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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 ACS International Products LP,

No. CV-19-00549-TUC-DCB

10 Plaintiff,

ORDER

11 v.

12 State Automobile Mutual Insurance
13 Company,

14 Defendant.

15 The Court denies the Plaintiff's Motion for Extension of Time for all discovery to
16 allow Plaintiff to file a motion to compel the deposition of the Defendant's attorney, John
17 DiCaro. (Docs. 78, 80.) The request for extending discovery to allow the Plaintiff's
18 damage expert, Thomas Selling, to supplement his expert report regarding property loss
19 (Doc. 78) is denied as moot. *See* (Supplement to Plaintiff's Motion to Extend Discovery
20 (Doc. 80) at 2 (explaining report has been supplemented)). The Court denies the
21 Defendant's Motion to Preclude use of Inadvertently Disclosed Privileged Information
22 (DiCaro Billing Analysis Report¹). (Doc. 82.)

23 The Plaintiff, ACS Industries, manufacturers decorative, organic fillers made from
24 polyester-resin granulates. Plaintiff alleges a hailstorm damaged the roofs of its
25 manufacturing plant and office. Initially, Marcor Platt, engineer, with Donan Engineering,
26 representing the Defendant State Auto Insurance reported the roof damage was due to hail
27 and covered under the policy. Subsequently, the Defendant secured a second opinion which

28 ¹ The disclosure was a Billing Analysis Report, which the Court refers to hereinafter as
billing statements.

1 was that the hail damage was old and occurred during a time-period outside the coverage
2 period. Plaintiff sues for bad faith failure to pay the insurance claim.

3 “A first-party bad faith claim arises from the fact that the insurer has a quasi-
4 fiduciary duty to act in good faith toward its insured’ and ‘imposes on the insurer a broad
5 obligation of fair dealing ... and a responsibility to give equal consideration to the
6 insured’s interests.’” (Motion Re: DiCaro Deposition (Doc. 80) at 2, 16 (quoting *Zilisch*
7 *v. State Farm Mutual Ins. Co.*, 995 P.2d 276, 279-80 (Ariz. 2000); *see also Rawlings v.*
8 *Apodaca*, 726 P.2d 565, 570 (Ariz. 1986). The attorney must be acting in the role of legal
9 counsel for attorney-client privilege to attach. If the attorney is acting in some other role,
10 as an ordinary businessman, for example as a claim adjuster, the privilege may not be
11 properly claimed. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir.
12 1977); *see also Samaritan Foundation v. Goodfarb*, 862 P.2d 870, 874 (Ariz. 1993) (For
13 the attorney-client privilege to apply, the attorney must be acting in the role of legal
14 counsel). In other words, to the extent DiCaro acted as a claim adjuster, claims process
15 supervisor, or claim investigation monitor, and not as a legal adviser, the attorney-client
16 privilege does not apply. *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind.
17 1991).

18 Defendant, State Auto, argues that it had reason to believe the Plaintiff’s claim was
19 fraudulently submitted, and the Donan Engineering report was inconclusive. Therefore, it
20 was appropriate for it to hire DiCaro in anticipation of litigation. “Numerous courts have
21 held that litigation is anticipated when the insurer discovers facts revealing that the loss at
22 issue was likely caused by its insured’s alleged bad conduct.” (Response (Doc. 81) at 9
23 (citing *Lett v. State Farm Fire & Casualty Co.*, 115 F.R.D. 501, 502-03 (N.D. Ga. 1987)
24 (litigation was anticipated when initial investigation revealed evidence that the insured had
25 committed arson). *See also Chambers v. Allstate*, 206 F.R.D. 579 (S.D.W.Va. 2002)
26 (“substantial and imminent” or “fairly foreseeable” threat of litigation arises when it
27 becomes evident to insurer that losses were caused by arson and insured was involved);
28 *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (D.C.Ga. 1982) (same). The only involvement

1 DiCaro had unrelated to litigation was to refer State Auto to Todd Springer, an engineer
2 with Augspurgen Komm Engineering (“AKE”), to conduct the engineering assessment
3 necessary for Defendant to process Plaintiff’s claim. State Auto denies DiCaro had any
4 involvement in the unbiased claim investigation conducted by Springer.

