IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02940-CMA-MEH

JODIE THANE,

Plaintiff,

v.

GEICO CASUALTY COMPANY,

Defendant.

ORDER

Michael E. Hegarty, United States Magistrate Judge.

During the course of discovery in this case, Defendant Geico Casualty Company ("GEICO") served a Notice of Intent to Take Deposition by Written Questions together with a subpoena duces tecum on the law firm currently representing Plaintiff in this action, seeking information from Plaintiff's former counsel, Robert Fischel ("Fischel"). GEICO also served a subpoena duces tecum on the Plaintiff's former counsel, Donald Moore ("Moore"). Both Moore and Fischel represented Plaintiff during the litigation underlying the present dispute. Plaintiff, through the law firm Franklin D. Azar and Associates, P.C. ("Azar"), now seeks protection from responding to GEICO's subpoena and deposition questions and, in addition, Moore moves to quash the subpoena, based on the attorney-client privilege and work-product doctrine. The Court finds GEICO has demonstrated waivers of the attorney-client privilege and work-product doctrine in certain respects and, thus, the motions are granted in part and denied in part.

I. Background

Plaintiff Jodie Thane ("Plaintiff") alleges that, as a result of an automobile accident involving Kenneth Farrell ("Farrell") and Aaron Thane on May 25, 2012, Farrell was seriously injured and

Aaron Thane was killed. Plaintiff and Aaron Thane were insured through a GEICO personal automobile insurance policy with liability limits of $50,000 per person/$100,000 per occurrence. Farrell brought claims against the Estate of Aaron Thane and Jodie Thane. Plaintiff alleges that GEICO failed to protect her interest and to attempt settlement of Farrell's claims within the policy limits. The matter was tried and, on August 29, 2014, a jury returned a verdict in Farrell's favor against Jodie Thane in the amount of $1,500,000. On November 7, 2014, the trial court reduced the award and entered judgment in the amount of $1,004,226.49. The Colorado Court of Appeals affirmed the judgment on March 10, 2016.

Plaintiff then filed this action in the District Court for the County of Denver, Colorado as the named insured under the GEICO policy, alleging claims for bad faith breach of the insurance contract and a violation of Colo. Rev. Stat. §10-3-1115. ECF No. 4. GEICO filed an Answer in response to the Complaint on November 30, 2016, then removed the action to this Court on December 1, 2016. ECF Nos. 1, 6. This Court issued a Scheduling Order on January 11, 2017, and discovery proceeded.[1]

In the present motion for protective order, Plaintiff contends that the documents and information GEICO seeks—described as the "attorney file" pertaining to Azar's representation of the Plaintiff in the underlying case—is protected from disclosure by the attorney-client privilege and work-product doctrine. In the motion to quash, Moore argues the same regarding the same type of documents and information sought from him.

In response to the motion for protective order, GEICO contends that Plaintiff waived any objection to the requested discovery by failing to timely object and impliedly waived both the

[1]GEICO also filed a motion for summary judgment on January 25, 2017 arguing the Plaintiff's claims are barred by the statute of limitations, and that motion remains pending before Judge Arguello. *See* ECF No. 25.

attorney-client privilege and work-product doctrine by placing at issue communications between herself and her attorneys, Moore and Fischel, in the underlying case. In addition, GEICO counters that the motion itself is procedurally improper, as none of the discovery was served directly on the Plaintiff but, rather, on her law firm and former lawyers, all non-parties to this action. GEICO also asserts that Plaintiff failed to supply a privilege log with her claim of privilege, as required by the applicable rules. In response to the motion to quash, GEICO raises the same arguments concerning Plaintiff's waivers of the privileges and failure to supply a privilege log.

Plaintiff replies by attaching all relevant discovery requests and arguing that they are virtually identical save the case caption. She also argues that her request for protection is broader than that which she could request in a single motion to quash (i.e., her attorneys were served with both a subpoena and notice to take a deposition) and, thus, she filed one motion for protective order "in an effort to simplify the exact scope of allowable discovery going forward." Reply, ECF No. 63 at 3. Further, Plaintiff attached a privilege log and claims there is no prejudice to GEICO. Finally, Plaintiff asserts that GEICO "wholly controlled" her defense of the underlying case and, thus, whether she desired to settle the claims is irrelevant. Before filing his reply, Moore filed a supplement attaching a privilege log for all documents withheld; in his reply, Moore argues that Plaintiff's counsel informed him that she did not waive the attorney-client privilege, and the work-product doctrine attaches to the discovery requested by GEICO.

Because Plaintiff and Moore filed their privilege logs after GEICO filed its response briefs, the Court granted GEICO's request to file a surreply in support of its objection to the motions. GEICO argues that Plaintiff's privilege log is untimely and lacks sufficient detail "as required by Colo. R. Civ. P. 26(b)(5)(A)."

II. Legal Standards

Rule 26(c) of the Federal Rules of Civil Procedure provides that a court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c). The party seeking a protective order bears the burden of establishing its necessity, *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981), but the entry of a protective order is left to the sound discretion of the court. *See Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008). As part of the exercise of its discretion, the court may also specify the terms for disclosure. Fed. R. Civ. P. 26(c)(1)(B).

The good cause standard is "highly flexible, having been designed to accommodate all relevant interests as they arise." *See Rohrbough*, 549 F.3d at 1321 (citation omitted). However, conclusory assertions are insufficient to show good cause. *Klesch & Co. Ltd. v. Liberty Media Corp.*, 217 F.R.D. 517, 524 (D. Colo. 2003). "Instead, the party seeking a protective order must show that disclosure will result in a clearly defined and serious injury to the party seeking protection." *Id.* (citing *Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 206 (D. Colo. 2002) (internal citations omitted)). As a general rule, the "good cause" calculation requires that the court balance "the [moving] party's need for information against the injury which might result from unrestricted disclosure." *Exum*, 209 F.R.D at 206 (citations omitted).

Fed. R. Civ. P. 45(d)(3)(A) requires the Court to quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires excessive travel by a non-party; (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden. Plaintiff and Moore rely on subsection (iii) of the applicable rule.

In diversity jurisdiction cases such as this one, state law controls the issues of privilege raised by the parties. *See* Fed. R. Evid. 501; *see also Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998). In Colorado, the attorney-client privilege is "established by the act

of a client seeking professional advice from a lawyer and extends only to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations." *People v. Tucker*, 232 P.3d 194, 198 (Colo. App. 2009) (citing *Losavio v. Dist. Court in and for Tenth Judicial Dist.*, 533 P.2d 32, 35 (Colo. 1975)); *see also People v. Trujillo*, 144 P.3d 539, 542 (Colo. 2006) ("the attorney-client privilege applies to confidential matters communicated by or to the client in the course of obtaining counsel, advice, or direction with respect to the client's rights or obligations"). The privilege applies only to communications under circumstances giving rise to a reasonable expectation that the communications will be treated as confidential. *Tucker*, 232 P.3d at 198 (citing *Wesp v. Everson*, 33 P.3d 191, 197 (Colo. 2001)). Mere statements of fact are not protected by the attorney-client privilege. *Trujillo*, 144 P.3d at 545 (citing *Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000) (noting that "the privilege protects only the communications to the attorney; it does not protect any underlying and otherwise unprivileged facts that are incorporated into a client's communication to his attorney")). "The burden of establishing the applicability of the attorney-client privilege rests with the claimant of the privilege." *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 467 (Colo. App. 2003) (citing *Clark v. District Court*, 668 P.2d 3, 8 (Colo. 1983)); *see also In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999).

"Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3)." *Frontier Refining Inc.*, 136 F.3d at 702 n.10 (internal quotation omitted). To be subject to the work-product doctrine the materials must have been "prepared in anticipation of litigation. It does not protect materials prepared in the 'ordinary course of business.'" *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125, 126 (D. Colo. 1993) (citation omitted). Thus, to receive work-product protection, the party resisting discovery must demonstrate that the information at issue "was prepared by the

attorney in anticipation of litigation or for trial." *In re Grand Jury Proceedings*, 616 F.3d 1172, 1184-85 (10th Cir. 2010); *see also Pepsico, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002) (stating that "[i]n order to protect work product, the party seeking protection must show the materials were prepared in anticipation of litigation, i.e., because of the *prospect* of litigation") (emphasis added).

