly are not privileged and must be disclosed.

11 Disclosure of Reserves

12 Legal Standard

13 The Federal Rules of Civil Procedure generally allow for broad
14 discovery, authorizing parties to obtain discovery regarding “any
15 nonprivileged matter that is relevant to any party’s claim or defense.”
16 Fed. R. Civ. P. 26(b)(1). Also, “[f]or good cause, the court may order
17 discovery of any matter relevant to the subject matter involved in the
18 action.” *Id.* Relevant information for discovery purposes includes any
19 information “reasonably calculated to lead to the discovery of admissible
20 evidence,” and need not be admissible at trial to be discoverable. *Id.*
21 There is no requirement that the information sought directly relate to a
22 particular issue in the case. Rather, relevance encompasses any matter
23 that “bears on” or could reasonably lead to a matter that could bear on,
24 any issue that is or may be presented in the case. *Oppenheimer Fund,*
25 *Inc. v. Sanders*, 437 U.S. 340, 354 (1978). District courts have broad
26 discretion to determine relevancy for discovery purposes. See *Hallett v.*
27 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). Similarly, district courts have
28

1 broad discretion to limit discovery where the discovery sought is
2 “unreasonably cumulative or duplicative, or can be obtained from some
3 other source that is more convenient, less burdensome, or less
4 expensive.” Fed. R. Civ. P. 26(b)(2)(C). Limits also should be imposed
5 where the burden or expense outweighs the likely benefits. *Id.*

6 A party may request the production of any document within the
7 scope of Rule 26(b). Fed. R. Civ. P. 34(a). “For each item or category, the
8 response must either state that inspection and related activities will be
9 permitted as requested or state an objection to the request, including the
10 reasons.” *Id.* at 34(b). The responding party is responsible for all items
11 in “the responding party’s possession, custody, or control.” *Id.* at 34(a)(1).
12 Actual possession, custody or control is not required. Rather, “[a] party
13 may be ordered to produce a document in the possession of a non-party
14 entity if that party has a legal right to obtain the document or has control
15 over the entity who is in possession of the document. *Soto v. City of*
16 *Concord*, 162 F.R.D. 603, 620 (N.D.Cal.1995).

17 *Analysis*

18 Defendant has withheld, on the basis of relevance, documents
19 reflecting loss reserves established in connection with Plaintiff’s claim. A
20 review of the cases reflects that the decision whether or not loss reserve
21 information is relevant in any given scenario depends upon the claims
22 asserted by Plaintiff. In *Bernstein v. Travelers Insurance Company*, 447
23 F.Supp.2d 1100 (N.D.Cal. 2006), the allegations were that Travelers
24 acted in bad faith by unjustifiably resisting claims and delaying
25 payments. Reviewing both federal and state law, the court determined
26 that loss reserve information may be relevant in determining the
27 subjective intent component of a bad faith claim. *Id.* at 1108. *Flintkote*
28

1 *Company v. Gernal Accident Assurance Company of Canada*, 2009 WL
2 1457974 *3 (N.D.Cal. 2009).

3 Defendant attempts to distinguish between first-party insurance
4 disputes and third-party insurance disputes. The Court finds the
5 distinction irrelevant in this case. Plaintiff's have sufficiently established
6 that Wind River, the purported re-insurer in this case, is actually the
7 front-line insurer. (See ECF No. 42 at 2).

8 The Court agrees with Plaintiff that his allegations of bad faith are
9 virtually indistinguishable from the allegations made in *Bernstein* and
10 *Flintkote*. Consequently, the Court finds that evidence regarding loss
11 reserves established by Defendant and by Wind River are relevant and
12 subject to disclosure.

13 Conclusion


14 For the foregoing reasons, Plaintiff's Motion to Compel Better
15 Responses is **GRANTED**. Absent further Order, Defendant is provide
16 Plaintiff with the documents subject to disclosure under this Order no
17 later than ten (10) days from the date of this Order.

18 As provided by Fed.R.Civ.P. 37(a)(5)(A), the Court is required to
19 impose costs upon the party or attorney whose conduct necessitated the
20 motion. The Court must provide an opportunity to be heard and must
21 impose costs unless the Court finds that the successful movant brought
22 the motion before attempting in good faith to resolve the dispute
23 informally; the opposition to the motion was substantially justified; or
24 other circumstances make an award of expenses unjust. *Id.* If Plaintiff
25 decides to request that costs be awarded, an appropriate motion should
26 be filed within fourteen (14) days of the date of this Order. The motion
27 should contain the necessary documentation and declarations regarding
28

1 costs. Defendant may file an opposition no later than seven (7) days
2 following the filing of the motion for costs.

3 IT IS SO ORDERED.

4 DATED: November 1, 2013
5

6
7 
8 Hon. Mitchell D. Dembin
9 U.S. Magistrate Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28