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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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Bryan Hunton, an individual,

No. CV-16-00539-PHX-DLR

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Plaintiff,

**ORDER**

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v.

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American Zurich Insurance Company, d/b/a  
Zurich American Insurance Company,

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Defendant.

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Following an in camera review of certain documents in April 2017, the Court found that the documents properly were subject to the attorney-client privilege and therefore denied Plaintiff's motion to compel. (Docs. 162, 180.) Plaintiff has moved for reconsideration of that order, and Defendant has filed a response in opposition. (Docs. 199, 202). For reasons stated below, the motion is granted.

Plaintiff contends that the recent deposition of Defendant's bad faith expert shows that Defendant is not merely defending this case based on the purely objective reasonableness of its conduct, but instead asserts that its actions in investigating, evaluating, and paying Plaintiff's claim were subjectively reasonable and taken in good faith. (Doc. 199 at 2-4.) Plaintiff argues that Defendant has impliedly waived the attorney-client privilege because Defendant has placed the claims adjuster's subjective beliefs at issue and those beliefs were informed in part by the advice of counsel. The Court agrees.

1 **I. Legal Standard**

2 The attorney-client privilege exists "to protect not only the giving of professional  
3 advice to those who can act on it but also the giving of information to the lawyer to  
4 enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S.  
5 383, 390 (1981). The law is clear that a party does not waive the attorney-client privilege  
6 by conferring with counsel and obtaining advice, by simply following the advice in  
7 taking action, or by relying on the advice to evaluate its claims and defenses. *State Farm*  
8 *Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1183 (Ariz. 2000). Nor is the privileged waived  
9 by "the mere filing of a bad faith action, the denial of bad faith, or the affirmative claim  
10 of good faith[.]" *Id.* at 1179.

11 A party cannot, however, "assert a defense based on the contention that it acted  
12 reasonably because of what it did to educate itself about the law, when its investigation of  
13 and knowledge about the law included information it obtained from its lawyer, and then  
14 use the privilege to preclude the other party from ascertaining what it actually learned and  
15 knew." *Id.* at 1177. Similarly, "when an insurer raises a defense based on factual  
16 assertions that, either explicitly or implicitly, incorporates the advice or judgment of its  
17 counsel, it cannot deny an opposing party the opportunity to discover the foundation for  
18 those assertions in order to contest them." *Mendoza v. McDonald's Corp.*, 213 P.3d 288,  
19 302 (Ariz. Ct. App. 2009) (citing *Lee*, 13 P.3d at 1178). In short, an insurer "is not  
20 allowed to assert the privilege when doing so 'places the claimant in such position, with  
21 reference to the evidence, that it would be unfair and inconsistent to permit the retention  
22 of the privilege' because the attorney-client privilege 'is not to be both a shield and a  
23 sword.'" *Id.* at 304 (quoting *Lee*, 13 P.3d at 1173).

24 **II. Discussion**

25 In this case, Defendant sent Plaintiff to Dr. Zoran Maric for an independent  
26 medical examination (IME) in November 2014. The IME report was favorable to  
27 Plaintiff in that Dr. Maric, in responding to specific questions posed by Defendant,  
28 opined that based on objective medical evidence Plaintiff's injury was the "direct result of

1 his work activity" on the day in question and there is no "evidence that this was a pre-  
2 existing condition." (Doc. 199-2 at 5-6.) Defendant's expert witness, Doug McCoy –  
3 who ultimately opines that there was no bad faith in this case – acknowledged at his  
4 deposition that the IME report was favorable to Plaintiff, that Defendant apparently had  
5 no basis to dispute Dr. Maric's medical findings, and that Defendant should not have  
6 waited several months to accept the claim after receiving the IME report absent a good  
7 reason. (Doc. 199-3 at 8, 17.)

8         Significantly, however, McCoy did not know why the claims adjuster, Lynell  
9 Brown, denied the claim after receiving the IME report on November 5, 2014 only to  
10 approve the claim several months later on March 25, 2015. He speculated that it was  
11 based on "a series of emails the exact same date between her and counsel," but did not  
12 know what was said in the emails because they were redacted based on the attorney-client  
13 privilege. (Doc. 199-1 at 7.) He confirmed that although he did not know the reason why  
14 Brown ultimately approved the claim, he "suspect[ed] it was a discussion she had with  
15 counsel the day she accepted it." (*Id.* at 9.)

16         In support of his no bad faith opinion, McCoy testified that, despite the IME  
17 report, Brown apparently "still had doubts" and "additional questions" about the specific  
18 cause of the injury and that after the retention of counsel, who "is an arm of  
19 investigation" into the claim, evidently "there were things that were done" causing Brown  
20 to decide that the claim was compensable. (*Id.* at 11, 13-15, 19-20.) Again, however,  
21 McCoy could not identify what "things" were done or why Brown's "doubts" and  
22 "additional questions" were answered because the emails between her and counsel were  
23 redacted. (*Id.* at 15-16.)

