IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

COMMONWEALTH INSURANCE COMPANY OF AMERICA,	)	
Plaintiff,	)	
v.	)	C.A. No. 11-1019-SLR-CJB
COLONY NORTH APARTMENTS,	)	
Defendant.	)	

MEMORANDUM ORDER

Pending before the Court in this declaratory judgment action is Defendant Colony North Apartments' ("Colony North" or "Defendant") motion to compel discovery regarding: (1) Plaintiff Commonwealth Insurance Company of America's ("Commonwealth" or "Plaintiff") handling of third-party property insurance claims where "margin clauses" were implicated and (2) certain documents pertaining to Commonwealth's independent adjuster York Risk Services Group ("York"). For the reasons discussed below, the Court will GRANT-IN-PART Colony North's motion with respect to the margin clause dispute and DENY Colony North's motion with respect to the York documents, with the scope of the requested discovery to be limited as outlined below.

I. BACKGROUND

In October 2010, a bridge collapsed on Colony North's property due to flooding. (D.I. 1 at ¶ 14) The dispute between the parties in this case relates to the scope of Commonwealth's liability to Colony North, pursuant to the terms of a policy of insurance ("the Policy") issued by Commonwealth to Colony North, for losses suffered by Colony North regarding the bridge

collapse. That dispute, in turn, revolves around how a "Margin Clause" contained in the Policy impacts such liability. The Margin Clause reads:

> The premium for this Policy is based upon the Statement of Values provided. In the event of loss under the Policy, the liability of the Insurer(s) shall be limited to the least of the following:
>
> A. The amount of the loss;
>
> B. 125% of the total stated value for each location or item of property insured including, without limitation, building, contents, machinery and equipment, stock, business income or gross earnings, extra expense and any other coverage provided at such location, as shown on the latest statement of values or other documentation on file with the Insurer(s);
>
> C. Any other Limit of Liability or Sublimit of Insurance or Amount of Insurance specifically used in the Policy that applies to any Insured loss or coverage or location.

(*Id.* at ¶ 21) In a November 9, 2010 letter to Colony North, Commonwealth wrote that it had determined that, due to Commonwealth's interpretation of the Margin Clause, the value of Colony North's claim was limited to $312,500. (D.I. 58 at 2 & ex. A)

On October 26, 2011, Plaintiff filed this action seeking a declaration of the parties' rights in connection with the Policy. (D.I. 1 at ¶ 3) On April 2, 2012, this action was referred to the Court by Judge Sue L. Robinson to "conduct all proceedings, including alternate dispute resolution; hear and determine all motions, through and including the pretrial conference." (D.I. 24)

On October 10, 2012, the parties filed a Joint Motion for Teleconference to Resolve Discovery Disputes. (D.I. 53) In subsequent briefing, the parties set out their position as to two disputed issues that remain before the Court (a third issue raised in the briefing, relating to the

sufficiency of Colony North's responses to damages-related discovery requests, was resolved by the parties). (D.I. 54, 55) The first dispute relates to Colony North's attempts to discover information regarding Commonwealth's handling of other third-party property claims where a margin clause was implicated.[1] (D.I. 54 at 1-3) The second dispute regards Colony North's attempts to discover the content of certain documents prepared by York, which Commonwealth redacted on grounds that the material was protected by the attorney-client privilege. (*Id.* at 3-4)

On October 22, 2012, the Court held a teleconference with the parties in order to attempt to resolve these issues. (D.I. 53) With respect to the margin clause dispute, the Court, citing to federal and Delaware state court precedent, determined that it was appropriate to allow for "some discovery" of the type that Colony North was seeking. (D.I. 60 at 25:1-9) However, as to the scope of that discovery, the Court ordered the parties to attempt to resolve the issue on their own, and if they could not, to set forward competing proposals in additional letter briefs. (*Id.* at 44:3-23) Ultimately, the parties could not agree and submitted their respective proposals. With respect to the privilege issue, the Court ordered the parties to provide additional briefing.[2] (*Id.* at 50:22-53:15) The parties' briefing on both issues was completed on November 12, 2012. (D.I. 56, 57, 58, 59)

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery

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[1] The particular discovery requests-at-issue were Colony North's Interrogatory Numbers 9 and 10, Request for Admission No. 10 and Document Request No. 8. (D.I. 54 at 1-2)

[2] In connection with that briefing, Commonwealth was also required to submit, in camera, redacted and unredacted versions of the two documents that are implicated in the dispute. The Court has received and reviewed those documents.

regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). The Rule further states that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Despite the otherwise broad scope of discoverable information, a court must limit the frequency or extent of discovery if, *inter alia*, it determines that the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii).

