UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil No. 12-81397-CIV-Marra/Matthewman

SUN CAPITAL PARTNERS, INC.,

Plaintiff,

vs.

TWIN CITY FIRE INSURANCE COMPANY,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT TWIN CITY'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS [DE 54] SUBSEQUENT TO COURT'S *IN CAMERA* REVIEW OF THE DISPUTED DOCUMENTS SUBMITTED BY PLAINTIFF SUN CAPITAL

THIS CAUSE is before the Court upon Defendant Twin City Fire Insurance Company's ["Twin City"] Motion to Compel Production of Documents [DE 54] and Plaintiff Sun Capital Partners, Inc.'s ["Sun Capital"] Response in opposition [DE 57]. Pursuant to this Court's February 25, 2015 Order [DE 131], Sun Capital submitted to this Court, on March 6, 2015, for *in camera* review, numerous documents it withheld from production to Twin City on the grounds of attorney-client privilege and work-product protection. The Court has carefully considered the parties' positions as argued in their papers and at oral argument, and has carefully conducted an *in camera* review of the disputed documents.[1] This matter is now ripe for review.

[1] The disputed documents submitted on March 6, 2015, for *in camera* review comprised 5 large binders of documents and 3 large binders of privilege logs. The Court has spent a considerable amount of time reviewing these documents.

I. BACKGROUND OF DISCOVERY DISPUTE AND ISSUES RAISED

This protracted discovery dispute began when Twin City filed its Motion to Compel Production of Documents from Sun Capital [DE 54]. In its motion, Twin City sought to compel production of (1) Sun Capital's communications with its broker, Marsh USA, Inc. ["Marsh"] about its claims for coverage arising from the underlying litigation ["Marsh communications"] and (2) insurance coverage analyses contained in Case Status Reports sent to Sun Capital by its defense counsel (Kirkland and Ellis) in the underlying litigation ["coverage analyses"]. [DE 54, p. 1]. Defendant asserted seven reasons why production of those two categories of documents must be compelled: (1) Sun Capital failed to meet its burden of establishing that the attorney-client privilege or the work-product doctrine exempts the documents from discovery and Sun Capital failed to meet its burden that it had not waived any such privilege; (2) because Marsh is neither a law firm nor the client, the Marsh Communications do not qualify as attorney-client communications; (3) Sun Capital's disclosure of privileged communications to Marsh constitutes third-party disclosure and waiver of any privilege; (4) the Marsh Communications contain unprotected, third-party advice as Sun Capital communicated with Marsh to obtain business advice, not legal advice; (5) Sun Capital improperly asserts work-product protection for documents prepared prior to the November 2, 2012 date when it could have reasonably anticipated litigation; (6) under the Court's opinions in *Maplewood I*[2] and *Maplewood II,* [3] the "common legal interest" exception to the attorney-client privilege mandates that Sun Capital cannot withhold from Twin City privileged documents from the underlying litigation because the issues of coverage and settlement were matters of common interest to both Sun Capital and Twin City; and (7) Sun Capital waived its privilege by placing the substance of the Marsh

[2] *Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, No. 08-23343-CIV, 2011 WL 3918597 (S.D. Fla. Sept. 6, 2011).
[3] *Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550 (S.D. Fla. 2013).

Communications and Coverage Analyses at issue when it asserted claims in its Complaint that Twin City breached the insurance policy by failing to indemnify Sun Capital, by failing to properly allocate coverage, and by failing to provide coverage for fees and settlement costs. [DE 54].

Sun Capital filed its response in opposition to Twin City's motion to compel [DE 57], asserting that Twin City's motion to compel should be denied for the following reasons: (1) the Marsh Communications are protected from disclosure by the attorney-client privilege because Marsh has served as Sun Capital's insurance broker for nearly fifteen years, Marsh acted as Sun Capital's "claims advocate" throughout the pendency of the underlying lawsuit, and the Marsh communications were made at the direction of Sun Capital's attorneys, Kirkland and Ellis ["K&E"], for the purpose of facilitating the providing of legal advice by K&E and Sun Capital's in-house counsel concerning insurance coverage for the underlying lawsuit; (2) work-product immunity protects from production all documents prepared on or after September 2, 2010, as it was reasonable for Sun Capital to anticipate litigation as of that date; (3) the "common legal interest" exception to the attorney-client privilege does not apply to communications between Sun Capital and its attorneys, K&E, containing coverage analysis because Twin City had taken an adversarial position to Sun Capital dating back to 2009; and (4) Sun Capital has not waived the attorney-client privilege or work-product protection because Sun Capital did not place the protected documents at issue. [DE 57].[4]

As can be gleaned from the following course of events, the Court has spent an extensive amount of time in an effort to resolve this discovery dispute.

