SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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AVI DORFMAN and RENTJOLT, INC.,

Plaintiffs, **Index No: 652269/2014**

-against-

ROBERT REFFKIN and URBAN COMPASS,

Defendants.

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AFFIRMATION OF DAVID B. DEITCH
IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS FROM DEFENDANTS ROBERT REFFKIN AND URBAN COMPASS

David B. Deitch, an attorney admitted to practice in the State of New York, affirms the following under penalty of perjury:

1. I am a member of the law firm of Harris, St. Laurent & Chaudhry LLP, the attorneys of record for Plaintiffs Avi Dorfman ("Dorfman") and RentJolt, Inc. (collectively "Plaintiffs"). The matters set forth below reflect my personal knowledge

2. I submit this Affirmation in support of Plaintiffs' Motion to Compel the Production of Documents from Defendants Robert Reffkin and Urban Compass (the "Defendants"). In this motion, Plaintiffs seek an order from the Court compelling Defendants to correct significant deficiencies in their responses to Plaintiffs' discovery requests in this case.

3. First, Plaintiffs ask the Court to compel Defendants to produce responsive texts and e-mails that have not been produced and for which Defendants have offered no explanation. A review of documents that Plaintiffs have obtained from third parties by subpoena, and a review of Plaintiffs' own document production prove that Defendants have either failed to conduct an

adequate search for responsive documents, have failed to produce responsive documents without justification, or have deleted responsive documents.

4. Second, Plaintiffs request that the Court require Defendants to provide a meaningful privilege log that will permit Plaintiffs to assess the bona fides of Defendants' withholding of documents based upon assertions of privilege. Defendants rely on a categorical privilege log that fails to provide useful information about the documents that have been withheld. Defendants' sole justification has been that the parties agreed to permit the use of categorical logs in the discovery order entered earlier in the case. Plaintiffs ask that the Court modify that Order because the use of a categorical log is neither reasonable nor fair in these circumstances where the categorical log makes it impossible to determine the basis of the privilege.

5. Plaintiffs have made repeated efforts to secure Defendants' compliance with its discovery obligations, including exchanges of voluminous correspondence and several "meet and confer" telephone conferences. We reluctantly seek the Court's intervention to ensure that Plaintiffs receive the document production and other discovery to which they are entitled.

STATEMENT OF RELEVANT FACTS

Avi Dorfman and Robert Reffkin Formed Urban Compass.

6. Plaintiff Avi Dorfman seeks compensation for his substantial contributions to the web-based real estate company, Urban Compass. In July 2012, Robert Reffkin and Dorfman agreed to collaborate and co-found a new company that would bring technology to the real estate rental market, empower real estate brokers, and reduce middleman costs. (Amended Complaint, Docket No. 47, hereinafter "Complaint" or "Compl." at ¶¶ 2-3, 27, attached hereto as Exhibit A.)

Dorfman made significant contributions to this enterprise that proved pivotal to the early success of Urban Compass.

7. Over nearly two months, Dorfman partnered with Reffkin and Alex Stern, a key founding member of Urban Compass, and drafted Urban Compass' business plan (*id*. ¶ 44 & Exhs. 11, 15, 17 (preparing a prospective profits and losses statement for Reffkin)), prepared a 120-day business roadmap (*id*. ¶¶ 42, 51 & Exh. 13), prepared an analysis of lessons learned from competitor companies (*id*. ¶ 43 & Exhs. 3, 6), developed materials for an investment presentation to Goldman Sachs (*id*. ¶¶ 44-49 & Exhs. 3, 7-10), crafted a compensation structure for Urban Compass (*id*. ¶ 43 & Exh. 4), helped name Urban Compass (*id*. ¶ 56 & Exh. 24), and convinced strategic hires to join the company—including Ori Allon, Twitter's New York director of engineering, who would become another co-founder of Urban Compass (*id*. ¶¶ 53-54 & Exh. 8), and Paul Groudas, who would become its Founding Engineer (*id*. ¶ 54 & Exhs. 19-23).

