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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSIE NIELSEN, a single woman,

Plaintiff,

v.

CALIFORNIA CAPITAL
INSURANCE COMPANY, a foreign
corporation, and EAGLE WEST
INSURANCE COMPANY, a foreign
corporation,

Defendants.

NO. 2:22-CV-0177-TOR

ORDER ON MOTIONS *IN LIMINE* &
OBJECTIONS TO WITNESS AND
EXHIBIT LISTS

BEFORE THE COURT is Plaintiff’s Motions *In Limine* (ECF No. 79),
Defendants’ Motions *In Limine* (ECF No. 81), Plaintiff’s Objection to Defendants’
Witnesses and Exhibits (ECF No. 77), Defendants’ Objections to Plaintiff’s
Witnesses and Exhibits (ECF No. 78), and Defendants’ Supplemental Objections
to Plaintiff’s Witnesses and Exhibits (ECF No. 133). The Court has reviewed the
record and files herein, the completed briefing, and the parties’ arguments.

1 **DISCUSSION**

2 **I. Motions *In Limine***

3 **A. Legal Standard**

4 “A motion in limine is a procedural mechanism to limit in advance
5 testimony or evidence in a particular area.” *United States v. Heller*, 551 F.3d 1108,
6 1111 (9th Cir. 2009). *In limine* rulings are “subject to change when the case
7 unfolds . . . even if nothing unexpected happens at trial.” *Luce v. United States*,
8 469 U.S. 38, 41-42 (1982); *see also McSherry v. City of Long Beach*, 423 F.3d
9 1015, 1022 (9th Cir. 2005).

10 **B. Plaintiff’s Motions *In Limine* (ECF No. 79)**

11 1. Evidence Not Produced in Discovery

12 Plaintiff moves to exclude any evidence not produced in discovery, noting
13 that the discovery deadline in this matter was August 1, 2022. ECF No. 79 at 3.
14 Defendants agree to the motion. ECF No. 103 at 2.

15 The Court has the discretionary power to exclude evidence that a party fails
16 to produce during discovery. *See Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d
17 1020, 1028 (9th Cir. 2003). Based on this authority and the parties’ stipulation, the
18 motion is **GRANTED**.

19 2. Witnesses Not Disclosed

20 Plaintiff moves to exclude the testimony of Stephen Airey, a former

1 employee of Defendants, who was not identified as a person with knowledge or
2 potential trial witness in Defendants' initial disclosures. ECF No. 79 at 3.

3 Defendants do not object. ECF No. 103 at 2.

4 Given the parties' stipulation on this matter and the fact that Mr. Airey was
5 not identified in the initial disclosure, ECF No. 76-1 at 33-38, or in an amended
6 disclosure, the motion is **GRANTED**.

7 3. Benefits From a Collateral Source and Offsets

8 Plaintiff objects to Defendants' proposed use of evidence of Plaintiff's
9 health insurance as impermissible collateral source evidence. ECF No. 79 at 4-5.

10 Defendants respond that they do not intend to argue that Plaintiff will receive a
11 windfall as a result of her health insurer paying her treatment bills. ECF No. 103
12 at 2. However, Defendants do argue that collateral source evidence of the at-fault
13 driver's payment and Defendants' payment of personal injury protection ("PIP")
14 benefits is admissible because it is relevant to Plaintiff's UIM claims. *Id.* at 3.

15 Plaintiff agrees that evidence of the at-fault driver's payment and the PIP coverage
16 is admissible. ECF No 123 at 2.

17 The parties appear to agree that, under Washington law, Defendant may not
18 present collateral evidence of Plaintiff's health insurance. *See Hayes v. Wieber*
19 *Enters., Inc.*, 105 Wash. App. 611, 616 (2001) (Plaintiffs "are permitted to recover
20 the reasonable value of the medical services they receive, not the total of all bills

1 paid.”). The parties also seem to agree that Defendant may present evidence
2 regarding Plaintiff’s settlement with the at-fault driver and its payout of PIP
3 benefits. Because of these stipulations and the underlying Washington authority,
4 the Court **GRANTS** Plaintiff’s motion to exclude collateral source evidence of
5 Plaintiff’s health insurer’s payments.

6 The parties also mutually agree that any related argument pertaining to
7 Defendants’ potential entitlement to offsets (due to the PIP payment and settlement
8 with the at-fault driver) should be addressed by the Court after trial. ECF No. 79 at
9 5. Given the parties’ agreement on deferring a decision on any offsets, the Court
10 **RESERVES** ruling on that matter at this time.

11 4. Time and Manner of Retention of Plaintiff’s Attorneys

12 Plaintiff moves for the Court to exclude evidence related to “the time or
13 circumstances” under which she employed her current attorneys, stating it is
14 irrelevant under Rules of Evidence 401-403. ECF No. 79 at 5-6. Defendants
15 stipulate that they will not introduce any evidence regarding the employment of
16 Plaintiff’s current counsel. ECF No. 103 at 2. The Court agrees with the parties
17 that any arguments concerning the employment of Plaintiff’s current attorneys are
18 irrelevant to the ultimate determination of Plaintiff’s causes of action, which have
19 nothing to do with the retention of counsel. *See* FED. R. EVID. 401, 403. The
20 Court therefore **GRANTS** Plaintiff’s motion.

1 5. Information Obtained After Defendants Refused to Pay Benefits

2 Plaintiff moves for the Court to bar Defendants from introducing later-
3 obtained reports and other evidence to “justify its previous denial of benefits and
4 failure to properly investigate the insurance claim.” ECF No. 79 at 7. Defendants
5 agree that the reasonableness of their actions in adjusting Plaintiff’s claim must be
6 judged by the information in their possession at the time of the claims assessment.
7 ECF No. 103 at 3. However, they argue that later-obtained evidence pertaining to
8 Plaintiff’s recovery is relevant to the jury’s assessment of her injuries under the
9 UIM claim. *Id.* at 3-4. They further submit that the opinions of Dr. Battaglia
10 should be admitted and that claims handling experts should be permitted to opine
11 upon the reasonableness of Defendants’ actions based on the information in their
12 possession. *Id.* at 4.

