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SOUTHERN DISTRICT OF CALIFORNIA

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

JESUS ANTONIO GARCIA and
CHRISTINA ELIZABETH PALMER
GERACI,

Plaintiffs,

vs.

PROGRESSIVE CHOICE
INSURANCE COMPANY and DOES
1 through 100, Inclusive,

Defendants.

CASE NO. 11-CV-0466 BEN (NLS)
**ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE
DEFENDANT'S ANSWER**

[Docket No. 79]

Presently before the Court is Plaintiff's Motion to Strike Defendant's Answer (Docket No. 79). For the reasons stated below, the Motion to Strike Defendant's Answer is **DENIED**.

BACKGROUND

I. FACTUAL BACKGROUND

This action arises out of Defendant Progressive Choice Insurance Company's denial of Plaintiff Christina Elizabeth Palmer Geraci's insurance claim.

On May 19, 2008, Geraci purchased a 2006 Jeep Grand Cherokee, VIN #1J8HS58N26C178213, from Jimmie Johnson Kearny Mesa Chevrolet. Progressive issued an automobile insurance policy, Policy No. 10079982-2 ("Policy") for the Jeep on June 2, 2008.

1 On August 10, 2008, Geraci called Progressive and reported that the Jeep had
2 been stolen. According to Geraci, she and her fiancé, Jesus Antonio Garcia, had driven
3 the Jeep to a bar in the Cardiff area the prior evening. At approximately 2:00 a.m.,
4 because Geraci and Garcia were too intoxicated to drive home, a friend drove Geraci
5 and Garcia to the friend's apartment to spend the night. When the same friend drove
6 them back to the bar the afternoon of August 10, the Jeep was missing. The Jeep was
7 later found by the CHP completely burned, in the Brawley area. Geraci reported the
8 alleged theft to the Encinitas Sheriff's Department and filed a claim for the Jeep with
9 Progressive on the following Monday. On July 27, 2009, Progressive denied coverage.

10 **II. PROCEDURAL BACKGROUND**

11 This action was originally filed by both Geraci and Garcia in the Superior Court
12 for the State of California, County of San Diego. Progressive removed this action on
13 March 7, 2011. The Complaint alleges that Progressive denied Geraci's claim for
14 coverage in violation of the insurance contract. The Complaint asserts two causes of
15 action: (1) breach of contract; and (2) breach of the duty of good faith and fair dealing.
16 Garcia was dismissed without prejudice from this action on June 10, 2011.

17 Early in the discovery process, Progressive asserted it was not liable for breach
18 of the implied covenant of good faith and fair dealing or for punitive damages because
19 it relied on the advice of counsel. Progressive disclosed Teresa Starinieri, an outside
20 attorney hired by Progressive during the investigation of Geraci's claim, as a witness.
21 (Docket No. 30 at 19 ¶ 4 and 33 ¶ 4.) In addition, in response to Geraci's discovery
22 demands, Progressive disclosed the claims file for the underlying insurance claim and
23 the electronic activity notes, which included communications between Starinieri and
24 Progressive's Fire & Theft Adjuster, Elizabeth McAndrew. (*Id.* at 19 ¶ 5 and 33 ¶ 3.)
25 These items were produced "subject to objection on grounds of attorney-client
26 privilege." (*Id.* at 33 ¶ 3.)

27 During McAndrew's deposition, it was discovered that there may have been
28 some email communications between McAndrew and Starinieri that were not in the

1 claims file. (*Id.* at 21 ¶ 11 and 34 ¶ 5.) At the request of Plaintiff's counsel,
2 Progressive searched for the emails, which were stored on an email system no longer
3 in use. (*Id.* at 34 ¶ 6.) On June 6, 2012, Progressive disclosed some of the documents
4 that were recovered from the old email system, but withheld those documents
5 containing privileged communications between Progressive's employees and Starinieri.
6 (*Id.* at 35 ¶ 8.) In addition, Progressive informed Geraci that it was withdrawing its
7 previously asserted advice of counsel defense and was now claiming attorney-client
8 and attorney work product privileges with respect to the withheld communications,
9 identified as Item Nos. 1-109 on the amended privilege log. (*Id.* at 21 ¶ 12, 35 ¶¶ 9-10,
10 43-58.) The amended privilege log also listed communications that were previously
11 disclosed. (*Id.* at 59-76.)

