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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

USF INSURANCE COMPANY, a Michigan corporation, )

Plaintiff, )

vs. )

SMITH'S FOOD AND DRUG CENTER, INC. )  
d/b/a SMITH'S FOOD AND DRUG CENTER, )  
#377, an Ohio corporation and J&I )  
MAINTENANCE, a Utah corporation, )

Defendants. )

SMITH'S FOOD AND DRUG CENTER, INC. )  
d/b/a SMITH'S FOOD AND DRUG CENTER, )  
#377, an Ohio corporation, )

Counterclaimant, )

vs. )

USF INSURANCE COMPANY, a Michigan corporation; and ROE CORPORATIONS I-X, inclusive, )

Counterdefendant. )

Case No.: 2:10-cv-01513-RLH-LRL

**ORDER**

(Motion to Strike #7)



1 On September 30, 2010, USF filed a complaint in this Court alleging that the  
2 indemnity clause in the Agreement is unenforceable due to the expiration of its express term and,  
3 therefore, USF has no obligation to defend Smith's in the Bell case. Specifically, USF asserted the  
4 following causes of action: (1) declaratory relief with respect to the Agreement; (2) declaratory  
5 relief with respect to the policy; (3) equitable indemnity; and (4) equitable subrogation. (Dkt. #1,  
6 Compl.) On September 23, Smith's filed an answer and counterclaim for the following causes of  
7 action: (1) declaratory relief; (2) bad faith; (3) equitable estoppel; and (4) punitive damages  
8 stemming from bad faith practices. (Dkt. #6). USF has now filed a motion to strike Smith's  
9 counterclaims. For the reasons stated below, the Court denies USF's motion to strike.

## 10 DISCUSSION

### 11 I. USF's Motion to Strike

12 USF seeks to strike Smith's entire counterclaim or, alternatively, portions of the  
13 counterclaim, based on Smith's attachment and use of alleged attorney-client privileged  
14 communications and work product stemming from the Bell litigation.

15 Under Rule 12(f) of the Federal Rules of Civil Procedure, a "court may strike from  
16 a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Matter is  
17 "immaterial" if it has no bearing on the controversy before the court. *In re 2TheMart.com, Inc*  
18 *Sec. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000). Allegations are "impertinent" if they are  
19 not responsive to the issues that arise in the action or are inadmissible as evidence. *Id.* A  
20 "scandalous" matter is one which casts a cruelly derogatory light on a party or other person. *Id.*  
21 The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that  
22 must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy,*  
23 *Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994).

24 Although a motion to strike under Rule 12(f) is typically limited to pleadings, a  
25 district court has the inherent power to strike a party's submissions other than pleadings. *See*  
26 *Metzger v. Hussman*, 682 F. Supp. 1109, 1110 (D. Nev. 1988). The alternative basis for striking

1 improper filings is the district court’s “inherent power over the administration of its business. It  
2 has inherent authority to regulate the conduct of attorneys who appear before it [and] to  
3 promulgate and enforce rules for the management of litigation . . . .” *Spurlock v. F.B.I.*, 69 F.3d  
4 1010, 1016 (9th Cir. 1995) (citations omitted). For example, district courts follow a long standing  
5 practice of striking attachments to motions, such as affidavits, that do not comply with the Federal  
6 Rules of Civil Procedure or Evidence. *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1003 (9th  
7 Cir. 2002) (recognizing practice of striking affidavits).

8           The Court finds that USF’s motion is deficient and procedurally improper. First,  
9 USF’s arguments concerning attorney-client privilege and work product fail to meet their burden  
10 under Rule 12(f) because the disputed documents do not amount to scandalous or impertinent  
11 matter. Certain communications made during Shannon’s correspondence with USF and Smith’s  
12 during the Bell case are relevant to the declaratory relief determination. The references and  
13 exhibits USF challenges undermine its assertion that it is not obligated to provide legal  
14 representation for Smith’s in the Bell case. Furthermore, although USF claims that the exhibits are  
15 barred by attorney-client privilege and work product, this is not the proper stage in the litigation  
16 nor is a motion to strike a proper vehicle to exclude such evidence. Indeed, Smith’s is not  
17 introducing any documents as evidence simply by attaching them to its counterclaim. USF retains  
18 the right to object to any attempt Smith’s may make to introduce said exhibits as evidence at trial  
19 or as support for a summary judgment motion. *See Chan v. Pan W. Corp.*, Case No.  
20 2:10-cv-1317-KJD-PAL, 2011 WL 830237 \*1 (D. Nev. Mar. 4, 2011) (citing *Advanced*  
21 *Commercial Contracting, Inc. v. Certain Underwriters at Lloyds of London*, 1998 WL 373407 \*2  
22 (E.D. La., July 2, 1998)). Accordingly, the Court denies USF’s motion to strike.

## 23 **II. Notice of Intent to Dismiss J&I Maintenance**

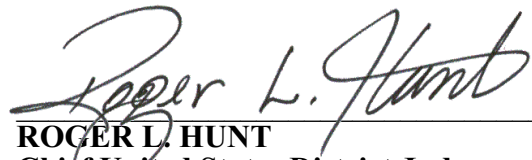
24           Rule 4 of the Federal Rules of Civil Procedure governs service of process. Rule  
25 4(m) states, “If a defendant is not served within 120 days after the complaint is filed, the court—on  
26 motion or on its own after notice to the plaintiff—must dismiss the action without prejudice

1 against that defendant or order that service be made within a specified time.” Plaintiffs have failed  
2 to provide the Court with proof of service for Defendant J&I Maintenance despite the Court’s  
3 notice of intent dismiss. (Dkt. #14, Jan. 26, 2011.) The Court therefore dismisses J&I  
4 Maintenance from this action.

5 **CONCLUSION**

6 Accordingly, and for good cause appearing,  
7 IT IS HEREBY ORDERED that USF’s Motion to Strike (#7) is DENIED.  
8 IT IS FURTHER ORDERED that Defendant J&I Maintenance is dismissed from  
9 this case.

10 Dated: April 4, 2011.

11   
12 **ROGER L. HUNT**  
13 **Chief United States District Judge**