8. During this time, Dorfman and Reffkin agreed that Dorfman would receive a significant equity stake in Urban Compass and that Reffkin and Urban Compass would acquire RentJolt. (*Id*. ¶¶ 38-39, 57-61 & Exhs. 2, 19 (e-mail from Dorfman, copying Reffkin, and noting that "RentJolt is being acquired by a larger, better-funded company that has raised large funding pre-launch.")). Given this understanding, both parties acted as if Dorfman was already a founding partner at Urban Compass. As Reffkin noted in e-mails, "[Dorfman had] more than proved [himself]" and "it would be a privilege to work with [Dorfman]" at Urban Compass (*id*. Ex. 18); and that "Everyone is going to be an A player at [Urban Compass]. Including you [Dorfman]!" (*id*., Exh. 24).

9. By August, Dorfman and the rest of the Urban Compass team had taken substantial steps toward securing $8 million in funding from Goldman Sachs. (*Id*. ¶ 49.) Following this success, with Allon and Groudas now on-board, and armed with Dorfman's business plans, competitor analyses, materials, and know-how, Reffkin informed Dorfman for the first time that he would receive only a small amount of the shares in the company—an offer that was eventually lowered to less than 1%. (*Id*. ¶ 59; GS-REFFKIN_006609, attached hereto as Exh. B.) This bombshell ran contrary to Reffkin's numerous representations that Dorfman would receive significant equity in Urban Compass. (Compl. ¶¶ 7, 38, 50-51, 57.) Indeed, e-mails subsequently disclosed by Goldman Sachs—but not Urban Compass—reveal that Reffkin never had any intention of partnering with Dorfman, and that he and Allon had begun to lay groundwork to "fire" Mr. Dorfman within a year of the launch of the Company's website. (GS-REFFKIN_006633, attached hereto as Exh. C.) When Dorfman objected to the meager equity offer, Reffkin responded that there was "no negotiation over equity size or vesting schedule" and simply cut him out. (Compl. ¶ 61 & Exhs. 25, 26.)

Plaintiffs Initiated Litigation and Discovery.

10. Plaintiffs Dorfman and RentJolt filed an Amended Complaint on December 10, 2014, asserting claims against Defendants for, among other things, breach of contract, *quantum meruit* and unjust enrichment. In essence, Plaintiffs allege that Defendants wrongfully misappropriated the reasonable value of the property and services that they contributed to Urban Compass.

11. On May 21, 2015, Plaintiffs' counsel served both Urban Compass and Reffkin with requests for production. The Document Requests sought relevant documents and communications, including, without limitation, relevant "e-mail" an "telephonic"

communications, such as text messages and communications from personal e-mails. (*See* Reffkin Document Requests, Definitions ¶¶ 6-7; Urban Compass Document Requests, Definitions ¶¶ 5-6, attached hereto as Exhs. D and E, respectively).

12. On August 25, 2015, Plaintiffs' counsel also served a subpoena for the production of documents upon Reffkin's former employer, Goldman Sachs, where Reffkin and Stern worked while they (and Dorfman) laid the groundwork for the launch of the Urban Compass website. (*See* Compl. ¶¶ 27, 38-71.)

13. Prior to the production of documents, the parties agreed to the use of search terms in lieu of a document-by-document search in order to reduce the scope and burden of the document requests.

Plaintiffs Raised Discovery Issues with Defendants.

14. During the ensuing eight months, Defendants produced a total of 6,024 documents and Goldman Sachs produced a total of 3,867 documents to Plaintiffs. The documents from Goldman Sachs included texts from Defendant Robert Reffkin's Blackberry, as well as e-mails from Reffkin's Goldman Sachs e-mail account, in which he corresponded with various current and former employees of Urban Compass, including Ori Allon and Alex Stern. Defendants failed to produce these same documents from the email accounts of Allon and Stern, causing Plaintiffs to question why there were significant and unjustified gaps in Defendants' production.

15. In an e-mail dated November 28, 2016, Plaintiffs' counsel expressed concern regarding the small number of e-mails produced from the personal e-mail accounts of Ori Allon, Robert Reffkin, and Alex Stern, as well as the complete absence of any text messages from these custodians. (11/28/16 E-mail from J. Foley to J. Vazquez, attached hereto as Exh. F.)

Defendants' response on this issue was largely limited to the conclusory and formulaic statement that Defendants had fully complied with their discovery obligations and saw no reason to do anything further. (11/29/16 E-mail from J. Vazquez to J. Foley, attached hereto as Exh. G). Defendants have repeated this response orally during our efforts to meet and confer without providing any further meaningful response during the parties' correspondence. Notably, throughout this lengthy correspondence, and during various telephone conferences, Defendants have never asserted that the documents sought had been deleted or were otherwise no longer available, suggesting either that Defendants had failed to search adequately for these documents, or that Defendants had chosen not to produce these (and presumably other) documents. Rather than going back and searching to make sure that responsive documents were indeed captured, Defendants simply repeat the same mantra that they performed a search.

16. On December 30, 2016, in a last ditch effort to resolve these disputes before proceeding to Court, Plaintiffs sent a letter to Defendants, addressing all of these discovery issues. (12/30/16 Letter attached hereto as Exh. H.) This letter specifically set-forth evidence that Plaintiffs had failed to produce relevant text messages and e-mails within the possession of Urban Compass and its employees. *Id*. By letter dated January 3, 2017, Defendants responded to this letter, largely relying again upon the conclusory and formulaic assertion that Defendants had complied with their discovery obligations. (1/3/2017 Letter attached hereto as Exh. I).

17. While Defendants addressed certain other concerns in that response (which are not the subject of this motion), they failed to provide a satisfactory response with respect to the three issues raised in this motion.

ARGUMENT

18. The law in New York favors disclosure. CPLR § 3101(a)(4) provides that "[t]here shall be full disclosure of all matter *material and necessary* in the prosecution or defense of an action, regardless of the burden of proof, by…any other person, upon notice stating the circumstances or reasons such disclosure is sought or required" (emphasis supplied). Exploring the scope of this statute, the Court of Appeals, *Kapon v. Koch*, 23 NY.3d 32 (2014), recently held that the words "material and necessary", must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity". *Id*. at 38 (quoting *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968)).

19. In the event that a party fails to respond to discovery requests, a court may compel compliance. Section 3124 provides that, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR § 3124. While Courts have expressed concern regarding the privacy of parties, the production of cellular phone records has been deemed appropriate where such communications are germane to the issues in dispute. *See Reid v. Soults*, 2012 WL 9494934, at *2-3 (N.Y. Sup. Ct. Oct. 26, 2012) (compelling a non-party to produce relevant text messages); *Walker v. Carter*, 2015 WL 4510406, at *2 (S.D.N.Y. Jul. 24, 2015) (Magistrate judge ordered the production of relevant text messages from a third party). Moreover, in light of the prominence of text messages as a form of communication, courts have increasingly found parties who fail to preserve text messages liable for spoliation of evidence. *Passlogix, Inc. v. 2FA*

Technology, LLC, 708 F.Supp.2d 378, 415-17 (S.D.N.Y. 2010) (fining defendant for breach of its duty to preserve text messages).

Defendants Have Failed to Produce Text Messages, E-mails and/or Other Documents.

- *Missing Text Messages*

20. It is indisputable that a number of Defendants' current and former employees communicated by text about the subject of this litigation. Yet, it appears that Defendants produced ***no text messages*** from Urban Compass' present or former employees, including Robert Reffkin, Ori Allon, Alex Stern, Paul Groudas, Michael Weiss, and Gordon Golub.[1] We have no way to know how many responsive texts Defendants have in their possession or control but have not produced, but we are aware of a number of specific examples of texts that should have been produced by Defendants but were not.

21. Third-party Goldman Sachs produced a number of texts from Mr. Reffkin's Goldman Sachs Blackberry on which Ori Allon, Alex Stern and Paul Groudas were recipients.[2] For example, Goldman Sachs produced several texts from Robert Reffkin to Ori Allon in which Reffkin described his discussions with Dorfman concerning employment with Urban Compass. In one text, dated July 26, 2012, Reffkin advised Allon that Dorfman would be accompanying him to a meeting with Allon the following day:

> Call is over. But will see you tomorrow at 1:30. Bringing the guy I wanted you to meet (former mckinsey, founded a tech real estate broker, wants to work for newco)

[1] In the December 30, 2016 letter, Plaintiffs' counsel requested that Defendants' counsel identify any texts that were produced. Counsel identified none, and we are aware of none in Defendants' production.

[2] The texts were produced from Mr. Reffkin's Blackberry, and his name appears on each one. The recipient of each text is identified only by telephone number. In the relevant period of time, Mr. Allon's telephone number was (408) 480-7389, Mr. Stern's telephone number was (914) 774-1949, and Mr. Groudas' telephone number was (518) 929-1943.

(GS-REFFKIN_003082, attached hereto as Exh. J.) In another text, dated September 6, 2012, Reffkin discussed an upcoming meeting between Allon and Dorfman concerning Dorfman's potential compensation at the start-up:

> For your meeting with Avi tomorrow, regardless of what numbers he says I discussed with him in the past, I told him we have no formal offer and that it will only come out of his conversation with you.

(GS-REFFKIN_006383, attached hereto as Exh. K). In yet another text from Reffkin to Allon, dated September 7, 2012, Reffkin proposed a plan to bring Dorfman on part-time, on a month-to-month basis, so that they would have the freedom to fire him:

> Also, on Avi. Avi called mike and gave a different account of your convo. Just too many red flags of not seeing reality as everyone else sees it. I don't think we should offer full time or advisor. Problem with advisor is we will end it in 1 year and he will create a bunch of noise / problems because of it. In same way he thinks he worked 200 hours on this when he hasn't worked 50 -- he will think his ideas made the company and could create a difficult situation for us. Best answer is to hire him with cash only as a month to month part time consultant 5k a month for 3 months guaranteed then month to month after. This gets rid of legal risk while not taking equity. Also, after 3 months I think we'll get all the info we need. 5k a month for part time reflects 60k a year which is more than fair when he has a full time job. I'd say 5-10 hours a week to not be too offensive, also he will work the same amount of time regarless [sic] what we contract because he likes the biz.

(GS-REFFKIN_006506, attached hereto as Exh. L.) In another text from Reffkin to Allon, dated September 12, 2012, Reffkin congratulated Allon for low-balling Dorfman in his employment offer:

> Nice! You are a monster. Well done. Tell avi that!!!! 1% is too much for him. Crazy. Btw - cyrus and josh kushner will be at our table tonight.

(GS-REFFKIN_007118, attached hereto as Exh. M.)

22. Defendants have not produced any of these texts—or any other texts from Ori Allon's phone though Allon testified in his deposition that he has not deleted any text messages. *See* Partial Transcript of Deposition of Ori Allon, attached hereto as Exh. N, at 210:9-15.

23. Plaintiffs themselves have produced a number of texts that should have appeared in Defendants' document production as well, including a number of text messages between Dorfman on the one hand, and either Stern or Groudas on the other hand. In one notable exchange, dated August 20, 2012, Stern and Dorfman discussed the employment negotiations negotiations with Reffkin. In that exchange, Stern noted the value that Dorfman brought to the enterprise:

> **Dorfman**: "How'd you like that comp e-mail," [sent from Dorfman to Reffkin discussing his potential compensation with Urban Compass].
>
> **Stern**: "Very well thought out and made a lot of sense. I really don't think u especially should sell yourself short[.]
>
> **Dorfman**: "Yea. Fuck that."
>
> **Stern**: "I mean, if He thinks we are all replaceable thats [sic] just not true and not something we can subject ourselves to[.] And I think it's a real red flag that we are having all of these issues day 1. It's only going to get more complicated[.]"

(DORFMAN_0022925-DORFMAN_0022929, attached hereto as Exh. O.) In another text message from Dorfman to Stern, dated September 18, 2012, Dorfman wrote:

> We sent a cease and desist letter yday – now its up to him what to do – no pt in suing yet tho – every step he takes to form/build the company just enlarges his liability.

(DORFMAN_0023109, attached hereto as Exh. P.) Likewise, Defendants failed to produce the text message from Dorfman to Groudas where Dorfman first reaches out to Groudas to probe his interest in working for the real-estate start-up.

> Hey Paul – this is Avi – I just e-mailed you but then realized I had your number so thought id try giving you a call – drop me a line when you can[.]

(DORFMAN_0022867, attached hereto as Exh. Q.)

24. All of these texts are responsive to Plaintiffs' Document Requests as they go to Dorfman's contributions to the real-estate start-up, and negotiations concerning his future involvement in the enterprise. And all are presumably in the possession of employees of Urban Compass (such as Allon, Stern, and Groudas) given that Defendants have never stated that they were deleted. Defendants have thus far provided no explanation why responsive texts like these were not produced from Reffkin, Allon, Stern, Groudas or other custodians who were the counterparties on many of these texts other than to provide a standard response saying that Defendants conducted a search.[3]

25. For these reasons, Plaintiffs request that Your Honor compel Defendants to produce all relevant text messages in their possession, custody, or control. And, if the

[3] In our correspondence with Defendants, we noted that Defendants have taken the position in the context of their assertions of privilege that Defendants were acting in expectation of litigation no later than September 17, 2012, when Dorfman sent Urban Compass a Cease and Desist Letter relating to the allegations now contained in the Complaint. Defendants have asserted that the existence of the texts referenced above is irrelevant because they predate the date of that letter. This is no answer. It is well-accepted that once a party reasonably anticipates litigation, the party must preserve *all* potentially relevant documents regardless of whether they were created before litigation was reasonably foreseeable. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 36 (1st Dep't 2012). Assuming that date—September 17, 2012—is the date on which Defendants became aware of the possibility of litigation, Defendants were obligated as of that date to preserve any and all relevant evidence. Even if a text was sent before that date, Defendants should still have the text assuming they did not delete it ***before September 17, 2012***. Defendants have never yet made any assertion that any of the responsive texts were deleted. If Defendants now wish to rely on the claim that texts were not produced because they were deleted, Defendants should also make clear when those deletions occurred.

Moreover, Defendants' argument that they could not order Stern to retain his documents because he started to work for Urban Compass on March 23, 2013 is equally unsatisfying as this provides no explanation as to what happened to his relevant documents and communications. (*See* Jan. 3 Vazquez Ltr. at 2.)

Defendants have failed to retain these documents in anticipation of litigation, provide an explanation for why such documents no longer exist.

- *Missing E-mails*

26. Our review of Defendants' document production leads us to the similar conclusion that Defendants have failed to produce responsive e-mails either because of a failure to perform adequate searches or because they have unjustifiably withheld documents from production. Third-party Goldman Sachs and Plaintiffs, together, have produced numerous documents that should have been part of Defendants' production. These omissions leave Plaintiffs without any means to gauge the extent to which other documents may also be missing from Defendants' production.

27. For example, Plaintiffs produced an e-mail dated August 7, 2012 from Dorfman to Allon. Following a lunch-meeting with Allon, Dorfman sent him an e-mail discussing prior tech companies that operated in the real estate space, and wrote:

> I think the model we are discussing takes elements of both of these into account, so worth thinking through how we might take what they have done to the next level.

(DORFMAN_0001487, attached hereto as Exh. R.)

28. Goldman Sachs produced an e-mail between Reffkin and Allon, dated September 6, 2012, in which Allon praised Dorfman for his real estate knowledge and experience:

> I hope we can make it work since we all value your knowledge and experience in the field. Looking forward to discuss tomorrow.

(GS-REFFKIN_006392, attached hereto. as Exh. S.) Goldman Sachs produced another e-mail from Reffkin to Allon concerning employment negotiations with Dorfman, in which Reffkin wrote:

> I told him I no longer have input and am staying out of it. But think the right answer would be you saying that there is a clear valuation gap between the 2 of us so we should stop talking about full time and he should definitely take bridgewater. I'd offer either or both of the below:
>
> 1. 0.25% equity over 1 year vest monthly (truth is we wouldn't need him for 4 years and I wouldn't want to give him 1% and fire him)
>
> 2. $5k a month cash consulting, 3 month guarantee, and month to month after

(GS-REFFKIN_006609, attached hereto as Exh. T.) In another e-mail produced by Goldman Sachs dated September 9, 2012 from Allon to Reffkin, Allon discussed his desire to use Dorfman for his knowledge and contacts without compensating him as a founder of the company:

> by the way, I told him I can't offer him more equity and a co-founder status. looks like he will accept my advisor offer, though, which is much better for us & will save us a lot of money while we'll still have access to all his knowledge and contacts.

(GS-REFFKIN_006628, attached hereto as Exh. U.) Finally, in another e-mail that Goldman Sachs produced that is dated September 9, 2012 from Reffkin to Allon, Reffkin expressed his preference to bring Dorfman on and fire him after a year:

> I don’t think he has any real contacts and don’t think his knowledge is that great. I think he’s mostly talk. I’d prefer to see him at .25% over 1 year as opposed to 1% over 4 years because we will 100% fire him after 1 year and he will than [sic] be a legal risk. My ideal preference is just 5k cash a month for consulting. The 1% I discussed with him was him working 20 hours a week which he won’t do. Whatever you agree on with advisor let’s make sure there is a clear understanding in writing about. The amount of hours he will spend in the office (not just hours working outside which can’t be monitored) so that we will have grounds if needed.

(GS-REFFKIN_006633, attached hereto as Exh. V). All of these e-mails included authors or recipients other than Reffkin who are current or former employees of Urban Compass. Yet, none were produced by Defendants, and Defendants have never made the simple unequivocal assertion that the documents were deleted at some point in time. This, of course, gives rise to the

possibility that Defendants either have failed to conduct an adequate search for documents, or they have unjustifiably withheld responsive documents.

29. For these reasons, Plaintiffs request that the Court compel Defendants to produce all responsive text messages and e-mail messages (and any other documents) in their possession, custody, or control. Plaintiffs also request that the Court order that, if responsive text messages and e-mails (or other documents) have been deleted, Defendant should identify the messages and e-mails and the date when they were deleted. To the extent that Defendants have failed to retain documents in anticipation of litigation, Plaintiffs and the Court should be so informed.

Defendants' Categorical Privilege Log Fails to Provide Any Useful Information.

30. Plaintiffs also request that the Court compel Defendants to individually log each document that Defendants have withheld on the basis of privilege. Based upon the parties' agreement in the August 31, 2015 "Electronic Discovery Order" (the "Discovery Order", attached hereto as Exh. W), Defendants have provided a categorical privilege log dated June 10, 2016 (the "Categorical Log", attached hereto as Exh. X) with respect to the three categories set forth in the order: "(a) privileged communications between a party and its outside counsel pertaining to this instant litigation; (b) attorney work product prepared in anticipation of, or during the course, of this instant litigation; and (c) privileged communications between in-house counsel for Urban Compass and its executive officers seeking or rendering legal advice regarding this instant litigation."[4]

31. The problem is that the Categorical Log fails entirely to fulfill the function for which that document is intended: to provide sufficient information to permit the opposing party

[4] Defendants have provided an individualized privilege log with respect to other documents that Defendants state do not fall within these categories. That privilege log is not the subject of this motion.

to assess the merits of the privilege assertion. While Defendants are correct that the parties agreed to the use of a categorical privilege log, that agreement took place before the parties were aware of the nature of the discovery in this case, and its use is simply inappropriate and unfair here.

32. The New York City Bar has provided guidance regarding the use of categorical privilege logs (*Guidance and a Model for Categorical Privilege Logs*, available at http://www2.nycbar.org/pdf/report/uploads/20072891GuidanceandaModelforCategoricalPrivilegeLogs.pdf ("NYC Bar Guidance")). This resource makes clear the several ways in which the Categorical Log is deficient.

33. *First*, Defendants' Categorical Log fails to serve the very purpose of a privilege log because there is no way for Plaintiffs to assess the merits of Defendants' assertions of privilege. As the NYC Bar Guidance notes, "a categorical privilege 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." NYC Bar Guidance at 2 (quoting *Auto. Club of N.Y., Inc. v. Port Auth. Of N.Y. & N.J.*, 297 F.R.D. 55, 59 (S.D.N.Y. 2013)). Defendants' log does not do so: It provides no information about the subject matter of any of the withheld communications, and provides no meaningful information about the senders and receivers of the individual withheld communications.

34. *Second*, the way in which Defendants' Categorical Log precludes Plaintiffs from assessing the assertion of privilege easily outweighs the minimal value of Defendants' use of a categorical privilege log here. As one court has noted, "[t]he justification for a categorical log of withheld documents is directly proportional to the number of documents withheld." NYC Bar Guidance at 3 (quoting *Auto. Club of N.Y., Inc.*, 297 F.R.D. at 60). Here, for example, one of the

categories that Defendants have used on their Categorical Log has only a single document in it. There is no value whatsoever to the use of a categorical privilege log for this single document; the only purpose for using a categorical privilege log for a single document is to obfuscate the basis for which Defendants have withheld that document. Moreover, the relatively small total number of documents included on the Categorical Log—248 documents—also counsels against the use of such a log. The individual logging of that number of documents imposes a relatively minimal burden on Defendants, and would provide Plaintiffs with a meaningful opportunity to assess Defendants' assertions of privilege.[5]

35. For these reasons, we request that the Court compel Defendants to individually log the privileged documents that appear on the Categorical Log. To the extent that this requires a modification to the Discovery Order in this case, Plaintiffs request that the Court order such a modification.

[5] Defendants have asked Plaintiffs' counsel to "propose a set of reasonable, minimally burdensome modifications" to their log that "would address [these] concerns" (Jan. 3 Ltr. from Vazquez at 4) but this offer is not meaningful. Without knowing the nature of the documents that Defendants have withheld, it is virtually impossible for Plaintiffs to propose any tweaking of the Categorical Log that would provide Plaintiffs with the information they need to assess Defendants' assertion of privilege. The only "reasonable, minimally burdensome modifications" here would be for Defendants to log individually the relatively small number of documents that appear on the Categorical Log.

CONCLUSION

36. For the foregoing reasons, Plaintiffs respectfully requests that this Court:

a. Compel Defendants to produce all responsive non-privileged text messages and e-mails (or other documents) in their possession, custody, or control that Defendants have not yet produced; and require that, if the Defendants have deleted any such responsive text messages and e-mails (or other documents), Defendants state the date(s) on which such deletions occurred;

b. Compel Defendants to individually log the withheld documents listed on the Categorical Log; and

c. Grant such other and further relief as the Court deems just and appropriate.

Dated: New York, New York
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