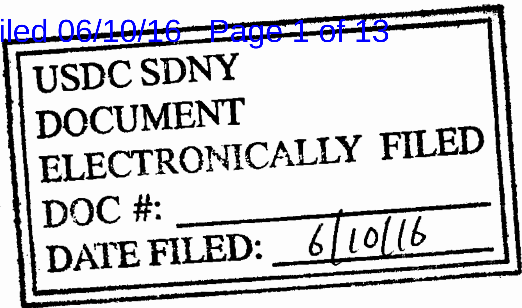

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMTRUST NORTH AMERICA, INC. *et al.*,

Plaintiffs,

-v.-

SAFEBUILT INSURANCE SERVICES, INC., *et al.*,

Defendants.

MEMORANDUM ORDER

14-CV-9494 (CM) (JLC)

JAMES L. COTT, United States Magistrate Judge.

Even though they recently wrote to the Court in seeking a further discovery extension that the parties' "resources would be better spent seeking a mutually acceptable compromise than continuing to create and litigate discovery disputes," *see* Letter, May 23, 2016, Dkt. No 210, at 2, defendants ignore their very own words and submit yet another discovery dispute for the Court's resolution. In the latest display of tooth-and-nail lawyering that has long characterized this reinsurance action, defendants seek to compel plaintiffs to produce the "work product and related material" of Alan Gray, LLC, an audit firm that plaintiffs retained to review the billing practices of a third-party administrator that processed insurance claims for them. For the reasons that follow, defendants' application is denied.

I.

The Court assumes familiarity with the underlying facts in this diversity action and will not recount them in any detail here.[1] In short, plaintiffs agreed to reinsure insurance policies that were underwritten by one of the individual defendants' companies. *See* Second Amended Complaint, May 13, 2015, Dkt. No. 54 ("Compl.") ¶¶ 1, 5. According to the complaint, plaintiffs did so believing that defendants would in turn reinsure plaintiffs and cover their costs through other entities owned and controlled by the individual defendants. *See id.* ¶¶ 5, 11(b). The costs to be covered allegedly included the expense of using a third-party administrator to process insurance claims that arose from the underlying insurance program. *See id.* ¶ 27(b).

In 2009, plaintiffs retained non-party Network Adjusters, Inc. ("Network") to serve as their third-party administrator.[2] *See* Network Order at 4; Plaintiffs' letter to the Court, dated June 1, 2016, Dkt. No. 213 ("Pl. Letter"), at 1. The agreement between plaintiff AmTrust North America ("AmTrust") and Network was set out in a "Master Claims Services Agreement." *See* Network Order at 4.

[1] For a fuller recitation of the underlying facts, see Judge McMahon's decisions dated October 28, 2015 (Dkt. No. 153) and December 1, 2015 (Dkt. No. 162) and the undersigned's decision dated May 16, 2016 (Dkt. No. 206).

[2] Defendants sued Network, naming it as a third-party defendant, but defendants' claims against Network have been dismissed. *See* Memorandum Decision and Order, October 28, 2015, Dkt. No. 153 ("Network Order"), at 16, *reconsideration denied*, Memorandum Decision and Order, Dec. 22, 2015, Dkt. No. 178.

According to their deposition testimony, two AmTrust executives, Claims Manager John Andrews and Vice-President of Finance Mark Murphy, became concerned that Network's fees were too high sometime during or before March 2014. Pl. Letter, Ex. 3, at 139:22-140:7 (Andrews Dep.); Ex. 4 at 62:17-63:7 (Murphy Dep.).[3] Their concern was not necessarily that the fees themselves were too high, but that they were high relative to the premiums generated by the underlying insurance program. *See id.* Ex. 4 at 62:17-63:7 (Murphy Dep.), Ex. 5 at 403:14-24 (Andrews Dep.). Murphy testified that costs of a third-party administrator are typically about four percent of the premium, but that Network's costs were about 20 percent. *See id.* Ex. 4 at 62:8-63:7 (Murphy Dep.); *see also id.* Ex. 3 at 139:10-21 (Andrews Dep.).

In March 2014, Andrews reviewed Network's invoices and found instances in which he believed that Network had overcharged—that is, charged more than the Claims Services Agreement allowed. *See id.* Ex. 3 at 85:7-86:24 (Andrews Dep.) and Ex. 5 at 397:15-398:15 (Andrews Dep.). According to Andrews, however, these billing discrepancies did not come close to explaining the high cost-to-premium ratio that led him to investigate. *See id.* Ex. 3 at 141:8-20 (Andrews Dep.). Andrews testified that Network's "service fees were overall proper" and that low premiums, not high costs, largely explained the unusually high ratio. *See id.* at 141:16-142:2.