5 **Motion to Extend Discovery**

6 State Auto will be unduly prejudiced if ACS is allowed to turn State Auto’s trial
7 counsel into a fact witness. As noted by Defendant, to overcome Defendant’s attorney-
8 client privilege, “ACS would have to demonstrate that its substantial need outweighs State
9 Auto’s interest in maintaining confidentiality.” (Response (Doc. 81) at 14 (citing
10 *Samaritan Foundation v. Superior Court*, 173 Ariz. 426 (App. 1992)). Plaintiff cannot
11 make this showing because it has deposed Springer, and State Auto’s claim adjusters,
12 Wakefield and Myers. ACS’s “need” to depose attorney DiCaro to gain information
13 Plaintiff already possesses does not outweigh the prejudice it would cause to State Auto if
14 its trial counsel was forced to recuse himself from representation. At trial, the Plaintiff is
15 free to argue that the Donar Report was not ambiguous, and Defendant acted in bad faith
16 when it did not pay the claim without conducting further investigation.

17 Springer’s deposition and case notes reflect the details of the information imparted
18 to him before he conducted his investigation. Meyers and Wakefield testified at their
19 deposition that they would not impart some of the information given to Springer because
20 it could bias his investigation. They need not be standard of care experts to testify to the
21 standards and procedures they would use as experienced and trained adjusters for State
22 Auto. Defendant’s assertion that their testimony conflicts with testimony from standard of
23 care experts does not make it inadmissible, but only goes to the weight of the evidence.
24 Plaintiff has sufficient evidence to argue the Springer engineering report was biased
25 without deposing DiCaro.

26 The Motion to Extend Discovery is denied as untimely because it was filed on
27 April 28, 2021, two days before discovery was set to end on April 30, 2021. Plaintiff
28 seeks additional time to file a motion to compel the deposition of Defendant’s attorney,

1 DiCaro, in response to Defendant’s assertion of attorney-client privilege. At the Court’s
2 request, the Plaintiff supplemented the motion with its arguments for compelling
3 DiCaro’s deposition. The issue has been fully briefed, and the Court finds that the
4 Plaintiff was not diligent in seeking an extension of the discovery deadline on the eve of
5 its expiration. The issue arose when Plaintiff sought to take DiCaro’s deposition on
6 February 11, 2021, and Defendant asserted attorney-client privilege on February 16,
7 2021.

8 Once the Court enters a scheduling order, the “schedule may be modified only for
9 good cause and with the judge’s consent.” Rule 16(b)(4), Fed. R. Civ. P. “Rule 16(b)’s
10 ‘good cause’ standard primarily considers the diligence of the party seeking the
11 amendment.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).
12 “The district court may modify the pretrial schedule if it cannot reasonably be met despite
13 the diligence of the party seeking the extension.” *Id.* (“carelessness is not compatible with
14 a finding of diligence and offers no reason for a grant of relief”). “Although the existence
15 or degree of prejudice to the party opposing the modification might supply additional
16 reasons to deny a motion, the focus of the inquiry is upon the moving party’s reasons for
17 seeking modification.” *Id.* “If that party was not diligent, the inquiry should end.” *Id.*

18 Plaintiff fails to address why they did not file a motion to compel in February or
19 early March at the latest. Diligence was especially important here because the Court had
20 granted multiple extensions of time to complete discovery from October 10, 2020 to
21 December 1, 2020, to March 1, 2021, and to April 30, 2021. The Court denies the extension
22 because Plaintiff waited until just days before the close of discovery to request additional
23 time. Federal courts deny extension requests brought on the eve of the close of discovery.
24 *See United States ex rel. Gohil v. Sanofi U.S. Services Inc.*, 2020 WL 1888966, at *4 (E.D.
25 Pa. Apr. 16, 2020) (collecting cases and holding “district court is well within its discretion
26 when it denies untimely discovery requests that could have been made at an earlier date”).

1 **Motion to Preclude Inadvertently Disclosed Attorney-Client Privileged Information**

2 The Defendant, State Auto, seeks to preclude the Plaintiff, ACS, from using the
3 “inadvertently” disclosed DiCaro billing statements which are attorney-client privileged
4 communications. According to State Auto, it inadvertently failed to redact² the billing
5 statements in its Claim File but marked them as privileged. Without disputing the claim
6 of privilege, ACS “took those privileged documents and published them in a motion, [the
7 Motion to Extend Discovery to depose DiCaro.] . . . ACS thus flagrantly and willfully
8 disregarded evidentiary, procedural, and ethical rules, which direct ACS to first dispute
9 State Auto’s claim of privilege with this Court before unilaterally publishing the
10 privileged information and/or to withhold the inadvertently disclosed privileged
11 information before a dispute over privilege is resolved.” (Motion Re: Preclude (Doc. 82)
12 at 2.)