12 On July 12, 2012, the parties filed a joint motion for determination of a discovery
13 dispute. (Docket No. 30.) Geraci asserted that Progressive had waived the attorney-
14 client privilege with respect to the newly discovered emails and with respect to the
15 communications already produced. Geraci requested that the email communications
16 be disclosed and that Starinieri be required to testify at a deposition without claiming
17 privilege. In the alternative, Geraci sought to re-depose witnesses, at Progressive's
18 cost. Progressive argued that the newly discovered emails were confidential attorney-
19 client communications, and that they had never been disclosed to outside parties.
20 Progressive argued that as a result, there had been no waiver of privilege with respect
21 to Item Nos. 1-109 on the amended privilege log.

22 Magistrate Judge Nita L. Stormes ordered Progressive to produce the documents
23 identified as Item Nos. 1-109 on its amended privilege log ("Discovery Order").
24 (Docket No. 31.) The Discovery Order held that "Defendant expressly waived
25 attorney-client privilege with respect to communications between it and Ms. Starinieri
26 concerning Plaintiff's claim." (*Id.* at 10.) Progressive moved to modify or set aside the
27 Discovery Order. (Docket No. 37.) The undersigned denied this motion on September
28 27, 2012. (Docket No. 53.) Progressive filed a Petition for Writ of Mandamus with

1 the Ninth Circuit Court of Appeals, requesting that this Court's September 27, 2012
2 Order be vacated. The Ninth Circuit denied the petition on March 4, 2013. (Docket
3 No. 66.)

4 Presently before the Court is Geraci's Motion to Strike Defendant's Answer
5 (Docket No. 79).

6 **DISCUSSION**

7 Geraci moves for an order striking Progressive's Answer and entering its default
8 for "egregious abuse of the litigation and discovery process." (Mot. to Strike at 3.)

9 Courts have an inherent power to impose a terminating sanction for abusive
10 litigation practices. *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir.
11 1987). A default or dismissal under the court's inherent power is justified in "extreme
12 circumstances." *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1071 (N.D.
13 Cal. 2006). The Ninth Circuit has suggested that extraordinary circumstances exist
14 where "there is a pattern of disregard for Court orders and deceptive litigation tactics
15 that threaten to interfere with the rightful decision of a case." *AdvantaCare Health*
16 *Partners, LP v. Access IV*, No. C 03-4496, 2004 U.S. Dist. LEXIS 16835, at *15 (N.D.
17 Cal. Aug. 17, 2004).

18 Progressive's conduct during discovery does not justify using the Court's
19 inherent power to impose terminating sanctions against it. Progressive has not
20 disobeyed any court order. In addition, there is no evidence that Progressive engaged
21 in any deceptive litigation conduct. Progressive argues that it was unaware of the 109
22 emails at the time it initially asserted the advice of counsel defense and produced other
23 privileged communications between the company and outside counsel, and it did not
24 decide to withdraw its advice of counsel defense until it discovered the emails. (Howe
25 Decl. ¶¶ 3, 8-9; Charles Decl. ¶¶ 5-7). Progressive did not attempt to hide the existence
26 of the 109 emails from the Court or opposing counsel once their existence was revealed
27 during McAndrew's deposition. Progressive advised opposing counsel of the situation,
28 provided a privilege log for the documents in question, and served amended Rule 26

1 initial disclosures and supplemental interrogatory responses. (Howe Decl. ¶¶ 9-10.)
2 Moreover, when the Ninth Circuit denied its Petition for Writ of Mandamus,
3 Progressive produced the 109 emails. (*Id.* ¶ 22.)

4 In addition, there is no evidence that Progressive’s decision to withhold the 109
5 emails based on attorney-client privilege grounds was made in bad faith, because
6 Progressive’s belief that there had not been a waiver of privilege was reasonable. As
7 Judge Stormes observed in the Discovery Order, the discovery dispute involved a
8 “unique situation.” (Docket No. 31, at 5.) Moreover, Judge Stormes granted
9 Progressive a temporary stay of her discovery ruling, implicitly finding that
10 Progressive’s position had some merit. *See Vallabhapurapu v. Burger King Corp.*, No.
11 11-cv-667, 2011 WL 5036705, at *1 (N.D. Cal. Oct. 21, 2011) (to succeed on a motion
12 for stay of a discovery ruling from a magistrate judge, the moving party must “ma[ke]
13 a strong showing that he is likely to succeed on the merits,” among other things).
14 Finally, in disposing of Progressive’s Petition for Writ of Mandamus, the Ninth Circuit
15 found that the issues raised by Progressive warranted a response, ordered briefing, and
16 sent the matter to a merits panel. (RJN, Exhs. D, E.)¹

17 Moreover, Judge Stormes has previously declined to impose sanctions. When
18 the parties filed a Joint Motion for Determination of Discovery Dispute, Geraci
19 requested that Progressive be sanctioned for the expense incurred in re-deposing the
20 witnesses. (Docket No. 30, at 8.) However, Judge Stormes declined to impose
21 sanctions. (Docket No. 31, at 10 (“In finding that Defendant expressly waived its
22 attorney-client privilege with respect to the newly discovered e-mails, this Court is not
23 finding that Defendant acted in bad faith and is not imposing a sanction.”)).

24 Geraci argues that Progressive wrongfully withheld the 109 emails. According
25 to Geraci, Progressive’s conduct throughout litigation—the way Progressive claimed
26 that it had produced a complete copy of the claim file when in fact there were 109
27

28 ¹ Progressive’s requests for judicial notice are **GRANTED**. *See* FED. R. EVID.
201(b).

1 emails that were not produced, and the way Progressive changed its defense after the
2 discovery cut-off date had passed—is indicia of bad faith.² Geraci cites several cases
3 that she claims present analogous situations in which courts have imposed a
4 terminating sanction for egregious litigation conduct. The cases Geraci cites are
5 distinguishable, however, in that they involve intentional destruction of evidence, theft,
6 knowingly false testimony, a pattern of intentional disregard for prior court orders,
7 fraud on the court, or violation of ethical rules—conduct that is much more egregious
8 than that at issue here. See *TeleVideo Sys.*, 826 F.2d at 917 (perjury); *Combs v.*
9 *Rockwell Int’l Corp.*, 927 F.2d 486 (9th Cir. 1991) (fraud on the court); *Stephen*
10 *Slesinger, Inc. v. Walt Disney Co.*, 155 Cal. App. 4th 736 (2d Dist. 2007) (theft and
11 fraud on the court); *Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal. App.
12 3d 272 (1st Dist. 1988) (violation of ethical rules); *Williams v. Russ*, 167 Cal. App. 4th
13 1215 (2d Dist. 2008) (destruction of evidence); *Doppes v. Bentley Motors, Inc.*, 174
14 Cal. App. 4th 967 (4th Dist. 2009) (pattern of intentional disregard for prior court
15

16 ² Geraci argues that this Court has previously found that Progressive withheld
17 the 109 emails in bad faith. In support of this argument, Geraci points to the Court’s
18 Response to Progressive’s Petition for Writ of Mandamus. In it, the Court stated:

19 [T]he [Ninth Circuit] should not condone Progressive’s behavior of first
20 disclosing a portion of the attorney-client communications, then asserting
21 the attorney-client privilege. Geraci, in response to Progressive’s
22 assertion of the advice of counsel defense, requested discovery of the
23 attorney-client communications to evaluate the defense. Progressive was
24 required to maintain hard copies of the attorney-client communications
25 in its claim file pursuant to California Code of Regulations, title 10,
26 Section 2695.3. However, Progressive produced only some of the
documents. In addition, there is no evidence that Progressive requested
from Starinieri a copy of either Starinieri’s files or the emails between
Progressive’s employees and Starinieri, as it should have to ensure
compliance with the California Code of Regulations. To allow
Progressive to claim the attorney-client privilege for the pertinent
documents under these circumstances would encourage less than diligent
compliance with discovery requests or, worse yet, deliberate attempts to
circumvent or prolong the litigation process.

27 *In Re: Progressive Ins. Co. v. U.S. Dist. Court for the S. Dist. of Cal.*, No. 12-73128,
28 Docket No. 5, at 9-10 (9th Cir.). Although it is true that this Court did not condone the
practice of asserting the attorney-client privilege after first disclosing a portion of the
attorney-client communications, the Court did not make a finding as to whether
Progressive’s conduct was in bad faith.

1 orders, intentional concealment of evidence, and destruction of evidence). In addition,
2 *Kim v. Westmoore Partners, Inc.*, 201 Cal. App. 4th 267 (4th Dist. 2011), is
3 inapplicable to the present case because it did not involve the imposition of a sanction
4 under the court's inherent authority.

5 **CONCLUSION**

6 For the reasons stated above, Plaintiff's Motion to Strike Defendant's Answer
7 is **DENIED**.

8 **IT IS SO ORDERED.**

9
10 DATED: 12/18/12

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12 HON. ROGER T. BENITEZ
13 United States District Judge
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