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[3] The deposition testimony of three AmTrust executives is cited in this Memorandum Order. Andrews's deposition began on December 22, 2015 (Pl. Letter, Ex. 3) and continued on May 11, 2016 (Pl. Letter, Ex. 5). Murphy's deposition occurred on December 10, 2015 (Pl. Letter, Ex. 4). Finally, the deposition of AmTrust's Vice-President of Claims Lynda Barry took place on April 27, 2016 (Pl. Letter, Ex. 6).

Leaving aside whether the amount that Network billed was proper, the complaint alleges that defendants were responsible for reimbursing plaintiffs for that amount. Specifically, the complaint alleges that defendants were contractually obligated to pay plaintiffs' "'actual Third-Party Claims Administrator's fee.'" *See* Compl. ¶ 62. Plaintiffs allege that they paid more than $1.7 million to Network, but that defendants only reimbursed them for less than half of this amount. *See id.*; *see also* Network Order at 4.

In the months leading up to Andrews's review of Network's invoices in March 2014, Andrews had occasionally sought counsel from Ohrenstein & Brown, LLP, the law firm representing plaintiffs in this action, regarding defendants' failure to reimburse plaintiffs for these costs. *See* Pl. Letter, Ex. 5, at 418:10-419:7 (Andrews Dep.).

Sometime around March or May 2014, plaintiffs retained audit firm Alan Gray "in conjunction with . . . retaining counsel, to explore the remedies available to . . . obtain . . . reimbursement of the service fees . . . paid" to Network. *See id.* Ex. 3 at 86:25-87:21 (Andrews Dep.) and Ex. 5 at 417:3-6 (Andrews Dep.).[4] Regarding Alan Gray's retention, Andrews testified that "we determined it would be appropriate for us to retain counsel and . . . a specialized vendor or consultant to help us conduct a comprehensive review of the issue, in order to ultimately enforce

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[4] Defendants call this audit firm "Alan Gray, LLC," while plaintiffs call it "Allan Gray, Inc." *Compare* Defendants' letter, May 27, 2016, Dkt. No. 212 ("Def. Letter") at 1 *with* Pl. Letter at 2. Andrews, for his part, calls the firm "Alan H Gray & Associates." Pl. Letter, Ex. 3, at 87:22-23 (Andrews Dep.). The Court will refer to it simply as "Alan Gray."

our rights [against defendants] . . . to recover the fees that we had . . . paid Network for claim service[s]." *See id.* Ex. 3 at 161:13-19 (Andrews Dep.). Andrews further testified that, when he "retained [Alan Gray], [he] had initiated conversations with . . . Ohrenstein & Brown concerning the need for advice of counsel with respect to the remedies under the Claim Service Agreement and the reinsurance agreements" with defendants "because of a continuing accounts receivable issue with" defendants "and then also with respect to remedies under the Claim Service Agreement if there was a true dispute as to the billing practices." *See id.* Ex. 5, at 417:18-418:8 (Andrews Dep.).

In an email dated May 1, 2014, which was addressed to Murphy and to AmTrust's Vice-President of Claims Lynda Barry, Andrews opined that AmTrust's dispute with defendants regarding the unreimbursed costs would turn on the legitimacy of Network's billing practices. *See* Def. Letter, Ex. D, at 2. Thus, Andrews stated that a technical review of Network's billing practices would be necessary "to identify questionable, or opportunistic, billing practices." *Id.*

After they raised billing issues with Network, plaintiffs received a $200,000 credit from Network, and they also renegotiated their fee arrangement with Network. *See* Pl. Letter, Ex. 5, at 408:24-409:7, 408:24-410:12 (Andrews Dep.); Ex. 6 at 257:3-13 (Barry Dep.).

II.

On May 27, 2016, defendants filed a letter-motion requesting a conference under Local Civil Rule 37.2 as a predicate for filing a motion to compel the

"production of Alan Gray's work product and related material," which plaintiffs have withheld on the ground that it is covered by the attorney-client and work-product privileges. *See* Def. Letter at 1. On June 1, 2016, plaintiffs opposed defendants' letter-motion. *See* Pl. Letter at 1. Given the extensive record already before the Court, and consistent with Rule 1's dictates to resolve matters in a "just, speedy, and inexpensive" matter, the Court will decide defendants' application without further briefing or a conference.

III.

"While state law governs the question of attorney-client privilege in a diversity action, federal law governs the application of the work product doctrine." *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 435 (S.D.N.Y. 2013). Rule 26 of the Federal Rules of Civil Procedure, which codifies the federal work-product privilege, provides that documents prepared "by or for" a party "in anticipation of litigation" are "[o]rdinarily" not discoverable. Fed. R. Civ. P. 26(b)(3)(A). Documents are considered work product if "'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (quoting Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994)) (emphasis omitted).

A.

Defendants argue that the Alan Gray material is discoverable because Alan Gray is not a law firm and because there is no evidence that "counsel was involved" in Alan Gray's retention. *See* Def. Letter at 4.[5] Plaintiffs' counsel has represented that it participated in the decision to retain Alan Gray and that the audit firm's work was done for counsel's benefit. *See* Pl. Letter at 1; Def. Letter, Ex. C, at 38:19-39:21 (transcript of April 15, 2016 meet-and-confer session). This representation is consistent with Andrews's testimony that Ohrenstein & Brown had been advising him in the months leading up to Alan Gray's retention. *See* Pl. Letter, Ex. 5, at 418:10-419:7 (Andrews Dep.). For the sake of argument, however, the Court assumes that counsel did not participate in the decision to retain Alan Gray.

"Unlike the attorney-client privilege, the work product doctrine does not require that the documents be prepared at the behest of counsel, only that they be prepared 'because of' the prospect of litigation." *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 74 (S.D.N.Y. 2010) (quoting *Adlman*, 134 F.3d at 1202). "'Beyond applying to documents prepared by attorneys, the work product privilege applies also to documents prepared by a 'party' and 'representatives' of that party, including consultants . . . and agents.'" *ECDC Envtl. v. New York Marine & Gen. Ins. Co.*, No. 96-CV-6033 (BSJ) (HBP), 1998 WL 614478, at *15 (S.D.N.Y. June 4, 1998) (quoting *Atl. Richfield Co. v. Current Controls, Inc.*, No. 93-CV-0950E(H), 1997 WL 538876, at *3 (W.D.N.Y. Aug. 21, 1997)) (citing Fed. R. Civ. P. 26(b)(3)).

[5] The "Alan Gray material" is defined by defendants as 438 documents that have been withheld. *See* Def. Letter at 2.

Regardless of whether counsel advised plaintiffs to hire Alan Gray, the evidence before the Court establishes that plaintiffs hired Alan Gray because of the prospect of litigation. Andrews repeatedly testified that he had retained Alan Gray "in conjunction with" retention of legal counsel. *See* Pl. Letter, Ex. 3, at 87:15-21, 161:13-19 (Andrews Dep.) and Ex. 5 at 417:13-418:8 (Andrews Dep.). In his May 1, 2014 email, Andrews predicted that the dispute with defendants over the unreimbursed costs paid to Network would turn on the legitimacy of Network's billing practices. *See* Def. Letter, Ex. D at 2. Defendants have proved him correct. Indeed, in the letter requesting permission to file a motion to compel, defendants make clear that a key defense is that the parties' losses "were directly caused by Network's overbilling and failures as" third-party administrator. *See* Def. Letter at 2. The record shows that, before suing defendants to recover payments to Network, plaintiffs sought to ensure that Network's costs were legitimate. Even if counsel did not advise plaintiffs to retain Alan Gray or a firm like it (which seems unlikely), the evidence demonstrates that plaintiffs retained Alan Gray in anticipation of litigation.

Defendants argue that Alan Gray's work was done not in anticipation of litigation but to carry out an ordinary "business audit." *See* Def. Letter at 4. The aim of the audit, according to defendants, was to investigate "Network's invoicing practices due to suspicion of overbilling and excessive fees." *See id.* The extent to which Alan Gray's analysis served ordinary business purposes is not immediately clear. Plaintiffs point out that defendants did not actually ask Andrews, who

apparently had first-hand knowledge of the subject, whether AmTrust used Alan Gray's findings in its negotiations for the $200,000 credit and the new fee arrangement. *See* Pl. Letter at 5. Barry testified that she had thought Alan Gray's analysis helped AmTrust renegotiate the fee arrangement, but she "was no longer in the position working with Network at that point." *See id.* Ex. 6 at 257:9-11 (Barry Dep.).

Even if the Court assumes that Alan Gray's analysis was helpful in plaintiffs' negotiations with Network, these facts do not strip away work-product protection. After all, "where an expert is employed for 'dual purposes,' both to prepare for litigation and for some non-litigation purpose, work product protection still applies." *William A. Gross Const., Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 262 F.R.D. 354, 362 (S.D.N.Y. 2009); *Adlman*, 134 F.3d at 1195 ("[A] document created because of anticipated litigation . . . does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation.").

If plaintiffs would have retained Alan Gray regardless of litigation prospects and if Alan Gray would have carried out its analysis "in essentially similar form irrespective of the litigation," Alan Gray's materials would not be eligible for work-product protection, even if they proved useful in litigation. *See, e.g.*, *Adlman*, 134 F.3d at 1202. In an apparent attempt to show that plaintiffs' retention of Alan Gray was a routine undertaking, defendants emphasize that "Alan Gray was retained by AmTrust based on Mr. Andrews's prior relationship with the firm." *See* Def. Letter

at 2 (emphasis omitted). Although Andrews's past dealings may explain why plaintiffs retained Alan Gray over another consultancy, these dealings do little to diminish the effect of Andrews's repeated testimony that he retained Alan Gray in conjunction with counsel as part of plaintiffs' effort to enforce their rights through a lawsuit. *See* Pl. Letter, Ex. 3, at 161:13-19 (Andrews Dep.).