24         Defendant, through the testimony and opinion of its bad faith expert, has put the  
25 subjective beliefs of the claims adjuster directly at issue, and those beliefs implicate the  
26 advice she received from Defendant's ICA counsel, Scott Finical. Indeed, Brown's  
27 motives and the advice of counsel appear to be so intertwined that McCoy could not  
28 explain what further questions Brown had, what steps she took to get them answered, or

1 what caused her to change her position and ultimately approve the claim; rather,  
2 McCoy could only speculate that those explanations lay within Brown's redacted  
3 communications with ICA counsel.

4 By electing to defend this case based on the subjective, not just objective,  
5 reasonableness of its adjuster's actions, Defendant placed at issue its "subjective beliefs  
6 and directly implicated the advice and judgment [it] had received from [Defendant's] ICA  
7 counsel incorporated in those actions." *Mendoza*, 213 P.3d at 303. Defendant has thus  
8 "rendered the advice and judgment its adjuster received from its ICA counsel relevant to  
9 the case." *Id.* In asserting the attorney-client privilege over the relevant communications  
10 between Brown and ICA counsel, Defendant has sought to shield Plaintiff from the very  
11 evidence he would need to challenge both Brown's subjective beliefs themselves and  
12 McCoy's expert opinion that there was no bad faith because Brown apparently got her  
13 additional questions answered through the advice of counsel. *See id.* at 304. It would be  
14 "unfair and inconsistent to permit the retention of the privilege" in this situation because  
15 the privilege "is not to be both a shield and a sword." *Id.* at 304 (quoting *Lee*, 13 P.3d at  
16 1173).

17 In summary, the Court finds that Defendant has impliedly waived the attorney-  
18 client privilege with respect to any communications between Brown and ICA counsel  
19 relating to the coverage determination and the ultimate decision to approve Plaintiff's  
20 claim. *See id.*; *Cosgrove v. Nat'l Fire & Marine Ins. Co.*, No. 2:14-cv-2229-HRH, 2016  
21 WL 4578139, at \*5 (D. Ariz. Sept. 2, 2016) ("Because defendant has raised a defense that  
22 is highly likely to have incorporated the advice or judgment of its coverage counsel,  
23 defendant cannot shield its communications with [counsel]. It would be unfair not to  
24 give plaintiff an opportunity to discover what advice [the claims adjuster] might have  
25 received from coverage counsel."); *Miller v. York Risk Servs. Grp.*, No. 2:13-cv-1419  
26 JWS, 2014 WL 4354833, at \*2 (D. Ariz. Sept. 3, 2014) ("It is impossible to test the  
27 accuracy of York's assertion that the adjusters acted reasonably . . . if a significant factor  
28 forming a basis for their decisions – the communications with the claims lawyers – is

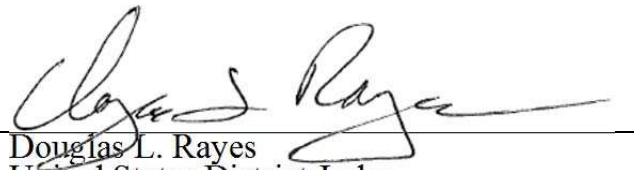
1 cloaked in secrecy.").

2 Defendant asserts that, unlike the facts in *Mendoza*, Defendant's reliance on  
3 counsel's advice did not force Plaintiff through "needless adversarial hoops" to secure his  
4 benefits. (Doc. 202 at 5.) But even if this were true, it does not preclude application of  
5 *Mendoza* in this case. Indeed, according to McCoy's testimony, it appears that counsel's  
6 advice in March 2015 may have been the basis for the ultimate approval of the claim –  
7 but only after a several month delay that Plaintiff claims to be unreasonable and in bad  
8 faith. Defendant notes that Brown accepted Plaintiff's claim "based on her conclusion in  
9 March 2015 that it was more probable that his injury was related to his employment[.]"  
10 *Id.* The question, however, is the basis for this conclusion, which Defendant seeks to  
11 cloak in secrecy under the attorney-client privilege.

12 "The linchpin in *Lee* and *Mendoza* is that defendant's subjective good faith in  
13 denying the claims is at issue. . . . [T]he analytical principle behind *Lee* and *Mendoza* is  
14 not how the defendant's good faith becomes an issue, but the fact that it is an issue."  
15 *Miller*, 2014 WL 4354833, at \*2. The Court, in the exercise of its discretion, finds that  
16 Defendant has impliedly waived the attorney-client privilege as set forth above. *See Lee*,  
17 13 P.3d at 1174 ("In discovery matters, including rulings on assertion of the privilege, the  
18 trial judge has broad discretion that we review only for abuse.").

19 **IT IS ORDERED** that Plaintiff's motion for reconsideration (Doc. 199) is  
20 **GRANTED**. Defendant shall, within seven (7) days from the date of this order, produce  
21 all communications between Brown and ICA counsel relating to the coverage  
22 determination and ultimate decision to approve Plaintiff's claim.

23 Dated this 29th day of August, 2017.

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27 Douglas L. Rayes  
28 United States District Judge