

1 Defendant now moves the Court for a protective order regarding any discovery into
2 Defendant's reasoning for not deposing Dr. Elkanich. On October 28, 2012, Plaintiff obtained the
3 opinion of an insurance coverage expert, Joseph Vaccaro ("Vaccaro"). *See Doc. #23, Exh. 2.*
4 Vaccaro concluded that Defendant acted in bad faith by, among other things, failing to promptly
5 depose Dr. Elkanich after this action was filed to evaluate Plaintiff's injuries.

6 Federal Rule of Civil Procedure 26(b)(1) provides that parties may "obtain discovery
7 regarding any non-privileged matter that is relevant to any party's claim or defense." Courts may
8 limit discovery, however, "to protect a party or person from annoyance, embarrassment,
9 oppression, or undue burden or expense." Fed.R.Civ.P. 26(c)(1). The party opposing disclosure
10 has the burden of proving "good cause," which requires a showing "that specific prejudice or harm
11 will result" if the protective order is not granted. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d
12 1122, 1130 (9th Cir. 2003).

13 Defendant argues its reason for not immediately deposing Dr. Elkanich is irrelevant and
14 privileged. The Ninth Circuit has held that post-litigation conduct is properly excluded as evidence
15 to prove bad faith. *See, e.g., Storner v. Paul Revere Life Ins. Co.*, 220 Fed.Appx. 566, 567 (9th Cir.
16 2007). Other courts have also held that an insurer's post-litigation conduct is not relevant to bad
17 faith or any other claim. *See, e.g., Dakota, Minn., & E. R.R. Corp. v. Acuity*, 771 N.W.2d 623, 635
18 (S.D. 2009). Rule 26(b)(3)(B) provides that courts "must protect against disclosure of the mental
19 impressions, conclusions, opinions, or legal theories of a party's attorney [...] concerning the
20 litigation." Rule 26(c)(1), however, allows "a party or any person *from whom discovery is sought*"
21 to move for a protective order (emphasis added). Here, Plaintiff has not propounded any discovery
22 regarding Defendant's litigation conduct or sought to depose Defendant's counsel. Plaintiff's
23 counsel further represented at the January 12, 2013 hearing that he does not intend to seek any such
24 discovery. Therefore, the Court finds that Defendant has not shown good cause for a protective
25 order.

26 Defendant should promptly file a motion *in limine* if it seeks to exclude Vaccaro's opinion
27 regarding Defendant's litigation conduct. In the event the District Judge determines the opinion is
28 admissible, Defendant's rebuttal expert shall be afforded an opportunity to amend his/her report to

1 address the litigation conduct issue, and Plaintiff shall be permitted to depose Defendant's expert
2 on the issue prior to trial. Accordingly,

3 **IT IS HEREBY ORDERED** that Defendant's Motion for Protective Order Regarding its
4 Litigation Conduct (#23) is **denied**.

5 DATED this 13th day of February, 2013.

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8 GEORGE FOLEY, JR.
9 United States Magistrate Judge
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