According to defendants, if Alan Gray "was retained in anticipation of litigation, then no explanation can be had for why no action was brought against Network." *See* Def. Letter at 4. One explanation is that Network addressed plaintiffs' concerns with its billing and, thus, the primary issue for plaintiffs became not what Network charged but that defendants had not reimbursed plaintiffs for those charges. The deposition testimony seems to indicate that there was at least some potential for litigation against Network, depending on what the analysis of Network's invoicing revealed. *See* Pl. Letter, Ex. 5, at 417:17-418:8 (Andrews Dep.) (testifying that Andrews had discussions with counsel concerning available "remedies under the Claims Service Agreement . . . if there was a true dispute as to [Network's] billing practices"). But even if there was not a real likelihood of litigation against Network, there can be little doubt that litigation against defendants was likely, and Andrews foresaw that Network's fees would be a key issue in that litigation. *See* Def. Letter, Ex. D, at 2. For all these reasons, the Court concludes that the Alan Gray materials are work product.

B.

Work product is a qualified privilege that can be overcome if the party seeking discovery demonstrates a "substantial need for the materials" and the party "cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii). A substantial need exists "where the information sought is 'essential' to the party's defense, is 'crucial' to the determination of whether the defendant could be held liable for the acts alleged, or carries great probative value on contested issues." *Nat'l Congress for Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000) (citations omitted).

Here, defendants have not demonstrated a substantial need for the work product at issue. Plaintiffs confirm that they "produced the source data that was provided to" Alan Gray. Pl. Letter at 4. Defendants concede that they "have access to the same underlying claims data as Alan Gray." Def. Letter at 4. Because defendants have hired their own experts to analyze this data, they do not have a substantial need for the materials. *See, e.g.*, *In re Nat. Gas Commodity Litig.*, No. 03-CV-6186 (VM) (AJP), 2005 WL 1457666, at *8 (S.D.N.Y. June 21, 2005) ("Plaintiffs do not have a substantial need for the analyses that defendants' counsel and experts provided to the government. Since the data used in defendants' analyses has been provided to plaintiffs, plaintiffs suffer no hardship by not having defendants' analyses."); *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 90-CV-7811 (AGS), 1994 WL 510043, at *11 (S.D.N.Y. Sept. 16, 1994) (no substantial need where defendant "already has the underlying factual

information" allowing it to "hire its own accountants or other experts to perform the analysis").

Defendants argue that "Alan Gray presumably had access to witnesses and material that was not and will never be available to Defendants' experts." *See* Def. Letter at 5. They offer no facts to support this allegation. "Such rank speculation plainly does not constitute a showing of substantial need and inability to secure the materials elsewhere. . . ." *McDaniel v. Freightliner Corp.*, No. 99-CV-4292 (RMB) (FM), 2000 WL 303293, at *7 (S.D.N.Y. Mar. 23, 2000).

Defendants also argue that "only production of the Alan Gray technical review will reveal specifically what AmTrust knew, and [w]hen it was known." *See* Def. Letter, at 5. But this information is available from other sources. Indeed, at Andrews's deposition, defendants repeatedly asked him about the issues that he had with Network's billing and when he learned of those issues. *See, e.g.*, Pl. Letter, Ex. 3, at 86:19-87:23, 140:3-7 (Andrews Dep.) and Ex. 5 at 397:15-398:35, 416:15-417:6 (Andrews Dep.). For these reasons, defendants have not met their burden of showing a substantial need for Alan Gray's work product.

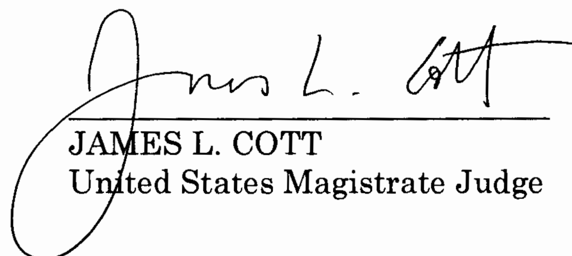
Because the Court determines that the Alan Gray material is protected work product, it is unnecessary to decide whether the Alan Gray material is covered by the attorney-client privilege. Accordingly, the Court declines to reach the issue.

IV.

For all these reasons, defendants' application to compel the discovery of the Alan Gray material is denied. The Clerk is directed to close Docket No. 212.

SO ORDERED.

Dated: New York, New York
June 10, 2016



JAMES L. COTT
United States Magistrate Judge