1.   A ruling from the U.S. District Court for the Southern District of New York compelling one of the defendants to produce "earlier in time" emails from email threads and addressing how email threads may be handled on the parties' privilege logs.

In *In re Actos Antitrust Litigation*, No. 1:13-cv-09244 (RA) (SDA), --- F.R.D. ----, 2022 WL 949798 (S.D.N.Y. March 30, 2022), U.S. Magistrate Judge Stewart D. Aaron addressed a motion to compel one of the Defendants to produce "earlier in time" emails that were included in threaded emails defendants already produced.

In this antitrust class action alleging that Defendants prevented competitors from timely marketing a generic drug, the parties had entered into a protocol for the production of electronically stored information (ESI) in native format that required the parties to de-duplicate the ESI produced but did not address the production of only the most inclusive email threads. *Id*. at *1. In making its productions, the Defendant against whom the motion to compel was brought used email threading, "by which a party reviews and produces the most-inclusive email in a thread." Plaintiffs objected to this format of production and sought to compel Defendant to produce "earlier-in-time emails" as well as the metadata associated with those emails.

Magistrate Judge Aaron began by noting that the parties' dispute highlighted the importance of negotiating a comprehensive ESI protocol before data production is undertaken. *Id*. at *2. He explained that the parties' ESI protocol did not expressly permit the use of email threading, nor do the Federal Rules of Civil Procedure or the local rules of the court contain any provisions regarding the use of email threading. Magistrate Judge Aaron also noted that the Sedona Principles encourage parties to have "early discussions" regarding "procedural issues relating to the form of production" and to enter into an "agreed upon protocol governing the production of ESI and avoid downstream misunderstandings or disputes." *Id*. (quoting *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, Comment 3.c. (2018)).

Magistrate Judge Aaron stated that it is not uncommon for ESI protocols to address the use of email threading, and Plaintiff had pointed to prior litigation in which Defendant had agreed to an ESI protocol that addressed email threading. *Id*. at *3. But the parties did not address email threading in this case.

Magistrate Judge Aaron found that Defendant's exclusion of lesser included emails from production resulted in the exclusion of the metadata associated with earlier emails in a chain and that this exclusion materially reduced Plaintiffs' ability to search for all correspondence within a date range. In particular, he found that excluding lesser included emails resulted in the recipients of some such emails not being identified and that it resulted in the loss of information identifying who was blind copied on lesser included emails even though this information was among the metadata the parties agreed to produce. In this regard, Magistrate Judge Aaron noted that the parties could have included in the ESI protocol provisions for the production of metadata to resolve these issues, but Plaintiffs were not provided the opportunity to negotiate how email threading might be accomplished in an acceptable manner.

Ultimately, Magistrate Judge Aaron declined to impose email threading on Plaintiffs. Even though he recognized that production of earlier-in-time emails would cause some additional burden on

Defendant, he found that any additional burden is not undue as Defendant agreed to the ESI protocol and likely already had reviewed many of the emails at issue. Accordingly, Magistrate Judge Aaron ordered Defendant to produce all responsive ESI to Plaintiffs, including earlier-in-time emails.

Magistrate Judge Aaron also provided guidance regarding a dispute between the parties regarding how email threads should be identified on privilege logs. He noted that the local rules of the court, specifically Local Civil Rule 26.2(c), provides that "when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category." *Id*. at *4. Magistrate Judge Aaron also quoted at length from the committee note to this local rule, including that "[b]ecause the appropriate approach may differ depending on the size of the case, the volume of privileged documents, the use of electronic search techniques, and other factors, the purpose of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case."

Based on these principles, Magistrate Judge Aaron concluded that categorical privilege logs are appropriate and that such a log is adequate "if it provides information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege." He further noted that Plaintiffs' proposal of permitting categorical logging of emails only where all emails "involved the same participants and subject matter" would not be appropriate, nor would Defendant's proposal of only logging the threaded emails together.