III. DISCUSSION

A. Margin Clause Dispute

The first dispute concerns "the scope of the review that Commonwealth [must] undertake in response to Colony North's discovery requests relating to Commonwealth's handling of [third-party] claims where margin clauses were implicated," (D.I. 59 at 1), and the related scope of records that Commonwealth will be required to produce.[3] As the Court noted during the October

[3] As previously noted, during the October 22, 2012 teleconference, the Court considered and rejected Commonwealth's position that no discovery should be permitted at this time into any claims Commonwealth handled regarding other insureds where margin clauses were implicated. (D.I. 60 at 25:1-11) During that teleconference, the Court agreed with Colony North's position that evidence regarding how Commonwealth interpreted the meaning of the same or similar margin clauses in other insurance contracts *could be* relevant extrinsic evidence as to the meaning of the Margin Clause at issue in this case, *if* the Margin Clause's meaning was ultimately determined to be ambiguous. *Cf. O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001) (noting that extrinsic evidence may only be used to interpret contract language under Delaware law if the meaning of a contract term-at-issue is ambiguous); *see also Sunnen Prods. Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 4:09CV00889 JCH, 2010 WL 743633, at *2 (E.D. Mo. Feb. 25, 2010) (allowing such discovery because if "the [insurance policy-at-issue] is ambiguous, as Plaintiff claims, then extrinsic evidence would be relevant"). Noting that under the Scheduling Order in place in the case, the Court would not make a determination as to whether the contractual provision-at-issue was ambiguous until (at a minimum) discovery was

22 teleconference, even in those many cases where courts have allowed discovery of other similar third party insurance claims or lawsuits, the courts have been mindful of the need to balance the relevance of the materials requested with the associated burden on insurers of producing those materials. *See, e.g., Phillips v. Clark Cnty. Sch. Dist.*, No. 2:10-cv-02068-GMN-GWF, 2012 WL 135705, at *6 (D. Nev. Jan. 18, 2012); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, Civ. No. 89-1701 (CSF), 1990 WL 191922, at *3-4 (D.N.J. Nov. 13, 1990). As a result of that balancing process, the courts have regularly imposed limits on the scope, time frame and number of other similar claim records that must be produced. *See, e.g., Sunnen Prods. Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 4:09CV00889 JCH, 2010 WL 743633, at *4 (E.D. Mo. Feb. 25, 2010) (ordering that the ten earliest and ten most recent responsive third-party claim files in a particular time period be produced); *Nestle Foods*, 1990 WL 191922, at *3-4 (affirming

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completed and case dispositive motions were filed, the Court ruled that it would permit limited discovery into such extrinsic evidence during the discovery period. Despite the Court's ruling, Commonwealth devotes a good portion of its submission on the margin clause issue attempting to re-litigate whether any such discovery should be permitted at this time. (D.I. 57 at 1-2) The Court will not re-open that issue, and again notes that federal law controls on this issue, and that its decision to permit some such discovery at this stage of the case is in line with similar decisions of other federal courts, *see, e.g., Phillips v. Clark Cnty. Sch. Dist.*, No. 2:10-cv-02068-GMN-GWF, 2012 WL 135705, at *5-6 (D. Nev. Jan. 18, 2012); *Sunnen Prods.*, 2010 WL 743633 at *2; *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, Civ. No. 89-1701 (CSF), 1990 WL 191922, at *3 (D.N.J. Nov. 13, 1990) (citing cases), including courts overseeing claims involving state contract law similar to the law of Delaware, *see, e.g., Garcia v. Benjamin Grp. Enter. Inc.*, 800 F. Supp. 2d 399, 404-05 (E.D.N.Y. 2011). The decision is also in line with decisions of courts in the State of Delaware. *See, e.g., Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1099, 1106-07 (Del. Super. Ct. 1991); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chem. Co.*, 558 A.2d 1091, 1093-95 (Del. Super. Ct. 1989). *But see Unisys Corp. v. Royal Indem. Co.*, No. Civ. A. 99C09055JOH, 2000 WL 33115694, at *3-4 (Del. Supr. Ct. Nov. 1, 2000) (finding that until the Court determined that the insurance policy's provisions at issue were ambiguous, discovery into extrinsic evidence regarding the policy would not be permitted, and indicating that the parties may file a summary judgment motion to attempt to resolve the issue of ambiguity).

a Magistrate Judge's order that the ten earliest and ten most recent responsive claim files in a particular time period be produced). The parties have put forward competing proposals for how Commonwealth must respond in this case.

Commonwealth notes that it has in excess of 1,750 individual property claim files regarding claims filed against it from 2007 through October 2012. (D.I. 57 at 2; Affidavit of Katherine Lee ("Lee Affidavit") (attached to D.I. 57) at ¶ 3). The files are kept in hard-copy form only (they are not stored electronically); the most recent six months' worth of files are located in Commonwealth's Vancouver office, with the remainder housed in off-site storage. (D.I. 57 at 2; Lee Affidavit at ¶ 4) It estimates that no more than 10 claim files could be reviewed in a work day by one of its employees (with additional time needed for redaction and review by counsel). (D.I. 57 at 3; Lee Affidavit at ¶¶ 6-10) As a result, Commonwealth proposes that it be required to search through a maximum of 30 of its most recently closed property claim files, which are located in its Vancouver office (and thus would be less costly to retrieve, as compared to off-site files). (D.I. 57 at 2-3) Commonwealth proposes that it search these files to determine whether the policy associated with each file had an "identical" margin clause to the one at issue in this case. If such a case file is found, and the margin clause was implicated, than it would be required to provide responsive records as to no more than the first 10 such qualifying claim files (and if less than 10 or no qualifying files were found, it would be permitted to stop its search after the total of 30 files were reviewed). (*Id.*) Commonwealth further requests that if the Court orders a more burdensome search that Colony North should bear the costs of that search. (*Id.* at 3)

Colony North proposes that Commonwealth search through 50 of these property claim

files. (D.I. 59 at 2) Because Colony North wishes to know how Commonwealth interpreted margin clauses before and after Colony North's claim (in part to determine if that interpretation changed in light of the claim), it proposes that Commonwealth review 25 claim files where the claims date from after November 2010 and 25 claim files where the claims date prior to November 2010 (i.e., between 2007 and November 2010).[4] (*Id.*) If, after this review, Commonwealth identifies 15 claim files relating to claims "that it settled where the policy contained a margin clause that is similar to the one at issue in this case," then Colony North would be content.[5] (*Id.*) If Commonwealth is unable to find 15 such claims, Colony North proposes that Commonwealth search through an additional amount of claim files (it suggests "perhaps . . . another 50") until the limit of 15 applicable files is reached. (*Id.*) For each responsive file, it seeks the following documents: (1) a copy of the insurance policy (including the statement of values); (2) correspondence between Commonwealth (or its adjusters) and its insured related to the claim; (3) correspondence between Commonwealth and its adjusters relating to the claim; and (4) internal communications within Commonwealth regarding the claim. (*Id.*)

After reviewing these proposals, and in an effort to balance the relevance of the materials

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[4] Colony North does not require Commonwealth to use a particular methodology to locate these respective groups of 25 files, only requesting that there be "no reason to question the selection process methodology." (D.I. 59 at 2)

[5] Colony North defines a "similar" margin clause as one that includes "a provision that provides that in the event of a loss, the liability of the insured shall be limited to the least (or lesser) of a percentage over and above the stated value of some item (or combination of items) of property and any other limit of liability o[r] sublimit of insurance." (D.I. 59 at 1 n.1) It notes that "[i]t is immaterial, in our view, whether the percentage of the stated value is 125%, 110% or any other percentage." (*Id.*)

requested with the burden on Commonwealth to produce such materials, the Court will order the following regarding the scope of Commonwealth's search and production:

1. Commonwealth will be required to search through a maximum of 40 property claim files. Of those 40 files, 20 shall be files involving claims made between January 1, 2007 and November 9, 2010 and 20 shall be files involving claims made from November 9, 2010 to the present. Commonwealth may use any methodology to determine which of the 20 claim files per date range (40 files total) are to be searched (so long as the methodology is unbiased as to the expected content of the files to be searched).

