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21 **UNITED STATES DISTRICT COURT**
22 **DISTRICT OF NEVADA**

23 TREASURE ISLAND, LLC,

24 *Plaintiff,*

25 vs.

26 AFFILIATED FM INSURANCE COMPANY,

27 *Defendant.*

CASE NO.: 2:20-cv-00965-JCM-EJY

AFFILIATED FM INSURANCE
COMPANY’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS RESPONSE TO
TREASURE ISLAND, LLC’S THIRD
MOTION TO COMPEL

ORAL ARGUMENT REQUESTED

Complaint filed: May 28, 2020

28 **I. INTRODUCTION**

This is Treasure Island’s third motion to compel, which it files, in large part because it failed to properly raise these issues in its prior motions. Like its prior motions, Treasure Island broadly asserts it is entitled to invasive and expensive searches for phantom documents it speculates must exist, despite clear evidence to the contrary. In addition, without citing any

1 authority, these demands include documents and communications with in-house and outside
2 counsel. The discovery sought by this third motion to compel is disproportionate to the needs of
3 this case and the Court should deny the motion in its entirety.

4 **II. DOCUMENTS SOUGHT BY TREASURE ISLAND**

5 **A. Claim Documents**

6 **1. There is No Basis for Additional Searches for Claim Documents**

7 AFM has produced its entire statutory claim file and also searched and produced the
8 electronically stored documents of the front line claim adjuster David Carroll. Documents that
9 were withheld were identified on a privilege log. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]. Treasure

19 Island, on the other hand, is obsessed with the *possibility* that there are emails that may not have
20 been included in the statutory file. On that basis, it insists that AFM search intranet sites,
21 computers, offices and personal electronic devices of five claim supervisors, two underwriters and
22 two in-house attorneys.¹

23 Moreover, Brian Cook, who was identified as the corporate designee concerning records,
24 signed a Declaration (Wang Decl., Exhibit F, Cook Declaration (ECF # 43-4), p. 3:1-10 and 3:17-

25
26 _____
27 ¹ The ESI Agreement in this case requires the parties to meet and confer regarding the scope of electronic
28 searches. At no time did AFM agree that a “reasonable search” would include every conceivable electronic
device owned or used by its employees. As is apparent from the letters attached as Exhibits A, C, E, F to
Treasure Island’s motion, counsel’s idea of meet and confer is to demand the same things, repeatedly.

1 19) filed in support of AFM's Opposition to Treasure Island's first Motion to Compel which
2 states:

3 6. Regarding AFM's claims file, TI's [Motion to Compel] asserts that AFM's
4 unilateral decision to only search 1-2 custodians and the central online files was improper,
5 and requests that AFM search the records of eight additional custodians. Such a search is
6 not likely to locate any material documents that have not already been produced. The
7 manner in which AFM maintains its claim files, including the TI claim, is that the primary
8 adjuster, in this case David Carroll copies any claims communications or electronic records
9 to the central online files. To the extent he communicated by email with other claims
10 personnel, such as Mr. Casillas (which is unlikely), all such communications are likewise
11 copied to the central online file. Emails that relate only to scheduling or setting up calls
12 regarding claims are generally not be sent to the online file, although they would be saved
13 on Mr. Carroll's computer and were produced.

14 * * * *

15 8. Jeff Casillas, Jason Wing, Maxine Walker, John Baker and I are claims
16 supervisors at various levels. We received all of our information about the Treasure Island
17 claim via email from David Carroll, the adjuster who was assigned to this claim.

18 These statements are, of course, in line with the testimony of Mr. Carroll and Mr. Cook and
19 AFM's position on this issue. As mentioned, AFM produced Mr. Cook as the corporate designee
20 regarding its file-keeping practices, but Treasure Island did not elicit any testimony in that would
21 support the existence of claim-related documents outside the claim file, and none has been cited in
22 the motion. See, *Sprint Communications Co., L.P. v. Vonage Holdings Corp.* (D. Kan., May 9,
23 2007, No. 05-2433-JWL-DLW) 2007 WL 1408399, at *1 (Court denied motion to compel where
24 moving party failed to point to deposition testimony reflecting that additional responsive
25 documents existed.)

26 As this Court observed at the hearing on the first two motions to compel, Treasure Island is
27 once again over-reaching and seeking documents that are not proportional to the needs of this case.
28 Wang Decl., Exhibit E, Transcript of Hearing (ECF # 82), at pp. 13:16-23; 56:08-09; 66:5-10,

1 76:10-15). The only documents that could be gleaned by the additional requested searches would
2 be duplicative of what has already been produced and, accordingly, the burden of such a search is
3 not proportional to the benefit to Treasure Island.