13 Defendant seeks sanctions against ACS as follows: 1) preclusion from using the
14 protected information and any inferences, including an order to strike its use in its
15 “Supplement” [Doc. 80]; 2) pay State Auto’s reasonable attorneys’ fees and costs
16 incurred in defending the willful violation of attorney-client privilege; and 3) any other
17 relief deemed appropriate by the Court.

18 The obvious problem with State Auto’s argument is that the billing statements
19 reflect involvement by DiCaro with Springer beyond simply making the referral to State
20 Auto, and the alleged privileged communications with Springer were made during the
21 time period that Springer was allegedly conducting the unbiased independent claim
22 investigation for State Auto. The billing statement in combination with the Springer notes
23 arguably supports Plaintiff’s assertion that DiCaro oversaw the State Auto claim
24 investigation and tainted its impartiality.

25 The Springer Notes reflect the following:

26 June 6, 2019: Conference call with Mike, Mike and John DiCaro reflecting
27 an overview discussion of the claim, including that the Plaintiff had made

28 ² The Defendant uses the term “redact” to mean it failed to omit the billing statements from the Claim File rather than as commonly used to mean to omit portions of the billing statements but not the billing statements in their entirety.

1 two claims, with one claim made for hail damage in 2016, which was denied
2 due to lack of coverage, and the second on September 2, 2018 DOL. The
3 insured had hired a Private Adjuster (PA), John Morris. An inspection was
4 going to be conducted by the claim adjuster, assumably Wakefield, and the
5 PA. Spinger was told about the Donan engineering inspection and report
6 identifying hail damage attributed to the September storm in part and in part
7 to a 2015 storm. The roof was described in detail, such as mod-bit with
8 granulated cap sheet; warehouse has no coating; office has elastomeric
9 coating, etc. State Auto had concluded that there was no clarity regarding
10 damage; where it was, what it was, etc. At the time of the conference call,
11 the Insured Plaintiff did not have a copy of the Donan report and things had
12 gotten confrontational with Morris, but Wakefield had calmed things down.

13 6/11/2019: Phone call to Mr. Wakefield after inspection to discuss the
14 results: Springer was "told to go through DiCaro. E-mail correspondence
15 with DiCaro to set-up conference call for 6/13/22. (Springer was deposed
16 3/25/21 and did not recall the 6/13/22 DiCaro conference call.)

17 (Motion Re: DiCaro Depostion (Doc. 80) at 8.)

18 The DiCaro billing statements reflect the following:

19 06/03/2019: Several communications with Claims Representative for State
20 Auto, Mike Wakefield, regarding case status and obtaining an expert to
21 inspect the building where the loss occurred.

22 06/03/2019: Communications with our expert, Todd Springer, regarding
23 his assignment and inspecting the property and building where the loss
24 occurred, and the report of prior expert, Donan Engineering.

25 06/03/2019: Begin review of Donan Engineering report by Marco Platt, in
26 order to discuss the same by our expert, Todd Springer, so he may investigate
27 the loss and evaluate the opinions of Platt and the hailstorm allegations by
28 the insured, ACS.

06/05/2019: Communications with possible expert witness, Todd Springer,
who we may retain to inspect the insured's, ACS, property, as well as
evaluate and rebut the Donan report, who is an expert who was retained prior
to Mr. Springer, in order to defend claim.

06/06/2019: Prepare for telephonic conference with Mike Wakefield and
Mike Myers of State Auto and our expert, Todd Springer, to discuss all
aspects of this claim and having Mr. Springer involved in the investigation
and inspection of the premises relating to hail damage, by analysis and
review of the former engineer's, Donan Engineering, report.

06/06/2019: Participate in telephonic conference with Mike Wakefield and
Mike Myers of State Auto and our expert, Todd Springer, to discuss all
aspects of this claim and involving Mr. Springer in the investigation of hail
damage at the insured's residence.

06/11/2019: Communications with our expert, Todd Springer, regarding
his work on hail related and damage cases, in order to defend claim, evaluate
the insured's, ACS, loss, and a response to the report of Marco Platt of Donan
Engineering.

