



contested—valuation formula. The pertinent facts of the instant dispute, however, are provided as necessary.

With respect to Plaintiff’s present motion, on October 4, 2013, Plaintiff sent a letter to Defendants requesting various documents of Robert D. Wieck (Wieck), counsel for Defendants. (Pl.’s Mot. Compel, Ex. 2). In relevant part, the letter reads as follows:

“The documents requested of [Wieck] are:

- “1. Any and all written communications to or from anyone which refer or relate to the Warrant which is the subject matter of the above-captioned matter (“the Warrant”).
- “2. Any and all documents which relate or refer to your discovery of errors in the Warrant in 2007.” Id.

In response, on November 7, 2013, Defendants replied to Plaintiff’s request for production of documents by objecting to the two requests and attaching a privilege log outlining which documents were being withheld due to either attorney-client or work-product privilege. Id., Ex. 3. The attached “Privilege/Work Product Log” (hereinafter referred to as the “privilege log”) stated that all communications and documents after February 7, 2008 were being withheld as privileged, but would not be identified or listed on the privilege log. Id.

On August 21, 2014, Management filed this Motion, where in the span of approximately thirty pages (excluding exhibits), it alleges a host of explanations as to why it is entitled to the documents requested in its October 4, 2013 letter.

## II

### Standard of Review

Plaintiff’s Rule 37 motion is predicated upon two overarching arguments in its memorandum: Defendants’ privilege log fails to proffer sufficient information or explanation to afford Plaintiff the opportunity to assess whether the attorney-client or work-product privileges

properly apply; and, notwithstanding those arguments, Defendants allegedly have waived both privileges. Rule 26(b)(1) of our Superior Court Rules of Civil Procedure clearly sets forth the liberality of our discovery rules, permitting broad discovery among the parties:

“[R]egarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Super. R. Civ. P. 26(b)(1); see also Henderson v. Newport Cnty. Reg’l Young Men’s Christian Ass’n, 966 A.2d 1242, 1246 (R.I. 2009).

In granting or denying a motion to compel, a trial justice has “broad discretion.” Colvin v. Lekas, 731 A.2d 718, 720 (R.I. 1999). Moreover, it is routinely held that “[t]he philosophy underlying modern discovery is that prior to trial, all data relevant to the pending controversy should be disclosed unless the data is privileged.” Cabral v. Arruda, 556 A.2d 47, 48 (R.I. 1989) (citing 8 Wright & Miller, Federal Practice and Procedure: Civil § 2001, at 15 (1970)). In analyzing our Rules of Civil Procedure, our Supreme Court has stated several times that when our state rules are substantially similar to the federal rules of procedure, it is appropriate to look to federal precedent for guidance. See, e.g., Crowe Countryside Realty Assocs., Co., LLC v. Novare Eng’rs, Inc., 891 A.2d 838, 840-41 (R.I. 2006) (“Because subdivision (b) of Rule 26, which is at the crux of our inquiry today, is substantially similar to its 1970 federal counterpart, this Court will look to federal court decisions interpreting that version of Fed. R. Civ. P. 26(b) for guidance.”).

### III

#### Discussion

##### A

#### Scope of Discovery Requests

Plaintiff's Motion prompts the Court to interpret and apply several provisions of Rule 26 in order to determine whether Plaintiff is entitled to the documents requested in its October 4, 2013 letter. As a threshold matter, and dealing first with the form of Plaintiff's request, Defendants argue in their objection that Plaintiff's request is "overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence." As noted by one federal district court, simply stating that a request is overly broad or burdensome is not adequate to put forth a successful objection; rather, "the party resisting discovery must show specifically how each [discovery request] is not relevant or how each question is overly broad, burdensome or oppressive." Vazquez-Fernandez v. Cambridge Coll., Inc., 269 F.R.D. 150, 155-56 (D.P.R. 2010). The only argument presented by Defendants in support of their contention is that the scope of the requests is overly broad or burdensome because the requests included materials that were protected by privilege.

Generally, "[b]lanket assertions of privilege are insufficient to avoid discovery; instead, documents must be described with particularity and must be accompanied by a particularized assertion of privilege." Green v. Baca, 219 F.R.D. 485, 491 (C.D. Cal. 2003) (quoting Glaxo, Inc. v. Torphram, Inc., No. 95 C 4686, 1996 WL 411487, at \*5 (N.D. Ill. July 18, 1996)). In Green, the defendant maintained that the plaintiff's discovery request was overbroad and too burdensome because it would require countless hours of separating privileged information from unprivileged information. See id. The Court rejected the defendant's argument, based in part on

the fact that the defendant did not provide any particularized information that the documents were privileged or information to allow the plaintiff to test the assertion of privilege. See id. at 491-92. The Court therefore concluded that the defendant’s argument was in fact “a blanket privilege objection, since defendant’s claim of burden rests on general assertions regarding the existence of privileged material.” Id. at 491.