The court in *Martin v. Monfort, Inc.*, 150 F.R.D. 172 (D. Colo. 1993), set forth a process to be considered in determining a claim for work-product protection:

> Rule 26(b)(3) ... contemplates a sequential step approach to resolving work product issues. First, the party seeking discovery must show that the subject documents or tangible things are relevant to the subject matter involved in the pending litigation and are not privileged. Once such a showing has been made, the burden shifts to the party seeking protection to show that the requested materials were prepared in anticipation of litigation or for trial by or for the party or the party's attorney, consultant, surety, indemnitor, insurer or agent. Such a showing may be made by affidavit, deposition testimony, answers to interrogatories, and the like. If the Court concludes that the items were prepared in anticipation of litigation, the burden shifts back to the requesting party to show: (a) a substantial need for the materials in the preparation of the party's case; and (b) the inability without undue hardship of obtaining the substantial equivalent of the materials by other means. Finally, even if substantial need and unavailability are demonstrated, the Court must distinguish between factual work product, and mental impressions, opinions, and conclusions, for the latter are rarely, if ever, subject to discovery.

Id. at 172-73 (internal citations omitted).

III. Analysis

GEICO raises several procedural challenges to the present motions before it attacks the substance of Plaintiff's and Moore's requests for relief. The Court will address each in turn.

A. Procedural Issues

First, the Court finds Plaintiff's filing of the "correct" challenged subpoena and discovery request with her reply brief (ECF No. 63-1) alleviates GEICO's concern that Plaintiff attached (nearly identical) documents from a different case to her motion. The Court finds no prejudice to

GEICO in this matter.

Second, the Court finds that Plaintiff, through her attorneys, correctly seeks relief pursuant to Fed. R. Civ. P. 26(c) in responding to GEICO's "Notice of Intent to Take Deposition by Questions" (ECF No. 63-1) and "Notice of Intent to Take the Oral Deposition of Robert Fischel" (ECF No. 63-5). To the extent these discovery requests seek information protected by the attorney-client privilege, the privilege belongs to the Plaintiff, and if protected by the work-product doctrine, the protection belongs to Plaintiff's attorneys.

Third, GEICO contends that the motion for protective order is not a sufficient response by the subpoena recipient, Azar, to raise objections. In the motion, Plaintiff, through her attorneys, argues that GEICO does not meet its burden to show that Plaintiff waived her attorney-client privilege or that it has a compelling need for the disclosure of work-product materials, and she seeks "an order from this court pursuant to Fed. R. Civ. Pro. [sic] 26(c)(1)(A) disallowing these discovery requests." Mot. 5. The Court has previously found, and finds here, that

> [a]lthough the motion at hand challenges a subpoena, which is typically governed by Rule 45, the motion does not seek to quash the subpoena but requests review of the scope of discovery sought. As Rule 26 governs the scope of discovery, it is the appropriate rule to apply in the adjudication of Plaintiff's request. *See, e.g., Rendon Group, Inc. v. Rigsby*, 268 F.R.D. 124, 126 (D.D.C. 2010) ("Rule 26 of the Federal Rules of Civil Procedure defines and governs the scope of discovery for all discovery devices, and, therefore, Rule 45 must be read in light of it.") (citing 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2452 at 392–393 (3d ed. 2008)).

Sun River Energy, Inc. v. Nelson, No. 11-cv-00198-MSK-MEH, 2011 WL 1527715, at *3 (D. Colo. Apr. 22, 2011).

Fourth, to the extent Plaintiff's motion may be construed as seeking to quash the subpoena served on Azar, the Court must determine whether Plaintiff has standing to seek such relief. The general rule is that a party has no standing to quash a subpoena served on a third party, except as to

claims of privilege or on a showing that there is a privacy interest applicable. *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997) ("[a]bsent a specific showing of a privilege or privacy, a court cannot quash a subpoena duces tecum"); *see also Broadcort Capital Corp. v. Flagler Secs., Inc.*, 149 F.R.D. 626 (D. Colo. 1993). Objections unrelated to a claim of privilege or privacy interest are not proper bases upon which a party may quash a subpoena. *Windsor*, 175 F.R.D. at 668; *see also Oliver B. Cannon & Son, Inc. v. Fidelity & Cas. Co. of N.Y.*, 519 F. Supp. 668, 680 (D.C. Del. 1981) (movant lacks standing to raise objections unrelated to any right of privilege). Here, the Plaintiff and her attorneys clearly seek protection from the subpoena based on the attorney-client privilege and work-product doctrine and, thus, the Court finds the Plaintiff makes the requisite showing to demonstrate she has standing to move to quash the subpoena served on Azar.

