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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

SAN JOAQUIN VALLEY INSURANCE
AUTHORITY,

Plaintiff,

v.

GALLAGHER BENEFIT SERVICES,
INC.

Defendants.

Case No. 1:17-cv-00861-EPG

ORDER:

1. GRANTING IN PART DEFENDANT GBS'S MOTION IN LIMINE NO. 2 REGARDING THE DELIBERATIVE PROCESS PRIVILEGE;
2. GRANTING GBS'S MOTION IN LIMINE NO. 3 SEEKING EXCLUSION OF EVIDENCE OF RESTITUTION OR DISGORGEMENT DAMAGES NOT DISCLOSED IN SJVIA'S RULE 26(A)(1) DISCLOSURES;
3. GRANTING IN PART AND DENYING IN PART GBS'S MOTION IN LIMINE NO. 4 SEEKING EXCLUSION OF TESTIMONY REGARDING UNDISCLOSED EXPERT DAMAGES OPINIONS
4. GRANTING GBS'S MOTION IN LIMINE NO. 5 SEEKING EXCLUSION OF ADVERSE TESTIMONY FROM DEFENDANT'S WITNESSES BEYOND RULE 45 GEOGRAPHICAL LIMITS

(ECF Nos. 84)

1 This order addresses Motions *in limine* two through five filed by Defendant Gallagher
2 Benefit Services, Inc. (GBS) on January 17, 2020. (ECF Nos. 84) The Court held a hearing on
3 the motions on February 3, 2020. (ECF No. 121.) The Court rules as follows.

4 **I. GBS' MOTION IN LIMINE NO. 2, SEEKING EXCLUSION OF TESTIMONY**
5 **WITHIN THE SCOPE OF SJVIA'S PRIOR ASSERTION OF DELIBERATIVE**
6 **PROCESS PRIVILEGE**

7 GBS's motion *in limine* No. 2 asks the Court to preclude SJVIA from eliciting any
8 testimony within the scope of SJVIA's assertions of deliberative process privilege. (ECF No. 84,
9 at p. 17). GBS claims that SJVIA made a strategic decision during discovery to assert the
10 deliberative process privilege to shield and withhold all information about any aspect of the
11 SJVIA Board's decision-making process that was not actually discussed during Board meetings.

12 SJVIA responds by arguing that "(1) the privilege was only asserted to questions
13 regarding Mr. Wander Poel's personal, subjective thoughts, motives or understanding not, as
14 GBS asserts, questions related to SJVIA; and (2) the privilege was only asserted in the form of an
15 admonition." (ECF No. 94, at p. 9).

16 The parties agree with the legal proposition that a party may not introduce evidence at trial
17 that they withheld as privileged during discovery, i.e. that a privilege cannot be used as both a
18 sword and a shield. *See Columbia Pictures Television, Inc. v. Krypton Broadcasting of*
19 *Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) ("Although courts have recognized that
20 reliance on advice of counsel may be probative of non-willfulness, the district court was within its
21 discretion in precluding Feltner from relying on advice of counsel in this case. The privilege
22 which protects attorney-client communications may not be used both as a sword and a shield.")
23 (internal citations and quotations omitted).

24 During the deposition of SJVIA Board Member and County of Tulare Supervisor Peter
25 Vander Poel, counsel SJVIA blocked questions based on the deliberative process privilege, for
26 example during the following questioning:

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1 Q: Well, were you trying to—were you trying to represent Tulare or the
2 SJVIA when you were on the board?

3 [Counsel for SJVIA]: Well, I'm going to object as to the extent, again, that the
4 question calls for you to disclose undisclosed subjective considerations as part of
5 any kind of legislative process. I'm going to caution you that that is—it falls
6 within the deliberative process privilege, is inadmissible, and should not be
7 disclosed. To the extent that there's been any kind of subjective intent while you
8 were on the board that has been made public, you can disclose that or testify to
9 that. But to the extent that it is subjective and not disclosed, it falls within the
10 privilege and should not be disclosed. Okay?

