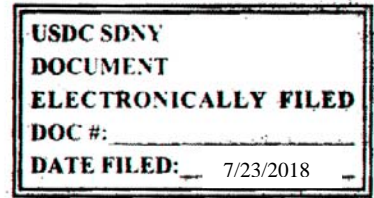


**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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**BLACKROCK BALANCED CAPITAL
PORTFOLIO (FI), et al.,**

Plaintiffs,

14-CV-09367 (JMF)(SN)

-against-

ORDER

**DEUTSCHE BANK NATIONAL TRUST
COMPANY, et al.,**

Defendants.

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SARAH NETBURN, United States Magistrate Judge:

Before the Court is a motion related to the privilege log produced by defendant Deutsche Bank National Trust Company (“Deutsche Bank”). The Court has been supervising issues related to Deutsche Bank’s log since late 2017. Deutsche Bank was ordered to produce its privilege log by November 13, 2017, ECF No. 359, and that deadline was extended, ECF No. 375. Then, in response to a motion to compel filed by plaintiffs (“BlackRock”), which raised numerous deficiencies in Deutsche Bank’s log, Deutsche Bank was granted additional time to review and modify its log before addressing BlackRock’s challenges. ECF No. 412.

On February 14, 2018, the Court ruled on BlackRock’s initial motion. As relevant here, the Court ruled that the use of metadata to import information for a privilege log, while not inherently problematic, did not “absolve[]” Deutsche Bank “of its obligations to review, supplement and correct a metadata privilege log to ensure that it satisfies the rigorous standards for a compliant log.” ECF No. 430. The Court directed Deutsche Bank to review and revise its log to make sure that the information provided is sufficient to allow BlackRock to understand the privilege assertions and make informed challenge decisions. Thereafter, the Court ordered a

“substantive and detailed” meet and confer. And if disputes remained, the plaintiffs would select 10 exemplars from the log for the Court’s *in camera* review (“Deficient Log Exemplars”). In addition, BlackRock challenged Deutsche Bank’s common interest privilege assertions, arguing that Deutsche Bank had improperly withheld 18,000 documents under this doctrine. Here, the Court directed BlackRock to identify 30 exemplars, and ordered Deutsche Bank to submit a sworn affidavit of a “party representative” explaining why the communications are protected under the common interest doctrine. Thereafter, the parties were directed to meet and confer in good faith, and if resolution was not possible, BlackRock was to select 10 exemplars for the Court’s *in camera* review (“Common Interest Exemplars”).

The parties were unable to resolve these issues, and BlackRock timely renewed its motion, identified 10 Deficient Log Exemplars and 10 Common Interest Exemplars, and moved the Court for an order finding that Deutsche Bank has waived its privilege as to all claims.

I. Deficient Log Exemplars

BlackRock alleges that Deutsche Bank’s privilege log remains woefully inadequate. See BlackRock Ltr., dated March 12, 2018.¹ Specifically, BlackRock contends that the log does not provide the general subject matter for 73,364 documents, does not identify the author for at least 15,211 documents, and fails to identify a lawyer for 651 documents. On this record, BlackRock argues that Deutsche Bank should be found to have waived its privilege assertions as to all claims.

Of the 10 Deficient Log Exemplars, Deutsche Bank withdrew its privilege assertion with respect to five documents. Most of these documents were examples where the privilege log

¹ Deutsche Bank responded to this letter on March 23, 2018, and BlackRock filed a reply letter on March 27, 2018. All three letters were served by email to the Court with requests to file redacted versions on ECF. Those requests are GRANTED and the parties are ORDERED to file these three letters with the proposed redactions.

failed to provide enough information to allow BlackRock to understand the privilege assertion. For example, descriptions such as “Fw:15Ga-1 Reporting [I],” “Missing Exception Reports – All Trustees -06-20-11.xls,” “Trade Updated Investment Policy I,” and “[s]preadsheet reflecting legal advice from unspecified in-house counsel regarding repurchase obligations,” all proved not to be privileged upon a challenge from BlackRock. In addition, two exemplars were previously produced in a less redacted form, and Deutsche Bank has agreed to reissue these exemplars in a similar manner following BlackRock’s challenge.

Deutsche Bank’s rolling corrections leaves the Court with only three documents out of the 10 exemplars to examine on the merits. Document 3 (**ICN ROK 003 1 00000111-2522**) discusses how to respond to a letter from Gibbs & Bruns regarding Wells Fargo’s role as master servicer for certain loans. Document 9 (**ICN PAS 001 1 00000012-1614**) discusses attorney advice as to the appropriate course of action if a breach of R&Ws occurred with respect to a specific loan. Both are privileged discussions between outside counsel and Deutsche Bank. Furthermore, these entries adequately describe the contents of the e-mails in either the subject or description fields. The entry for Document 3 contains sufficient information to show that the document relates to a response to a Gibbs & Bruns letter, while the entry for Document 9 contains sufficient information to show that the document relates to repurchase obligations for a JP Morgan Chase matter.

Finally, Document 6 (**ICN CAB 002 1 00000080-10243-1**) appears to be a balance sheet. Deutsche Bank seeks to redact the portions of the sheet that describe activities related to its counsel, but fails to show how those portions are for the purpose of seeking legal advice. The redacted portion of this document is not privileged and Deutsche Bank is ORDERED to produce it in full.

II. Common Interest Exemplars

As with the Deficient Log Exemplars, Deutsche Bank appears to have used the process of BlackRock's selection of Common Interest Exemplars as a way to make rolling corrections to its privilege log. As ordered by the Court, BlackRock selected 10 exemplars. Deutsche Bank has withdrawn its privilege assertion for two documents. See Deutsche Bank Ltr., dated March 16, 2018.²

Before even reviewing the documents *in camera*, it is clear that Deutsche Bank's revised privilege log still lacks adequate information for a majority of the documents submitted for review. Only two documents actually have a description in the "DESCRIPTION" field (**PIJ_002_1_00000025-0855** and **RER_002_1_00000178-0733**). Log rows for the other seven documents do not provide BlackRock with information sufficient to decide whether to challenge Deutsche Bank's privilege assertions. For example, **CAB_006_1_00000036-13219**'s "DESCRIPTION" field is left blank, and its "SUBJECT" is "FW: Deutsche Bank v. Landeros Reyes 202 Park St., Gypsum, CO." Similarly, **COD_002_1_00000006-0564**'s "SUBJECT" is "City of Chicago Debts on Unpaid Cases Violations Bank of America Updated Administrative Hearing Debts" and also does not provide a description. Further, **STA_001_1_00000013-0950**'s "TO/RECIPIENT" field neglects a clear name and only provides: "cn=amystoddard/ou=newyork/ou=dbna/o=deuba@dbamericas."

Additionally, **VIR 003 1 00000126-00196** and six other exemplars do not identify an attorney in the "IDENTIFY COUNSEL" field despite Deutsche Bank's assertion that these documents are attorney-client privileged or protected work product. Deutsche Bank admits that they fail to identify an attorney for 670 documents for which they assert attorney-client or work

² Deutsche Bank's request to file on ECF the March 16, 2018 letter and accompanying affidavits in redacted form is GRANTED.

product protection. Yet, Deutsche Bank did not edit their privilege log to identify an attorney or modify privilege assertions.

Upon review of the remaining eight Common Interest Exemplars, nearly all are found to be non-privileged. The common interest doctrine is not a separate privilege, but an extension of the work product or attorney client privilege. United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). Thus, the communication in question must be attorney-client privileged or protected work product. Allied Irish Bank v. Bank of Am., 252 F.R.D. 163, 171 (S.D.N.Y. 2008). The party asserting the common interest privilege must show: (1) all clients and attorneys with access to the communication had in fact agreed upon a joint approach to the matter communicated, and (2) the information was shared with the intent to further that common purpose. S.E.C. v. Wyly, No. 10 Civ. 5760 (SAS), 2011 WL 3055396, at *2 (S.D.N.Y. July 19, 2011). In reviewing the communications, “the key question is whether the parties are collaborating on a legal effort that is dependent on the disclosure of otherwise privileged information between the parties or their counsel.” AU New Haven, LLC v. YKK Corporation, No. 15 Civ. 03411 (GHW)(SN), 2016 WL 6820383, at *3 (S.D.N.Y. Nov. 18, 2016). The common interest doctrine only shields communications between codefendants, coplaintiffs, or persons who reasonably anticipate that they will become colitigants. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 628 (2016).

Deutsche Bank must produce **ICN PIJ 002 1 00000025-0855**. This communication is a string of emails between Impac and Deutsche Bank employees concerning a foreclosure action that is unable to proceed due to a clerical error. The emails reflect Impac and Deutsche Bank’s effort to correct this mistake so that a judge will release the asset in question. An attorney is not involved in this communication, and the emails do not seek or reflect legal advice. Therefore,

this document is not attorney-client privileged or protected work product and should be produced.

Deutsche Bank must partially produce **ICN RER 002 1 00000178-0733**. This communication is an email string between a paralegal with Residential Credit Solutions (“RCS”) and Deutsche Bank concerning pending litigation involving the Aames Mortgage Investment Trust 2005-2, to which Deutsche Bank was the indenture trustee and RCS was the servicer. The bottom half of the 09/22/2011 9:21 AM email reveals an RCS attorney’s legal advice regarding RCS’s legal strategy in the litigation. This portion of the email is protected by the common interest privilege because Deutsche Bank and RCS share a common interest as trustee and servicer. However, the remaining emails in this string are cover emails that attach copies of the 2005-2 trust. These emails do not seek or reflect legal advice and are therefore not attorney-client privileged or protected work product. Accordingly, the 09/26/2011 9:22 AM, 09/23/2011 6:34 PM, and redacted version of the 09/22/2011 9:21 AM emails should be produced. BlackRock may omit the portion of the email beginning with “The crux of...”.

Deutsche Bank must produce **ICN VIR 003 1 00000126-00196**. This communication is a cover email from a Wilmington Trust employee to Deutsche Bank and American Home Mortgage Servicing, Inc. employees that attaches a Notice to Lienholders and Tenant of Foreclosure. The purpose of this communication was to notify American Home Mortgage, servicer for the trust at issue, and Deutsche Bank, the indenture trustee, that Deutsche Bank was named as the plaintiff in the foreclosure action. Although this communication concerns litigation, an attorney is not a recipient of the email, and it does not seek or reveal legal advice. Therefore, this communication is not attorney-client privileged and should be produced.

Deutsche Bank must produce **ICN COD 002 1 00000006-0564**. This communication is an email string between a Deutsche Bank employee and various employees in Bank of America's BAC Home Loans Servicing group concerning violations the City of Chicago is asserting against properties titled to Deutsche Bank. Although the communication discusses impending litigation in which Deutsche Bank and the servicer would be colitigants, it is merely administrative. An attorney is not a party to the conversation, and the emails do not reveal legal advice or counsel's impressions. The predominate purpose of this communication is to notify Bank of America, as servicer, to contact the City of Chicago to negotiate or resolve Deutsche Bank's liabilities. Thus, this communication is not privileged and should be produced.

Deutsche Bank must produce **ICN RER 002 1 00000095-0062**. This communication is an email string between Deutsche Bank and Litton Loans employees concerning the status of two properties in litigation. There are no attorneys involved in this communication, and it does not seek or reveal legal advice. Rather, this communication is more akin to litigation management because its primary purpose is to update Deutsche Bank on hearing dates and the legal representative assigned to each case. The Court has directed that documents reflecting the management of litigation, as opposed to litigation strategies and advice, fall within the business communication category. Commerzbank A.G. v. Wells Fargo Bank, N.A., 15-CIV-10033 (KPF)(SN), ECF No. 368 at 2. Accordingly, this communication should be produced.

Deutsche Bank must produce **ICN WOE 002 1 00000021-0343**. This communication is an email string from a Deutsche Bank employee to a paralegal in the Wells Fargo Law Department. Although a paralegal is a party to the communication, the emails do not seek or reflect legal advice. Rather, the paralegal is notifying the Deutsche Bank employee that it contacted the wrong servicer. This communication is not privileged and should be produced.

Deutsche Bank must produce **ICN STA_001_1_00000013-0950**. This communication is a string of cover emails between Deutsche Bank employees that attach communications between attorneys at Nixon Peabody, outside counsel for Deutsche Bank. These cover emails do not reveal legal advice or counsel's impressions. Therefore, this communication is not privileged and should be produced.

Deutsche Bank properly withheld **ICN CAB 006 1 00000036-13219-1**. This communication is a draft affidavit prepared by Brown & Camp, LLC, counsel for Deutsche Bank in a foreclosure action, and is therefore protected work product. Work product protection is extended where it is shared "between codefendants, coplaintiffs, or persons who reasonably anticipate that they will become colitigants." Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 628 (2016). This document was shared with Deutsche Bank's Servicer, Title Insurer, and the Title Insurer's counsel, who are all colitigants and share a common interest with Deutsche Bank. Accordingly, this document is protected by the common interest privilege and should not be produced.

III. Waiver

Rule 26 of the Federal Rules of Civil Procedure provides that when a party withholds documents on the grounds of privilege, it must both "expressly make the claim" and "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A). When a party submits a privilege log that is deficient, the claim of privilege may be denied. United States v. Constr. Prods. Research, 73 F.3d 464, 473 (2d Cir. 1996); see also Fed. R. Civ. P. 26(b)(5), Advisory Committee Notes ("To withhold materials without such notice is contrary to the rule, subjects the

party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.”).

BlackRock contends that Deutsche Bank’s revised privilege log shows little improvement from the original, such that a finding of waiver is appropriate. It claims that many of the documents still lack meaningful descriptions or intelligible identifiers, making it impossible to assess whether the assertion of privilege was appropriate. It provides several pages of the log that exemplify these alleged deficiencies and cites case law that it claims supports its position. Deutsche Bank opposes waiver, arguing that BlackRock failed to engage in the Court-ordered meet-and-confer process and that the exemplar pages are not deficient on the merits.

The Court finds that Deutsche Bank has failed to provide an adequate privilege log notwithstanding multiple opportunities to do so. While some log entries are better than others – for example, where descriptions make clear that documents are draft discovery responses or attorney bills – Deutsche Bank’s obligation is to provide sufficient information so that BlackRock is able to assess the privilege fully. Moreover, as explained in the Court’s review of the exemplars, these deficient log entries often result in overly broad privilege assertions. Indeed, Deutsche Bank itself withdrew its privilege claims as to seven of the 20 documents that BlackRock selected as exemplars, and the Court found that an additional ten were improperly withheld.

A privilege log is not a mere administrative exercise. Its purpose is to ensure that a withholding party can justify a privilege designation. By submitting a deficient log, Deutsche Bank attempted to bypass this requirement, resulting in vastly overinclusive privilege designations. In an attempt to avoid this very problem, the Court ordered Deutsche Bank to provide a sworn affidavit by a *party representative* explaining why 30 of the Common Interest

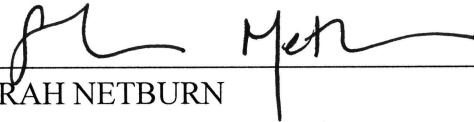
Exemplars were protected under the common interest doctrine. Instead, Deutsche Bank offered the sworn statement of a Morgan, Lewis & Bockius partner. The Court requested a party representative to force the party to defend its designations in connection with these loan-level litigations. Counsel's views were not requested.

The failure to provide a party affidavit is demonstrative of Deutsche Bank's broader failings with respect to its privilege log. The Court has given Deutsche Bank multiple opportunities to correct these deficiencies and it has failed to do so. Instead, Deutsche Bank waits until a document is challenged to review whether its privilege designation is correct. And as discussed earlier, when challenged, Deutsche Bank frequently realizes that the privilege was improperly asserted. This stance inappropriately shifts the burden to BlackRock to challenge a privilege assertion when Deutsche Bank should have established why a document was protected in the first place. A privilege log is not an iterative process and the Court will not offer Deutsche Bank another opportunity to follow the rules established in this Circuit.

Accordingly, Deutsche Bank has waived its privilege with respect to all documents listed on its privilege log (except as otherwise ruled in this Order) unless it can make a particularized showing as to individual documents that it believes are (1) adequately described on its log and, (2) in fact, privileged. Only documents listed on the privilege log with *complete* information—that is, the name of the author of the document, the name of any attorney, a clear description of the document, etc. —could qualify for this safety valve. Absent an application to the Court within 30 days on a document-by-document basis, all documents on the privilege log must be produced. The parties are ordered to file their letters on the docket. See notes 1 & 2 supra.

SO ORDERED.

DATED: July 23, 2018
New York, New York



SARAH NETBURN
United States Magistrate Judge