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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

8 IDALIS ARESTAD,

9 Plaintiff,

10 v.

11 LIBERTY MUTUAL FIRE INSURANCE  
12 COMPANY,

13 Defendant.  
14

CASE NO. C22-175RSM

ORDER DENYING MOTION TO COMPEL

15 This matter comes before the Court on Plaintiff Idalis Arestad's Motion to Compel. Dkt.  
16 #13. Defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") opposes. Dkt. #14.  
17 Neither party has requested oral argument.

18 Plaintiff submitted an underinsured motorist ("UIM") claim based on a 2018 collision.  
19 Plaintiff now asserts claims against Liberty Mutual for (1) breach of contract (the insurance  
20 policy), (2) insurance bad faith, (3) negligent claim handling, (4) violation of the Insurance Fair  
21 Conduct Act ("IFCA") and (5) Violation of Consumer Protection Act. *See* Dkt. #1.

22 On November 17, 2020, Plaintiff's counsel, Tom Lester, wrote to Liberty Mutual to  
23 advise that his client had settled her claim against the at-fault driver for that driver's \$25,000  
24 policy limits and that Plaintiff would be proceeding with a UIM claim. Dkt. #15 ("Hansford  
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1 Decl.”), Ex. 1 at 1. At the same time, Mr. Lester sought a response within 10 days from Liberty  
2 Mutual about purchasing the claim to proceed via subrogation against the at-fault driver. *Id.*

3 Liberty Mutual assigned Alison Whipple to the claim; she confirmed the underlying  
4 settlement with the at-fault driver’s insurance. She responded on November 18, 2020, informing  
5 Mr. Lester that they would not be buying out the underlying claim. Hansford Decl., Ex. 4 at 1.  
6 She also requested photographs and estimates from an earlier collision that Plaintiff was involved  
7 in on May 2, 2018, photographs, estimates, medical records, and imaging relating to the subject  
8 collision, and five years of prior medical records with any related imaging. *Id.* Liberty Mutual  
9 received Plaintiff’s UIM demand letter on November 25, 2020. Hansford Decl., Ex. 2. The letter  
10 repeats that Plaintiff settled with the at-fault driver for her \$25,000 policy limits and alleges  
11 medical expenses of just over \$12,000, but nonetheless demands the full \$100,000 UIM policy  
12 limits. *Id.* The medical records provided with the demand letter showed that Ms. Arestad’s  
13 treatment mostly consisted of chiropractic care.  
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16 On December 8, 2020, Ms. Whipple apparently informed Mr. Lester that, based on  
17 Liberty Mutual’s investigation, Plaintiff had been fully compensated by the underlying  
18 settlement and that Liberty Mutual would not be making any settlement offer. *See* Dkt. #14 at 3.  
19 This email is not provided to the Court.

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21 Between December 8, 2020, and February 25, 2021, there were apparently no  
22 communications between the parties. On February 26, 2021, Liberty Mutual received a letter  
23 demanding that it arbitrate Plaintiff’s UIM claim. Hansford Decl., Ex. 6. Ms. Whipple responded  
24 with a copy of the policy and explained that an earlier arbitration clause had been removed.  
25 Liberty Mutual did not hear from Mr. Lester until November 12, 2021, when it received a letter  
26 addressed to the Office of the Insurance Commissioner (“OIC”) and a draft complaint for filing  
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1 in Whatcom County Superior Court. Hansford Decl., Ex. 8. The parties then engaged in back-  
2 and-forth discussions, ultimately resulting in the filing of this action.

3 Plaintiff served interrogatories and requests for production on September 20, 2022,  
4 seeking the entire claim file for Plaintiff and the reserves set for Plaintiff's claim at various points  
5 in time. Liberty Mutual produced most of this file but redacted certain portions. A privilege log  
6 was provided. Liberty Mutual stated "No reserves had been set for Plaintiff's UIM claim by June  
7 30, 2018, or by May 30, 2019, because Plaintiff's UIM claim was not opened until on or around  
8 November 17, 2020, when Plaintiff's counsel notified Defendant that Plaintiff had settled her  
9 claim against the at-fault driver from the collision involving Plaintiff on May 30, 2018. By  
10 December 3, 2021, Defendant had set reserves of \$5,673.69 on Plaintiff's UIM claim." Dkt. #13  
11 at 3. Liberty Mutual claimed work product privilege for the reserve prices after Plaintiff's suit.

12  
13 The parties conferred but could not agree on the privileges claimed by Liberty Mutual.  
14 Plaintiff now moves to compel production or for the Court to conduct an in-camera review. The  
15 response from Liberty Mutual makes clear that work product privilege is at issue.

#### 16 17 **A. Legal Standard**

18 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any  
19 party's claim or defense and proportional to the needs of the case, considering the importance of  
20 the issues at stake in the action, the amount in controversy, the parties' relative access to relevant  
21 information, the parties' resources, the importance of the discovery in resolving the issues, and  
22 whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R.  
23 Civ. P. 26(b)(1). If requested discovery is not answered, the requesting party may move for an  
24 order compelling such discovery. Fed. R. Civ. P. 37(a)(1). The party that resists discovery has  
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1 the burden to show why the discovery request should be denied. *Blankenship v. Hearst Corp.*,  
2 519 F.2d 418, 429 (9th Cir. 1975).

3 Rule 26(b)(3) governs Liberty Mutual’s assertions of work-product protection. *See*  
4 *Schreib v. Am. Family Mut. Ins. Co.*, 304 F.R.D. 282, 285 (W.D. Wash. 2014); *MKB Constructors*  
5 *v. Am. Zurich Ins. Co.*, No. C13-0611-JLR, 2014 WL 2526901 (W.D. Wash. May 27, 2014). The  
6 work product doctrine protects from discovery “documents and tangible things that are prepared  
7 in anticipation of litigation or for trial by or for another party or its representative.” Fed. R. Civ.  
8 P. 26(b)(3)(A). When the issue comes before the court, it necessarily requires a case-by-case  
9 inquiry. *Garcia v. City of El Centro*, 214 F.R.D. 587, 592 (S.D. Cal. 2003). The party invoking  
10 the work product doctrine bears the burden of establishing that it applies. *United States v. Richey*,  
11 632 F.3d 559, 566 (9th Cir. 2011). The Ninth Circuit has stated that “a document should be  
12 deemed prepared in anticipation of litigation and thus eligible for work product protection under  
13 Rule 26(b)(3) if in light of the nature of the document and the factual situation in the particular  
14 case, the document can be fairly said to have been prepared or obtained because of the prospect  
15 of litigation.” *In re Grand Jury Subpoena (Mark Torf)*, 357 F.3d 900, 907 (9th Cir. 2004). If a  
16 document would have been created in substantially similar form in the normal course of business,  
17 however, the fact that litigation is afoot will not protect it from discovery. *Id.* at 908. Where a  
18 document serves a dual purpose—*i.e.*, the document “was not prepared exclusively for  
19 litigation”—the Ninth Circuit applies the “because of” standard:  
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22 Dual purpose documents are deemed prepared because of litigation  
23 if in light of the nature of the document and the factual situation in  
24 the particular case, the document can be fairly said to have been  
25 prepared or obtained because of the prospect of litigation. In  
26 applying the “because of” standard, courts must consider the totality  
27 of the circumstances and determine whether the document was  
created because of anticipated litigation, and would not have been

1 created in substantially similar form but for the prospect of  
2 litigation.

3 *Richey*, 632 F.3d at 567–68 (internal quotation marks omitted).

4 Plaintiff's Motion argues:

5 Litigation was commenced against Defendant Liberty Mutual in  
6 January, 2022 and removed to this Court in February, 2022. The  
7 redacted entries and other valuations comments were created from  
8 November 18, 2020 through December 3, 2021. Defendant's  
9 redactions obstruct discovery of possible improper practices  
10 employed by Defendant in evaluating Plaintiff's claims and  
11 unreasonably eliminates discovery of meritorious claims.

12 Dkt. #13 at 4. Liberty Mutual responds:

13 The court considered whether an insurer could reasonably anticipate  
14 litigation based on an insured's demand letter in *Leahy v. State Farm*  
15 *Mutual Automobile Insurance Co.*, 3 Wn. App. 2d 613, 418 P.3d  
16 175 (2018). The insured had sent a demand for payment of policy  
17 limits and suggested litigation would follow. *Id.* at 619, 622. The  
18 court noted the insurer had produced documents relied on during its  
19 evaluation, but held that from the date of the demand it was  
20 appropriate to redact the portions of the insurer's claim file showing  
21 its evaluation and mental processes. *Id.* at 625–26.

22 Here, as in *Leahy*, Liberty reasonably anticipated litigation after it  
23 received Ms. Arestad's demand letter of November 25, 2020.  
24 Liberty reasonably anticipated litigation at that time because,  
25 despite claiming medical expenses of just over \$12,000 arising  
26 almost entirely from chiropractic care for soft-tissue injuries, Ms.  
27 Arestad claimed general damages in excess of \$150,000 and  
demanded her \$100,000 policy limits.

The evaluations and reserve information sought by Ms. Arestad  
were all created after Ms. Arestad made her policy limits UIM  
demand and specifically addressed the value of her UIM claim in  
anticipation of litigation...

Dkt. #14 at 7. Liberty Mutual asserts that the redactions “contain the specific mental impressions  
and opinions of Liberty's adjuster” and thus constitute “opinion work product.” *Id.* at 8–9.

1 The Court, taking into account the facts surrounding the creation of the redacted  
2 documents at issue and the reserves, concludes that their litigation purpose so permeates any other  
3 purpose that the two purposes cannot be discretely separated from the factual nexus as a whole.  
4 *See In re Grand Jury Subpoena (Mark Torf)*, 357 F.3d at 907. Considering all the facts above,  
5 the Court agrees with Liberty Mutual that it was reasonable to anticipate litigation after it received  
6 Plaintiff's counsel's demand letter on November 25, 2020, seeking ten times the documented  
7 medical expenses. The redactions at issue all follow that demand letter and were created because  
8 of the prospect of litigation. They would not have been created in substantially similar form but  
9 for this prospect. Accordingly, Liberty Mutual has met its burden of establishing that the work  
10 product doctrine applies.  
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12 Having reviewed the briefing, along with the remainder of the record, the Court hereby  
13 finds and ORDERS that Plaintiff Idalis Arestad's Motion to Compel, Dkt. #13, is DENIED.  
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15 DATED this 21<sup>st</sup> day of December, 2022.

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17 RICARDO S. MARTINEZ  
18 UNITED STATES DISTRICT JUDGE  
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