2. A "responsive" claim file will be a file involving (1) a claim made on an insurance policy with a margin clause that is identical to or similar to the Margin Clause at issue in this case; and (2) a case where that margin clause was implicated. (*See* D.I. 60 at 40:16-41:19 (discussing the circumstances in which a similar or identical margin clause to that at issue in this case would be "implicated")) A "similar" Margin Clause is one that meets the definition provided by Colony North in its filing. (D.I. 59 at 1 n.1)

3. If Commonwealth identifies a responsive claim file, it shall produce the types of documents for that file requested by Colony North above. Commonwealth may redact these records for confidential, identifying and privileged information, making every effort to ensure that the nature of the redactions allow, to the extent possible, for Colony North to be able to determine which documents relate to which claim.

4. So long as it reviews an equal number of claim files from both date ranges discussed above, Commonwealth need not review or produce records regarding more than 10 responsive claim files. Thus, if the first 10 claim files that Commonwealth reviews are responsive, then it need not review any additional claim files.

5. Colony North will not be required to bear any cost of this search and production.

B. York Privilege Issue

The Court next turns to the second issue, which regards two documents prepared by York executive general adjuster and vice president James Podesva. (D.I. 58 at 1) York is an independent adjustment company, which was hired by Commonwealth to investigate and adjust Colony North's claim. (*Id.*) The two redacted documents are: (1) a set of "file notes" prepared by Mr. Podesva, which contain redacted notes relating to communications between York,

Commonwealth and Clausen Miller P.C. ("Clausen Miller") (the law firm representing Commonwealth in this matter); and (2) a copy of an invoice submitted by York to Commonwealth, which contains redacted portions relating to the same communications discussed in the file notes. (*Id.* at 1-2)

Under Delaware law,[6] "the party asserting a privilege bears the burden of proving that the material in question is privileged." *Glassman v. Crossfit, Inc.*, Civil Action No. 7717-VCG, 2012 WL 4859125, at *2 (Del. Ch. Oct. 12, 2012) (citing *Mayer v. Mayer*, 602 A.2d 68, 72 (Del. 1992)). To do so, the party must show "a communication was made (1) for the purpose of seeking, obtaining or delivering legal advice, (2) between privileged persons, and (3) that confidentiality was intended." *Rembrandt Techs., L.P. v. Harris Corp.*, C.A. No. 07C-09-059-JRS, 2009 WL 402332, at *5 (Del. Super. Ct. Feb. 12, 2009). The Delaware Rules of Evidence, which codify the attorney-client privilege, set forth the scope of the attorney-client privilege in Delaware:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

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[6] Delaware law applies because "a district court exercising diversity jurisdiction must, pursuant to Federal Rule of [Evidence] 501, apply the privilege law that would be applied by the courts of the state in which it sits." *Penn Mut. Life Ins. Co. v. Rodney Reed 2006 Ins. Trust*, No. 09-CV-0663 (JCJ), 2011 WL 1636949, at *1 (D. Del. Apr. 29, 2011).

Del. R. Evid. 502(b).

In its briefing, Commonwealth claims that the redacted material in the two documents-at-issue constitutes material protected by the attorney-client privilege. Colony North raises a number of arguments with regard to that assertion.

First, Colony North asserts that the communications at issue here were not made between privileged persons.[7] (D.I. 56 at 2-3) This issue relates to whether York is a third-party whose involvement in the communications-at-issue destroys the privilege. As stated above, the Delaware Rules of Evidence apply to confidential communications "(1) between the client or the client's representative and the client's lawyer or the lawyer's representative [or] . . . (4) between the client and a representative of the client." Del. R. Evid. 502(b). The key inquiry is whether a

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[7] Although the parties cite to what is sometimes referred to as the "common interest doctrine," (D.I. 56 at 3; D.I. 58 at 2), the Court is not convinced that this doctrine is applicable. The common interest doctrine is an exception to the general rule that the disclosure of confidential attorney-client communications to a third party constitutes a waiver of the attorney client privilege. *Rembrandt Techs., L.P. v. Harris Corp.*, C.A. No. 07C-09-059-JRS, 2009 WL 402332, at *7 (Del. Super. Ct. Feb. 12, 2009). "Under the common interest doctrine, when a third party and the privilege holder are engaged in some type of common enterprise and the legal advice relates to the goal of that enterprise . . . the parties are permitted to share privileged information without a waiver occurring." *Id.* At a minimum, this doctrine requires that "all members of the community . . . share a common *legal* interest in the shared communication." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (interpreting Delaware law) (emphasis added). Here, the Court does not believe that Defendant has sufficiently articulated how its relationship with York (and York's relationship to the legal issues implicated by this litigation) meets the requirements necessary to trigger the applicability of the common interest doctrine. *See Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, C.A. No. 09C-10-259 WCC, 2011 WL 532011, at *5 (Del. Super. Ct. Feb. 2, 2011) (declining to find that the common interest doctrine applied where nothing in the record suggested "that [the parties] anticipated becoming co-plaintiffs or co-defendants at the time they were sharing legal advice . . . [or that the third party] could not have simply walked away from the transaction without any liability"). Nonetheless, the Court need not resort to this doctrine because, as described below, Commonwealth and York's employee, Mr. Podesva, have a sufficiently close relationship to permit the extension of the attorney-client privilege to communications involving York via the so-called "agency theory."

"representative" may include an independent adjuster like York.

Although there appears to be no direct Delaware case authority on this particular issue, at least one Delaware court has recognized that confidential communications between an independent consulting firm, the client, and the client's attorney may be protected in "certain circumscribed situations" under a so-called "agency theory." *Am. Legacy Found. v. Lorillard Tobacco Co.*, No. Civ. A. 19406, 2004 WL 2521289, at *5 (Del. Ch. Nov. 3, 2004) (applying the agency theory in the context of an independent public relations firm). In *Am. Legacy Found.*, the Delaware Court of Chancery examined whether an independent consulting firm hired by the plaintiff "was the functional equivalent of an in-house . . . department . . . seeking and receiving legal advice from [the client's] counsel with respect to the performance of its duties." *Id.* (citations and internal quotations omitted). Although the court did not find that the firm-at-issue met the definition, to the extent that a firm could meet that definition, the Court of Chancery suggested that such a firm's communications with the client's counsel may be protected by the attorney-client privilege. *Id.*

With respect to the issue at hand, the parties cite to cases from other jurisdictions that suggest that the analysis set forth in *Am. Legacy Found.* should extend to independent adjusters. For instance, in *Residential Constructors, LLC v. Ace Prop. and Cas. Ins. Co.*, No. 2:05-cv-01318-BES-GWF, 2006 WL 3149362 (D. Nev. Nov. 1, 2006), the district court, using a similar analysis as that applied in *Am. Legacy Found.*,[8] found that the privilege "may extend to

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[8] Indeed, *Residential Constructors* and *Am. Legal Found.* both cite to the same legal precedent in support of their analysis on this issue. *See Residential Constructors*, 2006 WL 3149362, at *13 (citing *In re Cooper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001)); *Am. Legal Found.*, 2004 WL 2521289, at *5 (same).

