

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CAPITAL ONE CONSUMER)
DATA SECURITY BREACH LITIGATION) MDL No. 1:19md2915 (AJT/JFA)
_____)

This Document Relates to ALL Cases

PRETRIAL ORDER #19

This matter is before the court on plaintiffs’ motion for entry of electronically-stored information protocol and order regarding relevant time period (Docket no. 351) that was filed on March 13, 2020 along with a supporting memorandum (Docket no. 352). Defendants have filed an opposition to the motion (Docket no. 362) and plaintiffs have filed a reply in support of the motion (Docket no. 372). The hearing that was scheduled for Friday, April 3, 2020 at 10:00 a.m. was cancelled in accordance with General Order No. 2020-7. (Docket no. 370). Given the need to get the remaining issues presented in this motion decided promptly, the court has reviewed the parties’ briefs and will decide this motion without a hearing in open court.

Thankfully, the parties were able to narrow the disputes presented in this motion to two issues concerning the defendants’ obligations surrounding the preparation of a privilege log. The first issue concerns the defendants’ anticipated assertion of the bank examiner privilege and whether the documents that are anticipated to be withheld based on that privilege need to be logged on a document-by-document basis. The second issue involves whether the communications between Capital One and Debevoise & Plimpton LLP (“Debevoise”), the outside counsel hired by Capital One to investigate the circumstances surrounding the cybersecurity incident, need to be identified on a privilege log.

Plaintiffs' primary argument as to both issues is that they need the customary document-by-document privilege log in order to dispute the assertion of any privilege for those documents. Capital One's response is that it would be unduly burdensome to produce a document-by-document log of the thousands of communications with its numerous bank examiners and that a categorical designation, along with additional metadata information, would give the plaintiffs sufficient information to pursue a challenge to that anticipated assertion. As to the Debevoise documents, Capital One argues that communications between Capital One and Debevoise are "clearly privileged, and should not be the subject of a costly and burdensome logging process." (Docket no. 362 at 16).

Federal Rule of Civil Procedure 26(b)(5)(a) provides that when a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must 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 the information itself privileged or protected, will enable other parties to assess the claim. The parties to an action can agree that certain information does not need to be placed on a privilege log — as the parties in this case have done concerning documents created on or after July 30, 2019 and exchanged between the parties and their outside counsel relating to the legal claims in this action. As cited in Capital One's opposition, under appropriate circumstances courts have also found that a document-by-document log is not necessary for a party to assess a claim being asserted. (Docket no. 362 at 8, 12, 14–15). In any event, if a party does withhold documents on the basis of a privilege, the party asserting the privilege has the burden of establishing the appropriateness of that assertion if the receiving party challenges the assertion.

Bank Examiner Privilege

The issue involved in this motion is not whether the assertion of the bank examiner privilege is appropriate in this case. That question is left for another day, if and when Capital One withholds documents on the basis of that privilege. As shown in exhibit D to Capital One's opposition (Docket no. 363), it appears that Capital One does intend to withhold documents based on the bank examiner privilege, so it is appropriate for the parties and the court to address the manner in which that privilege is to be asserted. The issue before the court is what information is needed to enable the plaintiffs to assess and possibly challenge the assertion of that privilege.

Plaintiffs argue that the usual document-by-document log is needed since the bank examiner privilege (if properly asserted) is a qualified privilege, that purely factual information falls outside of the privilege, and the privilege may be overridden if good cause is shown. Plaintiffs say that they would be unable to identify key documents that they believe good cause would exist to override the privilege if they were obscured by categorical entries.

Capital One argues that it is subject to the regulatory and supervisory authority of several federal bank regulatory agencies that request information and documents from it both formally and informally. As a result of these requests, Capital One also has internal communications concerning the requests being made by the regulators and the collecting of information to provide a response. Based on a preliminary analysis, Capital One estimates that between 20,000 and 50,000 documents are potentially subject to the bank examiner privilege. Capital One's final proposal to avoid having to prepare a document-by-document log as requested by the plaintiffs was to provide: (1) a document-by-document log for 1-2% of all responsive documents subject to the bank examiner privilege; (2) a categorical log as to the remaining documents being withheld

containing the date range for the applicable documents, their subject matters, the authors, recipients, particular banking regulator at issue, and the total number of documents withheld; and (3) for the documents in the categorical log, available metadata from the bank examiner communications including the person who sent, received, or were copied on the communication, and the date of the communication. Capital One argues this would provide the plaintiffs with sufficient information to assess the privilege as required by Federal Rule of Civil Procedure 26(b)(5)(a) and would result in cost savings to Capital One well in excess of \$100,000.

Plaintiffs have suggested that they may challenge the assertion of the bank examiner privilege on at least two grounds, the first that the bank examiner privilege belongs to the regulator and the regulators must assert the privilege. The manner in which the documents being withheld are identified does not have any significant bearing on this legal argument. The second basis is to challenge the assertion on individual documents since the privilege is not absolute and could be overcome upon a showing of good cause. *See In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992). This is where plaintiffs assert they need specific, document-by-document information. Plaintiffs state they need a detailed description of the subject matter of each document in order to assess the need to challenge the assertion on a document-by-document basis.

The difficulty with this argument is that the information that Capital One has agreed to provide in its suggested categorical log, which includes the general subject matter of the documents, would not necessarily be any more detailed if listed document-by-document. Furthermore, if plaintiffs do decide to challenge the assertion of this privilege for good cause, it would be as to certain specific types of information and not necessarily to specific documents. If plaintiffs were to establish good cause to overcome any properly asserted privilege as to certain

types of subject matter information, then the burden would be on Capital One to locate those documents containing that subject matter information and to produce them.

For these reasons, the court finds that Capital One's proposal of providing:

(1) a document-by-document log for no less than 2% of all responsive documents being withheld subject to the bank examiner privilege;

(2) a categorical log as to the remaining documents being withheld containing the date range for the applicable documents, their subject matters, the authors, recipients, particular banking regulator at issue, and the total number of documents withheld; and

(3) for the documents contained in the categorical log, provide the available metadata from the bank examiner communications including the person who sent, received, or were copied on the communication, and the date of the communication

should be sufficient for the plaintiffs to assess any assertion of that privilege at this time.

Communications between Capital One and Debevoise

Capital One argues that it should not be required to log the communications between it and Debevoise relating to Debevoise's investigation concerning the Cyber Incident because they are clearly privileged, and it would be costly and burdensome to prepare a log of those documents. Capital One estimates there are approximately 1,000 post-litigation communications exclusively between Debevoise and Capital One. Plaintiffs dispute the privileged nature of the investigation conducted by Debevoise (and those hired by it) and argue that in order for Capital One to meet its burden to establish the privilege a log must be produced.

