SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Barbara Jaffe Justice PART 12

National Union Fire

-v-

Trans Canada Energy USA, Inc

INDEX NO. 650515/10

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 63-68

Answering Affidavits — Exhibits ____ No(s). 76-78

Replying Affidavits ____ No(s). 81

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/15/2013

BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 12

---x

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED, ACE INA INSURANCE COMPANY, and ARCH INSURANCE COMPANY,

Index No. 650515/2010

Motion Seq. Nos. 003- 004

DECISION AND ORDER

Plaintiffs,

-against-

TRANSCANADA ENERGY USA, INC. and TC RAVENSWOOD SERVICES CORP.,

Defendants.

---x

TC RAVENSWOOD, LLC,

Index No. 400759/2011

Plaintiff,

Motion Seq. Nos. 003-005

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PENNSYLVANIA (a/k/a AIG, n/k/a Chartis), ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED, ACE INA INSURANCE, AND ARCH INSURANCE COMPANY, and FACTORY MUTUAL INSURANCE COMPANY,

Defendants.

---x

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By notice of motion dated May 11, 2012, Factory Mutual Insurance Company ("FMIC")

and Chartis, Ace INA Insurance, and Arch Insurance Company (collectively, the "market insurers", with FMIC, the "insurance companies") move to partially confirm and partially reject the special referee's report entered on April 20, 2012. TransCanada Energy USA, Inc., TC Ravenswood Services Corp., and TC Ravenswood, LLC (collectively, "TransCanada") oppose. By notice of motion dated May 11, 2012, TransCanada moves to confirm the special referee's report entered on April 20, 2012. The insurance companies oppose.

I. BACKGROUND

On September 12, 2008, Unit 30, a steam turbine power generator at Ravenswood Generating Station in Queens, NY, shook violently, and was shut down. There was a crack in the generator's rotor. Unit 30 remained out of service until May 11, 2009. On September 16, 2008, TransCanada gave the insurance companies notice of the loss, making claims for repair costs and business interruption losses under its insurance policy.

To investigate the claims, the insurance companies hired experts, including insurance adjusters from Crawford Global Technical Services, and attorneys at firms Clausen Miller and Podvey Meanor to assist in the investigation and coverage determination. All of the insurance companies except FMIC denied coverage on June 2, 2010 and together filed a declaratory judgment action that same day. FMIC denied coverage on July 2, 2010 and was sued by TransCanada soon after.

II. PROCEDURAL BACKGROUND

On January 6, 2012, TransCanada moved to compel the production of documents that the insurance companies claimed were protected work product and attorney-client privileged communications. Almost all of the documents were created before coverage was denied. On

February 1, 2012, the insurance companies cross-moved for a protective order, and on March 14, 2012, the dispute was referred to a special referee to hear and report who, on April 18, 2012, conducted a hearing, reviewed a selection of the disputed documents *in camera*, considered the parties's legal arguments, and recommended that "any documents that pre-date the rejection of the claim are not subject to the privilege." (April 18, 2012 Hearing Tr. at 54 [Doc 60 NYSCEF]). The referee also recommended that all deposition questions related to reserves and reinsurance be barred, and that any dollar amounts and hours be redacted from the billing records.

On May 11, 2012, the insurance companies moved to reject and confirm partially confirm the referee's recommendations, and TransCanada moved to confirm them. Soon thereafter, the parties submitted oppositions and replies. On April 19, 2013, TransCanada sought to supplement their briefing with additional information. On June 7, 2013, this court issued an interim order directing the parties to submit the disputed documents for an *in camera* review, and at a June 12, 2013 conference, TransCanada indicated that the insurance companies had added approximately 140 documents to the privilege log, each dated before the denial and subject to the same issues presented in the motion. The parties were instructed to provide these documents for *in camera* review, and to submit any additional arguments by letter. TransCanada submitted their letter motion on June 26, 2013. The insurance companies opposed on July 10, 2013, and TransCanada submitted a reply on July 17, 2013. The documents were provided for *in camera* review in letters dated June 19, 2013, June 20, 2013, and July 17, 2013.

III. CONTENTIONS

TransCanada contends that the referee's recommendation is correct in that all documents are pre-denial, that documents created before an insurance company denies coverage are never

protected attorney-client communications or work product, and that even if the documents were protected, the protection was waived when the insurance companies disclosed the documents to each other.

Although the insurance companies contend that the recommendation should be disregarded because the referee applied the wrong legal standard and failed to review all the documents, they ask that the recommendation be confirmed to the extent that he recommended redacting billing records and barring deposition questions on reinsurance and reserves. TransCanada asserts that as it withdrew the requests for reinsurance and reserve information, the issue is moot and the recommendation need not be confirmed. It asks that I consider the supplemental briefs it submitted. The insurance companies ask that I disregard them.

IV. LEGAL STANDARD

There are three categories of protected materials in the CPLR: attorney-client communications, attorney's work product, and trial preparation materials. (CPLR 3101[b], [c], [d]; *Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 376-77 [1991]). "The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed, and its application must be consistent with the purposes underlying the immunity." (*Id.*).

a. Work product and trial preparation materials

To be protected work product or trial preparation materials, documents must be prepared for, or in anticipation of, litigation. (*See Millen*, 37 AD2d 817, 817 [insurers documents are not

protected work product or trial preparation materials until insurer makes firm decision to deny coverage]; *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 574 [1st Dept 2012] [work product applies to documents prepared in anticipation of litigation]; *Plimpton v Mass. Mut. Life Ins. Co.*, 50 AD3d 532, 533 [1st Dept 2008] [documents prepared to determine whether to litigate are not trial preparation materials]; *Rosario v N. Gen. Hosp.*, 40 AD3d 323, 323-24 [1st Dept 2007] [trial preparation materials only protected if created solely for litigation]; *Mahoney v Staffa*, 184 AD2d 886, 887 [3d Dept 1992] [work product only applies if there is a specific litigation at issue]). An insurance company cannot claim documents are prepared in anticipation of litigation until it makes a firm decision to deny coverage. (*See Brooklyn Union Gas Co. v Am. Home Assurance Co.*, 23 AD3d 190, 191 [1st Dept 2005] [insurer cannot anticipate litigation until it makes a coverage decision]; *Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 99-100 [2d Dept 1986] [same]; *Millen Indus. v Am. Mut. Liab. Ins. Co.*, 37 AD2d 817, 817 [1st Dept 1971] [same]). The insurance company has the burden of demonstrating when it decided to deny coverage. (*Landmark*, 121 AD2d at 100-102). Therefore, CPLR 3101[c] and [d][2] do not bar the disclosure of materials prepared before the insurance companies made a firm decision to deny coverage.

b. Attorney-client privilege

The attorney-client privilege "is not tied to the contemplation of litigation." (*Spectrum*, 78 NY2d at 380; CPLR 3101 [b] [attorney-client privilege communications are not obtainable]). In order to claim the privilege, the party seeking to withhold a document must show that it is a

confidential communication between the attorney and the client, made in the context of legal advice or services. (*Id.*; *Matter of Priest v Hennessy*, 51 NY2d 62, 68-69 [1980]). However, "the privilege is not narrowly confined to the repetition of confidences that were supplied to the lawyer by the client." (*Spectrum*, 78 NY2d at 380). For example, an attorney-authored memorandum collecting information from third-parties, as well as the client, could be privileged if drafted to communicate legal advice. (*Id.*). An investigative report by a non-attorney, however, does not become privileged upon being sent to an attorney, although such a report may be deemed trial preparation materials. (*Id.*; *MBIA*, 93 AD3d at 574 [consultants' litigation materials protected]).

Similarly, documents prepared in the ordinary course of business are not privileged, even if drafted by an attorney. Rather, for the privilege to attach, the communication must be made primarily for the purpose of furnishing legal advice, although the privilege does not disappear merely because the communication includes non-legal matters. (*See Brooklyn*, 23 AD3d at 191). Insurance companies investigate claims and decide whether to accept or deny coverage as part of their regular business activities, and consequently, courts have consistently held that the use of attorneys to perform such work does not cloak the documents in privilege. (*See id.* [insurance coverage investigation not privileged even if performed by attorney]; *Westhampton Adult Home v Natl. Union Fire Ins. Co of Pittsburgh Pa.*, 105 AD2d 627 [1st Dept 1984] [examining witnesses under oath and supervising the investigation is part of insurance company's ordinary business and not privileged]; *see also Rosario*, 40 AD3d at 323-24 [documentation regarding insurance

disclaimer is part of insurance company's ordinary business]; *Millen*, 37 AD2d at 817 ["(T)he payment or rejection of claims is a part of the regular business of an insurance company."]).

Documents may constitute privileged attorney-client communications, even if made before the insurance company decides to deny coverage, provided that they are primarily of a legal character, and not related to an insurance company's ordinary business activities. (*See All Waste Sys. v Gulf Ins. Co.*, 295 AD2d 379, 380 [2d Dept 2002] [finding that coverage legal opinions and draft disclaimer letters are attorney-client privileged communications]). Determining whether documents fall within this limited exception is factual, and requires *in camera* review of the documents. (*Spectrum*, 78 NY2d at 378).

c. Common interest privilege

The attorney-client privilege has been extended to cover some communications disclosed to third parties because "[t]he Courts of this State have recognized that the public interest is served by shielding certain communications from litigation, rather than risk stifling them altogether, and have afforded a conditional, or qualified, privilege to a communication made by one person to another upon a subject in which both have an interest, known as a common interest privilege." (*GUS Consulting GmbH v Chadbourne & Parke LLP*, 20 Misc 3d 539, 540 [Sup Ct, NY County 2008] [ellipsis omitted], *quoting Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). The common interest privilege is not a separate privilege, but an exception to the usual rule that disclosure to a third party waives privilege. (*See Hyatt v State of California Franchise Tax Bd.*, 105 AD3d 186, 205 [2d Dept 2013]). To avoid waiver, the parties must have a common interest

that is primarily legal rather than commercial. (*Id.* at 205-06; *U.S. Bank Natl Assn v APP Intern. Finance Co.*, 33 AD3d 430, 431 [1st Dept 2006]). "The clearest indication of common interest is dual representation." (*Am. Re-Ins. Co. v U.S. Fid. Guar. Co.*, 40 AD3d 486, 491 [1st Dept 2007]). The privilege also extends "where there is a joint defense or strategy, but separate representation." (*Id.*).

Moreover, "[l]ike all privileges, the common interest rule is narrowly construed." (*GUS* 20 Misc 3d at 451; *see also Aetna Cas. and Sur. Co. v Certain Underwriters at Lloyd's London*, 176 Misc 2d 605, 612 [Sup Ct, NY County 1998], *affd* 263 AD2d 367 [1st Dept 1999]). New York courts have consistently found that it is limited to where the parties reasonably anticipate, or are currently engaged, in litigation. (*See Hyatt*, 105 AD3d at 205; *Aetna Cas.*, 176 Misc 2d at 611-12; *Hudson Val. Mar., Inc. v Town of Cortlandt*, 30 AD3d 377, 378 [2d Dept 2006]; *Yemini v Goldberg*, 12 Misc 3d 1141, 1144 [Sup Ct, Nassau County 2006]; *Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 108 [Sup Ct, NY County 2003]; *Brooklyn Navy Yard Cogeneration Ptners v PMNC*, 194 Misc 2d 331, 334 [Sup Ct, Kings County 2002]; *Parisi v Leppard*, 172 Misc 2d 951, 956 [Sup Ct, Nassau County 1997]; *see also Allied Irish Banks, PLC v Bank of Am, NA*, 252 FRD 163, 171 [SD NY 2008] [reviewing New York law and finding that common interest exception does not apply until litigation reasonably anticipated]). Consequently, while the common interest privilege is an extension of the attorney-client privilege, it follows the contours of the trial preparation materials and work product protections in that it requires litigation or its anticipation. And, an insurance company cannot claim that it

anticipates litigation until it makes a firm decision to deny coverage. (*See Brooklyn*, 23 AD3d at 191).

Therefore, although no court has addressed this specific issue, it logically follows that insurance companies must decide to deny coverage before they may invoke the common interest privilege and protect their communications with third parties from disclosure.

V. *IN CAMERA* REVIEW

a. FMIC documents

The documents reviewed *in camera* primarily relate to FMIC's, and the market insurers', investigation of Ravenswood and the turbine. They reflect that the attorneys were supervising, coordinating, and directing the investigation, including collecting documents and hiring investigators, such as Crawford. The attorneys also prepared reports summarizing the results of the investigation. None of these documents are privileged. Many are not attorney-client communications, and those that involve the investigation of claims do not constitute legal advice. The attorneys were primarily working to determine whether to deny coverage, an ordinary business activity for an insurance company. Moreover, most of these documents pre-date the decision to deny coverage, so they are not protected work product or trial preparation materials.

Some of the documents, however, contain privileged material that need not be disclosed. FMPRIV-002018, FMPRIV-002019, FMPRIV-002153, and FMPRIV-002166 through FMPRIV-002168 contain communications between an attorney and client to obtain legal advice, and thus are protected. FMPRIV-002131 through FMPRIV-002142, FMPRIV-002154 and FMPRIV-

002160 are draft denial letters, which are protected trial preparation materials because FMIC decided to deny coverage before they were drafted, as evidenced by the documents reviewed. Similarly, FMPRIV-002121 through FMPRIV-002130, FMPRIV-002146, and FMPRIV-002147 were created after coverage was denied, and constitute protected trial preparation materials.

b. Market insurer documents

The market insurers collectively hired the same attorneys to both handle the investigation and assist with the coverage determination. The market insurers are independent from each other. Each has a separate percentage of the insurance coverage at issue and is a separate company. Notably, one of the market insurers chose to settle while the others continue to litigate. The market insurers are, therefore, third parties to each other.

Before denying TransCanada's claim, the market insurers' counsel communicated freely and jointly with all of the market insurers. No attempt was made to segregate the communications or keep them confidential from each other, and they produced no joint defense agreement, or similar evidence, that explains the terms and conditions of this joint representation. The market insurers also disclosed documents to FMIC, who has separate counsel.

The documents show that the market insurers conflated the decision to file a declaratory judgment action and the decision to deny coverage, and that they were considering coverage until just before the denial letter was issued and lawsuit filed. It is the market insurer's burden to prove when they decided to deny coverage. They have not submitted evidence stating that a firm decision to deny coverage was made earlier, and the documents submitted for review do not

clarify the issue. Therefore, any documents created before the denial letter was sent are not protected work product or trial preparation materials, and any attorney-client privilege was waived when the documents were disclosed to third parties because the common interest privilege exemption does not apply. The market insurers have not met their burden of proving that any of the documents they submitted for *in camera* review are protected from disclosure.

VI. CONCLUSION

It is thus,

ORDERED, that TransCanada's motion for leave to file supplemental papers is denied; it is further

ORDERED, that the special referee's recommendation to bar deposition questions regarding reserves and reinsurance is confirmed; it is further

ORDERED, that the special referee's recommendation that the parties redact hour and rate information from billing records is confirmed; it is further

ORDERED, that the insurance companies produce to TransCanada all documents not protected from disclosure in accordance with the decision above within 5 days of this order.

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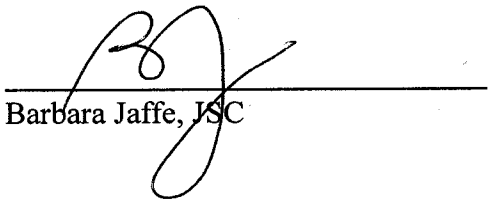

Barbara Jaffe, JSC

DATED: August 15, 2013
New York, New York