1 06/13/2019: Prepare for telephonic conference with expert, Todd Springer,
2 and State Auto representative, Mike Myers, to discuss all aspects of this
3 claim, the Marco Platt report, the building of the insured, ACS, with potential
and possible hail damage, and the work we would like Mr. Springer to do
and inspect that damage.

4 06/13/2019: Telephonic conference with our expert, Todd Springer, and
5 State Auto representative, Mike Myers, regarding claim status, inspection by
6 Mr. Springer of the insured's, ACS, building, and claimed hail damage, in
order to evaluate claim and provide analysis of the alleged damage.

7 06/17/2019: Prepare for communications with State Auto Representatives,
8 Mike Wakefield and Mike Myers, regarding inspection by our expert, Todd
Springer, of the insured's property, by review and analysis of Donan
Engineering's, roofing expert, 20+ page report.

9 06/17/2019: Telephonic conference with State Auto representatives, Mike
10 Wakefield and Mike Myers, regarding case status, the findings and opinions
of our expert, Todd Springer, and options to handle this matter going
forward.

11 *Id.* at 10-11; (Billing Analysis Report Bates# 413-415 (Doc. 80-3) at 69-70).

12 In combination, the Springer notes and billing statements reflect the time period
13 from when Springer was hired by State Auto to conduct the “independent” claim
14 investigation and issuance of his claim investigation report, *Id.* (Doc. 80-3) at 5. July 18,
15 2019. On July 23, 2019, five days after receiving the Springer Report, State Auto denied
16 the Plaintiff’s claim.

17 Defendant has Springer wearing two hats, simultaneously, he was conducting an
18 unbiased independent claim investigation and acting as the defense expert for State Auto
19 in anticipation of litigating the denial of the Plaintiff’s claim. DiCaro cannot wear these
20 two hats without jeopardizing State Auto’s attorney client privilege over the DiCaro-
21 Springer communications. The Court does not, however, reach the question of whether
22 the privilege was destroyed because it was waived. State Auto disclosed the billing
23 statements with the Claim File it released to the Plaintiff.

24 The January 2020 Privilege Log does not include any mention of the billing
25 statements for any DiCaro communications with Springer, the Bates #413-415
26 documents. The April 2020 Privilege Log adds the Bates # 413-415 documents, dated
27 August 29, 2019, and describes the privilege as: “Attorney Client Privilege/Post Bad
28 Faith Law Suit.” (Motion to Preclude (Doc. 82-2) at 4.) The April Privilege Log suggests

1 that the billing statements relate to attorney client communications after State Auto
2 denied the claim which occurred on July 23, 2019. The billing statements at issue were
3 for an earlier time period when Springer was allegedly conducting the unbiased
4 independent claim investigation for State Auto.

5 According to Rule 26, a party withholding information as privileged “must: (i)
6 expressly make the claim; and (ii) describe the nature of the documents, communications,
7 or tangible things not produced or disclosed--and do so in a manner that, without
8 revealing information itself privileged or protected, will enable other parties to assess the
9 claim.” Fed. R. Civ. P. 26(b)(5)(A). The April 2020 Privilege Log misrepresented the
10 time period covered by the billing statements as being after State Auto denied the claim,
11 not for work performed by DiCaro during the claim investigation. Only because Plaintiff
12 had the allegedly inadvertently disclosed documents, Bates # 413-15, could it recognize
13 the nature of the communications reflected in the billing statements was for a time period
14 when Springer was supposed to be conducting an independent claim investigation.

15 The billing statement was disclosed as part of the Claim File in January 2020,
16 without any claim of privilege. On April 7, 2020, the Defendant revised the Privilege Log
17 and added the billing statements, Bates #413-415. The Defendant took no further action
18 to bring the inadvertent disclosure to the Plaintiff’s attention.

19 Fed. R. Civ. P. 26(b)(5)(B), which requires: “If information produced in discovery
20 is subject to a claim of privilege . . . , the party making the claim may notify any party that
21 received the information of the claim and the basis for it. After being notified, a party
22 must promptly return, sequester, or destroy the specified information and any copies it
23 has; must not use or disclose the information until the claim is resolved; must take
24 reasonable steps to retrieve the information if the party disclosed it before being notified;
25 and may promptly present the information to the court under seal for a determination of
26 the claim. The producing party must preserve the information until the claim is resolved.”

