UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UTICA MUTUAL INSURANCE COMPANY,

Plaintiff,

v. **6:12-CV-00196 (BKS/ATB)**

MUNICH REINSURANCE AMERICA, INC.,

Defendant.

MUNICH REINSURANCE AMERICA, INC.,

Plaintiff,

v. **6:13-CV-00743 (BKS/ATB)**

UTICA MUTUAL INSURANCE COMPANY,

Defendant.

Appearances:

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Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

These related breach of contract actions arise from Utica Mutual Insurance Company's ("Utica") attempts to seek reimbursement from Munich Reinsurance America, Inc. ("MRAm") under reinsurance contracts MRAm issued to Utica in 1973 (6:12-cv-196) and 1977 (6:13-cv-743). [1] The Court previously denied the parties' motions to seal summary judgment documents but granted Utica, the party seeking to maintain documents under seal, permission to renew its motion. (Dkt. No. 272). In the same Memorandum-Decision and Order, the Court granted non-party Century Indemnity Company's ("Century") motion to intervene. (*Id*.). Currently pending before the Court is Utica's motion to seal certain exhibits to the parties' motions for summary judgment. (Dkt. No. 282). MRAm and Century oppose Utica's motion. (Dkt. Nos. 286, 287). For the following reasons, Utica's motion is granted in part and denied in part.

II. BACKGROUND

On June 27, 2016, Utica and MRAm filed under seal 285 of their exhibits in support of their motions for summary judgment and redacted references to these exhibits from their memoranda and statements of material facts. (Dkt. Nos. 202, 203, 204, 205, 207). The same day, they separately filed motions for leave to file portions of their summary judgment filings under

[1] For convenience, unless otherwise specified, docket citations are to the filings in 6:12-cv-196.

seal. (Dkt. Nos. 206, 266). The parties followed the same course of action when filing their opposition, reply, motion to strike, and motion for discovery submissions. (Dkt. Nos. 220–22, 225–31) (opposition papers); (Dkt. Nos. 243–47) (reply papers); Dkt. No. 223 (motion to strike); Dkt. No. 224 (motion for discovery); Dkt. No. 232, 248, 253, 267 (motions to seal). The Court granted the parties' request to file a redacted version of *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*, No. 6:13-cv-1178 (GLS/TWD), 2016 WL 254770, 2016 U.S. Dist. LEXIS 6219 (N.D.N.Y. Jan. 20, 2016), but otherwise denied their motions to seal with permission to renew.

In compliance with the Court's order, Utica appears to have reviewed the summary judgment exhibits at issue and reduced the number of exhibits it seeks to file under seal from 285 to approximately 100. Although MRAm filed the majority of the exhibits at issue in support of or in opposition to summary judgment, they were produced by Utica during discovery under a Protective Order. (Dkt. No. 21). Thus, Utica, as the party seeking to maintain the exhibits under seal, is the only party to file a renewed motion to seal.

Utica places the exhibits at issue into the following categories: 1) communications among Utica's in-house counsel and Utica employees (Dkt. Nos. 207-13, 20, 51, 52, 63; Dkt. Nos. 220-98, 146, 160, 76, 82, 86, 95, 101, 102, 159, 162; Dkt. No. 204-31); 2) documents containing Utica's in-house counsel's handwritten notes (Dkt. Nos. 207-17, 22; Dkt. Nos. 220-94, 81, 100; Dkt. No. 259-4; Dkt. No. 204, ¶¶ 10–11); 3) documents involving Utica's outside counsel (Dkt. Nos. 207-12, 18, 38; Dkt. Nos. 220-75, 154, 78–80, 84, 85, 87, 92, 125, 140, 130, 131, 61; Dkt. Nos. 204-6, 8, 9, 10; Dkt. No. 259-93); 4) communications among Utica's outside counsel (Dkt. Nos. 220-128, 129, 137, 50); 5) documents containing Utica counsel's handwritten notes (Dkt.

Nos. 207-14, 18, 21, 15, 155, 19, 37; Dkt. Nos. 220-90, 97, 123, 99, 127); 6) deposition transcripts (Dkt. Nos. 207-88, 90, 91, 100, 108, 154; Dkt. Nos. 220-5, 11, 13, 15, 16, 17, 19, 43, 45, 63); 7) arbitration documents (Dkt. Nos. 207-142, 144, 148, 149, 150); and 8) expert reports (Dkt. Nos. 207-49, 57, 65; Dkt. No. 220-144).

In support of its application to seal, Utica submitted a declaration by Bernard Turi, who has been employed by Utica since 1987 and presently serves as a senior vice president, general counsel, general auditor, and chief risk officer.[2] (Dkt. No. 282-3, ¶¶ 2–4). In his declaration, Turi identifies the attorneys who were in-house counsel during the relevant time period, including Kristen Martin, Alicia Atik, Lydia Berez, and Richard Creedon.[3] (*Id*. at ¶¶ 14–17). Turi also lists the law firms that represented Utica in connection with the insurance coverage issues arising out of the asbestos claims against Goulds: Berkes Crane Ronison & Seal LLP, Rivkin Radler LLP, Lewis Brisbois Bisgaard & Smith, Linklaters LLP, and Shaw Pittman. (*Id*. at ¶¶ 21–25). Turi avers:

> In connection with asbestos claims against Goulds and the insurance coverage issues arising out of those claims, I and other Utica employees sought, received, and provided legal advice, including from the law firms identified above, concerning the asbestos claims against Goulds and the insurance coverage issues arising out of those claims. Utica's in-house counsel and outside counsel identified above provided legal advice to Utica concerning the asbestos claims against Goulds and the insurance coverage issues arising out of those claims. The legal advice sought, received, and provided, included legal advice about the disputes and litigation between Utica and Goulds and the settlement between Utica and Goulds.

[2] "It is well-recognized that in-house counsel may serve both legal and business functions, and courts will scrutinize the nature of their communications before finding that those communications are privileged." *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 38 (E.D.N.Y. 2013) (citing *In re Cnty. of Erie*, 473 F.3d 413, 419, 421 (2d Cir. 2007)), *aff'd*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014). The parties do not appear to question that Utica's in-house counsel served legal functions.

[3] Creedon was also a senior claims officer from 2004 to 2013. (Dkt. No. 282-3, ¶ 17).

> In connection with asbestos claims against Goulds and the insurance coverage issues arising out of those claims, I, other Utica employees and the law firms identified above requested, created, and received documents prepared in anticipation of or because of ongoing litigation with Goulds and other of Goulds's insurers.
>
> The legal advice sought, received, and provided and the documents prepared in anticipation of or because of ongoing litigation continued after Utica's settlement with Goulds. Under the settlement, Utica was obligated to and did "cooperate with and assist in the prosecution and collection of" certain claims that Utica had assigned to Goulds. In addition, after the settlement, Utica also faced cross-claims filed by another of Goulds's insurers, CNA. Thus, after the settlement Utica anticipated and was involved in litigation related to the insurance it issued to Goulds.

(Dkt. No. 282-3, ¶¶ 26–28) (internal paragraph numbers omitted).

III. DISCUSSION

A. Motions to Seal

1. Legal Standard

"The notion that the public should have access to the proceedings and documents of courts is integral to our system of government." *United States v. Erie Cnty., N.Y.*, 763 F.3d 235, 238–39 (2d Cir. 2014). "Indeed, the common law right of public access to judicial documents is said to predate even the Constitution itself." *Id*. at 239. The "Constitution, and specifically the First Amendment to the Constitution, also protects the public's right to have access to judicial documents." *Id*.

Second Circuit precedent "indicate[s] that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006). The Second Circuit has instructed that the weight of the presumption of public access given to

summary judgment filings "is of the highest: 'documents used by parties moving for, or opposing, summary judgment should not remain under seal *absent the most compelling reasons*.'" *Id*. at 123 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). Moreover, under "the more stringent First Amendment framework . . . continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Id*. at 124. Examples of "higher values" may include law enforcement interest, the privacy of innocent third parties, *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995), and the attorney-client privilege, *Lugosch*, 435 F.3d at 125. The party seeking to maintain the judicial documents under seal bears the burden of showing that higher values overcome the presumption of public access. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997).

2. Common Law Right of Access

The Second Circuit has enumerated the steps a court must take when considering a motion to seal in light of the common law right of access. First, "[b]efore any such common law right can attach . . . a court must . . . conclude that the documents at issue are indeed 'judicial documents.'" *Lugosch*, 435 F.3d at 119. Second, after determining "that the documents are judicial documents and that therefore a common law presumption of access attaches," the court "must determine the weight of that presumption":

> "The weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance."

Id. (quoting *Amodeo*, 71 F.3d at 1049). Third, the court must balance any "countervailing factors" against the weight of the presumption of access. *Id*. at 120. "[T]he crux of the weight-of-the-presumption analysis" requires "balancing the value of public disclosure and countervailing factors such as (i) the danger of impairing law enforcement or judicial efficiency and (ii) the privacy interests of those resisting disclosure." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 143 (2d Cir. 2016) (internal quotation marks omitted). "[T]he privacy interests of third parties [also] carry great weight in the balancing of interests." *Dorsett v. Cty. of Nassau*, 762 F. Supp. 2d 500, 521 (E.D.N.Y.), *aff'd*, 800 F. Supp. 2d 453 (E.D.N.Y. 2011), *aff'd sub nom. Newsday LLC v. Cty. of Nassau*, 730 F.3d 156 (2d Cir. 2013).

3. First Amendment Right of Access

The First Amendment right of access stems from the qualified right of the public and the press "'to attend judicial proceedings and to access certain judicial documents.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). Once a court concludes that there is a qualified First Amendment right of access to the judicial documents at issue, it may only seal the documents "if specific, on the record findings are made demonstrating the closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id*. (quoting *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). The Second Circuit has been clear: "Broad and general findings by the trial court . . . are not sufficient to justify closure." *Id*. (quoting *In re New York Times Co.*, 828 F.2d at 116).

4. Application

The documents at issue "by virtue of having been submitted to the court as supporting material in connection with a motion for summary judgment – are unquestionably judicial

documents under the common law." *Lugosch*, 435 F.3d at 123. Further, the weight of the presumption of access "is of the highest: 'documents used by parties moving for, or opposing, summary judgment should not remain under seal *absent the most compelling reasons*.'" *Id*. (quoting *Joy*, 692 F.2d at 893). Thus, the common law presumption of access applies to the parties' summary judgment documents. It is equally well-settled that "there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion."[4] *Id*. at 124.

Having concluded that both the common law and First Amendment provide a right of access to the documents, the Court must consider whether countervailing factors outweigh the presumption of access and whether continued sealing is justified under "the more stringent First Amendment framework." *Id*. "Broad and general findings and conclusory assertions are insufficient to justify deprivation of public access to the record; specific, on-the-record findings are required." *Bernstein*, 814 F.3d at 144–45 (internal quotation marks and alteration omitted).

a. Attorney-Client & Work Product Privileges

"The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Second

[4]Utica argues that the "same reasoning" that the Court applied in granting a prior motion to seal applies here. (Dkt. No. 282-1, p. 3). The sealing order to which Utica refers stemmed from a discovery motion and was subject to a lower standard as the documents at issue were not necessarily judicial documents. (Dkt. No. 204). The Court must therefore re-evaluate the propriety of sealing under the more stringent standard applicable to judicial documents.

Circuit has instructed courts "to balance this protection of confidentiality with the competing value of public disclosure," but "apply [the privilege] 'only where necessary to achieve its purpose'" and "construe the privilege narrowly because it renders relevant information undiscoverable." *Mejia*, 655 F.3d at 132 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). The Second Circuit has "implied—but never expressly held—that protection of the attorney-client privilege is a 'higher value' under the First Amendment that may rebut the presumption of access." *Bernstein*, 814 F.3d at 145.

"The attorney work product doctrine 'provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.'" *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007) (quoting *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 383 (2d Cir. 2003)). *See also* Fed. R. Civ. P. 26(b)(3) ("Ordinarily, 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)."). As the Second Circuit has explained:

> There are two types of work product, ordinary or fact (herein "fact") and opinion. As we have stated previously, fact work product may encompass factual material, including the result of a factual investigation. In contrast, opinion work product reveals the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative, and is entitled to greater protection than fact work product. To be entitled to protection for opinion work product, the party asserting the privilege must show a real, rather than speculative, concern that the work product will reveal counsel's thought processes in relation to pending or anticipated litigation.

In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d at 183–84 (internal citations and quotation marks omitted).

Each of the exhibits at issue appears to contain a communication between Utica employees, in-house counsel, or outside counsel, or notes by Utica's attorneys. Utica does not specify, however, whether the exhibits are subject to the attorney-client privilege or constitute attorney work product.[5] Although Utica offers a brief description of each exhibit, the uniform statement it provides with respect to nearly all of the exhibits, i.e., that they contain a communication or note that "reflects legal advice and was prepared because of ongoing litigation," (Dkt. No. 282-1, pp. 6–15), fails to enable the Court to ascertain whether Utica is asserting attorney-client privilege or work product doctrine as a basis for sealing. For example, Utica describes Dkt. No. 207-52, as "an email from Utica's in-house counsel to Utica employees regarding the insurance coverage Utica issued to Goulds and the settlement between Utica and Goulds," places it in the "communications among Utica's in-house counsel and Utica employees" category, and asserts that it "reflects legal advice." (Dkt. No. 282-1, pp. 6–7). The email appears to have been sent to a number of individuals, but there is no indication who several of those individuals are or whether they are Utica attorneys, Utica employees, or outsiders. (Dkt. No. 207-52). Moreover, even assuming the email constitutes communications between attorney and client, there is no indication that the email was "intended to be, and in fact w[as], kept confidential," an element of the attorney-client privilege. *Mejia*, 655 F.3d at 132. Further, if the email is work product, Utica has not indicated whether it is fact or opinion work product. *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d at 183–84. These deficiencies are present with respect to every exhibit Utica seeks to seal. While it may be that each of the exhibits contain

[5] The Court identified this deficiency in its prior decision denying the parties' motions to seal. (Dkt. No. 272, p. 9).

privileged information or are subject to the attorney work product doctrine, without more information, the Court cannot make the "specific, on-the-record findings" required to seal judicial documents.[6] *Bernstein*, 814 F.3d at 144–45.

b. Utica's Exhibits

The majority of exhibits Utica seeks to seal were submitted by MRAm; there are, however, several it filed in support of its own motion for summary judgment and which it seeks to maintain under seal on the basis that they contain "legal advice and [were] prepared because of ongoing litigation." (Dkt. No. 282-1, pp. 11–12). Specifically, Utica requests to seal two paragraphs in Turi's summary judgment declaration (Dkt. No. 204, ¶¶ 10–11) and Exhibits 6, 8, 9, 10, and 31 to the declaration (Dkt. Nos. 204-6, 204-8, 204-9, 204-10, and 204-31). Turi does not indicate whether the documents are entitled to protection because they are subject to the attorney-client privilege or because they are subject to the work product privilege. Further, where a party submits its own purportedly "privileged documents to win summary judgment and . . .

[6]Utica argues that under the common interest doctrine, it cannot be deemed to have waived the attorney-client privilege or work product doctrine. In *Schaeffler v. United States*, the Second Circuit explained:

> While the privilege is generally waived by voluntary disclosure of the communication to another party, the privilege is not waived by disclosure of communications to a party that is engaged in a "common legal enterprise" with the holder of the privilege . . . . [S]uch disclosures remain privileged where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel in the course of an ongoing common enterprise and multiple clients share a common interest about a legal matter. The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.
>
> Parties may share a "common legal interest" even if they are not parties in ongoing litigation. The common-interest-rule serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.

806 F.3d 34, 40 (2d Cir. 2015) (internal quotation marks, alteration, and citation omitted). Because Utica has not established that any of the exhibits at issue are entitled to protection under the attorney-client privilege or work product doctrine, there is no basis on which to apply the common interest doctrine.

simultaneously [seeks] to prevent disclosure of those documents," it is precluded from asserting the attorney-client privilege. *Lugosch*, 435 F.3d at 125 (citing *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982)). Thus, to the extent Utica relies on the attorney-client privilege, its motion to seal these documents is denied.

c. Transcripts

Utica asserts that "[t]he following exhibits are transcripts or excerpts of transcripts that refer to privileged information: Munich Re Open. Exs. J, K, L, M, N, W, AF, BZ; Munich Re Opp. Exs. E, J, K, L, M, N, O, AJ, AL, BC; Exhibit 33 to Mr. Ahmad's June 27, 2016 declaration; and Exhibits 4 and 6 to Mr. Ahmad's August 15, 2016 declaration." (Dkt. No. 282-1, p. 16). Utica provides no information about these transcripts. Given the number of transcripts, as well as their volume, the Court declines to attempt to divine the basis on which such transcripts should be sealed or redacted. Accordingly, Utica's motion to seal these transcripts is denied.

d. Arbitration Filings

Utica asserts that that exhibits containing filings from "the arbitration between Utica and R&Q . . . refer to privileged information." (Dkt. No. 282-1, p. 16). The Court previously noted that there was "no evidence showing, in non-conclusory terms, what privacy interest is implicated [by the arbitration documents], which documents implicate them, and whether any sealing order may be narrowly tailored to serve that interest." (Dkt. No. 272, p. 13). As Utica makes no attempt to remedy this gap in the evidence, the Court finds no basis to revisit the issue here. Accordingly, Utica's motion to seal arbitration documents is denied.

e. Expert Reports

Utica moves to seal several "expert reports" on the basis that they "refer to privileged information." (Dkt. No. 282-1, p. 16). Utica offers no grounds whatsoever that would enable the Court to make the specific findings required to seal judicial documents, thus, its motion to seal "expert reports" is denied.

f. Redacted Briefs

In support of its motion for summary judgment, Utica filed briefs from *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*, No. 6:13-cv-1178 (GLS/TWD). (Dkt. No. 229-3). Utica seeks wholesale sealing of these briefs on the basis that United States District Judge Gary L. Sharpe ordered that they be sealed. (Dkt. No. 282-1; Dkt. No. 247-2). It appears, however, that the briefs are publicly available in redacted form. *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*, No. 6:13-cv-1178 (GLS/TWD), Dkt. No. 65-9; Dkt. No. 80-1. Accordingly, Utica's motion is denied to the extent it seeks wholesale sealing; it is granted to the extent it seeks to file redacted versions of the briefs.

Having balanced the almost entirely conclusory assertion of attorney-client privilege and work product doctrine against the weight of the presumption of public access, the Court finds that continued sealing is not justified and that the common law right of access requires disclosure.[7] Likewise, Utica has failed to provide a factual basis that would allow the Court to

[7] In a supplemental brief, Century notes that on February 24, 2017, United States District Judge David N. Hurd issued a memorandum-decision and order in *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, 6:09-CV-853, Dkt. No. 342, that "includes multiple quotes from the testimony of, and documents authored by, Utica's in-house and outside counsel reflecting opinions, advice or work product that Utica put at issue in its summary judgment briefing" and that involves information "that Utica is attempting to seal in this action." (Dkt. No. 289, pp. 1–2). According to the chart Century provided, Judge Hurd's decision quotes information that is the "same" as or "similar" to documents or testimony Utica seeks to seal in this case. (Dkt. No. 289, pp. 2–3). The public availability of such information, which Utica has not objected to, further undercuts Utica's arguments. Century generally cites

make "specific, on the record findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 120. Accordingly, except with respect to Utica's motion to file a redacted version of the briefs filed in *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*, No. 6:13-cv-1178 (GLS/TWD), Dkt. No. 65-9; Dkt. No. 80-1, which is granted, Utica's motion to seal is denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that in case number 6:12-cv-196, except with respect to Utica's motion to file a redacted version of the briefs from *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*, No. 6:13-cv-1178 (GLS/TWD) Dkt. No. 65-9; Dkt. No. 80-1, which is **GRANTED**, Utica's motion to seal (Dkt. No. 282) is **DENIED**; and it is further

ORDERED that in case number 6:13-cv-743, except with respect to Utica's motion to file a redacted version of the briefs in *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*, No. 6:13-cv-1178 (GLS/TWD), Dkt. No. 65-9; Dkt. No. 80-1, which is **GRANTED**, Utica's motion to seal (Dkt. No. 223) is **DENIED**; and it is further

ORDERED that the dispositive motion deadline is extended to May 26, 2017, and all documents, except those which the Court has ordered sealed, must be filed publicly.

IT IS SO ORDERED.

Dated: April 26, 2017

Brenda K. Sannes
U.S. District Judge

Utica's motion to seal but does not specifically identify the exhibits in this case that contain the information released publicly in Judge Hurd's decision. In any event, because the Court concludes that Utica has not sustained its burden, the Court does not evaluate the impact of the publicly disclosed information on Utica's motion to seal.