

3. A decision from the Southern District of New York compelling Defendants to amend their categorical privilege log to include more particularized information so that Plaintiff could assess Defendants' privilege claims or to produce a privilege log comprising the metadata for the withheld documents.

In *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18-CV-4044 (BCM), 2021 WL 1968325 (S.D.N.Y. Mar. 31, 2021), Magistrate Judge Barbara Moses of the Southern District of New York granted in part Plaintiff's motion to compel Defendants to amend their categorical privilege log or produce a privilege log comprising the metadata for the withheld documents. *Id.* at *1.

In this debt enforcement litigation, Defendants produced a categorical privilege log to comply with their obligations under Federal Rule of Civil Procedure 26(b)(5)(A). The parties had agreed to the use of a categorical privilege log. Plaintiff, however, claimed that Defendants' categorical privilege log was insufficient because it did "not provide information sufficient to allow [Plaintiff] to assess [Defendants'] claims of privilege."

Defendants' categorical privilege log covered over 12,500 withheld documents split among 21 categories, with each category providing information with the following columns: "Category Description," "Subject(s) of Documents or Communications," "Applicable Privileges or Immunities from Discovery," "Number of Documents Withheld," and "Number of Documents Redacted."

In describing Defendants' categorical log, Magistrate Judge Moses observed that there was little difference across the different columns between each category. Several of the category descriptions differed only by the names of the individuals and law firms listed. *Id.* at * 2. Similarly, the subject descriptions were mostly identical. Most described the subject as "Activist litigations brought on behalf of [Defendants], and related strategies." Additionally, each category listed the same statement for the applicable privileged or immunities: "Attorney-client privilege; work product doctrine; common interest doctrine." Magistrate Judge Moses observed that "[t]here is no attempt to indicate which privilege applies to which documents within any category." Finally, the date range for each category was the same eight-year span. *Id.* at *4.

Magistrate Judge Moses began her analysis with Rule 26(b)(5)(A), which requires a withholding party to "describe the nature of the documents, communications, or tangible things not produced or disclosed ... in a manner that, without revealing information itself privileged or protected ... enable[s] other parties to assess the claim." The privilege log must "establish the essential elements of the privilege" and "provide sufficient detail to permit a judgment as to whether the documents are at least potentially protected from disclosure." *Id.* at *3 (internal quotations omitted).

Under the local rules for the Southern District of New York, parties can agree to provide a categorical log. Magistrate Judge Moses cautioned, however, that the "party receiving a categorical log 'may object if the substantive information required by this rule has not been provided in a comprehensible form.' " *Id.* (quoting Local Civ. R. 26.2(c)). Here, she found several elements of Defendants' categorical privilege log to be insufficient.

First, the date range for the categorical privilege log was implausible at best. Magistrate Judge Moses noted that it was "extremely unlikely that the documents in each of the 21 categories span

the entire eight years.” *Id.* at *1. Certain categories included only a single withheld document, and others only a handful of documents, which made the date range claim particularly suspect. *Id.* at *3. Further, one category that encompassed the litigation at issue included a date range predating the litigation by seven years. Magistrate Judge Moses observed that the category likely contained “many documents that do *not* ‘relat[e] to the pending action’ (except in the sense that they are relevant to the issues in the pending action) and were *not* prepared in anticipation of it.” *Id.* (emphasis in original).

Another flaw involved Defendants’ treatment of the individuals appearing in the log. Unlike a traditional privilege log, Defendants did not include a column for senders, addressees, or recipients. Instead, Defendants included only a “ ‘non-exclusive’ list of recipients from numerous entities.” *Id.* at *2. This meant that some of the documents listed in the categories “may have been sent by or to individuals other than those listed in the description.” Additionally, Magistrate Judge Moses pointed out that some categories identified only one counsel, an in-house attorney who, according to Defendants, “acts in both a legal and a business capacity.” *Id.* at *3.

Despite her findings, Judge Moses explained that proportionality guided her decision: “[P]roportionality is an issue in evaluating privilege logs, just as it is with respect to other aspects of discovery.” *Id.* at *5. For the categories of documents dealing with events not at issue in the suit and that included outside counsel, Magistrate Judge Moses required only the provision of an accurate date range for the category and a complete list of senders, addressees, and other recipients of the communications within the category. For the work product category, Magistrate Judge Moses required provision of an accurate date range and a complete list of the individuals by and for whom the documents were prepared.

For the 1,359 documents directly relevant to the litigation, however, Magistrate Judge Moses ordered Defendants to produce a traditional privilege log, although she permitted the parties to stipulate to the provision of a metadata privilege log instead.