

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-01464-NYW

CENTER FOR BIOLOGICAL DIVERSITY and  
FOOD & WATER WATCH,

Plaintiffs,

v.

SWIFT BEEF COMPANY,

Defendant.

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**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF WITHHELD DOCUMENTS**

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**INTRODUCTION**

Pursuant to under Rule 37(a)(3)(B) of the Federal Rules of Civil Procedure, Plaintiffs Center for Biological Diversity and Food & Water Watch move the Court for an order compelling Defendant Swift Beef Company to release documents it has indefensibly withheld from Plaintiffs during discovery. *See generally* Ex. 4-7.<sup>1</sup> Swift Beef maintains that email communications identified in its Privilege Log, along with an unknown number of documents attached to those emails, are protected from disclosure by both the attorney-client privilege and work-product doctrine.

Swift Beef has not met its burden to withhold these documents. The Privilege Log fails to establish that the non-attorneys involved in the withheld communications are employees who are authorized to act on behalf of Swift Beef and who possess critical information, as is required

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<sup>1</sup> All exhibits to this Motion are attached to the Declaration of Neil Levine, filed concurrently.

for the attorney-client privilege to apply. Moreover, the entries in the Privilege Log are insufficient to demonstrate that the documents convey or asks for legal advice, as opposed to simply transmitting discrete factual information. As for Swift Beef’s concurrent reliance on the work-product doctrine, it is not apparent that email communications between outside counsel and Swift Beef employees—most of which appear to be transmitting documents—contain the mental impressions or strategies of an attorney.

Further, Swift Beef indicates that there are ten entries in its Privilege Log—highlighted in the log being submitted as Exhibit 2—that include attachments. For these, however, Swift Beef fails to include or identify in the Privilege Log these attachments, let alone offer any factual information or description that could sustain reliance on either the attorney-client privilege or work product protection.

In accordance with D.C.Colo.L.Civ.R. 7.1, counsel for the Parties have made good faith efforts via emails and phone conversations to address the disputes over Swift Beef’s withheld documents and Privilege Log. *See, e.g.*, Ex. 3. Based on those discussions, Swift Beef provided a supplement to the Privilege Log, released one document (Doc. #14) identified in its Privilege Log, and recently confirmed that ten unreleased emails have an unknown number of attachments to them, although none of which have been specifically identified or described.

## **BACKGROUND**

In responding to Plaintiffs’ First Set of Discovery, Ex. 4-6, Swift Beef withheld an multiple documents. The company initially produced a five-entry privilege log on July 25, 2020 that broadly grouped the documents depending on what period of time they were generated. Exh. 1. These entries were divided into the following categories: documents created before Plaintiffs’ 60-Day Notice Letter, those created between the Notice Letter and Complaint, those created after

the Complaint was filed depending on which law firm was involved, and one email communication from July 31, 2014. *Id.*

This was not the type of privilege log that the Parties agreed to prepare. The June 15, 2020 Supplemental Scheduling Order states that “[t]he parties agree to produce a privilege log sufficient to allow for substantive discussions over the documents or information that a privilege is asserted for withholding or redacting.” ECF Doc. 48 at 7. After an initial conference between the parties, Swift Beef produce a supplemental Privilege Log on August 27, 2020, with minor clarifications on November 20, 2020. Exh. 2.<sup>2</sup>

The Privilege Log contains forty-two entries. Exh. 2. Swift Beef describes each entry as an email communication. *Id.* One such email communication has been released by Swift Beef (Doc. #14).<sup>3</sup> Swift Beef relies on both the attorney-client privilege and work product doctrine to withhold the remaining forty-one documents. *Id.* Of the identified forty-one emails, seven (Doc. #5, 7, 18, 36, 37, 39 & 42) are email communications only (without attachments) and thirty-four involve attachments—described as “email with attachment(s). . .” *Id.* Swift Beef has highlighted ten entries in the Privilege Log, *id.*, because there are documents attached to the listed emails have also been withheld, Ex. 3; however, those attached documents are not identified or described in the Privilege Log, *see id.* & Ex. 2, and it is unknown how many documents are attached to these ten emails.

The persons involved in the withheld email communications are not identified in the Privilege Log. However, Plaintiffs understand that Steve Case and Sarah Maresh are, or were,

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<sup>2</sup> The November 20, 2020 version of the Privilege Log (Exh. 2) now contain a column for log entry numbers and has highlighted ten documents.

<sup>3</sup> This email had been copied to in-house counsel Nichols White according to the Privilege Log (Exh. 2), but was not an attorney-client communication and did not warrant work-product protection.

attorneys with Swift Beef’s outside counsel McGrath North, and Karen Couth is a paralegal with the same firm. Ex. 3. Mark Ritsema, Fernando Meza, and Jesus Santillan are known to Plaintiffs to be Swift Beef employees (or former ones) and Nicholas White is an in-house attorney for Swift Beef.<sup>4</sup>

## ARGUMENT

### I. **Document # 30 Should Be Released Because This Email Involves No Attorneys And Is Not Otherwise Privileged**

One withheld document—Doc. #30, dated March 7, 2019—involves no attorneys and thus neither the attorney-client privilege nor work-product protection should apply. Swift Beef maintains (Ex. 3) this document is properly withheld because it relates to another email (Doc. #3) that, as described, was sent from a Swift Beef employee (Mark Ritsema) to outside counsel. “For a communication between nonattorney employees to be held privileged, it must be apparent that that communication from one employee to another was for the purpose of the second employee transmitting the information to counsel for advice or the document itself must reflect the requests and directions of counsel.” *U.S. v. Badger*, 2013 WL 3937023, at \*3 (D. Utah July 30, 2013) (citations omitted). Swift Beef has not made the required showing to withhold this document, for it is *not* apparent from the Privilege Log that the purpose of Doc. #30 relates to the transmission of information to counsel for advice, or that Doc. #30 itself reflects the requests or directions of counsel. It should be released.

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<sup>4</sup> Swift Beef’s initial July 25, 2020 log states there are “multiple” protected communications between Swift Beef employees and outside counsel “prior to the receipt of the 60 day notice letter” that are being withheld as attorney-client privilege. Ex. 1. The November 20, 2020 Supplemental Privilege Log, in contrast, identifies no documents predating the 60-day Notice Letter that have been withheld. Ex. 2. Meanwhile, in the documents that Swift Beef has produced, Plaintiffs are not aware of any documents that involve communications between Swift Beef’s outside counsel and its employees. This discrepancy is unexplained.

**II. Ten Entries In The Privilege Log Include Attachments That Are Not Identified Or Described**

The Privilege Log highlights ten entries. Ex. 2 (Docs. # 3, 20, 26, 27, 31, 32, 33, 34, 35, 41). These entries reflect not just the described emails, but also, according to Swift Beef, represent multiple attachments for which Swift Beef maintains can be withheld too. Ex. 3.

Those attachments, however, are not identified or described in the Privilege Log. Consequently, Plaintiffs have no way of knowing what those attachments are, whether they contain purely factual information or were produced in the ordinary course of business, or whether they convey legal advice or an attorney's mental impressions. It is Swift Beef's obligation to properly log all documents it withheld in discovery. Because Swift Beef failed to log these attachments in any way, the Court should order the company to produce them in their entirety. *See Hurtado v. Passmore & Sons*, 2011 WL 2533698, \*5 (D. Colo. June 11, 2011).

**III. Swift Beef Has Not Met Its Burden To Withhold Documents Based On The Attorney-Client Privilege.**

A. The Attorney-Client Privilege

The attorney-client privilege extends to confidential matters communicated between attorneys and their clients in the course of receiving advice with respect to the clients' legal rights or obligations. *Plaza Ins. v. Lester*, 2015 WL 3528336, \*4 (D. Colo. June 4, 2015); *see Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981). The party asserting the privilege bears the burden of demonstrating it applies. *U.S. v. Lopez*, 777 F.2d 543, 552 (10th Cir. 1985). “On raising the privilege, a general allegation is insufficient.” *WildEarth Guardians v. U.S. Forest Serv.*, 713 F.Supp.2d 1243, 1266 (D. Colo. 2010); *see also Peat Marwick Mitchell v. West*, 748 F.2d 540, 542 (10th Cir. 1984). Instead, facts necessary to establish that the privilege applies to the withheld document must be set forth. *WildEarth Guardians*, 713 F.Supp.2d at

1266-67.

B. **Swift Beef Has Not Established Employees are Authorized to Speak on Behalf of the Company or Possess Critical Information**

“The administration of the attorney-client privilege in the case of corporations...presents special problems. As an inanimate entity, a corporation must act through agents.” *Commodity Futures Trading Comm’n v Weintraub*, 471 U.S. 343, 348 (1985); *Hansen Constr. v. Everest Nat’l Ins.*, 2017 WL 7726711, at \*2 (D. Colo. July 28, 2017) (same). In *Upjohn*, the Supreme Court ruled that a corporation-client is not just represented by its “control-group” and may extend to other employees. *Upjohn v. U.S.*, 449 U.S. 383, 394 (1981). Those employees must be authorized to speak for the corporation, *Mead Data Central v. U.S. Dep’t of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977), and possess the information needed by counsel, *Maintenance Enterprise v Dyno Nobel*, 2009 WL 10670683, \*3 (D. Wyo. 2009) (citing, *Upjohn*, 449 U.S. at 391).

Swift Beef’s Privilege Log reveals that each of the withheld documents (except for Doc. #30, which involves no attorneys) is an email communication between outside counsel and Swift Beef employees. However, not every communication with an employee is privileged. Nowhere has Swift Beef established that Mark Ritsema, Fernando Meza, or its former employee Jesus Santillan are agents or are otherwise authorized to speak on behalf of the company. The Privilege Log is silent on this requirement. Moreover, Swift Beef has not shown that these individual employees possess “the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.” *See Upjohn v. U.S.*, 449 U.S. at 391. The Privilege Log does not establish that these individuals are uniquely positioned or qualified to provide factual information to Swift Beef attorneys. In short, while the attorney-client privilege may cover employees, Swift Beef has not met its burden for these

employees.

C. The Subject of the Withheld Emails Appears to Involve Factual Matters Only, and Is Not Tied to Legal Advice.

The second deficiency in Swift Beef's Privilege Log is that it fails to establish that the communications pertain to legal advice. As an initial matter, the following thirty-four withheld emails appear to involve factual information that Plaintiffs are entitled to, as they concern the air scrubber (Doc. #2, 7), discharge monitoring reports or DMRs (Doc. #3, 6, 10, 22, 25, 30, 38), WET tests (Doc. #5, 8, 9, 11, 12, 15, 17, 23, 28, 29, 36, 40), the salt evaporator system (Doc. #31, 32, 33, 34, 35, 37, 39, 41, 42), equipment purchases (Doc. #4), and communications with Colorado Department of Public Health & Environment or CDPHE (Doc. #1, 13, 18). To the extent these documents are restricted to this factual information, the privilege does not apply. Swift Beef does not detail how the subject matter of each email connects to legal advice sought or rendered from Swift Beef's outside counsel. It is insufficient to merely describe the factual subject matter of the document withheld.

Highlighting this deficiency, most of these documents seem to be merely conveying attachments about a factual subject matter, meaning the withheld records are simply transmitting factual information, *not* seeking or procuring legal advice. *See U.S. v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998) (privilege protects "legal advice or strategy sought by the client"); *see also Plaza Ins. Co. v. Lester*, 2015 WL 3528336, at \*5 (D. Colo. June 4, 2015) ("Some of the documents included on Plaza's privilege log simply direct the Treece Firm to collect police files or court records."); *United States v. Badger*, 2013 WL 3937023, at \*2 (D. Utah July 30, 2013) ("The attorney-client privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing.") (internal quotations omitted; emphasis in original).

For the other entries in the Privilege Log, Swift Beef fails to provide any useful description about the subject matter of the emails:

- Docs. # 19, 20, 21, 27: These records are described as “email with attachments requested by counsel in anticipation of litigation;”
- Doc. #24: This document is described as “email with attachments in response to request from counsel;”
- Doc. #26: The complete description provided for this document is “email with attachment.”
- Doc. #16: This document is so broadly described—“various issues raised in the Notice Letter”—that Plaintiffs cannot discern what the communication’s subject matter may be.

For these seven entries, the offered descriptions are wholly insufficient to allow Plaintiffs or the Court to evaluate the propriety of the withholdings, and thus Swift Beef’s Privilege Log is inadequate and the withheld documents should be released. *See U.S. v. Badger*, 2013 WL 3937023, \*3 (“The privilege log must contain sufficient detail wherewith other parties, including the court, can assess the claim to a specific document and determine whether each element of the asserted privilege is satisfied.”).

### **III. Swift Beef Has Not Met Its Burden To Withhold Emails As Work Product.**

#### **A. The Work-Product Doctrine**

Protection for an attorney’s work product is governed by Rule 26(b)(3). *Frontier Refining v. Gorman-Rupp*, 136 F.3d 695, 702, n.10 (10th Cir. 1998). Rule 26(b)(3) exempts from discovery “documents and tangible things...prepared in anticipation of litigation or for trial,” Fed.R.Civ.P. 26(b)(3)(A), and provides a lawyer “with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel,” *Hickman v. Taylor*, 329 U.S.

495, 510 (1947); *see also Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 624 (D. Colo. 1998).

The protection covers “inquiries into the files and the mental impressions of an attorney.” *Hickman*, 329 U.S. at 510; *accord Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a)*, 735 F.3d 1179, 1185 (10th Cir. 2013) (“At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.”); *see also Fed. R. Civ. P. 26(b)(3)(B)* (covering “mental impressions, conclusions, opinions, or legal theories” about case). However, not “all written materials obtained or prepared by an adversary’s counsel with an eye toward litigation are necessarily free from discovery in all cases.” *Hickman*, 329 U.S. at 511 (1947); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (“[T]he work product doctrine is intended only to guard against divulging the attorney’s strategies or legal impressions.”). For example, documents prepared in the “ordinary course of business” are not protect under this doctrine. *W. Nat’l Bank v. Emp’rs Ins. of Wausau*, 109 F.R.D. 55, 57 (D. Colo. 1985).

B. The Privilege Log Lacks Sufficient Information To Justify Work-Product Protection

Based on the text in the Privilege Log, the majority of the withheld documents (34 documents) appear to be transmittal-type emails, described generally as “email with attachments.” Twenty-five of those concern regulatory compliance documents or equipment operated by Swift Beef: “email with attachment re: air scrubber” (Doc. #2), “email with attachment re: DMRs” (Doc. #3, 6, 10, 22, 25, 30, 38); “email with attachment re: WET tests” (Doc. #8, 9, 11, 12, 15, 17, 23, 28, 29, 40); “email with attachment re: salt evaporator system” (Doc. #31, 32, 33, 34, 35, 41); and “email with attachment re: equipment purchases” (Doc. #4). On their face, nothing about these transmittal emails appear to contain an attorney’s “mental

impressions, conclusions, opinions, or legal theories” about the case. *See* Fed. R. Civ.P. 26(b)(3)(B). The mere conveyance of factual material does not qualify as work product. *See Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (“[T]he work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions[;] it does not protect facts concerning the creation of work product or facts contained within work product.”).

Nine other documents are similarly described in the Privilege Log as “emails with attachments,” (Doc. # 1, 13, 16, 19, 20, 21, 24, 26, and 27), though the content of the attachments is not fully described. *See* Ex. 2. For four of them (Doc. # 19, 20, 21, 27), the log generically says “email re: attachments requested by counsel in anticipation of litigation.” Here, Swift Beef does not identify the attachments and merely parrots an essential element of the doctrine, providing no useful description that reveals whether or not the emails contain work product. Document # 26 is even more inadequately described as “Email with attachment,” which does not explain how an attorney’s work product could be found in this communication. Document # 24 is similarly nondescript, identified as an “email with attachment in response to request from counsel.” Documents # 1 and 13 convey, it seems, Swift Beef’s “communication[s] with Colorado Department of Public Health and Environment” to outside counsel. *How* those communications contain or reveal counsel’s mental impressions is not apparent from the description. For these nine withheld emails, nothing demonstrates that they contain an attorney’s mental impressions or otherwise involve protectable work product.

The seven emails that do *not* involve attachments (Doc. #5, 7, 18, 36, 37, 39 & 42) are so vaguely described that it is unknown whether they contain an attorney’s work product. They address basic factual matters about the case: Documents #5 and 36, “re: WET tests,” Document

#7, “re: air scrubber;” Document #18, “re: communications with CDPHE;” Documents #39 and 42, “re: salt evaporator system;” and Document #37, “re: repairs to salt evaporator system.” Ex. 2. While these documents may relate to aspects of the lawsuit, they do not necessarily concern the mental impressions or strategies of Swift Beef’s attorneys.

In sum, based on descriptions in Swift Beef’s Privilege Log, the emails and their attachments are documents *not* prepared for litigation but are seemingly either regulatory-type documents (WET tests, DMRs, or communications with the regulatory agency CDPHE) or documents concerning Swift Beef’s infrastructure at its Greeley plant (salt recovery system and air scrubber). They all are seemingly documents prepared in the ordinary course of Swift Beef’s business. The emails without attachments (Doc. #5, 7, 18, 36, 37, 39 & 42), meanwhile, are insufficiently described to know whether they are covered as work product.

Respectfully submitted,

Dated: November 24, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 24, 2020, I electronically transmitted Plaintiffs' Motion to Compel using the CM/ECF System for filing and service on all registered counsel.

/s/ Neil Levine  
Neil Levine