[4] Subsequent to the filing of its response to Twin City's motion to compel, Sun Capital filed its Notice of Filing an amended affidavit of Machua Millett on September 15, 2014 [DE 61], as well as a Notice of Intent to rely upon supplemental authority on September 16, 2014 [DE 62], and a Notice of Filing consolidated privilege log on September 16, 2014 [DE 63].

II. THE SEPTEMBER 19, 2014 ORAL ARGUMENT HEARING

The Court entered an Order scheduling oral argument on several motions, including Defendant's motion to compel discovery, for September 19, 2014. [DE 59]. The hearing proceeded as scheduled. At the conclusion of the September 19th hearing, the Court was concerned that the parties had not sufficiently met and conferred in a good faith effort to resolve this discovery dispute. Accordingly, the parties were directed to meet and confer on the Defendant's motion to compel within 20 days and file a joint status report 10 days thereafter. [DE 67; DE 68].

III. THE MEET AND CONFERRAL PROCESS

The meet and conferral process turned out to be fairly lengthy and involved. The parties filed their first Joint Status Report on October 21, 2014. [DE 79]. The parties announced in that joint status report their progress and further positions on this discovery dispute. Sun Capital requested that the Court conduct an *in camera* review of the Marsh Communications whereas Twin City stated that it believed that *in camera* review was unnecessary. [DE 79, ¶¶ 6-7]. Twin City further requested that, if the Court decided to review the Marsh Communications *in camera,* such review should also include the redacted "Coverage Issues" section of the Kirkland & Ellis reports to determine whether Marsh was assisting counsel relating to the issues in these reports, whereas Sun Capital asserted that *in camera* review of the Coverage Issues section of the litigation reports was unnecessary as a review of the Marsh Communications themselves would be sufficient to identify the coverage advice that was being provided. [DE 79, ¶ 7].

Upon review of the parties' Joint Status Report, the Court scheduled a telephonic hearing for December 18, 2014, to address the number of documents over which Sun Capital asserts a privilege, why Sun Capital seeks an *in camera* review of the documents in dispute, and the basis

for the request. [DE 91]. Prior to the December 18th telephonic hearing, Defendant filed, on December 17, 2014, a Notice of Filing consolidated privilege log containing Sun Capital's revised and supplemental privilege logs. [DE 93]. At the conclusion of the December 18, 2014 telephonic hearing, the Court ordered the parties to further meet and confer by December 29, 2014, and file a further Joint Status Report by December 30, 2014. [DE 95]. The Court also ordered that, once the Joint Status Report was filed, the Court would make arrangements with counsel to receive copies of the allegedly privileged communications to review them *in camera* along with the Insurance Coverage sections of the Kirkland & Ellis Litigation Status Reports. [DE 96].

On December 30, 2014, the parties filed their second Joint Status Report detailing their efforts to resolve this discovery dispute and their disagreement as to the number and nature of documents in dispute. [DE 104]. On January 21, 2015, the Court entered its Order requiring the parties to further meet and confer, to continue to sort through the Marsh Communications to determine which documents require *in camera* review, and to file a further Joint Status Report by February 20, 2015. [DE 116]. On February 20, 2015, the parties filed their third Joint Status Report in which they agreed that documents referenced in 214 Marsh privilege log entries and certain Litigation Status Reports should be reviewed by the Court *in camera*. [DE 129].

Thereafter, on February 25, 2015, the Court entered its Order Requiring Plaintiff to Submit Documents for *In Camera* Review on or before March 6, 2015. [DE 131]. The Court has carefully reviewed *in camera* all of the documents submitted.[5]

[5] *See* n.1, *supra*.