11 A: Thank you.

12 (ECF No. 87-18, at p. 5).

13 Q: Did staff explain to you that this was a concern because it created a cash
14 flow problem:

15 [counsel for SJVIA]: Again, I want to—I want to counsel you that the deliberative
16 process privilege also applies to staff. So to the extent these were undisclosed
17 discussions that took place, which then were relied upon by you in making
18 decisions as a board member, that is inadmissible and nondiscoverable and should
19 not be disclosed. Okay?

20 A: Okay.

21 (ECF No. 87-18, at p. 15)

22 Q: At some point in time, did you make a decision that you would try to use
23 the premium charges to other counties to offset losses associated with the County
24 of Fresno and the County of Tulare?

25 A: All right. Again, I'm going to make the same objection/admonition. When
26 he says "decision," I'm distinguishing between nondisclosed evidence and facts
27 which you may have relied upon in making a decision versus something that has
28 been disclosed publicly with regards to your actions on the board.

(ECF No. 87-18, at p. 27)

SJVIA's argument that these objections were only asserted in the form of an admonition is not persuasive. The witness repeatedly followed his counsel's advice. *See, e.g.*, ECF No. 87-18, at p. 22 ("I would say it's because of that admonition. . . . I would lean on the admonition."); ECF No. 87-18, at p. 29 ("I'm going to rely on the admonition."); ECF No. 87-18, at p. 32 ("And I'm going to rely on the admonition."). At no time did either the witness or his counsel waive the

1 objection.

2 SJVIA has argued that this scope is very limited because “the Ralph M. Brown Act []
3 requires that, with exceptions that do not apply here, all of a public entity’s business be conducted
4 in open session.” (ECF No. 94, at p. 13, citing Cal. Govt. Code §§ 54950, et seq.). That Act
5 provides in part “In enacting this chapter, the Legislature finds and declares that the public
6 commissions, boards and councils and the other public agencies in this State exist to aid in the
7 conduct of the people's business. It is the intent of the law that their actions be taken openly and
8 that their deliberations be conducted openly.” CA Gov. Code, § 54950. While the Court
9 appreciates this legal requirement, it appears inconsistent with counsel’s repeated admonitions to
10 assert the privilege “to the extent these were undisclosed discussions that took place, which then
11 were relied upon by you in making decisions as a board member.”

12 Thus, the Court grants GBS’s motion insofar as it requests that SJVIA be precluded from
13 eliciting any testimony within the scope of its assertion of the privilege. Based on SJVIA’s
14 objections on the record, the scope includes “undisclosed discussions that took place, which then
15 were relied upon by [a decision-maker] in making decisions as a board member.” It does not
16 include anything that was “disclosed publicly with regards to your actions on the board.”
17 Additionally, the Court will grant GBS’s motion insofar as it requests that “the Court bar all
18 SJVIA staff and Board members from testifying to issues over which SJVIA previously claimed
19 deliberative process privilege,” with specific questions to be addressed at trial.¹

20 GBS also asks that SJVIA be precluded from presenting any testimony “from any Board
21 members about whether the Board would have adopted higher rates or reserves had Gallagher
22 recommended them.” (ECF No. 84, at p. 17). GBS’s motion does not cite to any case law
23 supporting this request. Nor does it cite any specific assertion of the privilege at deposition
24 regarding such subject matter. Instead it argues as a matter of fairness that SJVIA should be
25 precluded from testifying over what it would have done because it has blocked some discovery
26 regarding its past decisions.

27
28 ¹ To the extent GBS believes that subject matter being elicited at trial was blocked during discovery, it may raise that
objection during trial.

1 Without any specific legal precedent, the Court declines to make such a ruling. Again,
2 SJVIA did allow some testimony regarding its decision-making to the extent it was publicly
3 disclosed. It is highly relevant for the jury to hear from Board Members what they would have
4 done in certain hypothetical circumstances, subject to the jury evaluating their credibility with the
5 benefit of direct and cross-examination. Although, again, no SJVIA witness can support such an
6 answer by describing what was discussed in closed session or was a previously undisclosed
7 subjective opinion, consistent with the Court’s ruling above.

8 **II. GBS’S MOTION IN LIMINE NO. 3, SEEKING EXCLUSION OF EVIDENCE**
9 **OF RESTITUTION OR DISGORGEMENT DAMAGES NOT DISCLOSED IN**
10 **SJVIA’S RULE 26(A)(1) DISCLOSURES**

11 GBS’s motion *in limine* No. 3 seeks exclusion of evidence of restitution or disgorgement
12 damages on the ground that they were not disclosed in SJVIA’s Rule 26(a)(1) disclosures. (ECF
13 No. 84, at p. 18).

14 SJVIA concedes that disgorgement of fees paid to Gallagher was not included in its Rule
15 26 disclosures but argues it should be allowed to seek disgorgement damages from the jury
16 because any failure was substantially justified or harmless. SJVIA primarily relies on the fact
17 that its complaint seeks “the amount of professional fees paid by SJVIA to GBS” in its prayer for
18 relief. (ECF No. 94, at p. 15).

19 Federal Rule of Civil Procedure 26(a)(1)(iii) requires each party, “without awaiting a
20 discovery request, [to] provide to the other parties . . . a computation of each category of damages
21 claimed by the disclosing party—who must also make available for inspection and copying as
22 under Rule 34 the documents or other evidentiary material, unless privileged or protected from
23 disclosure, on which each computation is based, including materials bearing on the nature and
24 extent of injuries suffered.” *Fed. R. Civ. P.* 26(a)(1)(iii). Rule 37(c)(1) states that “If a party
25 fails to provide information or identify a witness as required by Rule 26(a) or c, the party is not
26 allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a
27 trial, unless the failure was substantially justified or is harmless.” *Fed. R. Civ. P.* 37(c)(1).

28 SJVIA’s complaint states in its prayer for relief that SJVIA is seeking, among other

1 damages: “An award of restitution in the amount of the professional fees paid by SJVIA to GBS.”
2 (ECF No. 1-1, at p. 25).

3 However, its Rule 26 initial disclosures do not refer to restitution, disgorgement, or other
4 professional fees. SJVIA’s initial disclosures dated August 3, 2017 state in relevant part “This
5 negligent conduct fell below the standard of care and breached the contract resulting in damages
6 that exceed \$28,000,000. But for Gallagher’s breaches and professional negligence, SJVIA
7 would currently have an approximate \$8,000,000 surplus instead of a \$20,000,000 deficit.” (ECF
8 No. 87-29, at p. 7). SJVIA’s supplement to its initial disclosures included the statement
9 “Attached as Exhibit A is a detailed breakdown of Plaintiff’s damages in the amount of
10 \$28,249,265.” (ECF No. 87-30, at p. 3). The attached spreadsheet does not list any restitution,
11 disgorgement, or professional fees. (ECF No. 87-30, at p. 5).

12 SJVIA claims that the failure to disclose was harmless because “the full amount of fees
13 the SJVIA paid” is known. SJVIA asserts that amount is \$2,911,744.25. GBS argues, however,
14 that such a disclosure is insufficient because “[t]he amount of fees and how they should be
15 apportioned between obligations Gallagher adequately performed and obligations Gallagher
16 allegedly breached have not been the subject of any discovery or expert analysis.” (ECF No. 84,
17 at p. 22). SJVIA counters that “under applicable California law, it would be GBS’ burden—not
18 the SJVIA’s—to provide evidence of any amount of set-off GBS could possibly be entitled to
19 (though the SJVIA would dispute such a claim) because GBS contends that it performed *some* of
20 its services competently.” (ECF No. 94, at p. 16).

21 Also relevant to this issue is the substantial discussion made about SJVIA’s initial
22 disclosures regarding damages as part of the motions for summary judgment. GBS moved for
23 summary judgment on the basis that Plaintiff’s only theory of damages was legally improper. In
24 response, SJVIA claimed, in part, that it could also seek additional theories of damages, including
25 recovery of fees, even though those theories had not been in SJVIA’s rule 26 disclosures. The
26 following discussion took place on the record:

27 The Court: Ms. Strickroth [Plaintiff’s counsel], let me ask, we didn’t
28 cover these alternative theories. Are you or are you trying to reserve the right to
do either the loan amount/liquidity or the fees, and why do you get to do that? Or

1 are you rising and falling on this argument as the damages argument that you
made?

2 Ms. Strickroth: We are reserving the right to recover the loan amount,
3 which is part and parcel to the damages that we've calculated. It's subsumed in it.
4 We are reserving the right to recover the fees that Gallagher collected, which they
know exactly how much fees they've collected.

5 The Court: What do you do with the fact—was it in—I have your
6 disclosure. Is it in the disclosure?

7 Ms. Strickroth: No, it was not.

8 The Court: So are you going to amend the disclosure?

9 Ms. Strickroth: We can amend the disclosure, number one, and I don't think
10 that, it is my argument, that Gallagher is prejudiced in any way. They know
11 exactly how much they received in fees. It's not a calculation that is foreign or
hidden from them in any way.

12 (ECF No. 87-22, at p. 10).

13 Despite this discussion, SJVIA did not amend its initial disclosures to add these categories
14 of damages. Moreover, SJVIA's pretrial statement does not include any of these categories in its
15 statement of damages. ECF No. 68, at p. 16 ("The SJVIA seeks damages from GBS in the
16 amount required to restore the SJVIA to the financial position it would have been in but for
17 GBS's breaches and negligence."). Notably neither party has submitted a jury instruction on the
18 proper measure for disgorgement of fees or restitution.

19 Given this history, the Court will GRANT GBS's motion to the extent it will preclude
20 Plaintiff from seeking an award of disgorgement of fees it paid to GBS. Such a result follows
21 from Rules 26 and 37. It is undisputed that this category of damages was not included in
22 Plaintiff's initial disclosures. The failure is not substantially justified or harmless. Plaintiff could
23 have included this category of damages in its initial disclosures, yet chose not to. Indeed,
24 Plaintiff chose not to amend its initial disclosures even when this issue became apparent in
25 connection with the motion for summary judgment, and notwithstanding the Court's direct
26 question whether Plaintiff would amend its disclosures to add this category. Moreover, it is not
27 harmless. Although the parties disagree on who bears the burden of proving what portion of fees
28 could be claimed, they each claim that some allocation may need to be done. Even under

1 SJVIA's understanding of the law, GBS lost its opportunity to prepare a calculation and
2 associated evidence or expert testimony as to the amount of fees at issue by the claims in this
3 case. Finally, there are no jury instructions to consider on this legal issue and it is not ready to be
4 tried.

5 **III. GBS' MIL NO. 4 SEEKING EXCLUSION OF TESTIMONY REGARDING**
6 **UNDISCLOSED EXPERT DAMAGES OPINIONS**

7 GBS's motion *in limine* number 4 seeks to preclude SJVIA's expert witness, Mr. Bednar,
8 from testifying to three matters discussed in the declaration he filed in support of SJVIA's
9 opposition to GBS's summary judgment motion. Specifically:

- 10 • The opinion that a higher increase to non-founders helped the SJVIA when
11 compared to applying the 17% blended rate increase that GBS proposed.
- 12 • Had GBS set the rates appropriately, the increase would have been within the
13 range of normal.
- 14 • Had GBS set the rates correctly, the SJVIA would have collected enough premium
15 from the departing entities during the plan year to cover each entity's incurred but
16 not reported IBNR claims.

17 GBS claims that these opinions were not timely disclosed by Mr. Bednar's expert report,
18 under Fed. R. Civ. P. 26(a)(2). (ECF No. 84, at p. 23).

19 SJVIA agrees that Mr. Bednar will not testify as to the first opinion. (ECF No. 94, at p.
20 18 ("The SJVIA does not intend to offer at trial the complained-of statement from paragraph 15
21 of Bednar's declaration and is willing to agree that it will not elicit testimony from Bednar at trial
22 to the effect that had the SJVIA adopted the 17% blended rate increase in 2016 that GBS
23 recommended, the SJVIA would have suffered additional damage.")).

24 SJVIA argues that the other two opinions were adequately disclosed by Mr. Bednar's
25 expert report.

26 Regarding the opinion that "Had GBS set the rates appropriately, the increase would have
27 been within the range of normal," SJVIA points to the following statement in Mr. Bednar's timely
28 disclosed Rule 26 expert report: "SJVIA's rates would have been competitive in the marketplace

1 and would have remained attractive to new groups.” (ECF No. 81-8, at p. 13.) The Court finds
2 that this disclosure is substantially similar to the opinion at issue. The Court will therefore deny
3 GBS’s motion to the extent it seeks to preclude Mr. Bednar from offering the opinion that that
4 “Had GBS set the rates appropriately, the increase would have been within the range of normal.”

5 Regarding the opinion that “Had GBS set the rates correctly, the SJVIA would have
6 collected enough premium from the departing entities during the plan year to cover each entity’s
7 incurred but not reported IBNR claims,” SJVIA pointed to the chart at the end of his report that
8 calculates revised premium from departing entities and corresponding IBNR claims. (ECF No.
9 81-8, at p. 46). Counsel for GBS countered that the chart demonstrates that SJVIA did not collect
10 sufficient premiums, noting certain negative numbers on the chart. The Court concludes that the
11 basis for Mr. Bednar’s opinion on this subject was adequately disclosed to allow GBS to
12 understand the basis for this claim and challenge it through cross-examination. The Court will
13 therefore deny GBS’s motion to the extent it seeks to preclude Mr. Bednar from offering the
14 opinion that “Had GBS set the rates correctly, the SJVIA would have collected enough premium
15 from the departing entities during the plan year to cover each entity’s incurred but not reported
16 IBNR claims.”²

17 **IV. GBS’S MOTION IN LIMINE NUMBER 5 SEEKING EXCLUSION OF**
18 **ADVERSE TESTIMONY FROM DEFENDANT’S WITNESSES BEYOND**
19 **RULE 45 GEOGRAPHICAL LIMITS**

20 GBS’s motion *in limine* number 5 asks the Court to rule that a subpoena by SJVIA for Mr.
21 Volk and Mr. Toole fall outside the Court’s subpoena power, and cannot be commanded to testify
22 adversely in SJVIA’s case-in-chief.

23 SJVIA indicates that it intends to call adversely in its case in chief the following
24 witnesses:

- 25 • Mr. Volk, an Area Vice President and Consulting Actuary at GBS.
- 26 • Mr. Toole, GBS’s designated expert and Senior Managing Director at FTI

27 _____
28 ² To the extent Mr. Bednar seeks to testify to other opinions outside of his expert report, not addressed in this
opinion, GBS may raise that objection at trial.

1 Consulting, Inc.

2 GBS represents that neither witness reside, work in, or regularly transact business in
3 California. Mr. Volk is based out of FTI's Boca Raton, Florida office. Mr. Toole is based out of
4 FTI's Winston-Salem, North Carolina office.

5 Federal Rule of Civil Procedure 45 governs the reach of subpoenas for trials. Specifically,
6 Fed. R. Civ. P. 45(c)(1) provides:

7
8 (1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a
trial, hearing, or deposition only as follows:

- 9 a. within 100 miles of where the person resides, is employed, or regularly
10 transacts business in person; or
11 b. within the state where the person resides, is employed, or regularly transacts
12 business in person, if the person
i. is a party or a party's officer; or
ii. is commanded to attend a trial and would not incur substantial expense.

13 Fed. R. Civ. P. 45(c)(1).

14 Based on the facts represented by GBS, neither Mr. Volk nor Mr. Toole are within the
15 subpoena power. SJVIA does not contend otherwise. The Court will grant GBS's motion to the
16 extent it seeks confirmation that a subpoena by SJVIA for Mr. Volk and Mr. Toole fall outside
17 the Court's subpoena power, and that Mr. Volk and Mr. Toole cannot be commanded to testify
18 adversely in SJVIA's case-in-chief.

19 As a consequence of this ruling, SJVIA may use Mr. Volk and Mr. Toole's deposition
20 testimony at trial. *Fed. R. Civ. P.* 32 (a)(4) ("A party may use for any purpose the deposition of a
21 witness, whether or not a party, if the court finds . . . that the witness is more than 100 miles from
22 the place of hearing or trial . . .").

23 **V. CONCLUSION**

24 For the reasons set forth herein, IT IS HEREBY ORDERED that:

- 25 1. GBS's Motion *in Limine* 2 seeking exclusion of testimony within the scope of
26 SJVIA's proper assertion of deliberative process privilege, (ECF No. 84, at p. 13), is
27 GRANTED IN PART:

- 28 • SJVIA is precluded from eliciting any testimony from any SJVIA Board Member

1 regarding any “undisclosed discussions that took place, which then were relied
2 upon by [a decision-maker] in making decisions as a board member.” It does not
3 include anything that was “disclosed publicly with regards to your actions on the
4 board.”

- 5 • Additionally, the Court will bar all SJVIA staff and Board members from
6 testifying to issues over which SJVIA previously claimed deliberative process
7 privilege, with specific questions to be addressed at trial.
- 8 • GBS’s motion is denied insofar as it seeking a ruling that SJVIA be precluded
9 from presenting any testimony “from any Board members about whether the Board
10 would have adopted higher rates or reserves had Gallagher recommended them.”

11 2. GBS’s Motion *in Limine* No. 3 seeking exclusion of evidence of restitution or
12 disgorgement damages not disclosed in SJVIA’s Rule 26(A)(1) Disclosures (ECF No.
13 84, at p. 18) is GRANTED.

- 14 • Plaintiff SJVIA is precluded from seeking an award of disgorgement of fees it paid
15 to GBS.

16 3. GBS’s Motion *in Limine* No. 4 seeking exclusion of testimony regarding undisclosed
17 expert damages opinions (ECF No. 84, at p. 23) is GRANTED IN PART AND
18 DENIED IN PART.

- 19 • Mr. Bednar is precluded from testifying to the opinion that a higher increase to
20 non-founders helped the SJVIA when compared to applying the 17% blended rate
21 increase that GBS proposed.
- 22 • Mr. Bednar may testify to the opinion that had GBS set the rates appropriately, the
23 increase would have been within the range of normal.
- 24 • Mr. Bednar may testify to the opinion that had GBS set the rates correctly, the
25 SJVIA would have collected enough premium from the departing entities during
26 the plan year to cover each entity’s incurred but not reported (IBNR) claims.

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4. GBS’s Motion *in Limine* No. 5 seeking exclusion of adverse testimony from Defendant’s witnesses beyond Rule 45 geographical limits (ECF No. 84, at p. 28) is GRANTED.

- The Court holds that Mr. Volk and Mr. Toole fall outside the Court’s subpoena power and cannot be commanded to testify adversely in SJVIA’s case-in-chief.
- SJVIA may use Mr. Volk and Mr. Toole’s deposition for any purpose in its case-in-chief.

IT IS SO ORDERED.

Dated: February 6, 2020

/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE