

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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GREAT AMERICAN INSURANCE COMPANY OF :  
NEW YORK, AXA INSURANCE COMPANY, and :  
CERTAIN UNDERWRITERS AT LLOYD'S, :  
LONDON AND LONDON MARKET COMPANIES :  
SUBSCRIBING TO POLICY NUMBER :  
B0823MA1402182, :

15 Civ. 3976 (JSR)

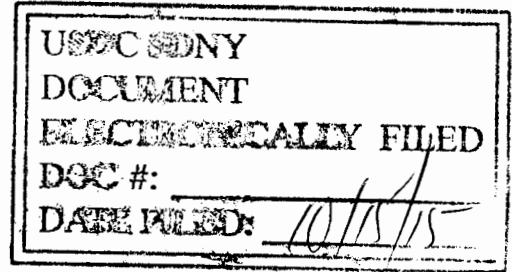
MEMORANDUM ORDER

Plaintiffs,

-v-

CASTLETON COMMODITIES INTERNATIONAL  
LLC and CASTLETON COMMODITIES TRADING  
(CHINA) CO. LTD.,

Defendants.  
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JED S. RAKOFF, U.S.D.J.

On May 22, 2015, plaintiffs Great American Insurance Company of New York, AXA Insurance Company, and Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy Number B0823MA1402182 filed a declaratory judgment action against defendants Castleton Commodities International LLC and Castleton Commodities Trading (China) Co. Ltd., seeking a determination that plaintiffs bore no liability for defendants' alleged loss. See Complaint, Dkt. 1. On June 26, 2015, defendants filed an answer and counterclaimed for breach of contract and breach of the duty of good faith and fair dealing. See Answer, Affirmative Defenses and Counterclaim, Dkt. 15. Each side now seeks to compel discovery of documents from its adversaries over which, it argues, privilege has been improperly

asserted. The Court, having reviewed the parties' submissions as well as the documents submitted for the Court's in camera review, hereby grants in part and denies in part each of the parties' applications.

By way of background, on September 14, 2015, defendants filed a motion to compel discovery of documents over which, in their view, plaintiffs had improperly asserted privilege. See Counterclaim-Plaintiffs' Memorandum in Support of Their Motion to Compel ("Defs. Br."), Dkt. 24. Plaintiffs responded on September 23, 2015, enclosing unredacted copies of the documents that defendants had identified for the Court's in camera review, along with explanations for the plaintiffs' claims of privilege in these cases. See Plaintiffs' Joint Memorandum of Law in Opposition to Defendants' Motion to Compel ("Pl. Opp. Br."), Dkt. 25. Defendants further supplemented their motion on October 7, 2015 in light of certain deposition testimony, and plaintiffs further responded on October 10, 2015. See Counterclaim-Plaintiffs' Supplemental Memorandum in Support of Their Motion to Compel ("Defs. Suppl. Br."), Dkt. 28; Plaintiffs' Joint Response to Defendants' Supplemental Memorandum of Law ("Pl. Suppl. Br."), Dkt. 31.

As for the plaintiffs' effort to compel discovery, that application was made in a joint telephone conference on September 25, 2015, at which time the Court instructed defendants to provide their

privilege and redaction logs. In an email dated October 2, 2015, the Court directed the defendants to produce for the Court's in camera review 25 documents that the Court randomly selected from these logs, in addition to 25 documents that plaintiffs had identified as improperly designated "privileged." Defendants produced these documents to the Court in camera on October 6, 2015.

**Defendants' Claim That Plaintiffs Have Improperly Asserted Privilege**

Defendants argue that plaintiffs have improperly asserted (1) attorney-client privilege, (2) work-product privilege, and (3) joint defense or "common interest" privilege. See Defs. Br. at 2-17. Defendants also contend that plaintiffs have improperly withheld reserve or reinsurance information, Defs. Br. at 15-17, and that plaintiff AXA produced privilege and redaction logs in an untimely fashion, warranting the Court's in camera review of entries on AXA's privilege and redaction logs. See Defs. Suppl. Br. at 4. The Court addresses each of these claims in turn.

Attorney-Client Privilege

Discussions between plaintiffs and their attorneys in advance of the plaintiffs' denial of coverage on May 22, 2015 are not privileged unless they are "primarily or predominantly a communication of a legal character," Brooklyn Union Gas Co. v. Am. Home Assur. Co., 23 A.D.3d 190, 191, 803 N.Y.S.2d 532, 534 (N.Y. App. Div. 2005), as distinct from routine insurance business activities such as

investigation into the circumstances from which the claim arose or insurance policy interpretation. See, e.g., Stephenson Equity Co. v. Credit Bancorp., Ltd., No. 99 Civ. 11395, 2002 WL 59418, at \*3 (S.D.N.Y. Jan. 16, 2002); Brooklyn Union Gas Co., 23 A.D.3d at 191. Plaintiffs must therefore produce, for example, documents involving communication with counsel who are performing investigative functions (such as GAIC0001621-28, GAIC0002280-86, Great American's Exhibit 8, EXCTRL00000420-22, and ASC00000420-22).

#### Work-Product Privilege

Regarding plaintiffs' assertion of work-product privilege, Federal Rule of Civil Procedure 26(b)(3) provides in relevant part that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) . . ." Fed. R. Civ. P. 26(b)(3)(A). "[T]he party seeking to withhold a document" pursuant to the work product doctrine "must demonstrate that the document it seeks to withhold was created 'because of' the anticipation of litigation." Stephenson Equity Co., 2002 WL 59418 at \*2. Defendants' position is that plaintiffs could anticipate litigation only beginning "the week of" May 22, 2015, the date when plaintiffs denied coverage. Defs. Suppl. Br. at 1. Plaintiffs' position seems to be that they could anticipate litigation beginning

at least on April 23, 2015, when defendants provided their proof of loss. See Pl. Opp. Br. at 6, 12.

The Court holds that in the context of insurance companies' work product assertions, "if a declination decision has been made, documents subsequently drafted are presumed to have been created in anticipation of litigation; if the claim has not yet been rejected the documents are part of the claim investigation process and are not work product." Amoco Oil Co. v. Hartford Acc. and Indem. Co., 93 Civ. 7295, 1995 WL 555696 at \*1 (S.D.N.Y. Sept. 18, 1995). The Court will presume, therefore, that documents generated before May 22, 2015 are not covered by the work product doctrine. However, the Court notes that some documents generated between April 23, 2015 and May 22, 2015 may overcome that presumption as a consequence of their detailed discussion of strategic aspects of litigation. Examples include EXTRL00000534, a memorandum containing attorney advice dated May 13, 2015, and EXHCCTRL00000906, an email containing attorney advice dated May 15, 2015. However, the Court will not accept work product assertions from plaintiffs for documents generated earlier than April 23, 2015.<sup>1</sup>

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<sup>1</sup>The Court further declines to apply a broadened "attorney work product" privilege under New York state law, CPLR § 3101(c), to plaintiffs' earlier communications, especially given the narrowness of the provision's scope. See "Scope of 'Work Product' Under Subdivision (c)," McKinney's CPLR § 3101:28; see also Wickham v. Socony Mobil Oil Co., 45 Misc. 2d 311, 312, 256 N.Y.S. 2d 342, 344 (N.Y. Sup. Ct. 1965) ("Reports of an attorney to his client as to the progress of pending litigation or advice

Common Interest Doctrine

Plaintiffs assert a joint defense or "common interest" privilege on the grounds that the insurers share a "common legal interest," memorialized in a Joint Defense Agreement on April 13, 2015. See Pl. Opp. Br. at 9-11. The Court notes defendants' opposing argument that plaintiffs do not have a common legal interest because, among other factors, the interests of primary insurers Great American and AXA conflicted with those of the excess London insurers. See Defs. Suppl. Br. at 2-3 nn.1-2. The Court is willing to assume that plaintiffs are entitled to the benefits of the common interest doctrine for the purposes of not waiving other forms of privilege by sending messages among themselves and their counsel. However, the Court does not view the common interest doctrine as an "independent source of privilege or confidentiality." Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York, 284 F.R.D. 132, 139 (S.D.N.Y. July 3, 2012). Thus, "[i]f a communication is not protected by the attorney-client privilege or the attorney work-product doctrine, the common interest doctrine does not apply." Fireman's Fund Ins., 284 F.R.D. at 139. Therefore, to the extent a given communication is not already covered by another privilege doctrine as outlined in this Order, the Court

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and opinions rendered to a client who is on the brink of litigation should clearly be considered 'work product of an attorney' and thus within the protection offered by § 3101(c) CLPR." ).

holds that any joint defense privilege existing among the plaintiffs does not immunize the communication from discovery.

Reserves and Reinsurance Information

Regarding the issue of whether information related to plaintiffs' reserves and reinsurance is discoverable, see Defs. Br. at 15-17, the Court concludes that such information ought not to be excluded as "palpably irrelevant." Garcia v. New York City Police Dept., 2014 N.Y. Misc. LEXIS 2479, at \*23 (N.Y. Sup. Ct. Bronx Co. Apr. 3, 2014). Documents such as Excess Insurers' entries labeled CAT 605-640 should therefore be produced if not covered by another relevant privilege.

Plaintiff AXA's Privilege Claims

Finally, defendants ask the Court to review in camera documents and information over which plaintiff AXA has asserted privilege. See Defs. Suppl. Br. at 4. Defendants argue that AXA "seriously delay[ed]" in providing privilege and redaction logs and that these logs establish AXA's improper withholding of documents. Defs. Suppl. Br. at 4. They request that the Court review in camera the entries they identify on AXA's privilege and redaction logs to determine if the documents were improperly withheld. See Defs. Suppl. Br. at 4. Having reviewed these documents, the Court determines that they are subject to the same disclosure requirements as apply to plaintiffs' materials more broadly, as outlined above. Otherwise, however, the

Court does not have a specific cause for concern about AXA's privilege assertions.

**Plaintiffs' Claim That Defendants Have Improperly Asserted Privilege**

Pursuant to the Court's instructions, defendants have provided four categories of allegedly privileged documents: (1) "privileged communications and/or protected work product which address CCI's cargo loss and/or cargo claim under the Policies (CCI anticipated litigation with insurers upon receipt of and following their October 30, 2014 reservation of rights)"; (2) "privileged communications and/or protected work product regarding CCI's recovery efforts against Fukang and Jiayue including litigation commenced in China in October 2014"; (3) "communications to or from counsel seeking or reflecting legal advice concerning CCI China's bitumen trading business, including the drafting and revising of proposals and contracts underlying the bitumen transactions"; and (4) "privileged communications and/or protected work product with regard to CCI's legal strategy and legal options immediately after discovering the Loss." Letter dated October 6, 2015 at 1.

Taking each of these categories in turn, the Court's in camera review has produced some skepticism about the first category. For example, the Court holds that CCI-PRIV-000523, CCI0035090-2, or CCI0067302-5 should not receive protection under this category, since they relate to lawyers' investigations or policy interpretation that



speaking more to the requirements for making a case to the insurers, not a case against the insurers in the courts. More broadly, the Court hereby holds that defendants may not assert work-product or attorney-client privilege before their submission of proof of loss on April 23, 2015. However, the Court will make an exception for discussions of legal strategy specifically related to the Chinese litigation commenced in October 2014, such as CCI-PRIV-001121 (included in Category 2).

The Court's ruling on Category 1 applies to Category 4 as well. As for Category 3, the Court sustains as privileged attorneys' preliminary drafts and revisions of proposals and contracts underlying the bitumen transactions, such as CCI-PRIV-304. However, communications relating to defendants' routine business, such as at least parts of the communications in CCI-PRIV-118 involving business plans rather than legal advice, are not privileged.

All counsel are directed to unredact or produce documents in accordance with the guidelines provided by this Memorandum Order by no later than October 19, 2015.

SO ORDERED.

Dated: New York, NY  
October 15, 2015

  
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JED S. RAKOFF, U.S.D.J.