13 Plaintiff is correct that “an insured may maintain an action against its insurer
14 for bad faith investigation of the insured’s claim and violation of the CPA
15 regardless of whether the insurer was ultimately correct in determining coverage
16 did not exist.” *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 279
17 (1998); *see also Bryant v. Country Life Ins. Co.*, 414 F. Supp. 2d 981, 1000 (W.D.
18 Wash. 2006) (“[W]hether the coverage decision is correct . . . is not dispositive of
19 the bad faith claim.”). However, Plaintiff speaks in vague terms of what evidence
20 she believed Defendants impermissibly relied upon after-the-fact to justify their

1 denial of her claims. *See* ECF No. 79 at 7 (arguing that Defendants relied upon
2 “later-obtained reports (and [] ‘hired-gun’ experts) or information [to] justify its
3 previous denial of benefits and failure to properly investigate the insurance
4 claim.”).

5 To the extent Plaintiff suggests that Dr. Battaglia’s first report from his
6 independent medical examination (IME) was impermissibly belated, the evidence
7 belies that the IME report was produced after the final offer. Dr. Battaglia
8 conducted the IME on May 12, 2022, and provided Defendants a report on May
9 25, 2022. ECF No. 44-1. It therefore cannot be said that Defendants’ reliance on
10 the IME report was an impermissibly retroactive attempt to justify their final bid
11 since the report was produced before the offer was extended. The Court therefore
12 **DENIES** Plaintiff’s motion insofar as it suggests that Defendants have relied on
13 the IME report to justify their final offer *ex post facto*.

14 Dr. Battaglia’s addendum report is a different matter. The report was
15 submitted one year after the final offer was made. *Compare* ECF No. 44-10 at 2
16 *with* ECF No. 72-6. Defendants therefore may not rely upon the addendum report
17 as evidence of their good faith investigation, as it would constitute an after-the-fact
18 justification of their claims handling procedures. However, the Court agrees with
19 Defendants that the evidence is not subject to total exclusion, because, as outlined
20 in the Court’s order on Plaintiff’s motion to limit Dr. Battaglia’s testimony, it still

1 may aid the jury's determination of the value of Plaintiff's UIM claim, particularly
2 with respect to her future claimed medical damages. *See* ECF No. 150. The Court
3 therefore **DENIES** Plaintiff's motion insofar as it would wholly exclude Dr.
4 Battaglia's addendum report, but **GRANTS** the motion insofar as Defendants
5 would rely on the report as proof of their good faith investigation.

6 6. Defense Testimony Regarding Need for Future RFA Treatment

7 Plaintiff asks the Court to exclude any defense testimony regarding the need
8 for her future RFA treatment and to rule that Defendants' employees are
9 unqualified to provide medical opinions. In view of the Court's recent order
10 limiting Dr. Battaglia's testimony on Plaintiff's need for future RFAs, the Court
11 **DENIES** Plaintiff's motion to exclude defense testimony regarding her need for
12 future RFAs and **GRANTS** Plaintiff's motion insofar as it states that Defendants'
13 adjuster-employees are unqualified to provide medical opinions at trial. *See* FED.
14 R. EVID. 701 (governing the opinion testimony of lay witnesses).

15 7. Showing the Jury Any Document or Information Not Admitted

16 Plaintiff moves to prevent Defendants from showing the jury proposed
17 evidence or other material not admitted as an exhibit by the Court. Defendants
18 concede to this motion. The Court therefore **GRANTS** the motion.

19 8. The Effect of any Lawsuit on Insurance Rates or Premiums

20 Plaintiff moves the Court to exclude Defendants from "[a]ny comment that

1 this lawsuit or award[] [of] damages will impact insurance rates or premiums,”
2 because to do so would be speculative and “unfairly prejudicial.” ECF No. 79 at 7.
3 Defendants agree. Because the parties are in agreement and the introduction of
4 any evidence to that effect would prove both irrelevant and unduly prejudicial, the
5 Court therefore **GRANTS** the motion. *See* FED. R. EVID. 401, 403.

6 9. The Effect of a Damages Award on Nielsen’s Pain or Health

7 Plaintiff asks the Court to exclude any potential argument that an award of
8 damages would not alleviate her injury or health conditions. ECF No. 79 at 8.
9 Defendants stipulate to this motion. ECF No. 103 at 2. Since the Court agrees that
10 any arguments pertaining to the effect of an award on Plaintiff’s health condition
11 would confuse the issues and mislead the jury, it adopts the parties’ agreement and
12 **GRANTS** Plaintiff’s motion. *See* FED. R. EVID. 403.

13 10. Evidence Suggesting the Medical Treatment and Bills Were
14 Unreasonable

15 Plaintiff requests that the Court exclude argument suggesting her medical
16 treatment and bills were not reasonably necessary. ECF No. 79 at 8. Defendants
17 do not dispute the amount of past medical expenses and billings, only Plaintiffs’
18 future RFA treatments. ECF No. 103 at 2. In view of Defendants’ concession on
19 the matter, the Court **GRANTS** the motion.

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1 11. Residence of Plaintiff’s Counsel or Experts

2 Plaintiff asks the Court to exclude any evidence regarding the residence of
3 Plaintiff’s counsel or witnesses. ECF No. 79 at 8. Defendant agrees to the motion
4 “provided it is reciprocal.” ECF No. 103 at 6. Plaintiff does not appear to dispute
5 the reciprocal application of this motion. *See generally* ECF No. 123. Finding that
6 the parties have reached an agreement on this matter and that any evidence
7 regarding the residence of Plaintiff’s attorneys or witnesses would be irrelevant to
8 the issues presented in this case, FED. R. EVID. 401, the Court **GRANTS** the
9 parties’ motions.

10 12. Disclosure of Illustrative or Demonstrative Exhibits

11 The parties jointly request an order requiring counsel to disclose all exhibits
12 and visual aids to be used during their opening statements prior to making those
13 statements in order to (1) allow the Court time to consider and rule upon any
14 objectionable information beforehand and (2) give the parties’ time to review and
15 verify the accuracy of exhibits. ECF No. 79 at 9. Plaintiff requests an order that
16 parties will not be obligated to share visual aids or demonstrative exhibits with one
17 another during trial, but adds that they intend to cooperate. *Id.* In the interests of
18 economy and the parties’ agreement, the court **GRANTS** the motion.