27 Importantly, nothing happened subsequent to the April 7, 2020 revised Privilege
28 Log. The Plaintiff did not return the billing statements, and Defendant did nothing to get

1 them back. The Court finds that simply adding the disclosed billing statements to the
2 Privilege Log in April was insufficient notice of the inadvertent disclosure of the billing
3 statements and the Defendant's claim of privilege.

4 The Court finds that the Defendant waived any claim of attorney-client privilege
5 over the billing statements because they failed to include them on the January 2020
6 Privilege Log and in fact disclosed them to Plaintiff in the Claims File. The April 2020
7 Privilege Log did not accurately describe the asserted privilege for the billing statements
8 because it suggested they were for work performed by DiCaro after State Auto denied the
9 claim instead of during a time when Springer was supposed to be conducting an
10 independent claim investigation. The Defendant's April 2020 Privilege Log did not
11 provide the notice envisioned in Rule 26 of an inadvertent disclosure. The Defendant
12 knew by April 2020 that it had disclosed the billing statements. Defendant knew by
13 February 2021 that Plaintiff wanted to depose DiCaro related to communications with
14 Springer during the time period disclosed in the billing statements. Defendant, however,
15 did not assert inadvertence of the disclosure or attorney client privilege until after the
16 Plaintiff used the billing statement as evidence to support its assertion that DiCaro was
17 supervising what was supposed to be an unbiased claim investigation by Springer.

18 The Court finds that State Auto fails to establish the disclosure of the billing
19 statement information was inadvertent. "To claim an inadvertent disclosure, the party
20 claiming inadvertence must demonstrate it took reasonable steps to prevent disclosure –
21 those steps are not present in this matter." *Id.* at 16. The Court considers the following
22 factors: (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2)
23 the time taken to rectify the error, (3) the scope of the discovery; (4) the extent of the
24 disclosure; and (5) the "overriding issue of fairness." *Id.* at 17 (citing *Hartford Fire Ins. V.*
25 *Garvey*, 109 F.R.D. 323, 331-32 (N.D. Cal. 1985) (finding federal courts apply these factors). As
26 noted by the Plaintiff, the disclosure was made in the Claim File, which assumably was closely
27 scrutinized by counsel before being disclosed. *Id.* at 16-18. All of the factors tip against the
28 Defendant, and it carries the burden to invoke the privilege. *Clarke v. American Commerce*

1 *National Bank*, 974 F.2d 127, 129 (9th Cir.1992); *United States v. Abrahams*, 905 F.2d 1276,
2 1283 (9th Cir.1990). The Court finds the billing statement disclosure waived the privilege, and
3 the Defendant fails to make a showing of inadvertence.

4 Pursuant to the case management schedule, the Defendant filed a Motion for
5 Summary Judgment on June 9, 2021. The Plaintiff filed a Motion to Extend the time to
6 respond to the summary judgment motion until after it can depose the Defendant's
7 attorney, DiCaro, pursuant to Fed. R. Civ. P.56(d), which provides for such an extension
8 if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot
9 present facts essential to justify its opposition." The Plaintiff asserts that the DiCaro
10 deposition is necessary to establish punitive damages, which require evidence of
11 something more than bad faith. The Court affirms its denial to extend discovery to all
12 Plaintiff to depose DiCaro for all the reasons discussed above and because the Plaintiff
13 had the billing statements as of January 2020. The Court will allow an extension of time
14 to file the Response to accommodate briefing the issues being ruled on in this Order.

15 **Accordingly,**

16 **IT IS ORDERED** that the Motion to Extend Discovery (Docs. 78 and 80) is
17 DENIED.

18 **IT IS FURTHER ORDERED** that the Motion to Preclude Using Inadvertently
19 Disclosed Privileged Information (DiCaro billing statements) (Doc. 82) is DENIED.

20 **IT IS FURTHER ORDERED** that the Motion to Extend the Time to file a
21 Response to the Defendant's Motion for Summary Judgment (Doc. 87) is DENIED in
22 part and granted in part.

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1 **IT IS FURTHER ORDERED** that within 30 days of the filing date of this Order,
2 the Plaintiff shall file the Response to the Defendant's Motion for Summary Judgment.

3 Dated this 6th day of July, 2021.

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Honorable David C. Bury
United States District Judge