4 As in its previous motions, Treasure Island fails to show that AFM omitted or failed to
5 produce the documents requested. Its only argument is that there are not enough documents in the
6 claim file so they must be somewhere AFM has not searched – which is ironic, since it was
7 Treasure Island that failed to provide any of the information AFM requested, and filed suit just two
8 months after first submitted a claim. Wang Decl., Exhibits H, I, J, K. As such, the claim file
9 consists of AFM’s requests for information and Treasure Island’s refusals.

10 Treasure Island also asserts that AFM identified a “problem”² with the claim that justifies
11 searching the computers of additional custodians for documents. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED] That message was conveyed to AFM with the initial notice
15 of the claim, and all documents concerning the claim have been produced and/or are in Treasure
16 Island’s possession. Wang Decl., Exhibit G. By asking for documents showing why AFM viewed
17 the claim as a “problem,” Treasure Island has manufactured an issue that does not exist and now
18 attempts to use it to justify an unnecessary and oppressive search for documents that do not exist.

19 **2. Additional Claim Personnel**

20 Treasure Island’s demand that AFM search the files of every person who had tangential
21 involvement with the claim is burdensome and not proportional to the needs of this case.
22 Speculation that there may *possibly* be documents when the testimony and evidence are to the
23 contrary is insufficient to justify a search of the files of Brian Cook, Jeff Casillas, Jason Wing,
24 Maxine Walker and Doug Backes. Moreover, contrary to Treasure Island’s assertion, Mr. Carroll
25 did not testify that these individuals had or would have had documents not already produced
26 already produced.

27 [REDACTED]
28 [REDACTED]

1 Treasure Island also demands that AFM search the emails of underwriter Bill Kropp and
2 his manager Marika Block on the grounds that they “received the initial claim.” Significantly,
3 Treasure Island did not even ask Mr. Carroll or Mr. Cook whether Mr. Kropp or Ms. Block was
4 involved in any decisions regarding the claim. Wang Decl. Exhibit A, Carroll Depo., 104:07-09,
5 106:9-13; Exhibit B, Cook Depo. 30(b)(6),117:12-14. If it had, the answer, of course, would have
6 been “no.” In addition, AFM has already produced documents reflecting that Mr. Kropp and Ms.
7 Block, did nothing more than forward the broker’s email to claims. Wang Decl. Exhibit G. There
8 is no basis to search or produce anything further from these two underwriting, not claims,
9 employees of AFM.

10 **3. In-House Counsel**

11 Treasure Island’s demand that AFM search and produce emails maintained by in house
12 counsel Robert Brunelli and Alexsa Marino is completely baseless. The fact that counsel was
13 consulted for advice creates “a rebuttable presumption that the lawyer is hired ‘as such’ to give
14 ‘legal advice,’ whether the subject of the advice is criminal or civil, business, tort, domestic
15 relations, *or anything else.*” *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (emphasis
16 added). This “presumption is rebutted when the facts show that the lawyer was ‘employed without
17 reference to his knowledge and discretion in the law.’” *Id.* Treasure Island has not and cannot
18 raise any facts to rebut the presumption that in-house counsel was providing legal advice to the
19 claims department. Speculation that they “must have been involved in adjusting the claim” is just
20 that, speculation. [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 Mr. Brunelli and Ms. Marino were clearly providing legal advice and acting as attorneys in
28 connection with this claim. They were not acting as adjusters and there is no basis to order a

1 search and production of their files. *C.f., W. Nat'l Bank of Denver v. Emp'rs Ins. Of Wausau*, 109
2 F.R.D. 55, 57 (D. Colo. 1985) (discussing circumstances when an attorney may be acting in the
3 capacity of an investigator and adjustor for the insurance company in the ordinary course of the
4 insurer's business). It is well established that the attorney client privilege extends to legal advice
5 provided in the course of a claim. *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 162-163
6 (D.Minn. 1986), cited with approval by this Court in *Schmidt v California State Auto. Ass'n*, 127
7 F.R.D. 182, 183 (D. Nev. 1989).

8 4. Sources to Be Searched

9 Even if the Court is inclined to order AFM to search the files of additional custodians, it
10 must limit the sources to be searched. Treasure Island lists both personal and work computers,
11 intranet sources and servers, as well as cell phones, PDAs and offices of the alleged custodians.
12 The parties did not agree to this overly broad and burdensome list of sources. In fact, the ESI
13 Agreement (ECF # 36) requires the parties to meet and confer in good faith regarding “potentially
14 relevant data sources.” *Id.*, at p.2. When AFM pointed out that the sources had not been agreed to
15 (MTC, Exh. C, fn. 3), Treasure Island simply ignored AFM’s concern. In fact, Treasure Island has
16 never made a good faith effort to narrow these sources or even explained why anything but an
17 individual’s work email should be searched. Treasure Island must, at a minimum, show that AFM
18 employees *used* their personal devices for business purposes and there is potentially relevant data
19 on them. *See, Cotton v. Costco Wholesale Corp.*, No. 12-2731-JWL, 2013 WL 3819974, at *6 (D.
20 Kan. July 24, 2013). This, Treasure Island has not and cannot do.

21 Treasure Island also seeks an order to search OneDrive, incorrectly asserting that drafts of
22 letters are maintained there. MTC, pp. 3, 7. [REDACTED]

23 [REDACTED] Accordingly,
24 searching OneDrive is disproportionate to the needs of this case, since, even assuming it was used
25 in this claim (and there is no testimony that it was), the system does not include any drafts.

26 Similarly, it would be unduly burdensome for AFM to search SharePoint for documents
27 because there was no testimony that anyone utilized this system in connection with this claim.
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 [REDACTED] There is simply no reason to require AFM to undertake a time-consuming and
17 expensive search of SharePoint when there is no evidence it was even used in connection with the
18 Treasure Island claim.

19 **B. Requests Nos. 34-39**

20 Treasure Island has repeatedly asserted that AFM must have documents which reflect
21 transmission of COVID-19 and whether it causes physical loss or damage because it is a “primary
22 factual issue in this case.” MTC, p. 12. Initially, it must be noted that numerous courts, including
23 one in this district, have ruled as a *matter of law* that COVID-19 and the temporary closures to
24 prevent the spread of the disease do not cause physical loss or damage. *See, e.g., Circus Circus*
25 *LV, LP v. AIG Specialty Ins. Co.*, No. 2:20-cv-01240-JAD-NJK, 2021 WL 769660, 2021 U.S. Dist.

26 _____
27 ³ In any event, the probative value of sample letters is obviously disproportionate to the burden of searching
28 the SharePoint system for every possible sample letter Mr. Carroll “could have” reviewed to respond to
Treasure Island’s claim.

1 LEXIS 36306 (D. Nev. Feb. 26, 2021); *Out West Rest. Group. v. Affiliated FM Ins. Co.*, No. 20-
2 cv-06786-TSH, 2021 U.S. Dist. LEXIS 52462 (N.D. Cal. Mar. 19, 2021). As such, there is no
3 factual issue regarding how COVID-19 is spread or if it causes physical loss or damage and
4 whether AFM has any documents in this regard is immaterial to this action.

5 Once again, Treasure Island has manufactured an issue that does not exist. When the claim
6 was initially submitted, AFM asked Treasure Island to provide information showing the actual
7 presence of COVID-19 at an insured location, as a prerequisite to coverage under the
8 Communicable Disease provisions. Treasure Island refused to provide anything claiming that it
9 was not seeking coverage under this provision (which provides coverage subject to sublimits
10 totaling \$200,000), but wanted to pursue a claim for business interruption under the other
11 provisions in the policy. Treasure Island also claimed it could not produce information about
12 individuals who had tested positive for COVID-19 because of HIPPA privacy regulations. Wang
13 Decl., Exhibit J. Even if AFM had documents responsive to these requests, which it does not, they
14 would be wholly immaterial to the issues in this case.

15 Treasure Island’s assertion that these requests encompass documents or communications
16 relating to the retention of epidemiologist Dr. Mark Roberts as a consultant outside of his retention
17 as a disclosed expert in the instant action is baseless. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 Fourth, the information sought in Requests 34-39 also includes information regarding
2 claims made by other insureds, and is disproportionate to the needs and issues in the case,
3 particularly since Treasure Island has not alleged or developed any evidence that AFM has acted in
4 a manner inconsistent with its customary practices. In addition, this Court previously ruled that
5 information about other insureds was limited to a list of claims made by other resort casino
6 complexes in Nevada whose claims for Communicable Disease coverage had been denied. Wang
7 Decl., Exhibit E, Transcript of Hearing, p. 64:03-18.

8 Finally, AFM has responded to discovery requests, including Requests for Admission, that
9 it has no such documents. As such, Treasure Island is seeking phantom documents.

10 Treasure Island likewise has no basis to demand that AFM produce documents from its
11 outside counsel and in-house counsel regarding meetings with Dr. Roberts. None of the attorneys
12 are “additional custodians” for purposes of the requests for production and there is no evidence
13 whatsoever that Tom Cook, who is not counsel in the instant case, had any involvement
14 whatsoever with Treasure Island’s claim or this litigation. The attempt to characterize him as a
15 “custodian” of responsive documents is disingenuous and nothing more than a fishing expedition.

16 As set forth more fully above in Section A.3, Treasure Island must rebut the presumption
17 that counsel was retained to provide legal advice. *See, United States v. Chen*, 99 F.3d 1495, 1501
18 (9th Cir. 1996). Treasure Island has not developed any evidence tending to show that any of the
19 attorneys who met with Dr. Roberts were acting as claim adjusters not attorneys. Moreover, it is
20 irrelevant when Dr. Roberts was retained as there has been no showing that his communications
21 with counsel were not for the purposes of the attorneys’ legal advice. “The attorney-client
22 privilege may extend to communications with third parties who have been engaged to assist the
23 attorney in providing legal advice,” *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2010), as
24 well as to communications with third parties “acting as agent” of the client. *United States v.*
25 *Landof*, 591 F.2d 36, 39 (9th Cir. 1978). Finally, there is no entry on the privilege log for these
26 documents because, as set forth ad nauseum, there are no documents.

1 **C. Request No 17 – Guidelines Regarding Communicable Disease Claims**

2 The Court addressed this request in connection with Treasure Island’s first Motion to
3 Compel and AFM is in the process of producing documents regarding the Talking Points as
4 ordered by the Court. Wang Decl., Exhibit E, Transcript of Hearing, p. 39:08-19. AFM objects to
5 Treasure Island’s attempt to reopen an issue already ruled upon by the Court. To the extent
6 Treasure Island seeks documents provided by Dr. Roberts, as set forth more fully above, there are
7 none.

8 **D. Request Nos. 20 and 21**

9 Request No. 20 seeks documents concerning “any claim under the Policy or any
10 predecessor policy.” With regard to the claim at issue here, the request is duplicative of many other
11 requests Treasure Island propounded seeking documents it believes must be somewhere other than
12 the claim file. With regard to other claims Treasure Island made, AFM produced the entire file for
13 the prior claim. Treasure Island is now using Request No. 20 as an additional attempt to require
14 AFM to search additional locations for documents which were tagged and included in the claim
15 file which has already been produced. Similarly, the documents sought by Request No. 21 were in
16 the claim file which has been produced in its entirety. Treasure Island’s speculation that AFM
17 obtained documents from Dr. Roberts that were considered in connection with this claim is
18 contrary to the testimony of Mr. Carroll, Mr. Cook and Dr. Roberts. Therefore, as set forth more
19 fully above, additional searches are not proportional to Treasure Island’s needs in this case

20 **E. SharePoint**

21 How SharePoint does or does not retain documents is not relevant to this litigation or this
22 motion⁴ as there has been no testimony that anyone created documents or otherwise used
23 SharePoint in connection with Treasure Island’s claim. See, Section A. 4., above for a full
24 discussion. Accordingly, ordering AFM to search SharePoint for documents responsive to
25 Requests Nos. 1, 2, 15, 17, 20, 21, 34-39, and 46 is not proportional to the Treasure Island’s needs
26 in this case

27 _____
28 ⁴ AFM’s own document retention policies which have been produced to Treasure Island, require the retention of documents far beyond the claimed default setting of SharePoint.

1 **III. CONCLUSION**

2 The Court should deny Treasure Island's Third Motion to Compel, as the time, money and
3 effort to locate and produce the additional documents are disproportional to the needs of the case.
4 This Motion is another example of over broad discovery with no purpose other than to harass and
5 distract from the fact that this action is unlikely to survive the pending Motion for Judgment on the
6 Pleadings.

7
8 DATED: April 5, 2021.

Respectfully submitted,

9 **CARLSON CALLADINE & PETERSON LLP**

10 /s/ Joyce C. Wang

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CERTIFICATE OF SERVICE

1
2 The undersigned counsel hereby certifies that on April 5, 2021, a true and correct copy of
3 **AFFILIATED FM INSURANCE COMPANY'S MEMORANDUM OF POINTS AND**
4 **AUTHORITIES IN SUPPORT OF ITS RESPONSE TO TREASURE ISLAND, LLC'S**
5 **THIRD MOTION TO COMPEL** was electronically filed with the Clerk of Court via the Court's
6 CM/ECF System and will be sent electronically to all registered participants as identified on the
7 Notice of Electronic Filing.
8

9 This 5th day of April, 2021.

10
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