On June 7, 2016, Pharmavite, while in contact with the Food and Drug Administration, recalled certain products. eeaat e07.) This recall allegedly caused plaintiffs a "Loss" under the policy in the amount of $9,000,000. trodat to38.) Plaintiffs subsequently filed their final statement of Loss with CF on October 5, 2017. andat to 44.) However, on February 7, 2017, CF disclaimed coverage. eeaat to45.) Plaintiffs subsequently commenced this action for breach of contract and a declaratory judgment, alleging that CF breached its obligations under the policy by failing to reimburse them.

Prior to this motion, the parties disputed whether certain documents in CF's privilege log were discoverable. Accordingly, CF requested an I3l.].9l]l review of the following documents: CFSIC1103, CFSIC1104, CFSIC 1111, CFSIC1112, CFSIC1113, CFSIC1114, CFSIC1115, CFSIC1116, CFSIC1117, CFSIC1831, CFSIC1832, CFSIC1833, and CFSIC1837. CF claimed that these documents were protected by the attorney work product and attorney-client privilege because they concern, I5,TIIjjlirl communications and materials from CF's counsel, Kennedys CMK LLC (CMK). Plaintiffs opposed. This court reviewed the documents I3lA].9linl and at a status conference, issued a brief decision directing CF to disclose all of the documents within 30 days or move to reargue. (NYSCEF Doc. No. 91.) CF moved to reargue, and again, plaintiffs oppose. (NYSCEF Doc. No. 111.)

trosdoorlcd

A motion for leave to reargue must be based on matters of law or fact overlooked or misapprehended by the court in determining the prior motion. t)99l CPLR 2221 [d]; msrll Pl1rt..rt3a9]j,ll l]3rl kl,1l45ttprtvdl7 AD3d 434 [2d Dept 2005]). "[l]t is not designed to offer a party an opportunity to argue a new theory of law not previously advanced by it." taht93r]l PlPA]lDTpC,93w28l0 AD2d 514, 515 [1st Dept

2001]). Here, CF argues that reargument is warranted because (1) this court overlooked the fact that CMK did not conduct the factual investigation of the claim, but rather provided legal advice to CF, and (2) that this court misapprehended the law regarding whether the attorney-client privilege exists for confidential communications made between an insurance company and its outside counsel. As a preliminarily matter, reargument is granted insofar as this application comports with CPLR 2221(d)(1), (2) and (3). CF does not advance arguments different from those tendered on the original application. (*Rubinstein v Goldman*, 225 AD2d 328, 328-329 [1st Dept 1996].)

The attorney-client privilege attaches if information is disclosed in confidence to the attorney for the purposes of obtaining legal advice or service. (*People v Osorio*, 75 NY2d 80, 84 [1989].) The privilege extends to communications from attorney to client. (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991].) "[T]he communication from attorney to client must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." (*Id.* at 377-378 [internal quotations and citation omitted].) "The communication itself must be primarily or predominantly of a legal character. (*Id.* at 378 [citation omitted]).

Whether a document is protected "is necessarily a fact-specific determination." (*Id.*) For instance, "an investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney." (*Id.* at 379.) Indeed, an attorney's communication is not privileged "when the attorney is hired for business or personal advice, or to do the work of a nonlawyer." (*Id.*)

In the context of insurance, "[t]he payment or rejection of claims is a part of the regular business of an insurance company." (*Bertalo's Rest. v Exchange Ins. Co.*, 240 AD2d 452, 454-455 [2d Dept 1997][internal quotation marks and citation omitted].) Consequently, "[d]ocuments prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged, and, therefore, discoverable." (*Id.*) Thus, these documents do not become privileged merely because the investigation was conducted by an attorney. (*Brooklyn Union Gas Co.*, 23 AD3d at 191.) Where an attorney acts as a claims investigator, and not as an attorney, the communications are not privileged. (*Id.*) Additionally, "[r]eports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and discoverable, even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation." (*Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648 [2d Dept 2004][citation omitted]).

The common thread in such cases is that the "insurance companies retained counsel to provide a coverage opinion, i.e. an opinion as to whether the insurance companies should pay or deny the claims." (*National Union Fire Ins. Co. of Pittsburgh, Pennsilvania v TransCanada Energy USA, Inc.*, 119 AD3d 492, 493 [1st Dept 2014].) Stated otherwise, counsel "were primarily engaged in claims handling." (*Id.*)

Similarly, "attorney work product only applies to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." (*Brooklyn Union Gas Co. v American Home Assur. Co.,* 23 AD3d 190, 190-191 [1st Dept 2005][citation omitted]). "The prospect of

litigation may be relevant to the subject of work product and trial preparation materials." (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 at 380 [citation omitted].) The burden of satisfying each element of the work product privilege rests on the party asserting it. (*John Blair Communications v Reliance Capital Group,* 182 AD2d 578, 579 [1st Dept 1992].) "The workproduct privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation." (*Coastal Oil N.Y., Inc. v Peck*, 184 AD2d 241, 241 [1st Dept 1992][citation omitted]).

CFSIC1837

CF has failed to meet its burden of demonstrating any right to protection with respect to CFSIC1837. CFSIC1837 appears to be a memoranda consisting of facts concerning the recall with notes about the policy terms. The privilege log indicates that this document was withheld on the basis of attorney work product. Although the document itself is not dated, the privilege log dates it as September 16, 2016. The privilege log fails to identify the author and recipient of this document. The privilege log additionally fails to identify any individuals copied on the correspondence. However, CF submits the affidavit of Heather L. Bell, Vice President at United States Fire Insurance Company, the claims administrator for the CF policy at issue here. Bell states that she prepared CFSIC1837 on September 16, 2016 to summarize the legal opinion rendered by CMK with respect to the merits of Otsuka's coverage claim. Additionally, Bell states that the document was withheld not only on the basis of attorney work product but also the attorney-client privilege.

Like *Brooklyn Union Gas Company v American Home Assurance Company*, here "there is no legal advice, no legal recommendations or attorney thought processes revealed" in CFSIC1837. (*Brooklyn Union Gas Co.*, 23 AD3d at 191.) Whereas

attorney work product only applies to documents prepared by counsel acting as such, Bell, by her own admission, states that she prepared the document. Despite Bell's uncorroborated statement that she was summarizing the opinions rendered by CMK, the very contents of CFSIC1837 suggest otherwise. Specifically, the document provides that "[i]investigation into these coverage issues is ongoing[]", indicating that CFSIC1837 was prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage. (*Id.*) To the extent that CMK investigated whether coverage should be provided and the costs of such coverage, these communications are not privileged because CMK was "acting as claims investigators, not attorneys." (*Id.*)

CF's assertion of the attorney-client privilege also fails because, as noted above, nothing in CFSIC1837 is primarily or predominantly a communication of a legal character. (*Id.*) As Bell herself admits, she created this one page claim note, and nothing in the document suggests that it was a communication between defendant and CMK. (NYSCEF Doc. No. 108 ["I created this one page claim note ... ."].) Regardless, such information does not become privileged merely because CMK conducted the investigation of whether coverage should be provided. (*Id.*)

CFSIC1832 and CFSIC1833

CF asserts the attorney-client privilege and attorney work product over CFSIC1832 and CFSIC1833. Here, the privilege log indicates that these two documents are communications from CMK to CF dated August 31, 2016. However, a portion of this communication is an email dated August 30, 2016 from an individual at nonparty Marsh Risk Insurance (Marsh) to CF. CMK is not copied on this email. The contents are not primarily or predominantly of a legal character. (*Spectrum Sys. Intl.*

Corp., 78 NY2d at 377.) Additionally, this email contains no legal advice, no legal recommendations or attorney thought processes. (*Brooklyn Union Gas Co.*, 23 AD3d at 191.) Accordingly, CF has not met its burden of showing that this email specifically is protected by the attorney work product or attorney client privilege. Insofar as privilege determinations are fact-specific, the author of the email indicates to CF that "Pharmavite has inquired" suggesting that the communication concerns the issue of whether coverage should be provided and the costs of such coverage. (*Id.*)

