

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 07, 2025

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STERLING AND WILSON SOLAR

SOLUTIONS, INC., a Delaware

Corporation,

Plaintiff,

v.

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND, an Illinois insurance

company, and ZURICH AMERICAN

INSURANCE COMPANY, an Illinois

insurance company,

Defendants.

No. 1:22-CV-03076-SAB

**ORDER GRANTING
PLAINTIFF'S MOTION TO
COMPEL; DENYING
DEFENDANTS' MOTION TO
BIFURCATE AND STAY
DISCOVERY**

Before the Court are Plaintiff's Motion to Compel, ECF No. 164, and [Amended] Motion to Compel, ECF No. 166, as well as Defendants' Motion for a Protective Order, ECF No. 167, and Motion to Bifurcate and Stay Discovery, ECF No. 169. Plaintiff is represented by Ana-Maria Popp, Justin T. Scott, and Rochelle Y. Doyea. Defendants are represented by Allen W. Estes, III, Melissa Lee, and Paul Friedrich. The Motions were considered without oral argument.

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**ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL; DENYING
DEFENDANTS' MOTION TO BIFURCATE AND STAY . . . # 1**

1 **FACTUAL BACKGROUND**

2 Plaintiff is constructing a solar power plant in Klickitat County. Plaintiff
3 entered into a subcontract with Conti, LLC (“Conti”) for Conti to perform work on
4 the power plant. Defendants¹ issued a performance bond that guaranteed Conti’s
5 performance under the subcontract for just under \$31 million (“the Bond”).

6 Sometime in November 2021, Conti began to falter in its performance under
7 the subcontract, and on February 18, 2022, Plaintiff terminated Conti’s subcontract
8 for default. On February 21, 2022, Plaintiff sent written notice (“the Notice”) to
9 Defendants, advising that Conti defaulted on the subcontract and specifically
10 stating that the Notice was being provided pursuant to Section 3 of the Bond.
11 Plaintiff has conceded that it did not comply exactly with the provisions of 3.1, 3.2,
12 and 3.3 of the Bond; however, Section 4 of the Bond states that “Failure on the part
13 of [Plaintiff] to comply with the notice requirement in Section 3.1 shall not
14 constitute a failure to comply with a condition precedent to [Defendants’]
15 obligations, or release [Defendants] from [their] obligations.”

16 Under Section 5 of the Contract, Defendants had ten (10) days to respond to
17 the Notice and indicate whether it would (1) arrange for Conti to complete the
18 work, (2) undertake to perform and complete the subcontract itself, or (3) obtain a
19 bid from another contractor to complete the work. However, after losing the
20 Notice, Defendants never provided a response. On March 11, 2022, more than ten
21 (10) business days after Defendants’ receipt of the Notice, Plaintiff signed a
22 subcontract with OLG, Inc. to complete Conti’s work.

23 **RELEVANT PROCEDURAL HISTORY**

24 Plaintiff filed its Amended Complaint on June 8, 2023, claiming (1) breach

25 _____
26 ¹ While the Bond was issued by Defendant Zurich, “Defendants” is used for the
27 sake of simplicity and avoiding confusion. *See* ECF 167 at 1 (referring to both
28 Defendants collectively as “Zurich”).

1 of contract and (2) breach of implied covenants of faith and good dealing
2 (collectively “the Bond Claims”). Plaintiff also claims (3) violation of the Unfair
3 Business Practices Act (RCW 19.86.020), (4) tortious insurance bad faith, and (5)
4 statutory insurance bad faith under RCW 48.30.010 (collectively “the Bad Faith
5 Claims”). Plaintiffs finally allege (6) *Olympic Steamship* damages for attorney’s
6 fees under Washington state law. Defendants counterclaim for breach of contract
7 and are seeking declaratory judgment.

8 On August 25, 2023, Defendants filed their Second Motion for Summary
9 Judgment. On April 4, 2024, the Court denied the Second Motion for Summary
10 Judgment, finding that Defendants’ principal argument—that they had no legal
11 obligation to respond to the lost notice because Plaintiff did not comply with the
12 provisions of Section 3—directly contradicted the terms of Section 4. The Court
13 found that “[c]onstruing the facts in the light most favorable to [Plaintiff],
14 [Plaintiff] created disputes of material fact regarding Defendants’ motion and
15 genuine factual issues concerning the [Bad Faith] Claims exist.”

16 On March 29, 2024, Defendants filed their Third Motion for Summary
17 Judgment. On May 21, 2024, the Court denied the Third Motion for Summary
18 Judgment, noting

19 This is the third motion for summary judgment filed by defendants. The
20 previous two motions were denied because (1) Defendants misconstrue
21 the requirements of the contract with Plaintiff and (2) issues of material
22 fact exist rendering dispositive motions inappropriate. Upon review,
23 this third motion is denied for the same reasons outlined in ECF Nos.
24 34 and 139.

25 Additionally, Defendants are prevented from filing any additional
26 dispositive motions unless first requesting and obtaining permission
27 from the Court. Any motion requesting permission should not exceed 5
28 pages and should outline the reasons why the factual record materially
changed in such a way that summary judgment is now warranted.

ECF No. 152.

1 On December 26, 2024, Plaintiff filed a Motion to Compel, ECF No. 164,²
2 requesting “the production of Defendants’ surety file and non-privileged claim
3 documents.” In that Motion, Plaintiff noted that Defendants had provided a
4 privilege log that identified 104 documents as protected under the attorney-client
5 or work-product doctrines.³ These included communications between in-house
6 adjusters—including David Bresel and Darrell Leonard, who are licensed
7 attorneys—and other employees of Defendants. Defendants do not dispute
8 Plaintiff’s allegations that while Defendants identified both Mr. Bresel and Mr.
9 Leonard as attorneys, Defendants

10 refused to confirm whether either individual was acting in their capacity
11 as legal counsel or as in-house adjuster. Yet [Defendants’] Initial
12 Disclosures identifies David Bresel as the only witness from Zurich as
13 having relevant knowledge of [Plaintiff’s] Bond claim, and in fact, Mr.
14 Bresel and Mr. Leonard appear to have been acting in a dual capacity,
15 both in assisting with Zurich’s defense and in investigating and
16 adjusting [Plaintiff’s] Bond claim. However, the Privilege Log’s entries
17 contain insufficient information for [Plaintiff] to determine the nature
18 or purpose of these withheld documents.

19 ECF No. 166 at 5–6.

20 On January 3, 2025, before responding to the Motion to Compel, Defendants
21 filed a Motion for Protective Order, ECF No. 167, seeking “a protective order
22 forbidding discovery of their post-litigation files created after May 31, 2022, the
23 date [Defendants were] first notified of this lawsuit.” The same day, Defendants
24

25 ² Amended at ECF No. 166 to reflect correct date of argument.

26 ³ In their response at ECF No. 171, Defendants stated that Plaintiff is only seeking
27 to compel discovery the 87 documents that they identified as work product;
28 however, Plaintiff’s reply at ECF No. 173 makes it clear it is also seeking
documents that Defendants have identified as protected under attorney-client
privilege.

1 filed a Motion to Bifurcate and Stay Discovery, ECF No. 169, asking the Court to
2 bifurcate the Bond Claims from the Bad Faith Claims and to stay discovery of the
3 Bad Faith Claims until the Bond Claims are resolved.

4 **PLAINTIFF’S MOTION TO COMPEL AND DEFENDANTS’ MOTION**
5 **FOR PROTECTIVE ORDER**

6 Because the Court has diversity jurisdiction in this case, federal law governs
7 assertions of work-product protection, while Washington state law governs
8 assertions of attorney-client privilege. *See* Fed. R. Civ. P. 501; Fed. R. Civ. P.
9 26(b)(3).

10 **A. Work-Product Doctrine**

11 ***i. Legal Framework***

12 The work-product doctrine prevents discovery of documents prepared in
13 anticipation of litigation. Fed. R. Civ. P. 26(b)(3). To qualify as work product,
14 documents must meet two prongs: (1) they “must be prepared in anticipation of
15 litigation or trial” and (2) they must be prepared “by or for another party or by or
16 for that other party’s representative.” *Id.*; *see e.g., In re California Pub. Utils.*
17 *Comm’n*, 892 F.2d 778, 780–81 (9th Cir.1989).

18 When documents are not prepared exclusively for litigation, they are
19 referred to as dual-purpose documents and courts apply the “because of” test.
20 *United States v. Richey*, 632 F.3d 559, 67–68 (9th Cir. 2011). The “because of” test
21 does not consider whether litigation was the primary or secondary motivation for
22 preparing a dual-purpose document. *In re Grand Jury Subpoena (Mark Torf/Torf*
23 *Env’t Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004). Instead, under the “because of”
24 test, a dual-purpose document is treated as work product if, given the nature of the
25 document and the totality of the circumstances, the court determines the dual-
26 purpose document “was created because of anticipated litigation, and would not
27 have been created in substantially similar form but for the prospect of that

1 litigation.” *Id.* Said another way, a dual-purpose document that would have been
2 prepared absent the prospect of litigation is not protected under the work-product
3 doctrine.

4 *ii. Analysis*

5 Defendants argue that the documents Plaintiff seeks were all created after
6 this litigation commenced and are thus work product. Specifically, Defendants
7 contend that the investigation “and all related documents” are “inextricably tied to
8 this lawsuit,” satisfying the “because of” test. ECF No. 180 at 6. Defendants
9 further place the blame on Plaintiff, stating that Plaintiff’s decision to file this
10 lawsuit deprived them of the opportunity to conduct a pre-litigation investigation
11 because they were “thrust[] . . . “into defending and investigating [Plaintiff’s]
12 claims *in* litigation.” *Id.* (emphasis in original).

13 Plaintiff argues that Defendants’ investigation into the handling of the Bond
14 Claims are central to Plaintiff’s Bad Faith Claims and that Defendants should not
15 be able to assert blanket privilege as a result of their decision to combine the
16 litigation and investigation files.

17 Defendants’ arguments are unpersuasive. Whether the documents are
18 “inextricably intertwined” between the investigation and the litigation is not the
19 relevant inquiry under the “because of” test. Rather, the Court’s analysis here turns
20 on whether the documents would have been prepared absent the prospect of
21 litigation, and absent this lawsuit, Defendants still would have investigated the
22 handling of the Bond Claims—specifically the undisputed fact that Defendants lost
23 the Notice. The timing of Plaintiff’s lawsuit is a fact to consider; however, when
24 weighing the totality of the circumstances, the “because of” test weighs in favor of
25 discovery because it appears Defendant failed to make a good faith effort to
26 maintain a privilege log separate from the investigation file.

27 //

1 **B. Attorney-Client Privilege Doctrine**

2 ***i. Legal Framework***

3 The attorney-client privilege doctrine shields confidential communications
4 regarding legal device and strategy between a client and an attorney. *See Pappas v.*
5 *Holloway*, 114 Wash. 2d 198, 203 (1990). The purpose of attorney-client privilege
6 is to encourage free and open communication between the client and attorney. *Id.*
7 Because the attorney-client privilege may “result[] in the exclusion of evidence
8 which is otherwise relevant and material,” the privilege “must be strictly limited to
9 the purpose for which it exists.” *Id.* at 203–04.

10 In *Cedell v. Farmers Insurance Company of Washington*, the court held that
11 an insurer may not invoke the attorney-client or work-product doctrines in first
12 party insurance bad faith claims (i.e., when the insured is alleging bad faith against
13 the insurer). 176 Wash. 2d 686, 697 (2013). However, the court further noted that
14 there is a difference between first party insurance suits and underinsured motorist
15 (“UIM”) claims, and that insurers in UIM cases could assert attorney-client and
16 work-product privilege. *Id.* Ultimately, the court in *Cedell* cautioned that even in
17 UIM cases, there are limits to an insurer’s attorney-client privilege. *Id.*

18 ***ii. Analysis***

19 Defendants argue, without citing any supporting authority, that the Bond
20 “occupies a similar position to a UIM claim.” ECF No. 167 at 7. Based on this
21 assumption, they contend that Washington Supreme Court’s decision in *Cedell* is
22 instructive here.

23 As a preliminary matter, Defendant has shown no case law demonstrating
24 that the present matter is sufficiently analogous to a UIM case, and the *Cedell*
25 court specifically cautioned that blanket attorney-client privilege protections may
26 not apply even within a UIM context. Moreover, as noted above, Defendants do
27 not dispute Plaintiff’s allegations that Defendants identified both Mr. Bresel and
28

1 Mr. Leonard as attorneys but failed to provide sufficient information to determine
2 whether their communications were protected under attorney-client doctrine. This
3 further demonstrates Defendants’ failure to create a privilege log in good faith, and
4 the Court finds that excluding the requested communications would go beyond the
5 purpose for which the attorney-client privilege exists.

6 **DEFENDANTS’ MOTION TO BIFURCATE AND STAY DISCOVERY**

7 **A. Legal Framework**

8 In a civil case, a court may, at its discretion, bifurcate issues; claims; or
9 counterclaims in order to (1) further convenience; (2) avoid prejudice; or (3)
10 further judicial economy. Fed. R. Civ. P. 42(b); *see also Hangarter v. Provident*
11 *Life & Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (noting that “Rule 42(b)
12 merely *allows*, but does not require, a trial court to bifurcate cases”) (emphasis in
13 original). A court may also stay discovery in civil cases if “it is convinced that the
14 plaintiff will be unable to state a claim for relief.” *Wood v. McEwen*, 644 F.2d 797,
15 801 (9th Cir. 1981).

16 **B. Analysis**

17 Defendants argue that the Bond Claims should be bifurcated from the Bad
18 Faith Claims. First, Defendants argue bifurcation will provide convenience by
19 allowing the parties and the Court to focus on the merits of the Bond Claims before
20 addressing the Bad Faith Claims because the Bond Claims are dispositive as to the
21 Bad Faith Claims. Second, Defendants argue they will be prejudiced if the claims
22 are litigated simultaneously because the “jury will be tainted through the
23 introduction of prejudicial, potentially inadmissible evidence.” ECF No. 169 at 6.
24 Defendants also argue they will be subject to additional prejudice because
25 litigating all of the claims simultaneously will force them to choose between (1)
26 waiving protection under the work-product and attorney-client privilege doctrines
27 or (2) maintaining protection under those doctrines but forgoing their ability to
28

1 demonstrate that they investigated Plaintiff’s claim in good faith. Finally,
2 Defendants argue bifurcation will further judicial economy because whether
3 Plaintiff “failed to comply with Section 3 of the Bond, an absolute condition
4 precedent, is a straightforward legal question.” *Id.* at 8.

5 Plaintiff notes that Defendant has already filed three separate motions for
6 summary judgment, each contending that Plaintiff’s noncompliance with Section 3
7 of the Bond is dispositive, and each have been denied. Plaintiff further argues that
8 since the trial has already been moved to March 2026, further delay will in fact
9 hinder judicial economy and inconvenience the parties and the Court by causing
10 them to expend more time and resources.

11 With regard to convenience and judicial economy, Defendants rely heavily
12 on the assumption that Plaintiff’s noncompliance with Section 3 completely
13 eliminates their liability. They are mistaken, however: this Court has continuously
14 held that the plain language of Section 4 makes it clear that Plaintiff’s failure to
15 comply with Section 3 does not release Defendants from their obligations under
16 the Bond. The issue of prejudicial or inadmissible evidence tainting the jury is
17 better addressed through motions in limine and jury instructions, not bifurcation.
18 The issue of Defendants having to choose between waiving or maintaining
19 privileges is moot: Defendants already made a choice by failing to create a
20 privilege log in good faith. Because they chose to intermingle the investigation and
21 litigation files, they cannot now claim that this decision warrants bifurcation.

22 Bifurcation of this matter is inappropriate and would result in wasted time
23 and resources. Based on this determination, the Court also declines to stay
24 discovery.

25 Accordingly, **IT IS HEREBY ORDERED:**

26 1. Plaintiff’s Motion to Compel, ECF No. 164, and [Amended] Motion
27 to Compel, ECF No. 166 are **GRANTED**.

28 **ORDER GRANTING PLAINTIFF’S MOTION TO COMPEL; DENYING
DEFENDANTS’ MOTION TO BIFURCATE AND STAY . . . # 9**

1 2. Within **fifteen (15)** days of this Order, Defendants shall produce to
2 Plaintiff any and all documents related to Defendants' investigation and handling
3 of Plaintiff's Bond Claim, as sought by Plaintiff's Request for Production Nos. 7–
4 13, and 29, including but not limited to those documents listed on Defendants'
5 Privilege Log, ECF No. 165 at 19–22. This Order does not include attorney-client
6 communications with, or work-product material created by, Defendants' outside
7 counsel.

8 3. Defendants' Motion for a Protective Order, ECF No. 167, and Motion
9 to Bifurcate and Stay Discovery, ECF No. 169, are **DENIED**.

10 4. The Court's prior orders regarding motions for summary judgment
11 remain in effect. *See* ECF No. 152.

12 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to file
13 this Order and provide copies to counsel.

14 **DATED** this 7th day of March 2025.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive style and is positioned to the right of the court seal.

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Stanley A. Bastian
Chief United States District Judge