19 13. Taxability of Recovery

20 The parties are also in agreement as to the fact that Defendants shall not

1 present any evidence regarding the taxability of her potential recovery. ECF Nos.
2 79 at 10; 103 at 2. The Court finds that any argument on the taxability of a
3 potential award would be irrelevant and has the potential to create confusion. FED.
4 R. EVID. 401, 403. The parties' agreement as to this motion is therefore

5 **GRANTED.**

6 14. Testimony or Evidence Plaintiff is Malingering

7 Plaintiff anticipates that Dr. Battaglia will opine that Plaintiff does not need
8 future RFAs or medical treatment for her neck pain and that she is malingering
9 "because of some unspecified psychological condition or because of the present
10 litigation." ECF No. 79 at 10. The motion is **GRANTED IN PART AND**
11 **DENIED IN PART** pursuant to the Court's order denying Plaintiff's motion to
12 limit Dr. Battaglia's RFA testimony. *See* ECF No. 150.

13 15. Characterization of Plaintiff's Medical Exam by Dr. Battaglia as
14 "Independent"

15 Plaintiff moves the Court to bar Defendants from referring to Dr. Battaglia
16 as "independent" or allowing them to say that he performed an "independent
17 medical exam" (IME). ECF No. 79 at 11. Defendants report that the word "IME"
18 was contained in the claim file and Plaintiff herself has even referred to the report
19 as an IME report. ECF No. 103 at 6. They further argue that Plaintiff should be
20 ordered not to refer to the examination as a "defense" medical examination, Dr.

1 Battaglia as a “hired gun” or imply that he is anything other than a privately
2 practicing physician who also does forensic work. *Id.* at 6. In support of this, they
3 state that Dr. Battaglia was hired before they became defendants to this action. *Id.*
4 at 7. Plaintiff retorts that he is not independent because he was hired by
5 Defendants through their lawyer and the suggestion that he has the potential to
6 confuse the jury. ECF No. 123 at 3.

7 The Court **DENIES** Plaintiff’s motion. Referring to the report as an
8 “independent medical exam” or Dr. Battaglia as an “independent” medical
9 examiner “will not cause confusion to the jury where plaintiffs will have the ability
10 to cross-examine [Dr. Battaglia] as to [his] retention by defendant[s].” *Reardon v.*
11 *Progressive Nw. Ins. Co.*, C10-225 RSL, 2011 WL 13234668 (W.D. Wash. Mar.
12 31, 2011) (citing FED. R. EVID. 403).

13 16. Expert Reports

14 Plaintiff’s final motion *in limine* argues that defense forensic experts’ reports
15 are inadmissible hearsay and that the Court should strike testimony in their reports
16 along with their planned trial testimony. ECF No. 79 at 10. Defendants answer
17 that Dr. Battaglia’s IME report is listed in Plaintiff’s exhibit list and part of the
18 record and therefore admissible, but concede that the litigation expert reports
19 otherwise prepared are inadmissible except as used to refresh an expert’s
20

1 recollection at trial. ECF No. 103 at 8. Plaintiffs do not appear to dispute this.

2 *See generally* ECF No. 123.

3 Since the parties appear to agree on this issue, the Court **GRANTS**
4 Plaintiff's motion to bar the litigation expert reports as inadmissible and **DENIES**
5 the motion as to Dr. Battaglia's prior IME report.

6 **C. Defendants' Motions *In Limine* (ECF No. 81)**

7 As a preliminary matter, Plaintiff asks the Court to strike Defendants'
8 motion because it is 25 pages overlength, and the rule for non-dispositive motions,
9 L. Civ. R. 7(f)(2), only allows for such motions to be up to ten pages in length.
10 ECF No. 104 at 1-2. Defendant replies that it is not overlength, because a motion
11 *in limine* is not a single non-dispositive motion but instead a number of brief
12 motions filed together. ECF No. 122 at 1-2.

13 It is the Court's preference to resolve the issues on their merits. Plaintiff had
14 ample opportunity to respond to Defendants' motions, and her response brief was
15 equally overlength. *See* ECF No. 104. The Court will consider both briefs in full
16 but reminds the parties to adhere to the local rules moving forward.

17 1. Exclusion of Plaintiff's Insurance Policy

18 Defendants withdraw this motion base on the Court's order denying their
19 motion for bifurcation or sequentialization but seek to reserve their right to renew
20 it later if the Court accepts a renewed motion for a sequential presentation of the

1 issues set for trial at a later time. ECF No. 122 at 2.

2 2. Evidence Regarding Claims Handling, Bad Faith, IFCA, & the CPA

3 Defendants withdraw this motion based on the Court's order denying their
4 motion for bifurcation or sequentialization but seek to reserve their right to renew
5 it later if the Court accepts a renewed motion for a sequential presentation of the
6 issues set for trial at a later time. ECF No. 122 at 2.

7 3. Photos of Vehicle Damage

8 Defendants withdraw this motion based on the Court's order denying their
9 motion for bifurcation or sequentialization but seek to reserve their right to renew
10 it later if the Court accepts a renewed motion for a sequential presentation of the
11 issues set for trial at a later time. ECF No. 122 at 2.

12 4. Reference to Motions *in Limine* and Related Documents

13 Defendants ask the Court to exclude all reference to the motions *in limine*,
14 supporting documents, and the Court's ruling on such motions. ECF No. 81 at 5.
15 Plaintiff does not appear to reject this argument. Accordingly, finding that
16 referencing such motions would be irrelevant and possibly confusing for the jury,
17 FED. R. EVID. 401-03, the Court **GRANTS** the motion.

18 5. Mention of Pre-Trial Motions

19 Defendants request that any reference to pretrial motions and this Court's
20 ruling on those motions be stricken. ECF No. 81 at 5. Plaintiff does not appear to

1 disagree. For the same reasons as to Defendants’ fourth motion *in limine* and the
2 parties’ stipulation on this point, the Court **GRANTS** the motion.

3 6. Exclusion of Portions of Policy Not Pertaining to UIM Benefits

4 Defendants move the Court to exclude any portion of Plaintiff’s insurance
5 policy which does not directly pertain to her UIM benefits. ECF No. 81 at 5-6.

6 Defendants argue that the majority of the policy is irrelevant to the issues presented

7 in this case, and maintain that only a few discreet portions are relevant, such as the

8 UIM policy limits and UIM bodily injury portion of the policy. ECF No. 81 at 7.

9 Defendants believe the Court should indicate the relevant portions of the policy in

10 the jury instructions, and the remainder should be excluded. *Id.* at 6.

11 Plaintiff responds that Defendant seeks to “exclude the very document the
12 jury must review to decide [her] multiple causes of action, including [the] breach

13 of contract claim.” ECF No. 104 at 2. She further submits that the Court can

14 answer the jury’s questions about the meaning of the policy during deliberations,

15 or that, if certain provisions require further explanation, Defendants could propose

16 a jury instruction. ECF No. 104 at 3, 5. Defendants reply that they already have

17 submitted a limiting jury instruction which contains the portions of the policy

18 needed to resolve this matter, and that presenting the entirety of the policy to the

19 jury is unnecessary.

1 The Court **GRANTS IN PART AND DENIES IN PART** Defendants’
2 motion to exclude portions of the policy which do not bear directly on Plaintiff’s
3 UIM benefits. On the one hand, the length and complexity of the policy carries a
4 significant potential for confusion. FED. R. EVID. 401. Excluding the title and
5 cover pages, the policy is over 55 pages long. *See generally* ECF No. 44-3.
6 Furthermore, certain segments are patently irrelevant to Plaintiff’s claim. For
7 example, the contract contains a Nuclear Energy Liability Exclusion Endorsement,
8 *id.* at 21-22, as well as a Nuclear, Biological, Chemical and Radioactive (NBCR)
9 Agent Exclusion, *id.* at 45-46. Including these provisions may waste valuable time
10 by unduly distracting or confusing the jury. FED. R. EVID. 403.

11 On the other hand, the Court agrees with Plaintiff that certain portions of the
12 policy not within the UIM coverage section may contextualize the agreement
13 between Defendants and Plaintiff for the trier of fact and aid their determination of
14 Defendants’ contractual obligations. Plaintiff shall reduce the exhibit to the
15 relevant pages.

16 7. Evidence of Size, Nature, or Financial Info of Defendants

17 Defendants move the Court to exclude information regarding their
18 financials, size, and subsidiaries, and the number of claims its employees handle,
19 characterizing it as irrelevant and unfairly prejudicial. ECF Nos. 81 at 6-7; 122 at
20 3. They further argue that such an order would be consistent with the Court’s prior

1 oral ruling at a discovery dispute hearing, ECF No. 24, and written order on a
2 motion to compel, ECF No. 47. Plaintiff responds that information regarding
3 Defendants’ size and business is essential background information. ECF No. 104
4 at 6. She adds that while she “does not intend to unduly focus on CIG’s wealth,”
5 the jury will need Defendants’ size and financial information to determine the
6 propriety of awarding punitive damages, and that an insurer’s profitability is
7 relevant to its motivation for minimizing claim payouts. *Id.* at 6-7.

8 The Court **GRANTS IN PART AND DENIES IN PART** Defendants’
9 motion. The Court **DENIES** the motion insofar as it relates to the nature of
10 Defendants’ business. The nature of Defendants’ business is relevant, because, as
11 Plaintiff describes, information about the claims handling department and its role
12 within Defendants’ business may provide valuable background information to the
13 jury about Plaintiff and Defendants’ relationship and Defendants’ obligations to its
14 policyholders. *See* ECF No. 401.

15 However, as to Defendants’ size and financial information, the Court
16 **GRANTS** Defendants’ motion. It is apparent that Plaintiff intends to argue that
17 Defendants were “motivat[ed] [to] minimiz[e] claim payouts and expenses to make
18 [itself] more profitable to the detriment of the insured.” ECF No. 104 at 7. The
19 Court is troubled by Plaintiff’s attempt to resurrect an issue that was previously
20 resolved on a motion to compel. In an earlier motion to compel discovery,

1 Plaintiff sought the production of a wide range of Defendant’s financial records.
2 *See* ECF No. 37 at 4 (“Plaintiff is seeking financial information beyond the figure
3 that go into the bonus calculations, which would open a window into the entirety of
4 the company’s financial records as it includes all documents that go into
5 determining the company’s profitability.”). The Court denied Plaintiff’s motion to
6 acquire financial information beyond the bonus information and related metrics
7 already supplied, explaining, “[t]he outstanding information is broad in scope and
8 not proportional to the needs of the case.” ECF No. 47 at 2. Plaintiff may not now
9 argue that information the Court previously deemed undiscoverable may be
10 presented at trial.

11 8. & 9. Employee Bonus Information & Personnel File Information

12 Defendants also ask that employee bonus and personnel file information be
13 excluded. ECF No. 81 at 7-8. They admit that the Court permitted discovery of
14 employee bonus and personnel file information of the adjusters who worked on
15 Plaintiff’s claim, but point out that the Court’s ruling was necessarily limited in
16 scope—specifically, the Court ruled that discoverable information would include
17 notices of discipline for adjusters who improperly evaluated a claim, or evidence of
18 bonuses paid because adjusters recommended not paying a claimant. ECF No. 81
19 at 7-8 (citing ECF No. 24 at 11). Defendants argue that none of the bases the
20 Court identified as relevant were found in discovery. *Id.*

1 Plaintiff responds that evidence related to adjuster bonuses is relevant
2 because the adjusters working on Nielsen's claim received bonuses since the time
3 her claim was made, and courts routinely find that bonus incentive programs are
4 relevant to a court's determination of a bad faith claim. ECF No. 104 at 7-8.
5 Plaintiff also filed several employee performance evaluations under seal, *see* ECF
6 No. 108, which she claims shows that adjusters were encouraged to put the
7 company's interests above policyholders' needs.

8 The Court **GRANTS** Defendants' motion to exclude employee performance
9 reviews. At trial, Plaintiff may **not** produce evidence of the employee performance
10 evaluations filed under seal. The Court reviewed those sealed files and finds that
11 they do not seriously establish that Defendants were disciplining employees for
12 overvaluing claims. The files contain sensitive information that poses an acute
13 threat of embarrassment to the private employees who are the subject of those
14 reviews. The evidence is both prejudicial and irrelevant. FED. R. EVID. 401, 403.

15 As for the bonus information, the Court **DENIES** Defendants' motion. The
16 evidence appears relevant to Plaintiff's bad faith claims, and does not carry the
17 same risks as producing other personnel file information.

18 10. Training Materials Not in Effect at Time of Claim or Available
19 Post-Litigation

20 Defendants ask the Court to bar the production of its training materials

1 which were provided after Plaintiff filed her claim or which were otherwise not in
2 effect at the time of her claim because it is irrelevant. ECF No. 81 at 8. As they
3 see it, when Plaintiff filed suit, her claims became a litigated matter and adjusters
4 were no longer involved in assessing her claim. *Id.* at 9. Plaintiff replies that the
5 duty to adjust her claim did not end simply because she sued to obtain her benefits.
6 ECF No. 104 at 10.

7 Plaintiff and Defendants appear to agree that employee training information
8 available and in effect during the time Defendants were adjusting Plaintiff's claim
9 but before she filed suit is admissible. Respecting training information not in
10 effect at the time of the claim or which only became available after suit was filed,
11 the Court agrees that such information is irrelevant. FED. R. EVID. 401. The
12 motion is therefore **GRANTED**.

13 11. Argument or Evidence Regarding Post-Litigation Actions,
14 Settlement Offers, and Litigation Tactics

15 Defendants move the Court to exclude any argument or evidence regarding
16 their post-litigation actions and offers of settlement and litigation strategy or
17 tactics. ECF No. 81 at 10-12. Plaintiff concedes she will not argue about
18 Defendants' post-litigation legal work or litigation conduct, but states that she does
19 intend to argue about (1) claims decisions made by Defendants after the suit began,
20 (2) evidence that Defendants forced her to litigate to obtain her benefits, and (3)

1 her request for investigative expenses incurred after litigation. ECF No. 104 at 10-
2 12. Defendants dispute Plaintiff's intent to argue about claims decisions made
3 after the suit began and request for the costs of hiring litigation experts, but do not
4 dispute that Plaintiff may argue she was forced to litigate to obtain the benefits she
5 sought. ECF No. 122 at 7.

6 The Court **GRANTS** the motion in part. Per the parties' stipulation,
7 Plaintiff may not argue about Defendants' litigation strategies or post-litigation
8 offers of settlement. The Court also grants the motion inasmuch as it seeks to
9 prevent evidence or argument regarding claims decisions made after the suit began,
10 because it was the actions leading up to Defendants' final offer and before suit was
11 filed that gave rise to the actions that formed the basis of Plaintiff's complaint, not
12 actions taken thereafter. *See Richardson v. Gov't Emps. Ins. Co.*, 200 Wash. App.
13 705, 716 (2017) (declining to allow the plaintiff to access her insurer's litigation
14 file after she filed suit because (1) it violated attorney-client privilege and the work
15 product doctrine, and (2) all information relating to her claim for bad faith
16 pertained to decisions the insurer made at the time of denying UIM benefits, before
17 the claim was filed).

18 Respecting Plaintiff's argument regarding the costs of investigation, the
19 Court **DENIES** Defendants' motion. As the Court outlined in its ruling denying
20 Defendants' motion for partial summary judgment, ECF No. 146, a genuine issue

1 of material fact exists as to whether Plaintiff’s experts’ evaluations—particularly
2 Dr. Soto’s—were investigative endeavors separate from the bringing of the CPA
3 claim.

4 12. “Golden Rule” Arguments

5 Defendants ask Plaintiff to avoid any “golden rule” argument -- arguments
6 placing themselves in Plaintiff’s position. ECF No. 81 at 12-13. Plaintiff accedes
7 not to do so, but cautions that she will be present evidence and arguments that she
8 is entitled to enhanced damages under IFCA and the CPA. ECF No. 104 at 12.
9 Defendants agree they will not seek to preclude such arguments. ECF No. 122 at
10 8. Given the parties’ agreement on these points, the Court **GRANTS** Defendants’
11 motion.

12 13. Exclusion of Non-Party Fact Witnesses

13 Defendants asks the Court to exclude non-party fact witnesses from the
14 courtroom during the trial. *See* FED. R. EVID. 615. Plaintiff is in agreement. ECF
15 No. 81 at 13. Accordingly, the motion is **GRANTED**.

16 14. & 15. Lay Witnesses May Not Testify as Experts; Experts Are
17 Limited to Their Area of Expertise & Non-Expert Testimony of
18 Medical Diagnoses or Conditions

19 Defendants request that the Court restrict lay witnesses from offering expert
20 or opinion testimony absent a proper foundation under FED. R. EVID. 701-703,

1 including the mechanism or cause of the accident and medical symptom causation.
2 ECF No. 81 at 14-15. Defendants further ask that any expert testimony be limited
3 to the area of their expertise. *Id.*

4 Plaintiff responds that Defendants misunderstand issues of admissibility on
5 lay versus expert witnesses, but that she generally agrees that witness testimony
6 requires a proper foundation. ECF No. 104 at 13. As an example, she explains
7 that lay witnesses can testify to medical-related subjects, such as their perception
8 of a person’s symptoms, pain, and suffering without any expert qualifications. *Id.*
9 at 14. It seems Defendants, and to the Court, that Plaintiff and Defendants are in
10 agreement as to this motion. The motion is therefore **GRANTED**, with the caveat
11 that “[l]ay witness testimony regarding Plaintiff’s medical condition . . . be limited
12 to conditions that are relevant and that [witnesses] observed without assigning
13 independent diagnoses to the same.” ECF No. 122 at 8.

14 16. Emotional Distress of Plaintiff Caused by Litigation

15 Defendants move for the Court to exclude any evidence or argument that the
16 litigation has caused Plaintiff’s emotional distress. ECF No. 81 at 15-16. Plaintiff
17 responds that the Court should not exclude all evidence about litigation pertaining
18 to her damages, because evidence that she was compelled to litigate to obtain her
19 policy benefits supports her various claims for violations of IFCA, the insurance
20 contract, the CPA, and the duty to act in good faith. ECF No. 104 at 16. She

1 maintains that “[b]ecause violations of IFCA and breach of the duty of good faith
2 provide for noneconomic and emotional distress damages, evidence that [she] was
3 compelled to litigate . . . and any noneconomic damages resulting therefrom must
4 be permitted at trial to support these claims.” *Id.* Defendants reply that, in the
5 UIM context, they step into the shoes of the tortfeasor and may take on an
6 adversarial role, and that therefore Plaintiff should not be able to argue the
7 litigation caused her noneconomic damages, as it would “undermine CIG’s ability
8 to litigate her UIM claim and punish it for defending as the at-fault driver would.”
9 ECF No. 122 at 9. The motion is **DENIED**. The presentation of this evidence
10 shall be compartmentalized to pertain only to the relevant issue.

11 17. Undisclosed Evidence

12 Defendants move to exclude any evidence undisclosed during discovery,
13 including evidence pertaining to her damage to property . ECF No. 81 at 16-19.
14 Plaintiff is generally amenable to this motion, but argues she should be able to
15 produce evidence pertaining to her loss of property under her CPA claim. ECF
16 No. 104 at 17. Having previously denied Defendants’ motion for partial summary
17 judgment as to Plaintiff’s CPA claim, the motion is **GRANTED IN PART**, but
18 **DENIED** as to Plaintiff’s presentation of evidence regarding damage to property.

19 18. Argument that Coverage was Denied

20 Defendants also ask the Court to exclude any argument by Plaintiff

1 regarding their alleged denial of her coverage. ECF No. 81 at 19-20. Having
2 previously denied Defendants’ motion for partial summary judgment on this issue,
3 ECF 146, the motion is **DENIED**.

4 19. Testimony Regarding Forces of Accident

5 The parties appear to agree they will not present evidence or expert
6 testimony opining on the forces involved in this accident, but stipulate to lay
7 testimony regarding accident descriptions. ECF Nos. 81 at 20; 104 at 17. The
8 Court agrees such testimony would be irrelevant since liability is not in issue and
9 therefore **GRANTS** the motion. *See* FED. R. EVID. 401.

10 20. Nature of Defense Counsel’s Firm, Practice, or Size

11 Defendants ask the Court to exclude evidence of the nature of their practice,
12 size of their firm, and types of cases accepted or clients represented by the firm.
13 ECF No. 81 at 21. Plaintiff appears to agree to this motion. ECF No. 104 at 17.
14 Because acceptance of such evidence would be irrelevant and unduly prejudicial,
15 the motion is **GRANTED**.

16 21. Evidence of Expenses of Litigation & Attorneys’ Fees

17 Defendants state this motion “will be withdrawn if the Court denies [its
18 motion for partial summary judgment].” ECF No. 122 at 9. Having denied their
19 motion for summary judgment, ECF No. 146, Court therefore does not reach this
20 motion.

1 22. Reference to the Fact that Proceeds From the Lawsuit Will Be
2 Shared With Plaintiff’s Counsel

3 The parties agree that they will not discuss the fact that any financial
4 recovery by Plaintiff will be shared with her attorneys. ECF Nos. 81 at 24, 104 at
5 19. The Court accepts their stipulation and **GRANTS** the motion.

6 23. Discussion of Damages Multipliers

7 Defendants withdraw this motion. ECF No. 122 at 10. The Court therefore
8 does not consider the issue.

9 24. Limitation of Expert Testimony to Reports

10 Defendants ask that the Court limit expert testimony to what was included in
11 their reports. ECF No. 81 at 25. They argue that under Federal Rule of Civil
12 Procedure 26, written expert reports must contain “a complete statement of all
13 opinions the witness will express and the basis and reasons for them.” *Id.* (quoting
14 Fed. R. Civ. P. 26(a)(2)(B)(i)). They acknowledge that an expert may supplement,
15 elaborate and explain their report through their oral testimony, but that trial is not
16 an opportunity for the expert to testify as to new opinions not within their report,
17 even if such opinions were expressed through their deposition testimony. *Id.* at 26.
18 Defendants now agree with Plaintiff that the motion does not apply to Dr. Soto
19 (Plaintiff’s treating physician). ECF No. 122 at 10. However, they ask that the
20 Court limit Mr. Dietz’s testimony as discussed in issue numbered 25. The Court

1 therefore discusses the limitations on Mr. Dietz's testimony in the following
2 motion and **GRANTS** the joint stipulation that Dr. Soto shall be allowed to give
3 oral testimony beyond what was provided in his expert report.

4 25. Limit Testimony of Robert Dietz

5 Finally, Defendants move the Court to limit the testimony of Mr. Dietz,
6 Plaintiff's insurance claims handling expert. ECF No. 81 at 26-27. Specifically,
7 they request that Mr. Dietz not discuss (1) issues of law reserved to the jury, (2) his
8 interpretations of case law, (3) whether Defendants hired Dr. Battaglia because
9 they believed that he would draw a conclusion in Defendants' favor, (4) the impact
10 of corporate bonuses on employees' behavior, and (5) whether Defendants
11 allegedly committed conversion or fraud, and/or improperly produced documents
12 pursuant to the discovery order or that the scope of permitted discovery was
13 somehow improper. *Id.* at 27-35.

14 Plaintiff argues that Defendants motions *in limine* on Mr. Dietz's testimony
15 is actually an untimely *Daubert* motion. ECF No. 104 at 30. She notes that all
16 motions to exclude expert testimony had to be filed on or before August 4, 2022.
17 *Id.* However, she agrees that Mr. Dietz will not testify about legal conclusions or
18 his interpretations of case law (issues 1 and 2) or issues of conversion or fraud
19 (issue 5). *Id.* at 30, 33.

1 Defendants respond that the scope of permissible testimony is routinely
2 addressed through motions in limine and that they are not seeking to exclude Mr.
3 Dietz's testimony, but simply attempting to circumscribe it. ECF No. 122 at 11.

4 Given the parties stipulation, the Court **GRANTS** Defendants' motion
5 limiting Mr. Dietz from discussing issues of law reserved to the jury, his
6 interpretation of the case law, and whether Defendants committed conversion or
7 fraud and/or improperly withheld documents during discovery.

8 As for the remaining issues, it is difficult to construe Defendants' motion as
9 anything but a belated *Daubert* motion. Defendants' briefing explicitly references
10 Evidence Rule 702 and even quotes a case from this District discussing the
11 *Daubert* standard. *See* ECF No. 81 at 27 (citing *Henricksen v. ConocoPhillips Co.*,
12 605 F. Supp. 2d 1142, 1153 (E.D. Wash. 2009)). The Court therefore **DENIES**
13 Defendants' motion to limit Mr. Dietz's testimony respecting his intent to testify as
14 to Dr. Battaglia's employment or the impact of bonuses. Of course, Defendants
15 remain free to object or cross-examine Mr. Dietz on these issues as they surface at
16 trial.

17 **II. Objections to Witnesses & Exhibits**

18 **A. Plaintiff's Objections to Defendants' Witnesses**

19 Plaintiff objects to the following proposed trial witnesses: Mr. Airey, Mr.
20 Vavra, Charlie Mitts, and Deputy Michael Swan. ECF No. 77 at 3.

1 The Court previously ruled on the admissibility of Mr. Vavra's testimony,
2 ECF No. 150, and holds here at *supra* page 3, ¶ 2 that Mr. Airey's testimony is
3 inadmissible. Defendants have also withdrawn their intent to call Deputy Swan at
4 trial. ECF No. 95 at 5.

5 Charlie Mitts was the at-fault driver who settled with Plaintiff for his policy
6 limits prior to Plaintiff seeking recovery from Defendants. Plaintiff argues that
7 Mr. Mitt's testimony is irrelevant because liability for the collision is not disputed.
8 ECF No. 77 at 3. The Court disagrees. Though liability is not in issue, Mr. Mitt's
9 testimony will provide relevant background information about the circumstances of
10 the accident giving rise to Plaintiff's claims as well as the payment of his policy
11 limits. The objection is therefore **OVERRULED** to the extent it seeks to exclude
12 the testimony of Mr. Mitt and Mr. Vavra. The objection is **SUSTAINED** as it
13 pertains to Mr. Airey and Deputy Swan.

14 **B. Plaintiff's Objections to Defendants' Exhibits**

15 1. Objections to Exhibits 500, 503, 521, 522 & 523

16 Plaintiff objects to Defendants' proposed exhibits 500, 503, and 521-23
17 (which contain Plaintiff's MRI imaging, treatment records, and the adjusters'
18 claims notes) as incomplete portions of the record. ECF No. 77 at 2 (citing FED. R.
19 EVID. 106). Defendants respond that they are willing to offer the entirety of those
20 records into evidence. ECF No. 95. As there no longer appears to be a conflict,

1 the Court **OVERRULES** the objection, contingent upon Defendants offering the
2 whole of those records into evidence.

3 2. Objections to Exhibits 501 & 502

4 Plaintiff objects to exhibits 501 and 502. ECF No. 77 at 2. Both exhibits
5 are social media reports of Plaintiff's online profiles and online activity. Plaintiff
6 asserts that these exhibits are irrelevant because one of the adjusters, Ms. Cook,
7 confirmed in her deposition that social media reports played no role in the
8 company's evaluation decision. *Id.* Defendants respond that the reports are
9 relevant for the jury's determination of the extent of her injuries, physical
10 limitations, and other noneconomic damages. ECF No. 95 at 2.

11 The Court agrees with Defendants and **OVERRULES** the objection. While
12 these reports may be irrelevant to the question of whether Defendants'
13 investigation was reasonable at the time of the final offer, it will assist the jury in
14 evaluating the objective value of Plaintiff's damages as to her UIM claim.

15 3. Objections to Exhibits 513 & 514

16 Plaintiff objects to exhibits 513 and 514, which include Dr. Battaglia's
17 addendum report and Mr. Vavra's expert report. ECF No. 77 at 2. Defendants
18 answer that they will not offer the reports into evidence, except as to allow Dr.
19 Battaglia and Mr. Vavra to refresh their memories. ECF No. 95 at 3. Since this
20 appears to resolve the problem, the Court **OVERRULES** the objection, subject to

1 the limitations outlined in this Court's order on Plaintiff's motion to exclude the
2 expert testimony of Mr. Vavra. ECF No. 150.

3 **C. Defendants' Objections to Plaintiff's Witnesses**

4 Defendants object to Ryan Lewis and Cynthia Mehrrens testifying at trial.
5 ECF No. 78 at 4. In a supplemental objection, they further object to the testimony
6 of Shelley Cook, Tracie Glashan, Martin Ighani, and Robert Dietz. ECF No. 133
7 at 6.

8 Shelley Cook, Tracie Glashan, and Martin Ighani are all CIG employees
9 (Ms. Cook and Ms. Glashan are adjusters; Mr. Ighani is an in-house attorney) who
10 were deposed and who Plaintiff asserts played a role in evaluating her claims.
11 Their proffered testimony is relevant, and the Court **OVERRULES** the objection
12 as it seeks to exclude them. Likewise, for reasons outlined in Defendants' motion
13 in limine, *supra* page 28, ¶ 25, the Court **OVERRULES** the objection insofar as it
14 seeks to exclude the testimony of Mr. Dietz. Mr. Dietz, like Defendants' insurance
15 expert Mr. Vavra, may testify so long as he refrains from offering legal
16 conclusions.

17 Ryan Lewis is another employee of CIG who Plaintiff maintains is charged
18 with training adjusters. The Court **OVERRULES** the motion to exclude the
19 testimony of Mr. Lewis. Evidence of Defendants' training program may prove
20 relevant to Plaintiff's CPA and/or bad faith claims but does not pose the same risks

1 as admitting employee personnel file information. Thus, while the Court will
2 permit Mr. Lewis to testify, his testimony must avoid reference to employee
3 personnel file information for the reasons outlined in the Court’s ruling on the
4 motion *in limine* at supra pages 19-20, ¶¶ 8-9.

5 The Court **SUSTAINS** Defendants’ objection to the testimony of Ms.
6 Mehrstens. Plaintiff submits that Ms. Mehrstens was directly involved in adjusting
7 Nielsen’s claim “through participating in roundtable discussions.” The fact that
8 Ms. Mehrten’s participation was limited to “roundtable discussions” without
9 further specification suggests that her adjustment of Plaintiff’s claims was, in fact,
10 not so direct. Since those who arguably played the greatest role in Plaintiff’s claim
11 adjustment—namely, Ms. Ellis, Ms. Cook, and Ms. Glashan—are available to
12 testify and the Court will permit them to do so, the Court rejects the testimony of
13 Ms. Mehrstens as needlessly cumulative. *See* FED. R. EVID. 403.

14 **D. Defendants’ Objection to Plaintiff’s Exhibits**

15 1. Objection to Exhibit 1

16 Defendants object to admission of exhibit 1, Plaintiff’s commercial auto
17 policy. The objection is **OVERRULED IN PART**. Plaintiff may only offer the
18 portions of the policy relevant to the issues.

19 2. Objection to Exhibit 5

20 Defendants object to admission of exhibit 5, a claims summary chart, on the

1 grounds that it has not been produced. ECF No. 78 at 2. Plaintiff represents that a
2 “copy will be provided . . . once complete.” ECF No. 94 at 2. The Court
3 **RESERVES** ruling on this objection as it lacks updated information as to whether
4 Defendants have received a copy yet or not.

5 3. Objections to Exhibits 6-11

6 Defendants object to admission of exhibits 6-11, which include claims
7 evaluations, loss reports, injury summaries, medical expense forms, and claim
8 performance criteria created by Defendants. Each of these are relevant as to the
9 value of Plaintiff’s claim and reasonableness of Defendants’ evaluation. The
10 objection is therefore **OVERRULED**.

11 4. Objection to Exhibits 12-26

12 Defendants object to admission of various exhibits containing Defendants’
13 employee training program materials and bonus information (exhibits 12-19) and
14 individual employee performance reviews (exhibits 21—25). *See generally* ECF
15 No. 133. For the reasons outlined in the motion *in limine* at *supra* page 20, the
16 Court will not allow Plaintiff to introduce evidence of the performance reviews of
17 individual employees. However, the training materials, bonus information, and
18 testimony of Mr. Lewis which are offered for the same purpose (i.e., to establish
19 Defendants’ bad faith) do not carry the same risk of needless embarrassment to
20 private persons and are relevant to Plaintiff’s extracontractual claims. The

1 objection is therefore **OVERRULED** as it pertains to the exhibits offered to show
2 training materials and bonus information and **SUSTAINED** as it pertains to the
3 exhibits regarding the performance and training of individual employees.

4 Respecting exhibit 20, Defendants' annual report, the Court has now twice
5 ruled that Plaintiff may not offer financial information about the company aside
6 from its bonus structure. ECF No. 47 at 2; *supra* at 19. The motion is therefore
7 **SUSTAINED** as to exhibit 20.

8 5. Objections to Exhibits 27-29, 33

9 Defendants object to the admission of Plaintiff's letter requesting benefits,
10 and claim files containing Plaintiff's medical records and bills (exhibits 27-29) as
11 well as a letter from Plaintiff's high school softball coach averring that she could
12 have played college softball but for her injury. These are all patently relevant to
13 the jury's determination of Plaintiff's entitlement to benefits. The objection is
14 **OVERRULED.**

15 6. Objections to Exhibits 31 & 32

16 Defendants object to the admission of video exhibits showing a hip labral
17 tear (which Plaintiff experienced) and RFA treatment. The Court finds that both
18 videos carry an undue effect of prejudice and would be needlessly cumulative, as
19 Plaintiff already intends to produce witness testimony regarding her hip surgeries
20

1 and both parties will offer expert testimony on RFAs and their effect. The
2 objection is **SUSTAINED**.

3 **7. Objections to Exhibits 49, 50 & 52**

4 Defendants object to admission of emails sent between counsel. The
5 objection is **OVERRULED** as to exhibit 50, which contains information about
6 Plaintiff's medical expenses and records and is therefore relevant to the jury's
7 determination of the value of her claim. *See, e.g.*, ECF No. 124 at 78. The
8 objection is **SUSTAINED** as to exhibits 52 and 49, as they just contain
9 correspondence between counsel and counsel/adjusters commenced after litigation
10 began that would not be helpful to the jury's determination of Plaintiff's damages.

11 **8. Objections to Exhibits 53 & 54**

12 Defendants object to the admission of invoices from Plaintiff's treating
13 physician and Mr. Dietz. For the reasons given in the Court's order on
14 Defendant's Motion for Partial Summary Judgment, ECF No. 146, and
15 Defendants' Motion *in Limine* 11, *supra* 22-23, the objection is **OVERRULED**.

16 **ACCORDINGLY, IT IS HEREBY ORDERED:**

17 1. Plaintiffs' Motions *in Limine*, ECF No. 79, are GRANTED IN PART

18 AND DENIED IN PART.

19 2. Defendants' Motions *in Limine*, ECF No. 81, are GRANTED IN PART

20 AND DENIED IN PART.

1 3. Plaintiffs' Objections to Defendants' Witnesses and Exhibits are
2 GRANTED IN PART AND DENIED IN PART.

3 4. Defendants' Objections and Supplemental Objections to Plaintiff's
4 Witnesses and Exhibits are GRANTED IN PART AND DENIED IN
5 PART.

6 The District Court Executive is directed to enter this Order and furnish
7 copies to counsel.

8 DATED September 29, 2023.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge