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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Marcus Labertew; and John McDermott and
10 Jennifer McDermott, husband and wife,

11 Plaintiffs,

12 v.

13 Chartis Property Casualty Company, also
14 known as AIG Casualty Company, and 21st
15 Century North America Insurance
16 Company, formerly known as American
17 International Insurance Company,

18 Defendants.

No. CV-13-1785-PHX-DGC

ORDER

19 This case involves an insurance coverage dispute and a claim of bad faith against
20 Defendants. Plaintiffs seek production of certain claim file documents that Defendants
21 have partially redacted on work product and attorney-client privilege grounds. The Court
22 held a discovery conference with the parties on March 26, 2018, and directed them to file
23 memoranda addressing the work product and privilege issues. Doc. 74. Having reviewed
24 the memoranda and relevant case law, the Court finds that Defendants have not
25 established work product protection but have not waived the attorney-client privilege.

26 **I. Background.**

27 In March 2010, Plaintiffs filed a complaint in state court against Loral Langemeier
28 asserting claims for breach of contract, defamation, fraud, and other wrongs arising out of

1 their relationship in Bio-Novix, a health products business venture. Doc. 1-1 at 2-10.
2 Langermeier had insurance policies with Defendants and tendered defense of the suit to
3 them before trial in January 2013. One month later, Defendants issued a position letter
4 stating that there was no coverage for the claims asserted in the lawsuit. Doc. 76-3.

5 On the third day of trial, the parties entered into a stipulated judgment against
6 Langemeier in the amount of \$1.5 million. Doc. 1-16 at 27-28. The judgment was part
7 of what is commonly called a “*Damron* agreement” under Arizona law, and included an
8 assignment of Langemeier’s claims against Defendants to Plaintiffs. *See Damron v.*
9 *Sledge*, 460 P.2d 997 (Ariz. 1969).

10 Plaintiffs chose to collect their judgment through a garnishment action initiated in
11 state court. Defendants removed the proceeding to this Court and filed answers to the
12 writs of garnishment, denying that they owed funds to Plaintiffs. Docs. 6, 7. Plaintiffs
13 thereafter filed an amended complaint alleging that Defendants owe Plaintiffs the \$1.5
14 million stipulated judgment and are liable to Plaintiffs under *Damron* for alleged bad
15 faith conduct. Doc. 42.

16 Plaintiffs sought production of the underlying claim file, including all documents
17 related to the processing, investigation, and denial of the claim. Doc. 79-3 at 3.
18 Defendants produced the claim file but redacted portions of ten pages on work product
19 and attorney-client privilege grounds. *Id.* at 4; Doc. 76 at 2. The redacted material
20 largely involves communications between the claims adjuster, Elisa Wheeler, two of her
21 superiors, Mike Mansour and Brian Applebee, and outside counsel, Steven Mesaros and
22 Randy Kingery. The redactions are as follows (listed in Bates number order):

- 23 1-2. 2/19-20/13 emails between Wheeler and Kingery (00081)
- 24 3-4. 1/29 and 1/31/13 emails between Wheeler and Mesaros (00082, 00082-3)
- 25 5. 2/4/13 email from Wheeler to Mansour (00116)
- 26 6-7. 2/7 and 2/12/13 emails between Mansour and Applebee (00122)
- 27 8. 1/28/13 email from Wheeler to Mesaros (00131)
- 28 9. 1/22/13 email from Wheeler to Mesaros (00140)

- 1 10-11. 1/17/13 emails between Wheeler and Mansour (00179)
- 2 12. Legal bills from counsel to Defendants (00265-70)
- 3 13. April to August 2013 claim notes (00272) (seven entries)
- 4 14. 2/12/13 claim note (00272)
- 5 15. 1/29/13 claim note (00273)

6 Defendants claim work product protection as to all redactions, and assert the attorney-
7 client privilege for the redactions in items 1-5, 8-9, 12-13, and 15 of the privilege log.
8 Docs. 76 at 4-5, 76-1 at 2-3.

9 **II. Work Product.**

10 Because the work product doctrine is a limitation on discovery, and not an
11 evidentiary privilege, federal law governs its application. *City of Glendale v. Nat'l Union*
12 *Fire Ins. Co. of Pittsburgh*, No. CV-12-380-PHX-BSB, 2013 WL 1797308, at *11
13 (D. Ariz. Apr. 29, 2013). To qualify for work product protection against discovery under
14 Federal Rule of Civil Procedure 26(b)(3)(A), “documents must have two characteristics:
15 (1) they must be ‘prepared in anticipation of litigation or for trial,’ and (2) they must be
16 prepared ‘by or for another party or by or for that other party’s representative.’”
17 *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (citation omitted).
18 “The primary purpose of the work product doctrine is to ‘prevent exploitation of a party’s
19 efforts in preparing for litigation.’” *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976
20 F.2d 573, 576 (9th Cir. 1992) (citation omitted).

21 Materials prepared as part of insurance claim investigations “are generally not
22 considered work product due to the industry’s need to investigate claims.” *Moe v. Sys.*
23 *Transport, Inc.*, 270 F.R.D. 613, 624 (D. Mont. 2010) (citation omitted). In the context
24 of claim disputes, however, “the nature of the insurer’s activity may eventually develop
25 into activity undertaken in anticipation of litigation where a sufficient degree of adversity
26 arises between the insurer and the insured or claimant.” *Id.* at 625. An insurer’s activity
27 shifts from the ordinary course of business to anticipation of litigation when, “in light of
28 the nature of the document and the factual situation in the particular case, the document

1 can fairly be said to have been prepared or obtained *because of the prospect of litigation.*”
2 *Id.* (emphasis in original); see *In re Grand Jury Subpoena*, 357 F.3d at 907 (joining other
3 circuits in employing the “because of” standard).

4 The “because of” standard is met, Defendants contend, where the insurer identifies
5 a “critical factor” which made it anticipate litigation. Doc. 76 at 6 (citing *Moe*, 270
6 F.R.D. at 625). Defendants assert that the critical factor in this case occurred on
7 January 22, 2013, when Defendants contacted counsel for advice because the prospect of
8 not accepting the tender of defense became evident from a review of the first amended
9 complaint. *Id.* at 7. Defendants note that by February 4, they were preparing a position
10 letter to deny coverage. *Id.* During this time frame, Defendants assert, “there was
11 ‘a sufficient degree of adversity between the insurer and the insured’ that the prospect of
12 litigation was evident.” *Id.* (quoting *Moe*, 270 F.R.D. at 625).

13 But where “an insurer has not yet formally denied a claim, the insurer ‘bears the
14 burden of persuasion by presenting specific evidentiary proof of objective facts
15 demonstrating a resolve to litigate.’” *Moe*, 270 F.R.D. at 625 (citation omitted). In this
16 case, Defendants did not formally deny coverage until February 13, when they sent the
17 position letter to Plaintiffs’ counsel. Docs. 76-3 at 2-7, 79 at 3. Defendants assert that
18 the prospect of not accepting the tender of defense became evident a few weeks earlier,
19 but present no evidence in support of this assertion. It is clear from the email exchanges
20 and privilege log that the coverage decision was still under consideration after the
21 purported January 22 “critical factor” date. On January 28, Ms. Wheeler emailed
22 Plaintiffs’ counsel stating that the “coverage investigation is ongoing.” Doc. 79-2 at 7.
23 She informed counsel on February 7 that she “hope[d] to have a position letter out to
24 [him by] the end of this week.” *Id.* at 2. The privilege log identifies emails and claim
25 notes dated February 12 – one day before issuance of the position letter – as including
26 “thoughts on coverage analysis.” Docs. 76 at 3, 76-1 at 2-3. In short, Defendants have
27 presented no specific evidence showing “a resolve to litigate” the coverage issue before
28 formally denying the claim on February 13. *Moe*, 270 F.R.D. at 625.

1 Moreover, “[t]he party asserting the work product doctrine has the burden of
2 establishing, *for each document*, the rule’s application.” *Id.* (emphasis in original).
3 Defendants make no effort to establish the doctrine for any particular document. Instead,
4 Defendants assert in a parenthetical that the doctrine applies generally to all fifteen
5 redactions. Doc. 76 at 5. This simple assertion is insufficient. *See Moe*, 270 F.R.D. at
6 625 (“System Transport has wholly failed to meet its burden of proving that the
7 documents it withheld based on the work product doctrine were all created in anticipation
8 of litigation. Its assertion that litigation was anticipated is based solely on the motor
9 vehicle accident that gave rise to Moe’s personal injury claims.”).

10 Defendants’ reliance on *Brown v. Superior Court*, 670 P.2d 725 (Ariz. 1983), is
11 misplaced. The insurance company in that case, Continental National Assurance, did not
12 take the position that it anticipated litigation before formally denying the claim. The
13 court specifically noted that although Continental “had made a claims investigation, . . .
14 Continental’s business is handling claims, and not every . . . claim gives rise to an
15 anticipation of litigation[.]” 670 P.2d at 733. It was only after Continental denied
16 the claim and retained counsel that it could have reasonably concluded that litigation
17 “was not merely possible, but quite probable.” *Id.* at 733-44.

18 In summary, the Court finds that Defendants have failed to meet their burden of
19 establishing work product protection for the redacted materials.

20 **III. Attorney-Client Privilege.**

21 **A. Implied Waiver.**

22 Federal courts look to state law to determine the applicability of evidentiary
23 privileges to discovery disputes in diversity actions. Fed. R. Evid. 501. Because this
24 case is brought under Arizona law based on diversity jurisdiction, the Court will apply
25 Arizona law to the attorney-client privilege issue.

26 In *State Farm v. Lee*, 13 P.3d 1169 (Ariz. 2000), the Arizona Supreme Court
27 addressed the applicable standard for determining the existence of an implied waiver of
28 the attorney-client privilege in cases where the mental state of a litigant is at issue.

1 *Lee* held that when the litigant “claiming the privilege *relies* on and advances as a claim
2 or defense a subjective and allegedly reasonable evaluation of the law – but an evaluation
3 that necessarily incorporates what the litigant learned from its lawyer – the
4 communication is discoverable[.]” 13 P.3d at 58 (emphasis in original).

5 In this case, Defendants’ Rule 30(b)(6) witness, Mr. Applebee, stated the
6 following during his deposition:

7 Q. And did your company rely on the views of coverage
8 counsel in making its ultimate decision?

9 A. Well, it’s a collaborative approach. So I would not agree
10 with the phrase “rely on.” I would say we discussed –

11 Q. I’m not asking what you discussed. I’m asking –

12 A. We did not rely on.

13 Q. Did you consider as one element of your analysis the view
14 given to you by coverage counsel?

15 A. Yes.

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17 Doc. 79-1 at 74. The parties dispute whether this testimony is sufficient to show an
18 implied waiver of the attorney-client privilege under *Lee*. Plaintiffs contend that
19 consideration of counsel’s advice as part of a collaborative approach in making the
20 coverage decision constitutes a waiver of the privilege. Doc. 79 at 4. Defendants
21 concede that they considered counsel’s advice as one element of their coverage analysis,
22 but argue that this is not enough to create an implied waiver. Doc. 76 at 5. The Court
23 agrees with Defendants.

24 *Lee* made clear that conferring with counsel and basing the coverage decision in
25 part on counsel’s advice is not enough to impliedly waive the privilege:

26 We assume client and counsel will confer in every case, trading information
27 for advice. This does not waive the privilege. We assume most if not all
28 actions taken will be based on counsel’s advice. This does not waive the
privilege. Based on counsel’s advice, the client will always have subjective

1 evaluations of its claims and defenses. This does not waive the privilege.
2 All of this occurred in the present case, and none of it, separately or
3 together, created an implied waiver.

4 13 P.3d at 66. An implied waiver occurred in *Lee* only because the case had “one more
5 factor – State Farm claim[ed] its actions were the result of its reasonable and good-faith
6 belief that its conduct was permitted by law **and** its subjective belief based on its claims
7 agents’ investigation into and evaluation of the law.” *Id.* (emphasis in original). The
8 investigation and evaluation included advice received from a number of lawyers. It was
9 “the last element, combined with the others, that impliedly waive[d] the privilege.” *Id.*

10 Thus, to waive the privilege under *Lee*, “something more is required” than merely
11 consulting with counsel and taking action based on the advice received. *Everest Indem.*
12 *Ins. Co. v. Rea*, 342 P.3d 417, 419 (Ariz. Ct. App. 2015). The privilege “is impliedly
13 waived only when the litigant asserts a claim or defense that is *dependent* upon the advice
14 or consultation of counsel[.]” *Id.* (emphasis in original).

15 In this case, Defendants have not asserted a defense that their conduct was the
16 result of their reasonable and good faith belief that the conduct was permitted by law,
17 based on an investigation into the law, *see Lee*, 13 P.3d at 66, or that any such beliefs
18 were dependent on advice of counsel, *see Everest*, 342 at 419. On the present record, the
19 “something more” required for an implied waiver under *Lee* is missing.

20 Plaintiffs note that shortly after receipt of the tender letter, Ms. Wheeler sent an
21 email to Mr. Mansour stating that she thought it would “be necessary to seek review by
22 coverage counsel,” and forwarded the letter to Ms. Mesaros for review. Docs. 79 at 4,
23 79-2 at 3-4. But as explained above, obtaining advice from counsel and taking action
24 based on such advice is not enough to waive the privilege. *See Lee*, 13 P.3d at 66.

25 Plaintiffs cite *Roehrs v. Minnesota Life Insurance Co.*, 228 F.R.D. 642, 646-47
26 (D. Ariz. 2005), which found an implied waiver where the claims adjusters purportedly
27 relied on legal opinions and investigations in denying coverage. Doc. 79 at 2-3. But the
28 decision in *Roehrs* is not controlling. For reasons stated above, the Court cannot find an

1 implied waiver under Arizona law in this case.¹

2 **B. Production of the Privilege Log.**

3 Plaintiffs claim that Defendants waived the attorney-client privilege by failing to
4 timely produce a privilege log. Doc. 79 at 5 (citing *Burlington N. & Santa Fe Ry. Co. v.*
5 *U.S. Dist. Ct. for the Dist. of Mont.*, 408 F.3d 1142 (9th Cir. 2005)). *Burlington* makes
6 clear that that there is no “*per se* waiver rule that deems a privilege waived if a privilege
7 log is not produced within Rule 34’s 30-day time limit.” 408 F.3d at 1149. Instead,
8 courts should engage in a “holistic reasonableness analysis” and make a case-by-case
9 determination based on various factors, including the delay in producing the privilege
10 log, the magnitude of the document production, and the degree to which the assertion of
11 privilege enables the adverse party to evaluate whether the withheld documents are
12 privileged. *Id.*

13 Having considered the relevant factors and the record as a whole, the Court does
14 not find that Defendants’ failure to timely provide a privilege log waived the privilege.
15 Defendants asserted the privilege and produced the redacted documents on January 12,
16 2018. Doc. 79-3 at 3-4. Defendants state that a clerical error may have caused the
17 attendant privilege log from being included with the production, but the log was provided
18 to Plaintiffs by mid-March. Doc. 76 at 2. The claim file and privilege log were each
19 relatively small (274 and 19 pages, respectively), but it does not appear that the delay in
20 providing the log was intentional or meant “as a tactical manipulation of the rules and the
21 discovery process.” *Burlington*, 408 F.3d at 1149. Nor does the privilege log preclude
22 Plaintiffs from challenging the assertion of privilege, as their memorandum demonstrates.
23 Doc. 79. In the absence of aggravating factors, the delay in producing the privilege log
24 does not constitute a waiver. *See Burlington*, 408 F.3d at 1149 (finding waiver where the
25 defendant engaged in gamesmanship by producing a deficient privilege log five months

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27 ¹ The claims adjusters in *Roehrs* testified that the denial of coverage was based in
28 part on the legal investigation of the claim. 228 F.R.D. 647 n.8. They also considered
factual and medical investigations, opinions of their supervisors, and policy terms. *Id.*
The Court is not convinced that mere consideration of the legal investigation in making
the coverage decision in *Roehrs* was sufficient to constitute an implied waiver under *Lee*.

1 late and thereafter made changes to the log).

2 **C. Rule 612.**

3 Finally, Plaintiffs cite Federal Rule of Evidence 612 for the proposition that an
4 adverse party is entitled to documents used to refresh a witness's recollection before
5 testifying. Doc. 79 at 6. Plaintiffs claim that Defendants waived the attorney-client
6 privilege because Mr. Applebee reviewed the unredacted claim file in preparing for his
7 deposition. *Id.*

8 “Although applicable to depositions, Rule 612 is a rule of evidence, and not a rule
9 of discovery. Its sole purpose is evidentiary in function ‘to promote the search of
10 credibility and memory.’” *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (quoting Fed.
11 R. Evid. 612 advisory committee notes to 1972 proposed rules). An adverse party is
12 entitled to production of a document used by a witness to refresh memory before
13 testifying only where the court decides that justice so requires. Fed. R. Evid. 612(a)(2);
14 *see Goldman v. United States*, 316 U.S. 129, 132 (1942) (noting that “where a witness
15 does not use his notes or memoranda in court, a party has no absolute right to have them
16 produced”); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. (1973) (citing *Goldman* and
17 noting that Rule 612 was amended to render the production of documents used by a
18 witness before testifying discretionary with the court to guard against “fishing
19 expeditions among a multitude of papers which a witness may have used in preparing for
20 trial”).

21 In this case, the Court does not find that justice requires production of the claim
22 file documents to which the attorney-client privilege applies. Under Rule 612,
23 “the relevant inquiry is not simply whether the documents were used to refresh the
24 witness's recollection, but rather whether the documents were used in a manner which
25 waived the attorney-client privilege.” *Suss v. MSX Int'l Eng. Servs., Inc.*, 212 F.R.D.
26 159, 164 (S.D.N.Y. 2002). For example, a waiver may occur if privileged documents are
27 disclosed to an individual outside the privileged relationship. *Id.* The privilege is not
28 lost, however, where the witness reviews his own privileged documents. *Id.*

1 This approach is consistent with the language of Rule 612. Although the rule
2 confers discretion on district courts to require production when documents are reviewed
3 before testifying, it does not purport to change the law with respect to privilege. Indeed,
4 the advisory committee notes make clear that nothing in the rule should “be construed as
5 barring the assertion of a privilege[.]” Fed. R. Evid. 612 advisory committee notes to
6 1974 enactment. “Thus, any discretion used by the court should take into account the
7 particular privilege being asserted.” *Suss*, 212 F.R.D. at 164.

8 In his role as a Rule 30(b)(6) witness, Mr. Applebee reviewed the unredacted
9 claim file to prepare for his deposition. But this review, standing alone, does not
10 constitute a waiver of the attorney-client privilege. Plaintiffs do not dispute that
11 Mr. Applebee was within the zone of privilege when he reviewed the claim file. Nor
12 have Plaintiffs shown that the manner of review somehow results in a waiver of the
13 privilege.

14 In short, Plaintiffs have not shown that production of the privileged claim file
15 materials is necessary in the interests of justice. *See Suss*, 212 F.R.D. at 165 (finding no
16 waiver where the privileged documents were restricted to individuals covered by the
17 privilege); *Stamps.com, Inc. v. Endicia, Inc.*, No. CV 06-7499-ODW(CTx), 2008 WL
18 11338241, at *6 (C.D. Cal. Oct. 6, 2008) (refusing to order production under Rule 612
19 where “there [was] no indication that [the witness’s] review of unredacted versions of
20 any particular document constituted a waiver of privilege”); *In re Managed Care Litig.*,
21 415 F. Supp. 2d 1378, 1380-81 (S.D. Fla. 2006) (denying motion to compel privileged
22 document reviewed in preparation for deposition).

23 Plaintiffs note that some courts have applied an automatic waiver of the privilege
24 under Rule 612. Doc. 79 at 7 (citing cases). This view has been subject to some
25 criticism. When the rule “is applied to require production in every instance in which a
26 deponent uses a document to refresh his or her memory prior to testifying, the distinction
27 between refreshment during and before testifying is, for all intents and purposes,
28 eliminated.” *Derderian v. Polaroid*, 121 F.R.D. 13, 16 (D. Mass. 1988). Thus, there is

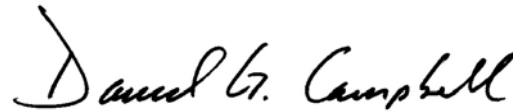
1 no exercise of the discretion which Congress intended courts to use in determining
2 whether, in fact, justice requires disclosure of documents reviewed before testifying.
3 *See id.* The Court declines to apply an automatic waiver.

4 **IV. Conclusion.**

5 Defendants have not established work product protection for the redacted portions
6 of the claims file, but have not waived – impliedly or otherwise – the attorney-client
7 privilege for the redactions in items 1-5, 8-9, 12-13, and 15 of the privilege log. *See*
8 Docs. 76 at 3-4, 76-1 at 2-3.

9 **IT IS ORDERED** that Defendants shall produce unredacted versions of the
10 documents identified in items 6, 7, 10, 11, and 14 of the privilege log by **April 23, 2018**.

11 Dated this 19th day of April, 2018.

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15 David G. Campbell
16 United States District Judge
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