

### **3. A ruling from the U.S. District Court for the Southern District of New York granting a motion to compel a metadata log related to communications from a sample of the putative class alleged in the action and finding that production of the log was proportional to the needs of the case.**

In *Ni v. HSBC Bank USA, N.A.*, No. 23-cv-0309 (AS)(KHP), 2024 WL 863699 (S.D.N.Y. Feb. 29, 2024), U.S. Magistrate Judge Katharine H. Parker addressed the proportionality of Plaintiff's request for a metadata log under Rule 26.

In this collective wage and hour action under the Fair Labor Standards Act, Plaintiff claimed that personal bankers at Defendant's bank branches worked off-the-clock through lunch and after hours but were not paid for that time. In discovery, Plaintiff sought a metadata log for the six-year period preceding the filing of the complaint showing email, text, and direct message (DM) activity for a sample of the putative class to evaluate whether employees worked through their lunch breaks and/or after their bank branch closed for the day. *Id.* at \*1.

The metadata log Plaintiff sought would include the names of the sender and recipient of the email/text/DM, the date and time the message was sent/received, and the subject line of the message. Plaintiff proposed that the log would include data from a sample of 93 employees across 53 bank branches, covering the last three months of each year of the sampled individual's employment. Plaintiff claimed (and Defendant did not dispute) that this information was relevant to Plaintiff's anticipated motion for class certification. In particular, Plaintiff intended to use this information to match against the time records of the employees in the sample to determine whether there was any activity during the employee's recorded lunch hour or after-hours.

Defendant objected to the requested log on the ground that the sample size was disproportionate to the needs of the case. Defendant argued that pulling metadata is a "manual process" and requires a "manual data pull" for each individual in the sample and proposed that the sample include only 49 personal bankers (8% of the putative class). Defendant claimed that this smaller sample would be less burdensome. Defendant also sought to limit the log to only messages sent, on the theory that "receiving a communication is not germane to whether an employee is working."

Magistrate Judge Parker began her analysis with Federal Rule of Civil Procedure 26(b)(1), which defines the scope of discovery to consist of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." She explained that the specific proportionality factors to be considered

are “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

Applying this rule, Magistrate Judge Parker found that Plaintiff’s requested metadata log was a “reasonable sample” of ESI. *Id.* at \*2. She noted that Plaintiff sought only metadata, not the content of any emails, texts, or DMs, meaning that Defendant would not need to expend resources reviewing the content of the ESI. In addition, she found Plaintiff’s proposed sample size to be for “a relatively modest, but informative, portion of the putative class.” In response, Defendant had provided no specific information about the monetary costs or the estimated hours involved in collecting the metadata.

Magistrate Judge Parker stated that courts have permitted discovery from samples of 25% or more of a class and that Plaintiff’s proposed sample was well within a sample size that courts find reasonable and representative. Accordingly, she held that Plaintiff’s proposal was proportional to the needs of the case given the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the likelihood that the information sought would quickly inform both sides of the scope of any potential off-the-clock time worked, and that Plaintiff’s proposed discovery outweighed the relative burdens on Defendant.

Magistrate Judge Parker disagreed with Defendant’s contention that only the metadata for messages sent was relevant to Plaintiff’s claims. She reasoned that messages received and not opened and responded to during lunch or after hours may not indicate that the recipient worked, but the employee may have responded to received emails during the relevant periods and they therefore may be required for context. She ordered Defendant to produce metadata for messages both sent and received by putative class members.

However, Magistrate Judge Parker noted that her conclusion did not mean that the sample size for the metadata exercise was “by default the appropriate sample for future discovery requests.” She added that if the discovery involved email searches, written discovery, or deposition testimony, a smaller sample size would be more proportionate.