Here, Defendants similarly argue that Plaintiff’s requests for production of documents are beyond the scope of permissible discovery solely because they include potentially privileged information. Unlike the defendants in Green, however, Defendants have produced a privilege log (albeit one that is contested and will be discussed infra). Nevertheless, as is clear to the Court, the very purpose of Rule 26 is to allow parties to obtain all relevant discovery, while permitting parties to withhold those privileged materials where appropriate. The mere fact that a request for documents includes a request for privileged materials does not—by itself—justify a conclusion from this Court that Plaintiff’s requests were overbroad or unduly burdensome. Plaintiff’s request reasonably seeks information regarding the drafting and negotiating of the Warrant and is not beyond the permissible scope of discovery. Arguably—and recognizing that Defendants have produced a privilege log in this case—this allegation does not appear to the Court to be one of overbroad or burdensome discovery, but rather one testing whether privilege should properly apply to the sought-after materials. Because of this conclusion, the Court rejects Defendants’ objection to Plaintiff’s requests. These arguments are relevant to this Court’s discussion of privilege and, accordingly, will be discussed therein.

## B

### Sufficiency of Description in Privilege Log

In moving to compel the production of documents set forth in Defendants' July 30, 2008 privilege log (attached to Defendants' November 7, 2013 response to Plaintiff's request for production of documents), Plaintiff argues that the privilege log violated the requirements of Rule 26(b)(5). As to this point, Plaintiff argues that the information provided by Defendants is insufficient to enable Plaintiff to assess the applicability of the privileges. Additionally, insofar as Defendants have claimed a general privilege to all documents after February 7, 2008, Plaintiff argues any such privilege was waived because Defendants failed to expressly list those documents in its privilege log. Defendants argue that because litigation was threatened on February 7, 2008, every document prepared by Wieck thereafter that relates to the Warrant falls under the work-product doctrine or protected attorney-client communication.

In support of its argument, Plaintiff cites to the Rhode Island Supreme Court's most recent pronouncement in State v. Lead Indus. Ass'n, Inc., 64 A.3d 1183, 1197-98 (R.I. 2013), for the relevant requirements of a privilege log. As our Court set forth, "[a] party who withholds discovery materials must provide sufficient information, usually in the form of a privilege log, to enable the other party to evaluate the applicability of protection. Id. at 1197; see also Corvello v. New Eng. Gas Co., 243 F.R.D. 28, 33 (D.R.I. 2007) (quoting In re Grand Jury Subpoena, 274 F.3d 563, 576 (1st Cir. 2001) ("[T]he 'universally accepted means' of claiming that requested documents are privileged is the production of a privilege log."). In order to claim protection of trial preparation materials, a party must satisfy Rule 26(b)(5):

"When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents,

communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.”

However, if a party withholding discovery fails to be specific enough in its privilege log to substantiate its reasons for objection, it is generally held that he or she will have waived that privilege. Lead Indus. Ass’n, 64 A.3d at 1197; accord Corvello, 243 F.R.D. at 33 (internal quotation marks omitted) (“A failure by the party claiming privilege to adequately describe the documents at issue, to sufficiently explain the basis for the privilege, or to assert the privilege in a timely manner, may be grounds for rejecting the claim. . . . Sometimes, such failure has been termed a waiver of the privilege.”). Despite this waiver rule, “[m]inor procedural violations, good-faith attempts at compliance, and other such mitigating circumstances militate against finding waiver.” Lead Indus. Ass’n, 64 A.3d at 1197 (citing 8B Charles A. Wright et al., Federal Practice and Procedure § 2213, at 185 (3d ed. 2010) (“[C]ourts should avoid hair-trigger findings of waiver . . . .”)).

In this case, Defendants withheld twenty-seven documents<sup>1</sup>—as noted in their privilege log—on the basis that those documents were subject to the “attorney-client privilege and/or work product.” See Pl.’s Mot. Compel, Ex. 3 at 3-4. For example, document seven of the privilege log simply states, “E-mail dated March 22, 2007, from Lou Rotella (‘Rotella’) to Arthur Fiorenzano (‘Fiorenzano’) and Kumar Chittipeddi (‘Chittipeddi’); (P00023).” Id. at 3. All other entries possess similarly brief statements describing the documents, without providing any information explaining the basis for the privilege. Indeed, it is unclear from the privilege log what documents Defendants claim are protected either under the attorney-client privilege or

---

<sup>1</sup> Plaintiff notes that on December 6, 2013, Defendants withdrew their claim of privilege to documents one through six. Accordingly, twenty-one documents remain contested.

work-product doctrine, or what documents are said to be protected by both privileges. Insofar as these documents are subject to one of these privileges, Plaintiff is correct that Defendants have not provided the Court with “sufficient information to allow the court to rule intelligently on the privilege claim.”<sup>2</sup> Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12 (1st Cir. 1991).

Moreover—and specifically with respect to all of the withheld documents dated after February 7, 2008—Defendants argue in their opposing memorandum that they were not required to produce the documents because Wieck only acted as a drafter of the Warrant and did not participate in the negotiation of the Warrant’s terms. Thus, Defendants argue that any communications involving Wieck were discussions with his client and, accordingly, are protected under the attorney-client privilege and/or are work-product doctrine. Defendants deny any allegation that Wieck was acting as an agent of F.A.F. to which the attorney-client privilege would not apply. Apart from these allegations in their papers, there is no other information about the specific documents that allows the Court to rule at this time on the claims of privilege. See S.E.C. v. Yorkville Advisors, LLC, 300 F.R.D. 152, 164 (S.D.N.Y. 2014) (finding plaintiff’s two privilege logs did not provide sufficient information required by Fed. R. Civ. P. 26(b)(5) to support the asserted claims of privilege).

In Yorkville Advisors, a federal district court found that the two privilege logs at issue failed to provide enough facts when the entries only included generalized, brief statements about the subject matter, the author and recipient, followed by what privilege applied. Id. at 162-64. The court found both privilege logs to be uninformative and, ultimately, found that the entries

---

<sup>2</sup> As the Corvello Court explained, “[t]he privilege log should: identify each document and the individuals who are parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure.” Corvello, 243 F.R.D. at 33 (quoting United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996)). The burden is on the party claiming the privilege that sufficient grounds exist to assert the privilege. Id. at 34.

“[do] not contain even basic information that would support a claim of attorney-client privilege. The description does not provide the titles or roles of the author and recipient. Also lacking is any basis to conclude that the document contains legal advice that reflects a client confidence.” Id. Similarly, in Constr. Prods. Research, 73 F.3d at 473, a federal appeals court found a privilege log to be deficient when it only contained “cursory description[s] of each document, the date, author, recipient, and ‘comments.’” Specifically, the court determined that “[t]he descriptions and comments simply do not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation.” Id. at 474 (citing Bowne of N.Y.C., Inc. v. AmBase Corp., 150 F.R.D. 465, 474 (S.D.N.Y. 1993)).<sup>3</sup>

Here, there is no question that the entries on Defendants’ privilege log possess similar deficiencies as the privilege logs possessed in the above-cited cases. As was held in Yorkville Advisors, the entries simply do not give the Court any information here to assess whether the attorney-client privilege or work-product doctrine properly apply. See Yorkville Advisors, 300 F.R.D. at 164. The only information provided in the privilege log is the type of document (i.e., e-mail, fax, memo), the author and recipient, and the date. Furthermore, Defendants do not

---

<sup>3</sup> The Bowne Court described the standard for testing the adequacy of a privilege log as follows:

“[W]hether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed. The focus is on the specific descriptive portion of the log, and not on the conclusory invocations of the privilege or work-product rule, since the burden of the party withholding documents cannot be discharged by mere conclusory or ipse dixit assertions.” Bowne, 150 F.R.D. at 474 (internal quotation marks omitted).

In finding that the information provided in the privilege log was deficient, the Constr. Prods. Research court noted the importance of supporting affidavits or other documentation to meet the party’s burden. Constr. Prods. Research, 73 F.3d at 474.

provide any information at all for the group of documents dated after February 7, 2008. Defendants repeatedly rely on the assertion that all documents were privileged, but do not specify exactly what documents they are withholding, whether Wieck was indeed giving legal advice, whether the document was also sent to a third party, or any other information serving to permit the Court to analyze the application of a privilege. Without any accompanying affidavits or documentation, apart from the bald-faced allegations in Defendants' memorandum, the Court is in no position to reach Plaintiff's several arguments regarding waiver, as it is unclear whether the documents are even subject to protection. See Corvello, 243 F.R.D. at 33; Constr. Prods. Research, 73 F.3d at 473-74. Quite simply, the limited assertions in the privilege log and the lack of supporting affidavits lead the Court to question whether Defendants have met their burden to assert privilege.

First, in order to claim the attorney-client privilege, a party must demonstrate the following elements of the privilege as noted by our Supreme Court:

“(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” State v. von Bulow, 475 A.2d 995, 1004-05 (R.I. 1984) (quoting United States v. Kelly, 569 F.2d 928, 938 (5th Cir.), cert. denied, 439 U.S. 829 (1978)).

Additionally, in invoking the work-product privilege, Rule 26(b)(3) requires a party to show generally that the requested documents were prepared in anticipation of litigation or for trial. See Super. R. Civ. P. 26(b)(3). When faced with a party attempting to prove the factual basis for

its privilege claims, “courts generally look to a showing based on affidavits or equivalent statements that address each document at issue.” Bowne, 150 F.R.D. at 473. In these instances, courts may look to adequate privilege logs to fill in the factual gaps. Id. This approach—termed the “privilege-log approach,” see In re Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992)—need not be invariably taken and it is within the sound discretion of the Court as to how it wants to proceed on the matter. Bowne, 150 F.R.D. at 474.

Regrettably, Defendants have not included any descriptive portions on their privilege log. As the Bowne Court concluded, “[n]othing on the log informs us whether the document contains legal advice or was prepared to elicit legal advice from others. We are also not informed whether the document was intended to be kept confidential and whether it was in fact so held.” Bowne, 150 F.R.D. at 474-75. This Court reaches a similar conclusion. Moreover, without reviewing the documents, it is impossible for the Court to decide whether the subject matter of those documents is indeed the same subject matter of Wieck’s affidavit or deposition (that were part of the summary judgment record), as Plaintiff alleges. On balance, whether the Court looks to the twenty-one entries or to the blanket assertion of privilege over all documents dated post-February 7, 2008, the privilege log is deficient.

As stated above, if a party fails to meet its burden in claiming privilege, that party risks a waiver of that privilege. However—and as noted by our Supreme Court—waiver should not be effected where there have been good faith attempts at compliance with our rules. Further, federal courts interpreting their counterparts to our rules have seemingly adopted far-ranging approaches when faced with the issue of an insufficient privilege log.<sup>4</sup> Accordingly, and because

---

<sup>4</sup> As the Ninth Circuit described on the issue of the proper assertion of privilege (in the context of Rule 34’s timeliness requirement):

the Court determines Defendants' good-faith attempts at complying with Plaintiff's discovery request were made, the Court elects to do the following. In lieu of invoking the harsh remedy of waiver, the Court hereby orders Defendants to supplement and/or amend their privilege log with respect to the twenty-one listed entries, as well as any and all documents dated on or after February 7, 2008 by May 5, 2015, together with any accompanying affidavits or other documentation to enable the Court to rule on the issues of the attorney-client and work-product privileges.<sup>5</sup> After Defendants submit their amended privilege log and supplemental materials, the parties are directed to meet and confer as to whether any contest of privilege still exists. If so, the parties shall schedule a conference in Chambers on how to proceed in this matter.

#### IV

#### Conclusion

For the foregoing reasons, the Court reserves judgment on Plaintiff's Motion pending Defendants' submission of an amended privilege log and supplemental materials. As noted, if Plaintiff still objects to Defendants' claims of privilege, the Court will confer with the parties in Chambers on how to proceed therefrom.

---

“A survey of district court discovery rulings reveals a very mixed bag, running the gamut from a permissive approach where Rule 26(b)(5) is construed liberally and blanket objections are accepted, to a strict approach where waiver results from failure to meet the requirements of a more demanding construction of Rule 26(b)(5) within Rule 34's 30-day limit. In general, a strict *per se* waiver rule and a permissive toleration of boilerplate assertions of privilege both represent minority ends of the spectrum.” Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont., 408 F.3d 1142, 1148 (9th Cir. 2005).

<sup>5</sup> See Corvello, 243 F.R.D. at 32 (noting court afforded party opportunity to submit amended privilege log further explaining bases for claiming privilege when “there were serious questions as to whether [its] privilege log sufficiently described the documents for which privilege was claimed.”).

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

---

**TITLE OF CASE:** Management Capital, LLC v. F.A.F., Inc. and Arthur Fiorenzano

**CASE NO:** PB 08-2364

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** April 21, 2015

**JUSTICE/MAGISTRATE:** Silverstein, J.

**ATTORNEYS:**

For Plaintiff: Joseph V. Cavanagh, Jr., Esq.; Robert J. Cavanagh, Jr., Esq.

For Defendant: Robert D. Wieck, Esq.; Rajaram Suryanarayan, Esq.