Indeed, the day after receipt of this email from Marsh, CF emailed CMK - the communication for which the privilege log entry accounts. This second email to CMK, however, cannot be protected. It indicates that CF retained CMK to act as claims investigators, not attorneys, and that they investigated the issue of whether coverage should be provided. It appears that these communications were made in the ordinary course of CF's investigation to determine whether to accept or reject coverage and to evaluate the extent of Pharmavite's loss. Again, the second email is not privileged and does not become privileged merely because CF retained CMK to conduct the investigation. (*Id.*)

Additionally, the email from Marsh and the email to CMK are dated August 30, 2016 and August 31, 2016 respectively, but CF did not allegedly disclaim coverage until February 7, 2017. The timing of these emails only bolsters the court's conclusion that CMK was providing a coverage opinion.

CFSIC1103, CFSIC1104 and CFSIC1831

CF asserts the attorney work product and attorney client-privilege over CFSIC1103, CFSIC1104, and CFSIC1831, correspondences by email and letter. These documents are not attorney work product because they are not documents "prepared by

counsel acting as such", and do not contain "materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." (*Brooklyn Union Gas Co.,* 23 AD3d at 190-191.) A review of CFSIC1103, CFSIC1104, and CFSIC1831 indicates that they were sent in connection with CMK's coverage investigation insofar as they reference "Otsuka America Claim No", and to some extent, bear dates prior to February 7, 2017 when CF disclaimed coverage. Therefore, they are not communications protected by the attorney-client privilege either.

CFSIC 1111 and CFSIC1112

CF asserts the attorney work product and attorney-client privilege over CFSIC1111 and CFSIC1112 but fails to meet its burden. These two communications are dated December 6, 2016 and December 8, 2016 whereas CF disclaimed coverage allegedly on February 7, 2017. Although these two communications are between CF and CMK, the communication from CMK to CF is only further indicia that counsel was retained to provide a coverage opinion. Counsel specifically states, "Based on the current state of the law, and our policy language, its my opinion that we can maintain our position that there is no actual contamination that could be considered to have resulted in, or would result in bodily injury." Because the payment or rejection of claims is a part of the regular business of an insurance company, reports, such as this, are made in the regular course of business and are discoverable. (*Bertalo's Rest.*, 240 AD2d at 454-455.) That both of these communications are dated before CF disclaimed coverage also indicates that these documents are not immune from discovery because they were prepared in the ordinary course of CF's business. These documents demonstrate that

CMK was "primarily engaged in claims handling." (*see Natl Union Fire Ins. Co. of Pittsburgh, Pennsylvania.*, 119 AD3d at 493.)

CFSIC1113, CFSIC1114, CFSIC1115, CFSIC1116 and CFSIC1117

CF asserts the attorney work product and attorney-client privilege over CFSIC1113, CFSIC1114, CFSIC1115, CFSIC1116, and CFSIC1117, individual pages of one document dated December 7, 2016. The document is a memorandum marked "Privileged and Confidential Attorney Work Product" however "a party's own labels are obviously not determinative of work product." (*Spectrum Sys. Intl. Corp.*, 78 NY2d at 381.) A review of these pages indicates that the document is a coverage opinion. Indeed, they demonstrate that CMK was primarily engaged in claims handling. For instance, CMK notes, "Pharmavite's QC group failed to follow proper protocol - accordingly, this matter may be more properly characterized as the failure of Pharmavites QC procedures, and not a 'true' recall case." (CFSIC1117.) Even if this memorandum has a mixed multipurpose insofar as it was also composed in anticipation of litigation, it is still discoverable and not privileged. (*see Bombard*, 11 AD3d at 648.)

Accordingly, it is

ORDERED that defendant Crum & Forster Specialty Insurance Company's motion is denied and defendant is directed to produce the documents reviewed here *in camera* within 10 days of this order's filing on NYSCEF.

8/28/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE