

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CEDAR GROVE COMPOSTING,
INCORPORATED,

Plaintiff,

v.

IRONSHORE SPECIALTY INSURANCE
COMPANY,

Defendant.

CASE NO. C14-1443RAJ

ORDER

I. INTRODUCTION

This matter comes before the Court on two discovery motions (and one motion to seal¹ in connection) filed by Plaintiff Cedar Grove Composting, Incorporated (“Plaintiff”) against Defendant Ironshore Specialty Insurance Company (“Defendant”). *See* Dkt. ## 45, 54, 57. The Court also considers the Parties’ Stipulated Motion to Extend Dates. Dkt. # 70.

¹ The Court has considered the documents filed under seal pursuant to Plaintiff’s Motion to Seal in connection with this Order. Those documents remain under seal at this time. However, in keeping with this Court’s procedures, the Parties are to meet and confer to consider whether redactions may render sealing unnecessary. *See* Local Rules W.D. Wash. LCR 5(g)(1) (parties “must explore all alternatives to filing a document under seal,” including meeting and conferring to determine whether redactions may resolve the issue). The Parties are **HEREBY ORDERED** to meet and confer **within fourteen (14) days of this Order** to discuss alternatives to sealing. Plaintiff must file a written statement **not to exceed three (3) pages within seven (7) days** of that conference informing this Court of the proposed resolution. In other words, that written statement should: (1) include the redacted versions of the sealed exhibits, (2) set forth concrete reasons for why the exhibits should remain sealed, or (3) explain that the exhibits no longer should be sealed. The exhibits will remain sealed pending a final determination.

1 This discovery dispute has quickly transformed into a behemoth, replete with
2 competing and disputed descriptions of at the Parties' efforts to meet and confer. This is
3 not the cooperative discovery contemplated by the Federal Rules of Civil Procedure (the
4 "Rules") and this Court does not look kindly on the Parties' behavior, especially when
5 even a quick a review of the record reveals that many of the disputes have since been
6 resolved and would have been resolved even without judicial intervention.

7 **II. BACKGROUND**

8 Plaintiff operates two organic waste composting facilities in Western Washington.
9 It was named as a defendant four times in 2013 in suits claiming various injuries as a
10 result of odors emanating from those facilities. *See* Dkt. # 42 (First Am. Compl.) ¶ 15.
11 Cedar Grove turned to its insurer, Defendant Ironshore Specialty Insurance Company.
12 *Id.* ¶¶ 16-17. It has not been happy with the results. In its complaint, it contends that
13 Ironshore defended it only after reserving its right to deny coverage on an improper basis,
14 that Ironshore forced it to expend hundreds of thousands of dollars to fund its own
15 defense, and that Ironshore improperly interfered in the defense of the lawsuits. *See id.*
16 ¶¶ 18-41.

17 **III. LEGAL STANDARD**

18 The Court has broad discretion to control discovery. *Avila v. Willits Env'tl.*
19 *Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011). That discretion is guided by
20 several principles. Most importantly, the scope of discovery is broad. "Parties may
21 obtain discovery regarding any nonprivileged matter that is relevant to any party's claim
22 or defense." Fed. R. Civ. P. 26(b)(1). "Information within this scope of discovery need
23 not be admissible in evidence to be discoverable." *Id.* The Court, however, must limit
24 discovery where it is not "proportional to the needs of the case, considering the
25 importance of the issues at stake in the action, the amount in controversy, the parties'
26 relative access to relevant information, the parties' resources, the importance of the

1 discovery in resolving the issues, and whether the burden or expense of the proposed
2 discovery outweighs its likely benefit.” *Id.*

3 IV. DISCUSSION

4 a. Plaintiff’s Motion for Fees

5 The Court begins with Plaintiff’s Motion for Fees (Dkt. # 54) because it explains
6 that many of the issues initially raised in the Motion to Compel (Dkt. # 45) have since
7 been resolved. Plaintiff’s primary basis for its Motion for Fees is that Defendant
8 produced files at issue in the Motion to Compel after it was filed. *See* Dkt. # 54 at 2.

9 Under Rule 37(a)(5), if a “motion is granted--or if the disclosure or requested
10 discovery is provided after the motion was filed--the court must, after giving an
11 opportunity to be heard, require the party or deponent whose conduct necessitated the
12 motion, the party or attorney advising that conduct, or both to pay the movant’s
13 reasonable expenses incurred in making the motion, including attorney’s fees.”
14 However, “the court must not order this payment if: (i) the movant filed the motion
15 before attempting in good faith to obtain the disclosure or discovery without court action;
16 (ii) the opposing party's nondisclosure, response, or objection was substantially justified;
17 or (iii) other circumstances make an award of expenses unjust.” *Id.*

18 The Court will **DENY** Plaintiff’s Motion for Fees because it finds that Plaintiff did
19 not attempt in good faith to obtain the requested discovery prior to filing its Motion to
20 Compel.²

21 ² The Court also notes that at least some of Defendant’s objections to Plaintiff’s requested
22 discovery had merit. For example, in the Ninth Circuit, a privilege log must “identify ‘(a) the
23 attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on
24 the document to have received or sent the document, (d) all persons or entities known to have
25 been furnished the document or informed of its substance, and (e) the date the document was
26 generated, prepared, or dated.’” *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 306 F.R.D. 234, 237
(N.D. Cal. 2015) (quoting *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992)).
27 Identifying privilege with sufficient specificity preferably will take the form of a document by
28 document log, but such detail is not necessarily required, depending on the circumstances. *See*
In re Imperial Corp. of Am., 174 F.R.D. 475, 478 (S.D. Cal. 1997). In this case, the Court is not
convinced that Defendant’s June 5, 2015 privilege log was inherently defective (*see* Dkt. # 63-4
(Handler Decl.) Ex. D) and, in any event, any defects have since been remedied. The Court
further notes that Defendant’s concerns regarding proportionality have since been emphasized in
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1 Prior to filing its Motion to Compel, Plaintiff was obligated to engage in a good
2 faith effort to obtain the requested discovery without resort to court action. *See* Fed. R.
3 Civ. P. 37(a)(1) (emphasis added); *see also* Local Rules W.D. Wash. LCR 37(a)(1).
4 Counsel must conduct themselves with “a high degree of professionalism and
5 collegiality” at any such conference. Local Rules W.D. Wash. LCR 1(c)(6). Regardless
6 of whose story is to be believed, Plaintiff’s counsel’s “effort” to confer with Defendant
7 could hardly be described as being a truly good faith attempt to resolve the issues.

8 Like *Rashomon* (Daiei Studios, 1950), depending on which party is telling the
9 story, the June 15, 2015 conference addressed every issue without issue (*see* Dkt. # 46
10 (Moore Decl.) ¶ 15), is not described at all (*see* Dkt. # 65 (Sheridan Decl.) ¶ 3 (stating
11 that Ms. Sheridan “was present on each of the telephonic meet and confer conferences”
12 but containing no description of any conference and simply claiming that Defendant’s
13 timeline of the dispute is misleading)), or lasted no more than 10 minutes, consisted of
14 only two brief questions, and did not reach every issue (*see* Dkt. # 48 (Handler Decl.) ¶ 3;
15 Dkt. # 62 (Toren Decl.) ¶ 2; Dkt. # 63 (Handler Decl.) ¶¶ 9-10).

16 Plaintiff’s counsel’s silence in response to Defendant’s counsel’s characterization
17 of the June 15, 2015 “meet and confer” conference is telling. Despite Defendant’s
18 counsel’s unanimous and unflattering description of the telephone meeting (*see* Dkt. # 48
19 (Handler Decl.) ¶ 3; Dkt. # 62 (Toren Decl.) ¶ 2; Dkt. # 63 (Handler Decl.) ¶ 10) and
20 despite presenting the declarations of three separate attorneys (*see* Dkt. # 55 (Raskin
21 Decl.) ¶ 3; Dkt. # 56 (Moore Decl.) ¶ 3; Dkt. # 65 (Sheridan Decl.) ¶ 3) – ostensibly “to
22 ensure that there was no miscommunication about Ironshore’s position” (Dkt. # 54 at 4
23 n.2) – Plaintiff’s counsel does not dispute Defendant’s counsel’s account in any way.
24 That is unacceptable.

25
26
27 the revisions to the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1) advisory
28 committee’s notes to 2015 amendment.

1 Instead, to support its Motion for Fees, Plaintiff relies on another “meet and
2 confer” conference between the Parties, taking place on May 1, 2015 or various
3 communications between the Parties in the interim. *See* Dkt. # 64 at 3-4. To highlight
4 the “discourse” taking place on these issues, the Parties present competing “timelines” of
5 the instant discovery dispute that do little more than muddy the waters and highlight the
6 complete dysfunction in the Parties’ relationship. *Compare* Dkt. #61 at 2-3 with Dkt. #
7 65-1 (Sheridan Decl.) Ex. A. The Court rejects Plaintiff’s reliance on these
8 communications to fill in the gaps in their June 15, 2015 “meet and confer.” Simply
9 because the Parties may have discussed some of the issues before does not mean that they
10 can avoid a substantive discussion about those issues in a subsequent meet and confer.
11 *See Johnson v. U.S. Bancorp*, No. C11-02010 RAJ, 2012 WL 6726523, at *2 n.5 (W.D.
12 Wash. Dec. 27, 2012). Simply put, this Court believes that Plaintiff has given the meet
13 and confer requirement short shrift. This is particularly highlighted by Plaintiff’s
14 complete failure to discuss the only remaining discovery issue, Ms. Ruettgers’ documents
15 and communications, in any of their telephonic meet and confers.³ *See* Dkt. # 61 at 10.

16 The Court believes that had the Parties adequately met and conferred, then they
17 could have resolved the vast majority of their discovery dispute without this Court’s
18 intervention. This belief is borne out by the Parties’ resolution of several of the issues
19 raised in the initial Motion to Compel without this Court’s intervention. *See* Dkt. # 63-5
20 (Handler Decl.) Ex. E (June 18, 2015 email indicating willingness to amend discovery
21 responses and privilege log and interest in continuing dialogue over its adequacy); Dkt. #
22 63-7 (Handler Decl.) Ex. G (Defendant’s production of supplemental production of
23 documents and third – and apparently inoffensive – privilege log in August 2015). In
24 fact, the Court notes that Plaintiff received an amended privilege log – the subject of

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26 ³ The only mention of Ms. Ruettgers in all of the correspondence is a single line buried in an
27 email dated June 10, 2015. *See* Dkt. # 46-10 (Moore Decl.) Ex. J at 7 (“We also note the
28 complete absence of documents sent to/from Ms. Laura Ruettgers, the outside attorney that
Ironshore used for much of the claims handling that occurred in this case.”).

1 much of Plaintiff’s Motion to Compel – before the briefing on that motion had even
2 completed.

3 The Court will take the opportunity to advise the Parties of the necessity of
4 meaningfully cooperating in discovery. What this means is actively meeting and
5 conferring regarding discovery issues before bringing any concerns to the attention of the
6 Court. In order for the Parties to engage in meaningful, cost-effective discovery, they
7 must cooperate in accordance with the spirit and purposes of the Rules. *See Oracle USA,*
8 *Inc. v. SAP AG*, 264 F.R.D. 541, 543-44 (N.D. Cal. 2009). The Court strongly
9 encourages the Parties to promptly meet their respective discovery obligations without
10 resort to motion practice and advises them that “it would be wise for the parties to
11 consider the letter and spirit of the Rules regarding discovery and engage in open,
12 cooperative, meaningful and efficient discovery practices.” *Rivers v. Walt Disney Co.*,
13 980 F. Supp. 1358, 1360 n.3 (C.D. Cal. 1997).

14 It is the Court’s sincere hope that cooler heads will prevail after such a meeting
15 and any future filings will avoid the hyperbole set forth in some of the Parties’ filings.
16 *See* Dkt. # 51 at 2 (“These claims are inaccurate at best”), 4 (“While this position borders
17 on the unbelievable...”); Dkt. # 64 at 2 (“That claim is demonstrably false”), 4 n.2 (“This
18 claim is completely meritless”) (emphases in original). Perhaps if the Parties truly
19 attempted to cooperate – as this Court’s Local Rules contemplate (*see* Local Rules W.D.
20 Wash. Introduction (“the judges of this district are very concerned about professionalism
21 among attorneys, especially in the conduct of discovery”); *cf. Quinstreet, Inc. v.*
22 *Ferguson*, No. C08-5525RJB, 2008 WL 5102378, at *2 (W.D. Wash. Nov. 25, 2008)
23 (“Parties are urged to exercise civility in their dealings with one another and use restraint
24 in the manner in which they refer to one another in the pleadings.”)) – then some of this
25 dispute may have been avoided (*see* Dkt. # 61 at 7-9, Dkt. # 64 at 2-5 (arguing over the
26 now-mythic meet and confer sessions between the parties)).

1 Nevertheless, if the Parties are truly unable to agree in the face of a future
2 discovery dispute, the Court refers the Parties to the Court’s expedited procedures set
3 forth in Local Rule 37(b) as an alternative. Finally, the Court cautions that it will not
4 abide any future discovery motions that fail to comply with this Court’s rules. Plaintiff’s
5 Motion for Fees is **DENIED**.

6 b. Plaintiff’s Motion to Compel

7 Based on this Court’s review of the record, the only matters remaining for this
8 Court’s determination relate to documents created by or communications with an
9 individual named Laura Ruetters. As best as this Court can tell, Plaintiff’s Motion
10 relates to three of its discovery requests: its Interrogatory No. 2, and Requests for
11 Production Nos. 2 and 9 to Defendant. *See* Dkt. # 46-6 (Moore Decl.) Ex. F.

12 i. *Procedural Requirements*

13 Before the Court proceeds to the merits of the instant discovery dispute, Defendant
14 argues that several procedural irregularities in Plaintiff’s Motion should cause it to be
15 denied or stricken. *See* Dkt. # 47 at 4-5. Specifically, Defendant claims that the Motion
16 lacks a certification that Plaintiff met and conferred with Defendant on these issues and
17 violates this Court’s formatting rules. For its part, Plaintiff admits its noncompliance
18 with this Court’s rules (*see* Dkt. # 51 at 2 n.1), but nevertheless argues that it adequately
19 met and conferred with Defendant (*see* Dkt. # 51 at 2-3 (citing Dkt. # 46 (Moore Decl.)
20 Exs. H-J). The Court has already explained that Plaintiff did not do so. Nevertheless, the
21 Court will consider the only remaining issue because it believes doing so will further this
22 case.

23 ii. *Work Product Doctrine and the Attorney-Client Privilege For Ms.
24 Ruetters’ Documents*

25 Defendant claims that documents relating to Ms. Ruetters are subject either to
26 attorney work-product protection or the attorney-client privilege.

27 Defendant retained Ms. Ruetters on January 30, 2013. *See* Dkt. # 50 (Ruetters
28 Decl.) ¶ 2. Defendant explains that it “retain[ed] Ms. Ruetters as coverage counsel for
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1 Ironshore to provide the company with legal advice as to its own potential liability,
2 including an immediate second-look at Ironshore’s Policy No. 001264600 (and its
3 renewal policy), with the goal of avoiding litigation being filed by Cedar Grove against
4 Ironshore.” *See* Dkt. # 49 (Krigstin Decl.) ¶ 9. The reason for taking this step,
5 Defendant’s senior vice president Dawn Krigstin explains, is that she had been informed
6 that Plaintiff had sued its predecessor insurer while the underwriting of the policies was
7 still taking place. *See id.* ¶ 3. Plaintiff’s attorney in that suit was Plaintiff’s counsel here:
8 Mr. Moore. *See id.*; Dkt. # 48 (Handler Decl.) Ex. A at 5-24. Ms. Krigstin explains that
9 she sought Ms. Ruetters’s advice because Mr. Moore had requested that he be appointed
10 as defense counsel for Plaintiff in the underlying lawsuits, which is unusual, and had
11 negotiated the underwriting of the policy, which was unusual. *See id.* ¶¶ 4-6. Believing
12 that Plaintiff (and Mr. Moore) was unusually litigious, Ms. Krigstin decided to retain
13 outside counsel. *See id.* ¶¶ 6-11. Based on her interactions with Plaintiff and Mr. Moore,
14 the “threat or implied threat of litigation” between Plaintiff and Defendant colored “the
15 creation of every communication I prepared for Ironshore or obtained from Ironshore’s
16 outside counsel, but especially after Cedar Grove’s first adversarial conference call with
17 me on February 1, 2013.” *Id.* ¶ 12.

18 Ms. Ruetters states that her “role as Ironshore’s retained counsel was not to
19 handle, process, or evaluate the Underlying Actions which had been filed against Cedar
20 Grove.” *See* Dkt. # 50 (Ruetters Decl.) ¶ 2. Instead, her immediate role “was to assist
21 my client Ironshore by providing legal advice and counsel regarding its liability for
22 insurance coverage or extra-contractual claims asserted or potentially asserted by Cedar
23 Grove against Ironshore.” *Id.* The potential for litigation, she asserts, “appeared to be a
24 significant and potentially imminent possibility from the outset of [her] representation.”
25 *Id.* ¶ 4. From then on, Ms. Ruetters provided Defendant with legal advice “with respect
26 to its proposed application of the deductible amounts in relation to the reservation of
27 rights defense that Ironshore had agreed to provide Cedar Grove.” *Id.* ¶ 5. From April

1 2013 to September 2013, she provided advice “with respect to the legal rights and
2 obligations of carriers with respect to choice of defense counsel.” *Id.* After Defendant
3 received Plaintiff’s notice of intent to sue in September 2013, Ms. Ruetters provided
4 further legal advice “regarding the law and strategy relating to its potential liability for
5 Cedar Grove’s noticed assertions, as well as insurance coverage and any further extra-
6 contractual claims potentially being asserted by Cedar Grove.” *Id.* ¶ 7.

7 After Defendant received Plaintiff’s notice of intent to sue letter, Ms. Ruetters
8 communicated with Plaintiff’s counsel, Mr. Moore, regarding the allegations in the letter.
9 *See id.* ¶ 7, Ex. B. She also, apparently, received Mr. Moore’s unsolicited emails
10 submitting third party vendors’ invoices from February 2014 to April 2014 until she told
11 Mr. Moore to send those invoices to Defendant directly. *See id.* ¶ 9; *see also* Dkt. # 46
12 (Moore Decl.) Exs. C, D. Ms. Ruetters provided counsel regarding the timing of
13 Defendant’s payments during this time – a task it seems she continued through
14 September 2014. *See id.*; Dkt. # 46-7 (Moore Decl.) Ex. G. From May 2014 to August
15 2014, Ms. Ruetters provided counsel regarding “the apparent exhaustion of its primary
16 policy . . . and the transition to Ironshore’s excess policy.” *Id.* ¶ 10. Finally, Ms.
17 Ruetters explains that after this case was filed, she provided advice regarding
18 Defendant’s “potential liability for insurance coverage and for extra-contractual claims.”
19 *Id.* ¶ 11.

20 Ms. Ruetters explicitly disclaims (1) examining any witnesses or communicating
21 with Plaintiff’s defense counsel or its consultants and experts in the underlying lawsuits;
22 (2) adjusting the value of Plaintiff’s defense costs or issuing payments for defense costs;
23 and (3) evaluating or processing the underlying actions filed against Plaintiff. *Id.* ¶ 12;
24 *see also id.* ¶ 4 (“the scope of my representation did not include making, and I did not
25 make, the substantive decisions on whether or not to provide Cedar Grove with a defense
26 in the Underlying Actions pursuant to Ironshore’s reservation of rights to deny
27 coverage”).

1 Ms. Krigstin confirms Ms. Ruettgers' role, stating that from the moment Plaintiff
2 submitted its claim to Defendant in January 2013, only its claims representatives
3 "investigated, evaluated and processed payments . . . relating to Cedar Grove's claims."
4 See Dkt. # 49 (Krigstin Decl.) ¶ 13. Those claims representatives were Tamara Ashjian,
5 Ms. Krigstin, "Mr. Thomas A. Zawistowski, AIC, and Ms. Michelle Duluc." *Id.* Indeed,
6 Defendant "has not instructed Cedar Grove or its counsel to contact its coverage counsel
7 Ms. Ruettgers instead of its claims representatives." *Id.*

8 Federal jurisdiction in this case is based on diversity. See First Am. Compl. ¶ 5.
9 As such, "Washington law applies to claims of attorney-client privilege, while federal
10 law governs assertions of work-product protection." See *Schreib v. Am. Family Mut. Ins.*
11 *Co.*, 304 F.R.D. 282, 285 (W.D. Wash. 2014) (citing *Lexington Ins. Co. v. Swanson*, 240
12 F.R.D. 662, 666 (W.D. Wash. 2007)); see also Fed. R. Evid. 501. "A party withholding
13 materials under an assertion of privilege has the burden of proving that the withheld
14 materials are actually privileged." *Aecon Bldgs., Inc. v. Zurich N. Am.*, 253 F.R.D. 655,
15 659-660 (W.D. Wash. 2008) (citing *Heath v. F/V Zolotoi*, 221 F.R.D. 545, 549 (W.D.
16 Wash. 2004)).

17 "The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3),
18 protects 'from discovery documents and tangible things prepared by a party or his
19 representative in anticipation of litigation.'" *In re Grand Jury Subpoena (Mark Torf/Torf*
20 *Envtl. Mgmt.)*, 357 F.3d 900, 906 (9th Cir. 2003) (quoting *Admiral Ins. Co. v. United*
21 *States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989)). "However, the work product
22 doctrine creates only qualified protection of such materials: a party may only obtain
23 discovery of these items upon a showing that they are relevant and there is a substantial
24 need for the materials to prepare its case and the inability to obtain the materials or their
25 substantial equivalent by other means." *Schoenmann v. Fed. Deposit Ins. Corp.*, 7 F.
26 Supp. 3d 1009, 1013 (N.D. Cal. 2014) (citing Fed. R. Civ. P. 26(b)(3)(A)(i), (ii)).

1 Generally speaking, in order to qualify for the protection, “documents must: (1) be
2 ‘prepared in anticipation of litigation or for trial’ and (2) be prepared ‘by or for another
3 party or by or for that other party’s representative.’” *United States v. Richey*, 632 F.3d
4 559, 567 (9th Cir. 2011) (quoting *In re Grand Jury Subpoena*, 357 F.3d at 907).
5 “[W]here a document serves a dual purpose, that is, where it was not prepared
6 exclusively for litigation, then the ‘because of’ test is used.” *Id.* Such documents “are
7 deemed prepared because of litigation if ‘in light of the nature of the document and the
8 factual situation in the particular case, the document can be fairly said to have been
9 prepared or obtained because of the prospect of litigation.’” *Id.* (quoting *In re Grand
10 Jury Subpoena*, 357 F.3d at 907). Courts must examine the totality of the circumstances
11 in determining “whether whether the ‘document was created because of anticipated
12 litigation, and would not have been created in substantially similar form but for the
13 prospect of litigation.’” *Id.* (quoting *In re Grand Jury Subpoena*, 357 F.3d at 908).

14 Based on the Court’s review of the record, it seems clear that Defendant was
15 motivated to hire Ms. Ruetters due to what it believed to be unusual circumstances
16 surrounding the claim for coverage. In her capacity, Ms. Ruetters prepared all
17 documents with an eye toward litigation that seemed likely, if not inevitable, even at
18 early stages of the relationship. All of the documents she describes “can be fairly said to
19 have been prepared or obtained because of the prospect of litigation.” *See Richey*, 632
20 F.3d at 567. Many of the communications between Ms. Ruetters and Defendant
21 highlight this. For example, one email at the very beginning of Ms. Ruetters’ retention
22 bears the subject line “RE: Cedar Grove: MTD outline.” *See Dkt. # 63-7 (Handler Decl.)*
23 Ex. G at 5. Strategy for a motion to dismiss plainly anticipates litigation and clearly was
24 prepared by Ms. Ruetters for Defendant. That is subject to work product protection.

25 Plaintiff does not attempt to rebut Defendant’s evidence of Ms. Ruetters’ role.
26 Instead, in concluding that the documents Ms. Ruetters prepared are necessarily the
27 “written claims file documenting [Defendant’s] actions” (or that those files are being

1 improperly withheld based on privilege), Plaintiff focuses on what Ms. Ruetters does
2 not explicitly disclaim, contends that “[t]hose documents simply *must* exist,” and asserts
3 that Defendant has not yet produced such documents.⁴ See Dkt. 51 at 6. None of this
4 goes toward actually rebutting Ms. Ruetters’ role. And Defendant has shown that many
5 of the documents she prepared were actively with an eye toward imminent litigation.

6 Additionally, to the extent that Plaintiff argues that an imminent threat of litigation
7 could not occur until the instant case was filed (*see* Dkt. # 51 at 4), that argument is
8 incorrect. Documents created prior to the filing of the case – or, more pertinent to this
9 case, the filing of the notice of intent to sue letter – clearly may be protected in certain
10 circumstances. See *Kifer v. Am. Fam. Mut. Ins. Co.*, No. 13-6085 RJB, 2015 WL
11 2085618, at *3 (W.D. Wash. May 5, 2015). And Defendant persuasively shows that in
12 July 2011, long before Plaintiff first submitted its claims to Defendant, Plaintiff had
13 already initiated litigation against a similar insurer for complaints regarding the odors
14 emanating from its plant, meaning that Defendant had real reasons to believe litigation
15 could and would occur. See Dkt. # 48 (Handler Decl.) Ex. A. That, coupled with what
16 Ms. Krigstin believed to be unusual and adversarial requests, raised more than a mere
17 specter of impending litigation. “Litigation need not be a certainty for work product
18 protection to arise.” See *Bickler v. Senior Lifestyle Corp.*, 266 F.R.D. 379, 383 (D. Ariz.
19 2010); *see also Arfa v. Zionist Org. of Am.*, No. CV 13-2942 ABC SS, 2014 WL 815496,
20 at *4 (C.D. Cal. Mar. 3, 2014) (requiring “an identifiable prospect of litigation or specific
21 claims have already arisen” for the rule to apply); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D.
22 615, 635 (D. Nev. 2013). Here, while litigation may not have been a certainty at the time

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24 ⁴ In addressing this argument, the Court is tempted to simply invoke Occam’s razor – “that in
25 explaining anything, no more assumptions should be made than necessary.” See *Am. Civil*
26 *Liberties Union v. Clapper*, 804 F.3d 624 n.2 (2d Cir. 2015) (quoting Oxford English Dictionary
27 (3d ed. 2004)). Perhaps it is too much of an assumption to think that Defendant seriously trying
28 to mislead both Plaintiff and the Court by simply waving its hand and stating that “these aren’t
the droids you’re looking for.” *Star Wars: Episode IV – A New Hope* (Lucasfilm 1977). A
simpler explanation is that many of those documents do exist – and Plaintiff has received them
(and would have received them) without this Court’s intervention. See Dkt. # 54 at 6.

1 the relationship began, there was a fair prospect of such litigation, particularly as Plaintiff
2 had already brought suit against its predecessor insurer regarding similar issues. *See*
3 *generally* Dkt. # 48 (Handler Decl.) Ex. A.

4 Finally, the Court finds that Plaintiff has not presented a substantial need for the
5 documents prepared by Ms. Ruettgers or that it cannot obtain its substantial equivalent by
6 other means. *See In re Grand Jury Subpoena*, 357 F.3d at 906. For one, Plaintiff cannot
7 demonstrate that it has substantial need to examine these documents because they are
8 “claims handling documents” because the evidence Defendant has put forth strongly
9 suggests that Ms. Ruettgers’ files are not such ordinary “claims handling documents.”
10 *See* Dkt. # 51 at 5. Second, even assuming they were, it is unclear whether the claims
11 handling documents Plaintiff has since received constitute such a substantial equivalent.

12 The Court further finds that Ms. Ruettgers’ communications with Defendant are
13 also likely covered by Washington’s⁵ attorney-client privilege. “The attorney-client
14 privilege protects confidential communications between attorneys and clients.” *Aecon*
15 *Bldgs.*, 253 F.R.D. at 660. Based on a review of the most recent privilege log, many, if
16 not all, of the entries involving Ms. Ruettgers qualify. *See* Dkt. # 63-7 (Handler Decl.)
17 Ex. G. But the inquiry does not end there. Under Washington law, “in first-party bad
18 faith insurance suits, *Cedell* creates a ‘presumption that there is no attorney-client
19 privilege relevant between the insured and the insurer in the claims adjusting process, and
20 that the attorney-client and work product privileges are generally not relevant.’” *MKB*
21 *Constructors v. Am. Zurich Ins. Co.*, No. C13-0611JLR, 2014 WL 2526901, at *4 (W.D.
22 Wash. May 27, 2014) (quoting *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 246-
23 47 (Wash. 2013)). However, “an insurer may overcome the presumption that the
24 privilege is inapplicable if it can show that its attorney was not involved in ‘investigating,
25 and evaluating, or processing the claims.’” *See Everest Indem. Ins. Co. v. QBE Ins.*

26
27 ⁵ Because the Court finds that Ms. Ruettgers’ communications with Defendant pass muster under
28 Washington law, it declines to address whether another state has a more “significant
relationship” to those communications.

1 *Corp.*, 980 F. Supp. 2d 1273, 1279 (W.D. Wash. 2013) (quoting *Cedell*, 295 P.3d at 246).
2 This may be done by presenting “evidence that the attorney was instead ‘providing the
3 insurer with counsel as to its own liability.’” *Id.* In federal court, this may be done by
4 affidavit, rather than through the procedural *in camera* review process. *See Indus. Sys. &*
5 *Fabrication, Inc. v. W. Nat. Assur. Co.*, No. 2:14-CV-46-RMP, 2014 WL 5500381, at *2
6 (E.D. Wash. Oct. 30, 2014).

7 Both Ms. Ruettgers and Defendant’s representative explicitly disclaim many, if
8 not all, of the “quasi-fiduciary” tasks of the insurer. For example, Ms. Ruettgers
9 disclaims doing anything to “handle, process, or evaluate the Underlying Actions which
10 ahd been filed against Cedar Grove.” *See* Dkt. # 50 (Ruettgers Decl.) ¶ 2. She “did not
11 adjust the value of Cedar Grove’s defense cost claims or issue payments for defense
12 costs, and accordingly, [she] did not evaluate or process the Underlying Actions filed
13 against cedar Grove.” *Id.* ¶ 12. Ms. Ruettgers also disclaims “examin[ing] any witnesses
14 under oath or communicat[ing] with defense counsel or its consultants or experts, such as
15 the third party vendors used by defense counsel in the underlying lawsuits against Cedar
16 Grove.” *Id.* In other words, Ms. Ruettgers has disclaimed precisely the “quasi-fiduciary
17 tasks of investigating and evaluating or processing the claim” addressed in *Cedell*. 295
18 P.3d at 246.

19 Plaintiff has not presented any evidence to show that Ms. Ruettgers has actually
20 engaged in such tasks, mostly relying on conjecture to claim that Ms. Ruettgers must
21 have been involved in the acts allegedly constituting bad faith in this action. *See* Dkt. #
22 51 at 6 n.8. This is not enough. Defendant has adequately shown that the
23 communications sought to be protected are subject to the attorney-client privilege.

24 Accordingly, the Court will **DENY** Plaintiff’s Motion to Compel. Dkt. # 45.

25 **V. STIPULATED MOTION TO EXTEND**

26 Finally, the Court has reviewed the Parties’ stipulation. *See* Dkt. # 70. Having
27 reviewed the stipulation, the Court does not believe that any extension of time is

1 necessary. The Court is optimistic that the Parties can adequately complete their
2 preparations within the current schedule. The Parties have at least two months to
3 exchange their initial expert witness reports, over four months to complete discovery, and
4 over five months to prepare dispositive motions. *See* Dkt. # 69. Additionally, the Parties
5 have nearly eight months to prepare for trial. *Id.* The Court finds no good cause to
6 extend those dates at this time.

7 VI. CONCLUSION

8 For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Compel (Dkt.
9 # 45) and **DENIES** Plaintiff's Motion for Fees (Dkt. # 54). Additionally, the Court
10 **DENIES** the Second Stipulated Motion to Extend Trial Date and Related Dates. All
11 dates remain as set. Dkt. # 70.

12 Finally, Plaintiff's Motion to Seal (Dkt. # 57) remains pending. As set forth above
13 in footnote 1 of this Order, the Parties are to meet and confer **within fourteen (14) days**
14 of this Order to discuss whether alternatives to sealing – such as redactions – may resolve
15 confidentiality concerns. Plaintiff is to file a **written statement not to exceed three (3)**
16 **pages within seven (7) days** of that conference addressing those issues.

17
18 Dated this 23rd day of December, 2015.

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21 

22 The Honorable Richard A. Jones
23 United States District Court
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