IV. LAW AND ANALYSIS

A. WORK PRODUCT DOCTRINE

Federal Rule of Civil Procedure 26(b)(3), which sets forth the work product doctrine, states in relevant part:

> (A) *Documents and Tangible Things.* 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). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Fed. R. Civ. P. 26(b)(3).

The burden is on the party withholding discovery to show that the documents are protected by the work-product privilege. *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 698 (S.D. Fla. 2007). Pursuant to *Milinazzo*, there is a rebuttable presumption that all documents prepared before the final decision on an insured's claim are not work-product, and that documents prepared after the final decision are work-product. *Id.* at 701. This presumption may be rebutted by specific evidentiary proof of objective facts that the party anticipated litigation before the final decision on an insured's claim. *Id.*

In determining whether this presumption has been rebutted, the Court may consider the length of time between the alleged date of anticipated litigation and the date suit was actually filed, whether the parties were working towards a resolution, and whether there was a clear

intention to sue made by one of the parties. *See, e.g.*, *1550 Brickell Assoc.'s. v. Q.B.E. Ins. Co.*, 253 F.R.D. 697, 699-70 (S.D. Fla. 2008) (finding that lengthy time between date alleged to be in anticipation of litigation and date that suit actually filed, "undercuts any argument that [prior] documents [before claim was denied] were prepared in anticipation of litigation"); *Milinazzo*, 247 F.R.D. at 701 (finding that counsel for insured's letter requesting coverage information and threatening suit did not rebut presumption where parties engaged in "lengthy discourse" prior to filing suit); *Royal Bahamian Ass'n, Inc. v. QBE Ins. Corp.*, 268 F.R.D. 695, 698 (S.D. Fla. 2010) (stating that "offhand comment" from unidentified member recommending suit against insurer did not rebut presumption, especially where suit was not filed until four years later); *AIG Centennial Ins. Co. v. O'Neill*, No. 09-60551-CIV, 2010 WL 4116555, at *11 (S.D. Fla. Oct. 18, 2010) (finding that statement from insurer that it believed there was no coverage for loss, but insurer would be available to "bring some resolution to this matter" did not constitute denial because matter was still being resolved).

Here, Sun Capital claims that it reasonably anticipated litigation on September 2, 2010. This is the date of an email from defense counsel to Sun Capital summarizing a call with Twin City, stating, "[T]hey have (a) significant issues with the rates; and (b) concerns about the way the fees and costs are being allocated (or not being allocated) between the two actions. Sounds like these will be two battlegrounds going forward." [DE 57-10]. Sun Capital also points to the letters it received from Twin City regarding Twin City limiting coverage for the underlying litigation. [DE 57-8, 57-9]. The Court rejects Sun Capital's argument that it reasonably anticipated litigation on September 2, 2010. The September 2, 2010 email does not reflect that Sun Capital was clearly anticipating litigation at that point, especially when Sun Capital did not file suit against Twin City until more than two years later on December 20, 2012. Further, as

supported by the email and the coverage opinion letters exchanged between the parties, the parties were actively working together towards a resolution to the coverage disagreements.

The Court finds that the date on which Sun Capital reasonably anticipated litigation was November 2, 2012, the date of the final denial letter. Sun Capital has not overcome the presumption under *Milinazzo*, as it has not provided specific evidentiary proof of objective facts that it reasonably anticipated litigation before the date of the final denial letter—November 2, 2012. Sun Capital has not met its burden of showing that documents created prior to November 2, 2012 are protected by the work product privilege. Therefore, Sun Capital can only claim work product protection for those documents prepared on or after November 2, 2012.

B. ATTORNEY-CLIENT PRIVILEGE

State law provides the rule of decision in diversity actions where a party asserts the attorney-client privilege. *See, e.g., 1150 Brickell Assoc. v. QBE Ins. Co.*, 253 F.R.D. 697, 699 (S.D. Fla. 2008); Fed. R. Evid. 501. Under Florida law, an attorney's client is permitted "to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." § 90.502, Fla. Stat. (2013). The confidentiality of attorney-client privileged communications "is an interest traditionally deemed worthy of maximum legal protection." *State Farm Fla. Ins. Co. v. Puig*, 62 So. 3d 23, 27 (Fla. Dist. Ct. App. 2011). Under Florida law, the burden of establishing the attorney-client privilege rests on the party claiming it. *Milinazzo,* 247 F.R.D. 691. Unlike a claim of attorney-client privilege raised by an individual, a claim of privilege raised by a corporation is subject to a heightened level of scrutiny under Florida law. *Id.* Further, the attorney-client privilege only protects those communications made for the purpose of obtaining informed legal advice, and not business

advice. *See, e.g.*, *State v. Branham*, 952 So. 2d 618, 621 (Fla. Dist. Ct. App. 2007); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 689 (S.D. Fla. 2009).

i. "Joint client" and "common legal interest" doctrine

Generally, a party waives the attorney-client privilege when he or she discloses communications with an attorney to a third party. *Maplewood Partners, L.P.*, 295 F.R.D. at 605. However, under the "joint client" doctrine, clients of the same attorney may share privileged communications with a co-client without waiving attorney-client privilege. *Id.* at 594, 605; *see also* Fla. Stat. 90.502(4)(e). For example, a joint client relationship has been found to exist where an insurer, acting under an indemnification clause, assigns defense counsel to represent an insured because "the interests of an insurer providing defense coverage essentially merge with the interests of its insured being defended." *Maplewood Partners, L.P.*, 295 F.R.D. at 596. However, if joint clients, such as an insurer and insured become adversaries in a subsequent dispute, such as a bad faith action, the attorney-client privilege does not protect their communications, and otherwise privileged documents may be discoverable between the parties.[6] *Id.* at 596, 599.

In *Maplewood II*, the Court attempted to provide clarification on the application of the "joint client" doctrine to the situation where an insurer provides reimbursement of defense expenses to an insured for a claim made against the insured. *Id.* at 598. There, Maplewood brought a breach of contract[7] action against its insurer, Indian Harbor, for failing to pay for defense fees and judgment and settlement costs arising from three suits brought against Maplewood. *Id.* at 556, 563. Specifically, Maplewood disagreed with Indian Harbor's

[6] However, the parties "are free to assert the privilege as to outsiders," who were not "joint clients." *Maplewood Partners, L.P.*, 295 F.R.D. at 594.

[7] Maplewood alleged that Indian Harbor breached a financial and professional services indemnity policy referred to as a "claims made policy" as it only covers losses that are reported during the policy period to the insurer "as soon as practicable." *Maplewood Partners, L.P.*, 295 F.R.D. at 557.

determination of what entities were insured, what claims were covered, and the appropriate allocation of covered and non-covered losses. *Id.* at 556, 624. During discovery, Indian Harbor requested communications between Maplewood and its attorneys pertaining to the underlying litigation, including assessments of potential liability and estimates of settlement values. *Id.* at 556. The Court found that a joint client relationship existed between Maplewood and Indian Harbor during the underlying litigation brought against Maplewood, at least until the date the parties' first anticipated litigation against each other. *Id.* at 604. The Court in *Maplewood II* found the following factors supported that a joint client relationship existed between the parties:

> the parties' voluntarily and affirmatively undertaken contractual obligations pursuant to the Policy [including the cooperation clause in the Policy, requiring the insured to provide facts regarding the underlying litigation that may not be contained in the pleadings, and requiring the insured to not settle any claim without the insurer's consent], evidence of cooperation and disclosure as to defense counsel's expenses, shared decision-making roles as to material aspects of the litigation—including the question of trial strategy and settlement decisions, frequent attendance at joint meetings by both parties' representatives, frequency and content of correspondence—all done toward the achievement of a common objective of successfully defending against the claims in the Underlying Matters.
>
> *Id.* at 604.

Further, the Court in *Maplewood II* held that when an insured purchases a policy that "provides for the reimbursement of incurred defense expenses as to 'claims made' against the insured and includes . . . requirements governing litigation as to underlying claims brought against the insured . . . and when the insured . . . discloses otherwise-privileged materials with the insurer, it is proper to find that the insured has selectively waived its privilege as to matters to which its interests [align] with the insurer." *Id.* at 603.

Similarly, under the "common legal interest" or "joint defense" doctrine, communications between parties with separate counsel who share a common legal interest are protected by the attorney-client privilege. *Id.* at 594, 606; *see also* Fla. Stat. 90.502(4)(e). "However, if the

parties . . . are later in opposition with each other, statements which were made by one co-defendant to another defendant's attorney are not protected by privilege." *Id.* at 606. Further, "[a] client who is part of a joint defense arrangement is entitled to waive the privilege for his own statements, and his co-defendants cannot preclude him from doing so." *Id.* at 609.

The Court in *Maplewood II* also addressed the applicability of the "common legal interest"/"joint defense" doctrine, finding that Indian Harbor shared a "common legal interest" with Maplewood because the parties had a common interest in minimizing liability in the underlying litigation brought against Maplewood. *Id.* at 607. Thus, the Court found that Maplewood waived its privilege to communications made for the "common litigation-related cause," stating that, "[P]reventing others from access to communications which occurred in a joint defense group simply does not appear to serve the interests of the attorney-client privilege." *Id.* at 608, 612. In finding that Maplewood waived its privilege to communications made for the "common litigation-related cause," the Court relied on the following facts: the insured's attorney freely provided information to the insurer, such as status updates; the insurer was involved in settlement discussions, as required by the policy; the insurer communicated with the insured regarding matters that were relevant to whether there was coverage for the underlying litigation; and it did not appear that the insured's attorney sought consent from the insured before disclosing potentially privileged matters to the insurer. *Id.* at 610, 612. Further, the Court noted that "Plaintiffs purchased the Policy . . . with a cooperation clause, and subsequently made a claim under the Policy, effectively inviting the insurer into the Plaintiffs' relationship with its selected counsel, at least temporarily and only as to this subject matter." *Id.* at 613.

Thus, the Court in *Maplewood II* ordered that only communications exchanged "'for the limited purpose of assisting in [the parties'] common cause'" would be produced, which

included: communications relating to "calculations of settlement value or options . . . , litigation outcomes . . . , and the representation of individual defendants and questions regarding attorneys' fees payments." *Id.* at 611-12 (citing *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So.2d 437, 441 (Fla. Dist. Ct. App. 1987)). The Court made clear, however, that the parties were "not aligned as to their [current] coverage dispute" and thus the insured's communications with coverage counsel regarding Maplewood's suit against Indian Harbor were not discoverable. *Maplewood Partners, L.P.,* 295 F.R.D. at 602.

ii. Sun Capital and Twin City had a "common legal interest" in minimizing Sun Capital's liability in the underlying litigation.

Here, it is unclear based upon the facts provided to this Court, whether Twin City can be considered a joint client of Sun Capital's defense attorney in the underlying litigation brought against Sun Capital. Some factors support the finding under *Maplewood II* that Twin City was a joint client of Sun Capital's defense attorney, including the contractual obligations contained in the subject policy, which required Sun Capital to cooperate with Twin City and provide any requested information regarding the "defense, negotiation and settlement of any Claim," and which required the insurer's consent before settling any underlying claim. *See* [DE 1-2, HCC Policy, Section XIII.A, Section VI.A.]. Further, it is likely that Sun Capital shared what would be considered privileged information with Twin City regarding the defense and settlement of the underlying claims, even if the parties had differing viewpoints regarding coverage for the underlying claims under the subject policy. However, it does appear that the insurer in *Maplewood II*, which was the primary carrier, was more involved in the defense of the underlying litigation than Twin City, an excess carrier, was involved here. Therefore, the Court does not make a finding based on the facts provided that Twin City and Sun Capital were joint clients in the underlying litigation.

The Court does find, however, that at a minimum the parties had a "common legal interest" in minimizing Sun Capital's liability in the underlying litigation, until the point that the parties reasonably anticipated litigation against each other (November 2, 2012). Here, Sun Capital voluntarily entered into an insurance agreement with a cooperation clause and subsequently made a claim under the subject policy, "effectively inviting [Twin City] into [Sun Capital's] relationship with its selected counsel, at least temporarily and only as to this subject matter." *See Maplewood Partners, L.P.*, 295 F.R.D. at 613. Even though the parties disagreed early on as to what underlying claims were to be covered and the proper allocation of reimbursement for covered and non-covered claims, Sun Capital and Twin City appeared to be working towards a resolution of these issues and both parties had a common interest in minimizing Sun Capital's total liability. Again, it is also likely that Sun Capital shared what would be considered privileged information with Twin City regarding the defense and settlement of the underlying claims. Further, Sun Capital and Twin City entered into a written agreement specifically stating that Sun Capital and Twin City "share a common interest in the defense" of the underlying litigation. [DE 54-5].

Therefore, the Court finds that those communications exchanged between Sun Capital and its defense counsel and/or Marsh[8] "for the limited purpose of assisting" in the parties' common litigation related cause shall be disclosed to Twin City, including those documents relating to calculation of settlement value, evaluations of the strength of the individual claims, and any other litigation outcomes in the underlying litigation. *See id.* at 611-12 (citing *Visual*

[8] Due to the fact that the Court is finding that a limited waiver of attorney-client privilege existed as to those documents exchanged between Sun Capital and its defense counsel for the purpose of defending the underlying claims, up until the point Sun Capital and Twin City anticipated litigation against each other (November 2, 2012), the Court does not find it necessary to make a ruling at this time as to whether Marsh was categorically acting in a business capacity or whether it was facilitating attorney-client privileged communications. However, in conducting its *in camera* review, the Court has ordered production of those individual communications between Sun Capital and Marsh where Marsh is clearly acting in a business capacity and not facilitating attorney-client privileged communications.

Scene, Inc., 508 So.2d at 441). These communications will be limited to the time period prior to the date on which the parties reasonably anticipated litigation, which the Court has determined was November 2, 2012. Further, the Court makes clear that Sun Capital's communications with its coverage counsel regarding the current suit against Twin City are not discoverable.

C. WAIVER OF PRIVILEGE UNDER THE "AT-ISSUE" DOCTRINE

A waiver of attorney-client privilege or work-product privilege may occur when a party "affirmatively injects a privileged communication directly into the litigation, as necessary to prove an element of a claim or defense." *Maplewood Partners, L.P.*, 295 F.R.D. at 614-15; *see also GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F. 2d 755, 762 (11th Cir. 1987) (citing *Home Ins. Co. Advance Machine Co.*, 443 So. 2d 165, 168 (Fla. Dist. Ct. App. 1983) ("It is the rule in Florida that a party who bases a claim on matters which would be privileged, the proof of which will necessitate the introduction of privileged matter into evidence, and then attempts to raise a privilege so as to thwart discovery, may be deemed to have waived that privilege.").

Under the "at-issue" doctrine, also referred to as an "implied waiver" of privilege:

> a party waives work-product privilege protection when (1) assertion of the protection results from some affirmative act by the party invoking the protection; (2) through this affirmative act, the asserting party puts the protected information at issue by making it relevant to the case; and (3) application of the protection would deny the opposing party access to information vital to its defense.

Stern v. O'Quinn, 253 F.R.D 663, 676 (S.D. Fla. 2008). An "affirmative act" that puts protected information at issue depends on the circumstances of the case and may include presenting testimony at trial that discloses work-product documents or asserting a claim or defense that relies on work-product documents. *Stern*, 253 F.R.D. at 679-80, n.7. However, as it relates to the work-product privilege, the "at-issue" doctrine will not result in a waiver of opinion work-product materials, but rather may only result in the waiver of fact work-product materials.

Maplewood Partners, L.P., 295 F.R.D. at 624.

Here, Sun Capital, by way of its allegations in this suit against Twin City, has put privileged information at issue. Sun Capital alleges the following in its Complaint against Twin City:

> Twin City erroneously determined that, since the breach of fiduciary [duty] count . . . represented the sole potentially covered count of the 18 counts asserted against Sun Capital . . . , it was entitled to allocate based upon the relative legal exposure between covered and noncovered Loss. Twin City viewed the potential exposure arising from each count to be relatively similar, and thus, concluded that an appropriate allocation for the breach of fiduciary duty count would be approximately five percent.
> . . . .
> Twin City . . . erroneously concluded that the . . . Policy provides no coverage for the settlement of the 2008 Litigation or defense expenses incurred by other law firms who acted on Sun Capital's behalf.
> . . . .
> Twin City improperly denied coverage for the settlement of the 2008 Litigation because it concluded that the only damages sought in the 2008 Litigation were recessionary in nature and thus did not constitute insurable Loss under the . . . Policy.
> . . . .
> Twin City acknowledged coverage [for fees for Sun Capital's counsel], but concluded that because most of the exposure at issue in the 2008 Litigation was in its opinion attributable to the non-covered fraudulent transfer counts, an appropriate allocation, based on Sun Capital's relative legal exposure, would be less than the 55 percent allocation of fees agreed to between [the primary insurer] and Sun Capital in August 2011.
> . . . .
> Twin City . . . thus breached the contract by those acts and omissions alleged above, including without limitation its refusal to make payment, much less full and timely payment of Sun Capital's defense costs and other covered Loss.

[DE 1, ¶¶ 57, 58, 59, 62, 71].

Here, it appears that one of the primary disputes between the parties relates to the allocation clause of the subject policy,[9] which allows Twin City to allocate reimbursement between any covered claims and any non-covered claims based on the relative exposure of the underlying defendants, including the relative exposure to each individual claim and as to each

[9] "The Twin City Excess Policy 'follows form' to the HCC Primary Policy." DE 1, ¶ 29.

individual defendant. While Sun Capital has not spelled out in detail what work-product communications it will rely on to prove its allegations, it will likely need to rely on attorney work-product materials from the underlying claims to show that the allocation between the covered claims and non-covered claims was proper and supported by its defense counsel's evaluation(s).

In addition, the application of the attorney-client privilege and work-product privilege here would deny Twin City access to information that would be vital to its defense. Sun Capital is claiming that the allocation between the covered claims and non-covered claims was proper, whereas Twin City disagrees. Defense counsel's evaluations of the underlying claims weigh on the allocation between the covered claims and non-covered claims, and thus are vital to Twin City's defense.

Here, communications between Sun Capital and its defense counsel regarding the defensibility of the underlying claims, the allocation of reimbursement for covered and non-covered losses, and communications regarding the settlement of the underlying claims would ordinarily fall within the work-product privilege (after anticipation of litigation) and would not be discoverable. However, because Sun Capital has placed these items "at-issue" in this case and these items are vital to Twin City's defense, the attorney-client privilege and (fact) work-product privilege is waived as to these limited items.

CONCLUSION & RULES OF PRODUCTION

In conclusion, the Court finds that a work-product privilege attaches to all Sun Capital documents prepared on or after November 2, 2012. The Court finds a limited waiver of attorney-client privilege as to those communications exchanged between Sun Capital and its defense

counsel and/or Marsh[10] for the limited purpose of assisting in the parties' common litigation related cause (documents relating to calculation of settlement value, evaluations of the strength of the individual claims, and any other litigation outcomes in the underlying litigation), up until the point the parties reasonably anticipated litigation against each other (November 2, 2012). Thus, all of the disputed documents prepared before November 2, 2012 are discoverable, except those attorney-client privileged communications that were not prepared for the purpose of assisting in the common litigation related cause. For this reason, the Court has found that the majority of the "Insurance Matters" sections of the insurance analyses should remain redacted because such positions do not relate to the purpose of defending the underlying claims. The Court is only allowing limited production of small portions of these sections.

Further, under the "at-issue" doctrine, the Court finds a limited waiver of the attorney-client privilege and work-product privilege for documents prepared before and after November 2, 2012, which specifically relate to the defensibility of the underlying claims, the settlement of the underlying claims, and the allocation of reimbursement for covered and non-covered losses. This finding of a limited waiver of privilege under the "at-issue" doctrine provides some overlap with the limited waiver found under the "common legal interest" doctrine, as it relates to defense counsel's evaluation of the underlying claims and the settlement terms (prepared before November 2, 2012), but it also allows for production of any additional documents prepared after November 2, 2012 that relate to those items put "at-issue."

The court finds that this provides a limited intrusion into the work-product privilege and the attorney-client privilege between Sun Capital and its defense attorneys in the underlying litigation, and strikes a careful balance between Twin City's need to defend the allegations involved in the current litigation and Sun Capital's right to prevent truly privileged materials

[10] *See* n.8, *supra.*

from being disclosed. As a whole and after a careful *in camera* review, the Court has found that certain of the disputed documents are not discoverable because they relate to Sun Capital's strategy decisions with regard to securing coverage for the underlying matters and not to the defense of the underlying matters or the allocation between non-covered and covered losses.

Upon review of the relevant motions, responses and replies, the argument of the parties, the privilege logs, the documents provided by Plaintiff for *in camera* review, the rules and case law, it is hereby **ORDERED** that, based upon the foregoing, Twin City's Motion to Compel Production of Documents [DE 54] is GRANTED IN PART AND DENIED IN PART; and the disputed documents shall be produced as directed by the Court in attached Exhibit "A."

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, in the Southern District of Florida, this 21st day of April, 2015.

WILLIAM MATTHEWMAN
United States Magistrate Judge

Exhibit "A"

Shall Be Produced:	Shall Not Be Produced
10704-10705	13332-13334
10875	13341-13343
10880-10882	13364
10883	13369
10903 (redact unrelated case names)	13468-13469
13205-13208	13493-13495
13234-13242 (redact unrelated case names)	13643
13244-13251 (redact unrelated case names)	13654-13655
13322-13326	13664-13665
13496-13500	13673
14312-14322	13676-13678
14915-14921	13679-13682
16052-16059 (redact unrelated case names)	13683-13687
17006-17007	13766
17008-17011	13768
11206	13774-13776
11214-11249	13786-13788
28197-28200	13789-13791
36018-36019	13796-13799
40280-40291 (redact unrelated case names)	13800-13804
40320-40334	13805-13809
85933-85935	13810-13814
100565-100567 (redact unrelated case names)	13815-13819
100569-100570 (redact unrelated case names)	13820-13825
100759-100762	13826-13832
103964	13833-13838
104073	13958
104111-104112	14163-14164
104187-104188	14168
104201-104202	14177
104212	14186-14188
104222-104231	14189-14190
104564-104573	14201-14205
104808-104810	14211-14212
104890-104894	14215
104292-104930	14316-14322
104945-104950	15847-15848
105666	16022-16025
105689-105699	16043
105712-105718	16353-16360
105739-105741(redact unrelated case names)	17000-17005
105751-10572 (redact unrelated case names)	17006-17007

105809-105811	17008-17011
105812-105814	17012-17021
105857-105860	17022-17029
106094-106096	11212-11213
106119-106123	13076-13082
106124-106127	13128-13129
106138-106142	36017
106143-106148	39750-39753
113077	39754-39758
113079-113081	40292-40305
	40306-40319
	40359
	40386
	40515-40517
	51879-51887
	64817-64819
	84684-84689
	84871-84874
	84875-84876
	84877-84880
	85105-85108
	85179-85181
	85188-85191
	85192-85195
	85375-85376
	85817-85818
	85876-85877
	85878-85879
	85883-85884
	85885
	85924-85927
	85928-85931
	91015-91016
	101513-101516
	101533-101536
	102337-102347
	103322-103327
	103608-103610
	103742-103750
	103751-103760
	103764-103767
	103831-103832
	103935-103936
	104189-104192
	104214-104221
	104399-104404

	104405-104410 104411-104415 104416-104420 104421-104423 104424-104426 104430-104431 104472-104477 104478-104482 104483-104486 104487-104490 104500 104766-104733 104774-104780 104781-104787 104788-104794 104795-104800 104801-104804 105606-105611 105667-105670 105671-105680 105681-105688 105700-105711 105745-105750 105753-105759 105760-105763 105764-105765 105780-105784 105785-105790 106128-106132 106133-106137 106308-106309 106382-106384 106726-106731 106732-106737 106738-106744 128009-128014 128028-128029

With regard to the "Insurance Matters" sections, Sun Capital shall only produce the first paragraph and the last paragraph contained on Bates No. 07030; the remaining three paragraphs on 07030 shall remain redacted. Further, the remaining "Insurance Matters" sections of the coverage analyses shall not be produced.