communications between a corporation's or company's attorney and an independent contractor who is 'the functional equivalent of an employee.'" *Id.* at *12 (internal citations omitted). The *Residential Constructors* Court found that this determination is made on a "case-by-case basis," by looking to "whether the consultant had primary responsibility for a key corporate job, whether there was a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's position in litigation, and whether the consultant is likely to possess information possessed by no one else at the company." *Id.* at *13. That Court went on to find that "an independent adjuster handling the investigation of a claim for the insurer is the functional equivalent of a claims employee of the insurer" because the independent adjuster performed the same functions as an in-house claims employee. *Id.* at *14-15; *see also Markwest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, Civil Action No. 05-cv-01948-PSF-PAC, 2007 WL 1106105, at *4 (D. Colo. Apr. 12, 2007) (finding independent adjuster to be agent of insurance company for purposes of attorney-client privilege analysis); *Safeguard Lighting Sys., Inc. v. N. Am. Specialty Ins. Co.*, No. Civ. A. 03-4145, 2004 WL 3037947, at *2 (E.D. Pa. Dec. 30, 2004) (same). Thus, the Court will apply this analysis to the case-at-bar to determine whether York is an agent of Commonwealth for privilege purposes.

Here, Mr. Podesva, the independent adjuster from York handling this claim, described his function as follows:

> A carrier will assign us a claim, and during that process we'll make inspections. We'll conduct investigations into the cause of [loss], the nature and extent of damage. We'll report back the findings to the insurance carriers, who will review our reports and will instruct us on authorities for settlement claims.

(D.I. 56, ex. A at 9:17-24) From this description, which does not appear to disputed, and from

the remainder of the information provided to the Court by the parties, it appears that Mr. Podesva had the primary responsibility for the claims adjusting job at issue in this case. It is also very clear from the transcript of Mr. Podesva's deposition that he had a continuous and close working relationship with Commonwealth. (D.I. 56, ex. A at 20:15-22:8; 28:4-33:21; 48:15-51:25) The record is somewhat less clear as to whether (and to what extent) Mr. Podesva possessed information related to the Colony North claim that was not likely known by anyone at Commonwealth. But after assessing the totality of Mr. Podesva's relationship with Commonwealth, as it relates to his role with regard to the claim at issue in this case, the Court finds that Mr. Podesva appears to have been acting as Commonwealth's agent—functioning as the equivalent of an in-house Commonwealth employee with respect to the Colony North claim. Thus, the Court finds that, so long as there are no other obstacles to asserting the attorney-client privilege, any communications between or among Mr. Podesva, Commonwealth and Commonwealth's attorney, made for the purposes of facilitating the rendition of legal advice, can be protected by the privilege.

Second, Colony North argues that the redacted portions of the two documents cannot be privileged because they were created more than seven months prior to the filing of this action. (D.I. 56 at 2) The Court finds this argument unpersuasive because "[u]nlike the work product doctrine . . . the attorney-client privilege is not premised on a requirement that the communications between the attorney and client occur 'in anticipation of litigation.'" *Rembrandt Techs.*, 2009 WL 402332, at *5; *cf. Safeguard Lighting Sys.*, 2004 WL 3037947, at *2. Here, although the redactions to the two documents at issue relate to communications made in advance of this lawsuit, the timing of those communications should not act as an absolute bar to the

ability to assert the privilege.

Third, Colony North argues that, even if York employees can amount to privileged persons under Delaware law, the redacted portion of the file notes and the invoice are not privileged, because they are not communications made for the purpose of seeking, obtaining or delivering legal advice. Colony North states that the former are notes made by Mr. Podesva to the "file" (not to an attorney) and notes that the redactions on the invoice relate in part to a communication between Mr. Podesva and Owen Watson, a non-attorney Commonwealth employee. (D.I. 56 at 2-3) As to the former, "[n]ormally, an author of a memorandum to 'file' intends the memorandum as a communication to himself, in order to document some past event or occurrence for future reference" and thus Commonwealth "must persuade the Court that [the] 'file' [communications] were not intended for that purpose, but, rather, were created as confidential communications to his attorney to facilitate the rendition of legal advice." *Balin v. Amerimar Realty Co.*, Civ. A. No. 12896, 1995 WL 170421, at *7 (Del. Ch. Apr. 10, 1995). Here, that burden has not been met, as there is no indication that the files notes were or would ever have been sent to a lawyer for the purpose of facilitating the rendition of legal advice. Instead, it appears as if these notes were made to record the use of Mr. Podesva's time so that he could later bill Commonwealth for the services he provided. As to the notes on the invoice, there is also no indication that they were meant to be or ever were communicated to an attorney; instead, they contain the same content from the file notes—content that was transferred to the invoice sent to Commonwealth for billing purposes.

However, that does not end the inquiry. The attorney-client privilege may still apply to shield documents from disclosure if their contents sufficiently relate to communications made for

the purpose of obtaining legal advice. For example, if such documents recite the contents of prior confidential attorney-client communications, courts have found them to be protected by the attorney-client privilege. *See, e.g., In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 83 (S.D.N.Y. 2006) ("A memorandum to a file may be protected where it records a confidential attorney-client communication."); *Cedrone v. Unity Sav. Ass'n*, 103 F.R.D. 423, 427 (E.D. Pa. 1984) (determining that the parts of lawyer's notes that "reflect information received from the client are protected by the attorney-client privilege"). In addition, some courts have held that reference to the underlying subject matter of confidential attorney-client communications is also protected by the attorney-client privilege. This Court made such a determination in *Lee Nat'l Corp. v. Deramus*, 313 F. Supp. 224 (D. Del. 1970), a case involving Missouri privilege law, explaining that "ordinarily questions which would require a client to disclose the subject matter discussed confidentially with an attorney would be barred by the privilege."[9] *Id.* at 226. The *Lee Nat'l* Court explained the rationale for extending the privilege to such information:

> [A]n affirmative response to [a question seeking information about the subject matter of an attorney-client communication] could be taken, by implication, to suggest that a client considered his position, with respect to the issues discussed, as either suspect or vulnerable. Second, such a rule would erode the basic public policy underlying the attorney-client privilege.

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[9] The Court has not found precedent from the Delaware state courts that expressly addresses whether a reference to the particular subject matter of an attorney-client communication is protected by the attorney-client privilege. In one case involving a dispute over certain documents assertedly covered by the privilege, however, the Delaware Court of Chancery suggested as much. *Cf. In re Fuqua Indus., Inc. S'holders Litig.*, No. Civ. A. 11974, 1999 WL 959182, at *2 (Del. Ch. Sept. 17, 1999) (finding that an indication that a document was written between counsel and client was sufficient to show that the document was subject to the attorney-client privilege because to hold otherwise, "then either privilege logs would have to go into far greater detail (and therefore risk waiving the attorney-client privilege) or parties would have to disclose the documents to show they were on a legal topic in order to obtain the privilege—which they would then have waived by showing the document").

> It would be a simple matter to sharpen the questions to require greater and greater specificity regarding the matter discussed so as to avoid altogether the effectiveness of the privilege. Third, if the responses were merely limited to the most general terms of the subject discussed, it would be of little benefit or enlightenment to an opponent or to the Court, for certainly the privilege would prevent further questions going to the content of the discussions.

Lee Nat'l Corp., 313 F. Supp. at 227; *cf. In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003) (finding that a question seeking information regarding the "specific nature" of legal advice sought from counsel—whether an attorney was consulted "about the preparation of the Form I-485"—was protected, while noting that questions about the "general purpose" of the work may not be privileged).

Here, the redacted material-at-issue appears to refer to a communication from Commonwealth and York to Commonwealth's counsel, Clausen Miller, about a particular subject matter relating to the issues involved in this litigation. Although the issue is a close one, the Court finds that all of the redactions-at-issue sufficiently relate to the specific subject matter of confidential communications, and thus are protected by the attorney-client privilege. *Lee Nat'l Corp.*, 313 F. Supp. at 225-227 (finding that absent waiver, inquiry into whether a corporation had consulted with counsel concerning proposed changes in the bylaws and certificate of incorporation would be barred by the attorney-client privilege).

For the reasons outlined above, the Court will deny Colony North's motion to compel with respect to these documents.

IV. CONCLUSION

For the reasons set forth above, it is hereby ORDERED that Colony North's motion to compel margin clause discovery is GRANTED-IN-PART, to the extent set forth above in this

Memorandum Order. Colony North's motion to compel the disclosure of the York privilege documents is DENIED.

In light of these decisions, the Court also orders that the parties should meet and confer regarding appropriate modifications that should be made to the current Scheduling Order. Thereafter, the parties should jointly submit a revised proposed Scheduling Order by no later than **January 4, 2013**.

Dated: December 21, 2012

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE