SO ORDERED.

SIGNED this 17th day of March, 2021.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	
Miguel Arquimedes Caceres,	Case No. 18-80776 Chapter 7
Debtor.	
James B. Angell, Chapter 7 Trustee for Miguel Caceres,	
Plaintiff,	
v.	Adv. Proc. No. 20-09007
Allstate Property and Casualty Insurance Company,	
Defendant.	

ORDER
GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL, REOPENING THE DEPOSITION OF MICHAEL REESER, AND AWARDING REASONABLE EXPENSES UNDER RULE 7037(a)(5)

This adversary proceeding comes before the Court on the motion to compel (Docket No. 55, the "Motion") filed by chapter 7 trustee James B. Angell (the "Plaintiff" or, where appropriate, the "Trustee"), pursuant to Federal Rule of Civil Procedure 37(a), as made applicable to this proceeding by Federal Rule of

Bankruptcy Procedure 7037. In the Motion, the Plaintiff seeks (1) turnover of certain documents[1] it asserts have been wrongfully withheld by Allstate Property and Casualty Insurance Company (the "Defendant" or, where appropriate, "Allstate"), (2) an order reopening the deposition of Michael Reeser, an Extracontractual Liability Specialist employed by the Defendant, with the costs of reopening to be paid by the Defendant, and (3) an award of reasonable costs and attorney's fees to Plaintiff pursuant to Rule 7037(a)(5).

The Defendant filed a response to the Motion (Docket No. 62, the "Response"), asserting it was unable to locate several of the documents sought by the Plaintiff or that such documents did not exist.[2] The Defendant also argued that the remaining document at issue, a Microsoft Word file compiled by Mr. Reeser (the "Reeser Document"), contained communications involving participants who were not part of the tripartite relationship and not within the permissible scope of discovery. The Defendant also asserts that the communications were unrelated to the defense of the Debtor. For these reasons, the Defendant contends the communications in the Reeser Document are still protected by attorney client privilege and the work product doctrine. In support of that assertion, the Defendant filed a Supplemental Privilege Log as an exhibit to its Response (Docket No. 62, Ex. 1). While the Supplemental Privilege Log contains numerous new entries, the Court observes that the additions appear to derive entirely from the Reeser Document. The Defendant also argued that both the Motion generally and the Plaintiff's specific request for reasonable expenses should be denied as the Plaintiff failed to confer with the Defendant in good faith to obtain the requested documents prior to filing the Motion.

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[1] Specifically, the Plaintiff sought turnover of a Microsoft Word document maintained by Allstate Employee Michael Reeser, a Home Office Referral form submitted by Rose Marie Rosado, a copy of Allstate's mailroom policies for its Raleigh Office, and "all emails and notes in Allstate's possession regarding the conference call that occurred on October 11, 2018" (Docket No. 55).

[2] In the Response, the Defendant asserts it has been unable to locate any Home Office Referral document generated by Rose Marie Rosado and that "there were no documents containing mailroom policies for the Raleigh office at any time in recent years" (Docket No. 62).

The Court conducted a virtual hearing on the Motion on March 9, 2021, at which Robert Jessup appeared on behalf of the Plaintiff, who was also present, and Thomas Curvin and Jeffrey Kuykendal appeared on behalf of the Defendant. At that hearing, the parties confirmed that the only material remaining at issue was the Reeser Document and both sides presented arguments as to whether it should be turned over to the Plaintiff. At the conclusion of that hearing, the Court indicated it would determine whether, and how many, of the entries from the Reeser Document would be subject to *in camera* review and possible turnover.

PROCEDURAL HISTORY

The Court assumes the parties' familiarity with the facts and history of this adversary proceeding and the underlying bankruptcy case but will nevertheless provide some context as the procedural posture of this case has some bearing on the determination of the Motion. The pertinent case and discovery milestones, as reflected in docket filings and submitted exhibits, are as follows:

1. Miguel Arquimedes Caceres (the "Debtor") filed a petition for relief under chapter 7 of the Bankruptcy Code on October 19, 2018 (Case No. 18-80776).
2. The next day, James B. Angell was appointed as chapter 7 trustee for the Debtor's bankruptcy case.
3. Among the primary assets listed in the Debtor's schedules were potential claims against Allstate and the Debtor's state-court attorneys who were retained by Allstate to defend the Debtor in litigation arising from an automobile accident.
4. This Court set a show cause hearing based upon alleged conflicts of interest involving Charles M. Ivey, III, the Debtor's chapter 7 bankruptcy attorney.
5. After extensive testimony at the show cause hearing, Attorney Ivey filed a motion to withdraw as attorney, which was granted by the Court on February 12, 2019.
6. The Trustee, believing that Allstate may be liable to the Debtor for breach of contract, insurance bad faith, and other potential claims, conducted examinations and obtained documentation under Rule 2004 of the Federal Rules of Bankruptcy Procedure.

7. Throughout 2019 and into 2020, the Trustee conducted examinations of, and received documentation from, employees of Allstate, Attorney Ivey, and the law firms representing the Debtor in the state-court litigation.
8. On November 26, 2019, the Court entered an order granting the Trustee's motion to compel, overruling Allstate's objection, and directing Allstate to produce documents (Case No. 18-80776, Docket No. 146, the "November 2019 Order"). The Court found the communications within the documents at issue were part of a tripartite relationship between the Debtor, Allstate, and the state-court attorneys retained to represent the Debtor and related to Allstate's stated defense of the Debtor.
9. On May 1, 2020, the Plaintiff-Trustee initiated the instant adversary proceeding against the Defendant on behalf of the Debtor's chapter 7 estate. The Plaintiff seeks damages for breach of contract, unfair claims handling, unfair and deceptive trade practices, bad faith, and negligence.
10. On June 11, 2020, the Defendant filed a Motion for Withdrawal of Reference, which was denied by the District Court on August 28, 2020.
11. On June 24, 2020, the Court entered an initial scheduling order requiring all discovery to be concluded by February 15, 2021.
12. On October 26, 2020 the Court granted the parties Joint Motion to Extend Pretrial Deadlines, and required that discovery be completed by April 15, 2021, which remains the deadline as of this Order.
13. According to the transcript attached to the Motion, on February 9, 2021, the parties conducted the deposition of Michael Reeser. The transcript reflects that the Plaintiff intended to "hold this deposition open" after learning of the Reeser Document and the Defendant's stated intention to include it in the Supplemental Privilege Log.
14. In an email response to the Plaintiff on February 19, 2021, the Defendant's attorney stated he would be sending the Supplemental Privilege Log to the Plaintiff "by the end of the day next Wednesday [February 24], although I'm aiming to finish it on Monday [February 22]" (Plaintiff's Supplemental Hearing Materials, Ex. 4).
15. On February 22, 2021, the Court entered an order granting the United States Bankruptcy Administrator's Motion for Mediated Settlement Conference, which requires the Plaintiff and Defendant to attend a pre-trial mediated settlement conference as soon as possible after the completion of discovery on April 15, with the conference to be concluded on or before April 30, 2021.
16. On March 1, 2021, the Plaintiff filed the instant Motion to Compel.
17. The Defendant averred that it provided the Supplemental Privilege Log to the Plaintiff on March 5, 2021.

DISCUSSION

It appears to the Court, and the parties have confirmed, that the only materials still at issue in the Motion are the contents of the Reeser Document. The Plaintiff asserts the entirety of the Reeser Document should be turned over for the following reasons: (1) the Defendant waived any privilege relating to the contents of the Reeser Document when Mr. Reeser brought the materials to his deposition; (2) the Defendant waived any privilege relating to the contents of the Reeser Document by not including the material on its privilege log until after Plaintiff discovered the existence of the material at Mr. Reeser's deposition; and (3) the contents of the Reeser Document contain communications within the tripartite relationship and concern the defense of the Debtor, pursuant to the findings and reasoning within the November 2019 Order.[3] The Court will address these arguments in turn.

First, the Court finds the Defendant did not waive any privilege or work product claims through the presence of the Reeser Document at Mr. Reeser's deposition. Rule 612 of the Federal Rules of Evidence provides that "the use of a privileged document by a deposition witness to refresh his memory will waive the privilege and lead to the disclosure of the document." *Baxter Int'l, Inc. v. Becton, Dickinson & Co.*, No. 17-C-7576, 2019 WL 6258490, at *8 (Bankr. N.D. Ill. Nov. 22, 2019) (citations omitted); *see also* 4 WEINSTEIN'S FEDERAL EVIDENCE § 612.05(2) (2021) (noting a document used to refresh recollection during a witness's testimony must be produced for opposing counsel on demand, despite any assertions of privilege or work product). The transcript of Mr. Reeser's deposition, however, reflects no use of the Reeser Document to refresh Mr.

[3] While entered in the main bankruptcy case, the Court has already explicitly determined, as part of the November 2019 Order, the parameters of the tripartite relationship between the Defendant, the Debtor, and the state-court attorneys retained by the Defendant to represent the Debtor, including the scope of the Defendant's defense of the Debtor. Accordingly, the findings in the November 2019 Order apply equally within this adversary proceeding and will not be revisited, pursuant to the law of the case doctrine. *See Otte v. Naviscent, LLC*, No. 19-cv-07898, 2021 WL 66306, at *9 (N.D. Cal. Jan. 7, 2021) (finding "the law of the case doctrine extends to bankruptcy cases, which comprise the initial bankruptcy filing and any adversary proceedings that arise from the filing.")

Reeser's memory during his testimony. The Defendant's counsel clearly informed the Plaintiff that he "[didn't] want [Mr. Reeser] to review the substance of the notes to refresh his memory, because there are client privileges" (Docket No. 55, Ex. A, p. 29). Mr. Reeser's testimony at the deposition demonstrates he was not using the Reeser Document to refresh his memory and the questioning of Plaintiff's counsel instructed Mr. Reeser to answer "without reviewing your notes" (Docket No. 55, Ex. A, p. 25, 48, 53). While the use of a writing to refresh a witness's recollection *prior* to testifying may also waive assertions of privilege, Rule 612 allows disclosure only if "the court decides that justice requires" it and only if the party seeking disclosure demonstrates that the witness used the writing to refresh his memory in advance of actual testimony. 4 WEINSTEIN'S FEDERAL EVIDENCE § 612.05(3)(a) (2021); *see Nutramax Lab., Inc. v. Twin Lab., Inc.*, 183 F.R.D. 458, 469 (D. Md. 1998) (adopting the three-element test described in *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985)). Here, the Plaintiff has not met his burden of showing that Mr. Reeser used the Reeser Document to refresh his memory at, or in advance of, the deposition. *Brown v. Tethys Bioscience, Inc.*, No. 3:11MC11, 2011 WL 4829340, at *1–2 (E.D. Va. Oct. 11, 2011). Considering counsels' instructions to Mr. Reeser to answer questions without consulting the Reeser Document and the limited answers provided by Mr. Reeser in response to questions on the dates and recipients of communications contained within the Reeser Document,[4] the Court concludes the Reeser Document is unlikely to have influenced Mr. Reeser's deposition. Consequently, the Court finds the Defendant has not waived assertions of privilege by bringing the Reeser Document to the deposition.

Second, the Court finds the Defendant did not waive its claims of privilege and work product with regard to the contents of the Reeser Document by its

[4] Mr. Reeser answered "I don't know" or "I don't know without going back and looking" in response to several questions about the identity of participants on calls, the number of pages in the Reeser Document, and the number of emails contained in the file (Docket No .55, Ex. A, pp. 24–26).

delayed inclusion of the material on the Supplemental Privilege Log. Failure to raise an objection in response to a document production request may constitute a waiver of privilege or work product immunity, *Hall v. Sullivan*, 231 F.R.D. 468, 473–74 (D. Md. 2005), *aff'd* 272 Fed. App'x. 284 (4th Cir. 2008), however, "because waiver is considered a serious sanction, it is generally found only in cases of unjustified delay, inexcusable conduct, and bad faith." 6 MOORE'S FEDERAL PRACTICE § 26.47 (3d ed. 2021); *Clay v. Consol Pa. Coal Co.*, No. 5:12CV92, 2013 WL 5133065, at *2 (N.D. W. Va. Sept. 13, 2013). Delayed inclusion of a document in a privilege log does not amount to a per se waiver of privilege or work product claims. Instead, "[t]he level of sanctions imposed turns on the justification for failure to comply" and "[t]he remedy is tailored to the wrong[.]" 6 MOORE'S FEDERAL PRACTICE § 26.90 (3d ed. 2021). Based on the facts and representations before it, the Court does not find unjustified delay, inexcusable conduct, or bad faith sufficient to warrant a waiver of any privilege or work product claims relating to the Reeser Document.

Third, the Court disagrees with the Plaintiff's assertion that the entirety of the Reeser Document contains communications within the tripartite relationship that are subject to discovery. In the November 2019 Order, the Court found, based on the prior testimony of the Debtor's state-court attorney as well as arguments from Allstate's counsel, that defending the Debtor in supplemental collection proceedings post-judgment, shielding the Debtor from the pursuit of an unwanted bad faith claim against Allstate, and filing for bankruptcy were all part of Allstate's stated defense of the Debtor. Therefore, the Court found the documents at issue were communications within a tripartite relationship and could not be withheld by Allstate under the theory that the communications were unrelated to the defense of the underlying personal injury action.

The Defendant takes the position that the communications in the Reeser Document remain outside the tripartite relationship because the discussions are between the Defendant, its in-house counsel, and outside counsel retained solely to advise and represent the Defendant. The Defendant asserts that these participants'

communications in the Reeser Document do not pertain to the defense of the Debtor, pursuant to the parameters of that defense as defined by the Defendant and described in the November 2019 Order.

There is support for the Defendant's contention that the tripartite relationship does not include its in-house attorneys and outside counsel retained solely to represent the Defendant. In the relationship between an attorney, an insurer, and an insured, North Carolina courts have joined other jurisdictions in holding that "communications between the insured and *the retained attorney* are not privileged to the extent that they relate to the defense for which the insurer has retained the attorney." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 617 S.E.2d 40, 46 (N.C. Ct. App. 2005), *aff'd* 625 S.E.2d 779 (N.C. 2006) (emphasis added). The Court does not find, however, that the tripartite relationship extends to the Defendant's in-house counsel. Federal courts in Georgia, for instance, have adopted the same tripartite interpretation applied by North Carolina courts and declined to find in-house counsel to be part of that relationship, reasoning that "there is no presumption that in-house counsel is employed to represent the interests of the insured as opposed to the insurer." *Camacho v. Nationwide Mut. Ins. Co.*, 287 F.R.D. 688, 693 (N.D. Ga. 2012). The *Camacho* court, therefore, found communications between the insurer and its in-house claims counsel to be subject to the attorney-client privilege. *Id.* at 693–94. The same district reaffirmed this reasoning in *Skinner v. Progressive Mountain. Ins. Co.*, No. 1:13-cv-00701, 2013 WL 12073464, at *5 (N.D. Ga. Nov. 14, 2013), finding attorney-client privilege would still cover communications between an insurer and its in-house counsel "as there is no thought that [the insurer's] in-house counsel would have been representing [the insured]." *Id.* This Court finds the reasoning of *Camacho* and *Skinner* persuasive and, therefore, finds that attorney-client privilege would still cover the Defendant's communications with its in-house counsel and with outside counsel retained solely on the Defendant's behalf.

Nevertheless, while upholding the privileged nature of an insurer's communications with its in-house counsel, the *Skinner* court cautioned that

"[t]his privilege would not extend to those circumstances where [the insurer's] in-house counsel was joined in conversations with [the state court attorney retained to defend the insured]." *Id.* The Supplemental Privilege Log contains an entry from October 11, 2018, which is a summary of a conference call that involved, among others, the state-court attorneys retained by the Defendant to represent the Debtor (the "October 11th Entry") and included discussion of post-judgment litigation against the Debtor, which was part of the Defendant's continuing defense of the Debtor. As such, the October 11th Entry is within the bounds of the tripartite relationship despite in-house counsel's participation.

While the Court agrees with the Defendant that most of the Reeser Document contains communications outside the tripartite relationship, the October 11th Entry should have alerted counsel for the Defendant that, pursuant to the November 2019 Order, the Reeser Document must be listed in a privilege log. Accordingly, the Plaintiff was justified in filing the Motion and turnover of the October 11th Entry is appropriate. As an additional remedy, and to avoid prejudice, the Court will also permit the Plaintiff to reopen Mr. Reeser's deposition if he desires to do so. *See Casale v. Nationwide Children's Hosp.*, No. 2:11-cv-1124, 2014 WL 1308748, at *10 (S.D. Ohio Mar. 28, 2014) (finding "waiver of privilege" to be an inappropriate remedy and that reopening the plaintiff's deposition and permitting additional necessary discovery "is sufficient to remedy any prejudice" based on plaintiff's late disclosure).

As it is granting the Motion in part, the Court also will award the Plaintiff reasonable expenses under Rule 37(a)(5). Due to the presence of the October 11th Entry, the Reeser Document should have been included in the Defendant's privilege log and its omission prompted the early end of Mr. Reeser's deposition. Moreover, the Defendant, knowing the discovery completion deadline in this proceeding is April 15, 2021, unreasonably delayed providing the Plaintiff with the Supplemental Privilege Log.[5] The Court finds the

[5] The Court is not persuaded by the Defendant's argument that awarding expenses under Rule 37(a)(5) is not appropriate here because the Plaintiff failed to attempt to obtain the discovery

circumstances prompting the Plaintiff to file the Motion support the awarding of reasonable expenses under Rule 37(a)(5), including those expenses incurred in filing the motion, such as attorney's fees, as well as the costs of reopening the Reeser deposition.

CONCLUSION

For the reasons stated above, IT HEREBY ORDERED that the Plaintiff's Motion to Compel is granted in part and denied in part. The Defendant is directed to turnover, no later than 5:00 p.m. on March 19, 2021, the October 11, 2018 entry from the Reeser Document.[6]

IT IS FURTHER ORDERED the Plaintiff is permitted to reopen the deposition with Mr. Reeser at a time that is convenient for all counsel and the deponent; however, the deposition shall be completed no later than April 9, 2021.

IT IS FURTHER ORDERED that the Defendant shall pay the Plaintiff's reasonable expenses incurred in filing and prosecuting the Motion as well as the costs of reopening Mr. Reeser's deposition. The Plaintiff is directed to file an affidavit setting forth the amount of such fees within 10 days of this Order, upon which the Defendant will have 10 days to file an objection. Any objections that

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without court order and failed to confer in good faith with opposing counsel. As evidenced by the email response on February 19, 2021, which was itself nine days after Mr. Reeser's deposition, counsel for the Defendant assured the Plaintiff the Supplemental Privilege Log would be sent no later than February 24, 2021 (Plaintiff's Supplemental Hearing Materials, Ex. 4). The Plaintiff did not receive the updated log as promised and filed his Motion on March 1, 2021. The Defendant did not complete and send the Supplemental Privilege Log until March 5, 2021, which was nearly a month after Mr. Reeser's deposition and more than one week after the Defendant's stated delivery date. Based on the email communication between the parties, *see Patrick v. CitiMortgage, Inc. (In re Patrick)*, No. 13-6103, 2014 WL 7338929, at *23 (Bankr. N.D. Ohio Dec. 22, 2014) (finding email exchange without telephonic or in-person meeting satisfied Rule 7037(a)), as well as the Defendant's stated apology for the delay at the hearing on the Motion, the Court finds the Plaintiff attempted to obtain discovery prior to filing the Motion and thus satisfied Rule 37(a)(5).

[6] The Supplemental Privilege Log does not appear to contain any material beyond the October 11th Entry that is subject to turnover. However, the Defendant is directed to turnover, to the extent its counsel identifies such material, any additional communications in the Reeser Document involving, directed to, or cc'ing the state-court attorneys retained by the Defendant to represent the Debtor that discuss aspects of the Debtor's defense.

are not timely filed shall be waived. Any hearing or arguments on the fee affidavit and any objection will be scheduled at the discretion of the Court.

END OF DOCUMENT

PARTIES TO BE SERVED

Angell v. Allstate

AP case # 20-9007

James B. Angell
via cm/ecf

Robert H Jessup
via cm/ecf

Thomas E. Curvin
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