Fifth, GEICO asserts that neither recipient of the subpoenas (Azar or Moore) served objections to the subpoenas in accordance with the deadline set forth in Fed. R. Civ. P. 45(d)(2)(B). Regarding Azar, the Court has already determined that the motion for protective order serves as a proper response to the discovery requests, including the subpoena, served on Azar. To the extent that GEICO argues the motion is untimely, the Court notes that GEICO does not rebut the Plaintiff's assertion that "the parties agreed [the] Plaintiff would have until May 8, 2017 to file the discussed Motion for Protective Order [which "would address all outstanding discovery issues"]. Reply ¶¶ 4, 7; Resp. 3. As for Moore, GEICO did not rebut his assertion that he "has obtained an extension to May 17, 2017 to comply with the subpoena." Mot. ¶ 3. Moore's motion was filed on May 16, 2017; the Court finds the motion timely pursuant to Fed. R. Civ. P. 45(d)(3).

Finally, GEICO contends the privilege log served by the Plaintiff is untimely and lacks sufficient detail as required by "Colo. R. Civ. P. 26(b)(5)(A)." Notably, GEICO removed this action

to federal court and, as such, the case is governed by the *federal* rules of civil procedure and supporting case law.[2] *See Zander v. Craig Hosp.*, 743 F. Supp. 2d 1225, 1230 (D. Colo. 2010) ("Discovery in the federal courts is governed by the Federal Rules of Civil Procedure, regardless of whether jurisdiction is based on a federal question or diversity of citizenship."). Nevertheless, Fed. R. Civ. P. 26(b)(5)(A) is substantially similar to the Colorado rule in several material respects and provides:

> (A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

At the outset, to the extent GEICO asserts that the privilege log fails to comply with the deadline set forth in Fed. R. Civ. P. 45(d)(2)(B), the Court finds the clear language of the rules governing privilege logs—Fed. R. Civ. P. 26(b)(5) and 45(e)(2)—set no deadlines whatsoever and there is no reference in these rules to the deadline in Rule 45(d)(2)(B) or in any other rule. Courts "must interpret statutes and rules of procedure based on their plain language." *United States v. Ceballos–Martinez*, 371 F.3d 713, 716 (10th Cir. 2004).

GEICO cites no applicable law supporting its position that a party waives its privilege *unless* a privilege log accompanies a written objection to a subpoena or a discovery request at the time the objection is due. The Court has found no such support in this District; however, in the District of Kansas, courts have found that "parties withholding privileged material must provide the notice and

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[2]The "*Erie* doctrine," as it has come to be known, has been interpreted to mean that federal courts are to apply state substantive law, but federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

information required by Rule 26(b)(5) when they are otherwise required to object or provide the discovery under the federal rules of civil procedure." *Robinson v. City of Ark. City, Kan.*, No. 10-1431-JAR-GLR, 2012 WL 603576, at *5 (D. Kan. Feb. 24, 2012) (citing *Sprint Commc'ns Co., L.P. v. Vonage Holdings Corp.*, No. 05–2433–JWL–DJW, 2007 WL 1347754, at *2 (D. Kan. May 8, 2007) (finding that inherent within Rule 26(b)(5) "is a requirement that the claim of privilege should be made at the same time that the privilege objection is lodged and the documents are withheld")); *see also Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 661–62 (D. Kan. 1999) (a privilege log is timely when provided at the time a party withholds information and, if not timely, objections to privilege and work product may be deemed waived); *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 902 F. Supp. 1356, 1360 (D. Kan. 1995) ("the producing party must provide the Rule 26(b)(5) notice and information at the time it was otherwise required to produce the [requested] documents"). However, even these courts recognize that the sanction of "waiver" is best suited for the more serious discovery violations. *First Sav. Bank*, 902 F. Supp. at 1361 ("waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith."); *see also Design Basics, LLC v. ProBuild Co., LLC*, No. 10-cv-02274-REB-BNB, 2011 WL 2600980, at *5, (D. Colo. Jun. 30, 2011) (same). The Court will address the question of "waiver" of the attorney-client privilege and work-product doctrine below.

Next, to the extent GEICO complains the Plaintiff, herself, has failed to "expressly" make a claim of attorney-client privilege, the Court is not persuaded. Certainly, the law recognizes that attorneys representing parties in federal court speak on behalf of those parties during the litigation. *See State Farm Fire & Cas. Co. v. Dunn-Edwards Corp.*, 728 F. Supp. 2d 1273, 1277 (D.N.M. 2010) (in the context of whether a defendant consented to removal, "There is no reason why an attorney cannot be called upon to speak on her client's behalf.").

As to the log's content, in Colorado, "[g]enerally, a privilege log is adequate if it identifies with particularity the documents withheld, including their date of creation, author, title or caption, addressee and each recipient, and general nature or purpose for creation. In addition, the particular privilege relied on must be specified." *Zander*, 743 F. Supp. 2d at 1232. "The information provided in the privilege log must be sufficient to enable the court to determine whether each element of the asserted privilege is satisfied." *Horton v. United States*, 204 F.R.D. 670, 673 (D. Colo. 2002).

Here, the Plaintiff's privilege log provides the date of each document, the particular privilege asserted, and the description of each document, in which Plaintiff typically states or implies the author and recipient(s) and the general nature of the document. *See* Privilege Log, ECF No. 63-6. GEICO's assertion that the "descriptions simply state, 'invoice,' 'post-litigation document,' 'invoice recap,' 'medical bill,' etc." is incorrect (*see* Surreply 2); not a single document listed on the log is described in such a meager fashion. *See* ECF No. 63-6. Rather, Plaintiff describes, for instance, the documents as "emails between [herself] and Robert O. Fischel" or "emails between [herself] and [a paralegal at Azar]," which appear to be subject to the attorney-client privilege.[3] *Id.*

Therefore, the Court finds no basis on which to deny the present motions founded on any procedural deficiencies argued by GEICO.[4]

B. Substantive Issues

[3]GEICO does not challenge whether any particular document(s) listed on the privilege log are subject to the attorney-client privilege or work-product doctrine.

[4]GEICO contends that neither Plaintiff nor Moore produced a single document in response to the discovery requests and subpoenas served on Moore and Azar; as such, the Court assumes that the Plaintiff and Moore have acted in good faith and have withheld every responsive document in their possession, custody, or control under either the attorney-client privilege or work-product doctrine. If the Plaintiff has withheld any documents not subject to a privilege, she should produce them immediately, or if GEICO becomes aware that documents exist for which the Plaintiff, Azar, or Moore have not asserted a privilege, GEICO should alert the Court immediately.

Plaintiff seeks protection from disclosing, and Moore seeks an order quashing a subpoena requesting, information and documents concerning the following:

> Attorney file[s] pertaining to [Azar attorneys' and Moore's] representation of Third-Party Defendant Jodie Thane and the Estate of Aaron Thane for the underlying case Robert Thane, Branden Hanson, Jodie Thane and Todd Thane, Plaintiffs & Kenneth Farrell,Third Party Plaintiff, v. Kenneth Farrell,The Estate of Aaron Thane, Jodie Thane and Branden Hanson & The Estate of Aaron Thane, Jodie Thane and Branden Hanson, Third Party Defendants, Cause No. 2012CV2852, in the District Court of Jefferson County, Colorado.

See ECF No. 46 at 4; ECF No. 63-1 at 6. Plaintiff and Moore argue that any such information and documents are protected from disclosure by the attorney-client privilege and/or the work-product doctrine.

GEICO counters that both protections have been waived by the Plaintiff's "placing in issue" all confidential communications and documents "going directly" to her claims and GEICO's defense. Resp. 9–11, ECF No. 56. Specifically, GEICO contends that "it would be unfair for Plaintiff to thrust her lack of knowledge of the implications of settlement versus trial into the litigation while simultaneously wielding attorney-client privilege and work-product protection to frustrate attempts by GEICO to prove her knowledge regarding those implications and thereby negate the very foundation necessary for GEICO to prevail on her claims against it." *Id.* at 11; *see also* Resp. 9, ECF No. 57. Additionally, regarding Moore, GEICO asserts that Plaintiff has listed him as a potential witness and his "entire litigation file" in her initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) in this case. *See* ECF No. 57-3.

Moore replies that he has been informed the Plaintiff "has no intention of waiving [her] attorney-client privilege"; argues that "GEICO has not demonstrated substantial need to obtain documents that would otherwise be protected by the work-product doctrine"; and, concedes that "[t]he materials sought by GEICO that fall with the province of the attorney-client privilege and

work-product doctrine should only be ordered for production should the Court make a finding that [Plaintiff] has impliedly waived the claims of privilege by bringing the within lawsuit." Reply ¶¶ 7, 16, 17, ECF No. 67. Plaintiff argues that the sole issue in this case is whether GEICO's conduct in the underlying litigation was reasonable, with respect to its rejection of Farrell's (plaintiff) offers to settle, and that "[c]ommunications between [Plaintiff] and employees of the Azar firm have no bearing on the issues in this case." Mot. ¶ 8. Further, Plaintiff replies that her defense in the underlying case was "wholly controlled by GEICO" and "[w]hether [Plaintiff] desired to settle the claim is irrelevant as it is undisputed that GEICO was the sole decision maker in regard to settlement of the claim." Reply ¶ 12.

"Both the attorney-client privilege and the work-product doctrine provide protections for the client." *Martensen v. Koch*, 301 F.R.D. 562, 573 (D. Colo. 2014) (citing *In re Grand Jury Subpoenas*, 561 F.3d 408, 411 (5th Cir. 2009) (noting that work-product protections belong to both the client and the attorney, and either may invoke those protections)). In Colorado, a client impliedly waives the attorney-client privilege by placing privileged communications or material at issue or by disclosing the privileged information to a third party. *Id.* (citing *People v. Sickich*, 935 P.2d 70, 73 (Colo. App. 1996) ("[B]ecause defendant put in issue what advice he did or did not receive from counsel, as well as his own understanding of the proceedings, he waived the attorney-client privilege with respect to his discussions with counsel on these topics."). "Moreover, a litigant cannot use the work-product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Id.* (quoting *Frontier Refining, Inc.*, 136 F.3d at 704). The party seeking to overcome the attorney-client privilege—here, GEICO—carries the burden of establishing a waiver or an exception. *Wesp*, 33 P.3d at 198.

The Colorado Supreme Court found that an implied waiver of privilege is appropriate in the following instance:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Mountain States Tel. & Tel. Co. v. DiFede, 780 P.2d 533, 543–44 (Colo. 1989). In addition, the Federal Rules provide that work product may be discovered if it is otherwise discoverable under Rule 26(b)(1) and "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A).

The Court finds that Plaintiff has impliedly waived her privilege with respect to her communications with Moore during the underlying litigation. According to GEICO (and unrebutted by Moore and Plaintiff), Moore and others in his firm were hired by GEICO to represent the Plaintiff and the Estate of Aaron Thane in their capacities as third-party defendants in the underlying case. ECF No. 56 at 2. It is also undisputed that Farrell's settlement offers were made during the course of the underlying litigation. Plaintiff admits in her motion that "[t]he only confidential communication *at issue in the present case* is the communication between GEICO and counsel hired by GEICO (Mr. Don Moore) and [Plaintiff]." Mot. ¶ 8 (emphasis added). In addition, she disclosed Moore as a witness in this case and listed the "entire litigation file" belonging to his firm regarding the underlying case as "relevant to disputed facts." *See* ECF No. 57-3. Finally, the Court finds the Plaintiff's knowledge, if any, concerning the settlement offers made during the underlying litigation is relevant to the issues in this case and may be "vital" to GEICO's defense.

Regarding Moore's work-product materials, the Court notes that Moore's privilege log lists

certain documents that, likely, do not involve any settlement discussions with Farrell including, for example, deposition outlines, notes, and summaries. Therefore, the Court will order GEICO (who did not receive a copy of the privilege log until after its response brief was filed) to identify those documents listed as protected by the work-product doctrine for which GEICO believes it has a substantial need to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

As for the Azar firm, it is undisputed that Fischel, a former Azar employee, represented the Plaintiff and her husband "in their capacity [sic] as third-party plaintiffs" in the underlying case. *See* ECF No. 56 at 2. Plaintiff argues that she has not waived her privileges regarding communications with Azar employees during the underlying case by instituting this action because "the *defense* of Ms. Thane was wholly controlled by GEICO" and "[w]hether [she] desired to settle the claim is irrelevant as it is undisputed that GEICO was the sole decision maker in regard to settlement of the claim." Reply ¶ 12 (emphasis added). The Court is not convinced.

Plaintiff does not rebut that she served both as a defendant (represented by Moore) and as a plaintiff (represented by Fischel) in state court. The cases in which she was a defendant and a plaintiff were consolidated in February 2014. Resp. 2. Although the Complaint alleges that Farrell's first settlement offer was made before he filed suit against the Plaintiff (Compl. ¶ 8), which GEICO allegedly refused, the Complaint also asserts that "Farrell provided GEICO with additional opportunities to settle the claims" during the course of the litigation (*id.* ¶ 9). Plaintiff does not specify when these "additional opportunities" arose and, to the extent offers were made (likely to Plaintiff's counsel) after Plaintiff filed suit against Farrell as a third-party plaintiff, her knowledge of and response to the offers would be relevant to whether GEICO acted reasonably in responding to the same offers.

Regarding GEICO's argument that Plaintiff has placed "at issue" her lack of knowledge concerning actions taken at the appellate phase of the underlying case, the Court finds no waiver of the attorney-client privilege or work-product doctrine. While GEICO's "non-disclosure" at the late stage of the underlying case may be relevant to GEICO's statute of limitations defense set forth in its motion for summary judgment and Plaintiff's equitable tolling argument set forth in her response, there is no indication that Plaintiff's communications with counsel or any work-product materials prepared by the Azar firm are implicated in such arguments.

Therefore, the Court concludes Plaintiff has impliedly waived her attorney-client privilege regarding any communications between herself and Fischel or any other Azar employee concerning settlement offer(s) made by Farrell during the underlying litigation. GEICO may question Fischel and/or Plaintiff, by oral deposition or written questions, concerning any such settlement offer(s) and may seek copies of written communications regarding the same.

As with Moore, the Court will direct GEICO to identify in the Plaintiff's privilege log which document(s) it seeks to obtain that might contain information concerning offers made by Farrell to settle claims made by and against Plaintiff during Fischel's representation of the Plaintiff and to explain why it cannot obtain copies of such documents or the information contained in them by other means.

III. Conclusion

In sum, the documents and information GEICO seeks through the challenged discovery requests and subpoenas are protected from disclosure by the attorney-client privilege and work-product doctrine. GEICO has failed to establish waiver by any alleged procedural deficiencies in the Plaintiff's or Moore's submissions. However, GEICO has demonstrated the Plaintiff placed at issue in this case her communications with Moore in the underlying litigation *and* her

communications with Fischel or any other Azar employee regarding any settlement offers made by Farrell in the underlying litigation. In these respects, Plaintiff has waived her attorney-client privilege. With respect to documents and information withheld by Plaintiff and Moore under the work-product doctrine, the Court directs GEICO to identify in a motion to compel those documents it seeks to obtain and to explain how GEICO is entitled to each requested document under this order and why GEICO cannot obtain the documents (or their substantial equivalent) by other means.

Therefore, it is ORDERED that Plaintiff's Motion for Protective Order [filed May 5, 2017; ECF No. 44] and Moore's Verified Motion to Quash Subpoena [filed May 16, 2017; ECF No. 46] are **granted in part** and **denied in part** as follows. **On or before August 8, 2017**, Moore shall produce to GEICO all responsive written communications withheld on the basis of attorney-client privilege. **On or before August 8, 2017**, Azar shall produce to GEICO all written communications between the Plaintiff and Fischel or any other Azar employee drafted during the underlying litigation regarding settlement offers made by Farrell during the underlying litigation. Finally, **on or before August 8, 2017** and in accordance with this order, GEICO may file a motion to compel the production of documents listed in the Plaintiff's and Moore's privilege logs as withheld pursuant to the work-product doctrine, in accordance with this order.

Dated at Denver, Colorado, this 25th day of July, 2017.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge