

1 the above-captioned case, alleging breach of the insurance contract and failure to indemnify.

2 On May 4, 2009, INSCORP filed a Motion to Compel Further Responses to Requests for
3 Production of Documents. [Docket No. 37.] On May 6, 2009, INSCORP filed a Motion to Compel
4 Further Responses to Interrogatories. [Docket No. 41.] For the following reasons, the Motion to
5 Compel Further Responses to Interrogatories is GRANTED IN PART AND DENIED IN PART and the
6 Motion to Compel Further Responses to Production of Documents is GRANTED.

7 **II. DISCUSSION**

8 Most of this dispute boils down to a single question: May Plaintiffs fulfill all of their discovery
9 obligations by reference to the universe of documents from the underlying litigation? The answer is:
10 Plaintiffs cannot fulfill their obligation to produce documents by making the entire underlying litigation
11 file accessible without referencing which specific documents are responsive to which specific requests.

12 **A. Legal Standards**

13 Rule 26 provides the scope of discovery:

14 Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
15 party's claim or defense For good cause, the court may order discovery of any matter
16 relevant to the subject matter involved in the action. Relevant information need not be
admissible at the trial if the discovery appears reasonably calculated to lead to the
discovery of admissible evidence.

17 Fed. R. Civ. P. 26(b)(1). Rule 26 also provides the standards for limiting discovery:

18 [T]he court must limit the frequency or extent of discovery otherwise allowed by these
19 rules or by local rule if it determines that . . . the burden or expense of the proposed
20 discovery outweighs its likely benefit, considering the needs of the case, the amount in
controversy, the parties' resources, the importance of the issues at stake in the action, and
the importance of the discovery in resolving the issues.

21 Fed. R. Civ. P. 26(b)(2)(C). "Relevance for purposes of discovery is defined very broadly." *Garneau v.*
22 *City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998). "The party seeking to compel discovery has the
23 burden of establishing that its request satisfies the relevancy requirements of Rule 26(b)(1). Thereafter,
24 the party opposing discovery has the burden of showing that the discovery should be prohibited, and the
25 burden of clarifying, explaining or supporting its objections." *Bryant v. Ochoa*, 2009 WL 1390794 at *
26 1 (S.D. Cal. May 14, 2009). Those opposing discovery are "required to carry a heavy burden of
27 showing" why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir.
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1 1975); *WebSideStory, Inc. v. NetRatings, Inc.*, 2007 WL 1120567, *1 (S.D. Cal. Apr. 06, 2007).¹

2 **B. Motion to Compel Responses to Interrogatories**

3 On February 18, 2009, INSCORP served Interrogatories to Mancini and SMP. Mancini and
4 SMP responded to the Interrogatories on March 23, 2009. (Lozano Decl. Exs. D, E.) The parties met
5 and conferred in an attempt to resolve their disputes, but were unsuccessful.

6 1. Improper Use of Rule 33(d)

7 INSCORP seeks to compel responses from Mancini to Interrogatory Numbers 1, 2, 3, 12-16 and
8 19 and to compel responses from SMP to Interrogatory Numbers 2, 3, 12, and 22 on the basis that
9 Plaintiffs have improperly used Rule 33(d) to respond to these interrogatories.

10 Mancini purported to respond to Interrogatory Number 1, 2, 3, 12-16 and 19 by incorporating a
11 ten page “preamble” that appears to be a legal brief on Mancini’s legal and factual arguments in the
12 case. This is not an appropriate method of responding to an interrogatory and the Court strikes the
13 incorporation of the preamble. SMP also attempts to respond to interrogatories with a long preamble,
14 which is stricken. Mancini then makes a brief response and adds that all facts can be found within the
15 entire universe of documents involved in the underlying litigation, including expert reports, discovery
16 responses, pleadings and depositions. This is not an appropriate response to an interrogatory.

17 The Federal Rules of Civil Procedure allow, in strictly limited circumstances, for a party to refer
18 to specific business records in response to an interrogatory. Rule 33(d) provides:

19 If the answer to an interrogatory may be determined by examining, auditing, compiling,
20 abstracting, or summarizing a party's business records (including electronically stored
21 information), and if the burden of deriving or ascertaining the answer will be
substantially the same for either party, the responding party may answer by:

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23 ¹Plaintiffs assert that a court should not grant a motion to compel discovery unless the moving
24 party can show substantial prejudice from the denial of discovery. Plaintiffs’ citation to two out of
25 circuit cases involving untimely motions to compel discovery does not constitute a reason for the Court
26 to ignore all of the relevant Ninth Circuit precedent. *See In re Sulfuric Acid Antitrust Litigation*, 231
27 F.R.D. 331, 339 (N.D.Ill. Sep 06, 2005) (finding untimely motion to compel can only succeed by
28 showing actual and substantial prejudice.); *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7th
Cir. 2001) (finding no abuse of discretion in denying untimely motion to compel in absence of actual
and substantial prejudice.) INSCORP correctly cites the Ninth Circuit standard for review of denial of
discovery, that the trial court’s broad discretion to deny discovery will not be disturbed “except ‘upon
the clearest showing that denial of discovery results in actual and substantial prejudice to the
complaining litigant.’” *Sablan v. Department of Finance of Com. of Northern Mariana Islands*, 856
F.2d 1317, 1321 (9th Cir. 1988) (citations omitted.)

1 (1) specifying the records that must be reviewed, in sufficient detail to enable the
2 interrogating party to locate and identify them as readily as the responding party
could; and

3 (2) giving the interrogating party a reasonable opportunity to examine and audit
4 the records and to make copies, compilations, abstracts, or summaries.

5 Fed. R. Civ. P. 33(d). Mancini’s attempt to use Rule 33(d) fails. First, the “assertion that pleadings,
6 depositions, or exhibits are ‘business records’ under this rule has been rejected by every court to
7 consider it.” *Melius v. National Indian Gaming Com’n*, 2000 WL 1174994 at * 1 (D.D.C. Jul 21,
8 2000)(collecting cases); *SEC v. Elfindepan*, 206 F.R.D. 574, 576-78 (M.D.N.C. 2002); see also *E&J*
9 *Gallo Winery v. Cantine Rallo, Sp.A.*, 2006 WL 3251830 (E.D. Cal. Nov. 8, 2006)(finding business
10 records of a third party did not qualify for use of Rule 33(d).). SMP’s attempt to respond to
11 Interrogatory Numbers 2,3,12, and 22 by reference to expert reports and depositions also does not
12 comport with Rule 33(d).

13 Second, referring to a wide universe of documents does not specify the records in sufficient
14 detail. *Dibbs v. The Franklin Mint*, 2007 WL 4327876 (W.D. Wash. Dec. 10, 2007) (responding to
15 interrogatory by referencing entire document production does not specify records in sufficient detail.)
16 Plaintiffs have not provided any justification for why the burden of reviewing the documents to identify
17 where the answers can be found should be shifted to INSCORP. Plaintiffs next argue that providing
18 responses to the interrogatories would constitute an undue burden because every document would have
19 to be copied many times. Plaintiffs assert that they “do not wish to attached [sic] the multiple costs of
20 repair from the underlying case to each response.” (Opp at 10.) INSCORP has stated that Plaintiffs
21 may refer to specific documents and need not re-print those documents.²

22 All of the Interrogatories in question in this section are “contention interrogatories” that seek all
23 facts that support a particular contention. The Federal Rules of Civil Procedure provide:

24 An interrogatory otherwise proper is not necessarily objectionable merely because an
25 answer to the interrogatory involves an opinion or contention that relates to fact or the
26 application of law to fact, but the court may order that such an interrogatory need not be
27 answered until after designated discovery has been completed or until a pre-trial

28 ²Plaintiffs also state that INSCORP has taken the deposition of Mancini and concluded the
deposition. To the extent that Plaintiffs are arguing that a party may not seek to compel responses to
interrogatories after completing a deposition, there is simply no legal or logical support for such a
position.

1 conference or other later time.

2 Fed. R. Civ. P. 33(c). Because Plaintiffs are more familiar with their contentions than INSCORP could
3 be, the burden is not equal and the use of Rule 33(d) is inappropriate. *Fresenius Medical Care Holding*
4 *Inc. v. Baxter Intern, Inc.*, 224 F.R.D. 644, 652 (N.D. Cal. 2004). While contention interrogatories are
5 proper, they can impose a large burden. Contention interrogatories are often overly broad and unduly
6 burdensome when they require a party to state “every fact” or “all facts” supporting identified
7 allegations or defenses. *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 445, 446-447 (D. Kansas 2000).
8 Accordingly, the Court hereby modifies each interrogatory to seek “the material or principal facts”
9 instead of “all facts” and GRANTS the Motion to Compel these interrogatories as modified.

10 2. Attorney Client Privilege

11 INSCORP moves to compel further responses to Interrogatory Numbers 6, 10-17, 19, 20, 24 and
12 25 from Mancini and to Interrogatory Numbers 25 and 28 from SMP on the ground that Plaintiffs have
13 improperly asserted the attorney-client privilege. Rule 26 provides:

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15 When a party withholds information otherwise discoverable by claiming that the
information is privileged or subject to protection as trial-preparation material, the party
must:

16 (i) expressly make the claim; and

17 (ii) describe the nature of the documents, communications, or tangible things not
18 produced or disclosed--and do so in a manner that, without revealing information itself
privileged or protected, will enable other parties to assess the claim.

19 Fed. R. Civ. P. 26(b)(5). A privilege log should contain the following information: (1) the identity and
20 position of its author; (2) the identity and position of the recipient(s); (3) the date it was prepared or
21 written; (4) the title and description of the document; (5) the subject matter addressed; (6) the purposes
22 for which it was prepared or communicated; (7) the document’s present location; and (8) the specific
23 privilege or other reason it is being withheld. *Miller v. Pancucci*, 141 F.R.D. 292, 302 (C.D.Cal. 1992).

24 INSCORP claims that Plaintiffs have failed to provide a privilege log to support their assertions
25 of privilege. Plaintiffs claim that they have produced a privilege log. (Opp. at 8.) Plaintiff SMP,
26 however, also claims that it produced redacted billing records to support *Brandt* fees “along with a
27 privilege log addressing the redactions” and that it “should not be burdened with the production of a
28 further privilege log for any and all protected documents Defendant seeks.” (Opp. at 14.) No privilege

1 logs were included with any filing relating to this motion. Accordingly, the Court is without sufficient
2 information to determine whether Plaintiffs have produced sufficient privilege logs. In order to make
3 sure that Plaintiffs comply with their discovery obligations, the Motion is GRANTED as to these
4 Interrogatory Numbers and Plaintiffs shall produce a privilege log in compliance with Rule 26(b)(5) as
5 described above for every communication withheld under claim of privilege.

6 3. Brandt Fees

7 INSCORP seeks to compel a further response to Interrogatory Number 17, seeking “the amount
8 of attorneys’ fees and costs” Mancini has incurred in connection with this action. Mancini responded
9 only that the information is subject to the attorney-client privilege and work product immunity. (Lozano
10 Decl. Ex. D.) INSCORP argues that Plaintiffs should have included this information in their Rule 26
11 initial disclosures as part of the damages calculations and should have responded in full to this
12 interrogatory. In Opposition, Mancini first argues that information relating to the underlying action is
13 irrelevant. This argument is non-sensical as the Interrogatory seeks information about fees in this suit.
14 Mancini next argues that the information is protected by a confidential settlement agreement. Mancini,
15 however, presents no authority for the novel proposition that she may shield relevant information from
16 INSCORP because Mancini and SMP, both Plaintiffs, do not wish to share it with the Defendant.³
17 Mancini also argues that she “has provided a verified response to the Interrogatory, which Defendant
18 may use at trial.” (Opp. at 13.) The entire response is: “Objection. Vague and ambiguous; ‘this action’
19 was not defined. Assuming ‘this action’ pertains to the bad faith action, this interrogatory is objected to
20 as being subject to the attorney-client privilege and work product privileges.” (Lozano Decl. Ex D at
21 29.) Thus, Mancini has not provided any useful response that INSCORP could use at trial.

22 Finally, Mancini argues that the information is protected by the attorney-client privilege. As
23 INSCORP argues, Mancini has waived any privilege for this information. Attorneys' fees incurred by a
24 plaintiff to obtain benefits under an insurance policy are recoverable as economic damages resulting
25 from the breach of the good faith covenant. *Brandt v. Superior Court*, 37 Cal.3d 813, 817 (1985). Only
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27 ³In order to protect any confidentiality, the parties shall treat all information in response to this
28 interrogatory as “confidential.” The parties shall jointly submit a protective order to govern the use of
confidential information.

1 those fees incurred to obtain benefits are recoverable, fees to obtain any amount that exceeds the amount
2 due under the policy are not recoverable. *Id.*; see also *Essex Ins. Co. v. Five Star Dye House, Inc.*, 38
3 Cal.4th 1252, 1258 (2006) (fees attributable to recovery of emotional distress or punitive damages not
4 recoverable under *Brandt*). By seeking to recover the fees expended in this litigation, Plaintiffs have
5 waived the privileges that might have covered the information. *Luna v. Sears Life Ins. Co.*, 2008 WL
6 2484596 at * 1 (S.D. Cal. Jan 11, 2008) (finding that a party may not protect the fee information from
7 discovery while seeking fees as damages.)

8 Because the information sought is relevant and any privilege has been waived, the Motion to
9 Compel is GRANTED as to Interrogatory Number 17.

10 4. Relevance Objections

11 INSCORP seeks to compel further responses to Interrogatory Numbers 5-13 and 21 on the
12 ground that Mancini improperly objected that the Interrogatories sought irrelevant information. Mancini
13 asserts that these Interrogatories seek information about Mancini in her role as plaintiff in the underlying
14 action and are irrelevant to this action. INSCORP disputes this claim. The Interrogatories seek
15 information about: the settlement negotiations and settlement amount of the underlying action; the
16 damages and repairs to the property, including the cost of those repairs; and when Mancini became
17 aware of the defects in the structures. (Mancini Responses, Lozano Decl. Ex. D.) INSCORP explains
18 that the damages and repairs are relevant because INSCORP's indemnity obligation only arises if there
19 is a manifestation of covered damages during the policy period. Thus the type of damage, as well as the
20 type and cost of repairs are relevant to determine if INSCORP has any liability. INSCORP further
21 explains that the allocation of settlement funds is relevant to determine the type of damages sustained by
22 the underlying Plaintiffs. Accordingly, INSCORP has demonstrated the relevance of the information
23 sought and the Motion to Compel is GRANTED as to these Interrogatories.

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1 **C. Motion to Compel Production of Documents**

2 On June 4, 2008, INSCORP served Requests for Production of documents on Mancini and on
3 SMP. (Lozano Decl. Exs B and C.) Plaintiffs responded to these requests on March 23, 2009. (*Id.* at
4 Exs D and E.) The parties met and conferred but could not resolve their differences. (Lozano Decl. ¶¶
5 10, 14.)

6 1. Production of Entire Universe of Documents on Disc

7 Rule 34 provides: “A party must produce documents as they are kept in the usual course of
8 business or must organize and label them to correspond to the categories in the request.” Fed. R. Civ. P
9 34(b)(2)(E)(I). As described above, Plaintiffs have made the entire universe of documents produced,
10 deposition transcripts, expert reports etc. available on 73 computer disks. Plaintiffs contend that this
11 manner of production is appropriate to respond to all of the document requests. INSCORP argues that
12 this production is not appropriate because the disks do not represent documents as they are kept in the
13 ordinary course of business. INSCORP asserts that each disk is “an amalgam of various documents
14 from various sources.” (MPA at 5.) INSCORP also asserts that the disks contain tens of thousands of
15 pages. (Reply at 2.) Plaintiffs claim that it would be an undue burden to force them to respond to the
16 document requests by specifying which documents respond to which requests. Plaintiffs do not provide
17 any support for their assertion that the burden to them of specifying which documents respond to which
18 requests would outweigh the benefit to INSCORP. The Court has no reason to doubt Plaintiffs’
19 assertion that the documents were not “shuffled or mixed up.” (Opp at 8.) Nonetheless, the Court also
20 has no reason to doubt INSCORP’s assertion that each disk is an amalgam of various documents.
21 Because the documents are not kept in the ordinary course of running the business of the depository,
22 producing the entire universe of documents does not comport with the requirement that documents be
23 produced as they “are kept in the usual course of business.” *See Ultratech, Inc. v. Tamarach Scientific*
24 *Co.*, 2005 WL 40074 at * 3 (N.D.Cal. Jan 05, 2005) (“producing documents as they are maintained in
25 storage is not as the documents are kept in the ‘usual course of business.’”) While it may be burdensome
26 for Plaintiffs to review the entire universe of documents to ascertain which documents are responsive to
27 the document requests, it would be even more burdensome for INSCORP to guess which documents are
28 responsive to which requests. Accordingly, the manner of production is not appropriate. The Court

1 agrees, however, that multiple printouts do not make sense and Plaintiffs may respond to the document
2 requests by providing a specific list of documents that are responsive to each request. Plaintiffs must
3 identify the documents, for example by bates number, such that INSCORP will have no difficulty
4 identifying and locating the specific responsive documents.

5 2. Undue Burden

6 INSCORP moves to compel further responses from Mancini as to Request for Production of
7 Documents Numbers 1-9, 16, 20-25 and 27, claiming that Mancini improperly objected to these requests
8 as unduly burdensome and merely referenced the document depository and the 73 disks produced.
9 INSCORP also moves to compel further responses from SMP to Request for Production of Documents
10 Numbers 1-13, 20, 24, 33-41, 43-47, 49-50, 54, and 55. Plaintiffs argue that they have complied with
11 their obligations to respond to discovery by stating that INSCORP may search through the entire
12 universe of documents in the underlying litigation. Plaintiffs do not assert that the documents requests
13 are not relevant, only that they are unduly burdensome. For the reasons explained above, it is not
14 sufficient for Plaintiffs to refer to the entire universe of documents in the underlying action.
15 Accordingly, the Motion to Compel is GRANTED as to these requests and Plaintiffs are ordered to
16 supplement their responses by identifying which documents are responsive to which requests.

17 3. Attorney-Client Privilege and Work Product Immunity

18 INSCORP moves to compel further responses from Mancini to Request for Production of
19 Documents Numbers 10-15, 17-21 and 28. INSCORP moves to compel further responses from SMP to
20 Request for Production of Documents Numbers 6,7,9,10, 14-21, 24, 34-37, 41-49 and 51-53. The
21 document requests seek information about the settlement of the underlying action; the assignment of
22 SMP's rights to Mancini; discussions with other plaintiffs in the underlying action; damages claimed in
23 this action, including attorneys fees and costs and punitive damages; when SMP learned of the defects at
24 the property; INSCORP's failure to provide a defense and Plaintiffs' claim that INSCORP owed a duty
25 to defend and indemnify; and documents provided to experts. (Lozano Decl. Exs. D, E.). INSCORP
26 moves to compel further responses, claiming that Mancini improperly asserted the attorney-client
27 privilege and work product immunity without providing a privilege log. INSCORP further argues that it
28 is unlikely that every single document requested is privileged. Mancini argues that the documents are

1 irrelevant because they relate to Mancini in her role as plaintiff in the underlying action; are protected
2 by a confidential settlement agreement; and are protected by the attorney-client privilege. Mancini
3 further argues that she should not have to produce a privilege log because the documents sought are
4 irrelevant.

5 As discussed above, the damages claimed by Mancini is a proper subject of discovery and
6 Plaintiffs may not use their own confidentiality agreement to hide documents from INSCORP. Also as
7 discussed above, Plaintiffs must provide a proper privilege log in compliance with Rule 26(b)(5) for all
8 documents withheld under claim of privilege. Accordingly, the Motion to Compel is GRANTED as to
9 these requests and Plaintiffs are ordered to supplement their responses by identifying which documents
10 are responsive to which requests.

11 4. Brandt Fees

12 INSCORP moves to compel further responses from Mancini to Request for Production of
13 Documents Numbers 17-20, and from SMP to Request for Production of Documents Numbers 17, 18
14 and 22 seeking information about *Brandt* fees or fees incurred by Plaintiffs to compel payment of policy
15 benefits. Plaintiffs are seeking *Brandt* fees as an element of damages in this action. As described
16 above, only fees attributable to seeking policy benefits, as opposed to punitive damages, are recoverable.
17 Thus, INSCORP argues that the redacted billing statements that Plaintiffs have provided are not
18 sufficient for it to evaluate whether the fees are recoverable as *Brandt* fees. Moreover, as described
19 above, Plaintiffs have waived the attorney client privilege as to the fees incurred by seeking the fees as
20 damages. Accordingly, the Motion to Compel Production of Documents is GRANTED as to these
21 Requests and Plaintiffs are ordered to supplement their responses by identifying which documents are
22 responsive to which requests.

23 5. Miscellaneous

24 a. Mancini 14, 15, and 26

25 INSCORP moves to compel further responses from Mancini to Request for Production of
26 Documents Numbers 17-20, seeking documents relating to the allocation of settlement funds; copies of
27 the settlement checks and documents relating to damages arising from SMP's work. Plaintiffs object
28 that this information is irrelevant and privileged. As discussed above, this information is relevant and

1 not privileged. Accordingly, the Motion to Compel Production of Documents is GRANTED as to these
2 Requests and Plaintiffs are ordered to supplement their responses by identifying which documents are
3 responsive to which requests.

4 b. SMP Responses that Rely Upon Other Responses

5 INSCORP moves to compel further responses from SMP to Request for Production of
6 Documents Numbers 39, 42, 48, 53-55, 57-62, and 65, arguing that SMP has improperly referred to
7 other responses. SMP argues that it would be unduly burdensome for it to respond to all 70 document
8 requests. If the response is truly the same as to other requests, the burden of cutting and pasting the
9 response is not undue. If the response is not exactly the same, it is inappropriate to refer to it.

10 Accordingly, the Motion to Compel Production of Documents is Granted as to these Requests and
11 Plaintiffs are ordered to supplement their responses.

12 c. SMP Promises of Future Production

13 INSCORP moves to compel further responses from SMP to Request for Production of
14 Documents Numbers 49-52, 68 and 70, claiming that SMP has promised to produce the documents at a
15 at later time. SMP opposes, arguing that is “unsure just how many versions of ‘You have everything’
16 can be said before INSCORP is satisfied.” (Opp. at 13.) The responses in question do state that
17 documents will be produced. Accordingly, the Motion to Compel Production of Documents is Granted
18 as to these Requests and SMP must either produce additional documents or submit a statement signed
19 under penalty of perjury that all responsive documents have been produced and specifically identified.


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1 **III. CONCLUSION**

2 For the foregoing reasons, It Is Hereby Ordered that The Motion to Compel Responses to
3 Interrogatories is GRANTED and no later than **July 13, 2009** Plaintiffs shall supplement their responses
4 to the Interrogatories and Requests for Production of Documents as described herein. IT IS FURTHER
5 ORDERED that, no later than **July 13, 2009** the parties shall submit a Joint Motion for Protective Order
6 governing the use of confidential documents in this case.⁴

7 IT IS SO ORDERED.

8 DATED: June 18, 2009

9 
10 Hon. Nita L. Stormes
11 U.S. Magistrate Judge
12 United States District Court

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27 ⁴The Court desires that the parties reach agreement on the terms of a protective order. If the
28 parties cannot agree, after a face to face meet and confer between lead trial counsel, the parties may submit a joint motion with a separate statement by each party as to any disputed issues.