UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' *MOTION IN LIMINE* TO EXCLUDE DEFENSE DOCUMENTS OR TESTIMONY WHICH REFER TO ADVICE FROM COUNSEL THAT DEFENDANTS COMPLIED WITH FEDERAL AND STATE LAWS

PLAINTIFFS' MOTION *IN LIMINE* NO. 4

[REDACTED VERSION]

Plaintiffs respectfully submit this memorandum in support of their motion for an Order precluding defendants from introducing into evidence at trial documents or testimony relating to any advice received from counsel, including any putative consultations with counsel. In the operative answer, defendants do not assert an advice of counsel affirmative defense. Additionally, throughout discovery, defendants withheld documents on the grounds of privilege and, indeed, recalled many such documents via motion. However, now at trial defendants suddenly seek to use advice of counsel as a basis to negate scienter. Defendants should be precluded from doing so based on their failure to assert an advice of counsel affirmative defense and their withholding of privileged documents during discovery.

I. Introduction

Defendants asserted the attorney-client privilege throughout the discovery process as a shield to bar discovery. They withheld thousands of documents on that basis and recalled numerous others via motion on that ground. The withheld and "clawed-back" documents include communications between defendants and in-house counsel, communications between in-house counsel and Household International, Inc.'s ("Household") auditors, and memoranda prepared respecting certain lending practices. Defendants also asserted the privilege in depositions and in response to interrogatories.

And defendants successfully opposed motions to compel based on the attorney-client privilege as well. *See, e.g.*, January 17, 2007 Minute Order (Guzman, J.), Docket No. 923; January 24, 2007 Minute Order (Nolan, M.J.), Docket No. 931; August 30, 2006 Minute Order (Nolan, M.J.), Docket No. 658; *see also* Defendants' Memorandum of Law in Opposition to Lead Plaintiffs' Motion to Compel Household Defendants' Responses to Third Set of Interrogatories, Docket No. 589. Of particular importance for purposes of this motion is defendants' use of the attorney-client privilege to withhold documents relating to communications between Household's

counsel and Andrew Kahr. As the Court may now be aware, Mr. Kahr, a founder of Providian Financial Corp., was retained by defendants to develop "'opportunistic methods to accelerate the growth'" of Household's consumer lending business unit. December 13, 2006 Order at 1 (Nolan, M.J.), Docket No. 824 (citation omitted). Mr. Kahr's proposals were memorialized in a series of memoranda to Household officers, including legal counsel. Defendants withheld from production the memoranda between Mr. Kahr and legal counsel, including documents related to Household's use of the Federal Parity Act (also known as the Alternative Mortgage Treatment Parity Act or "AMTPA") to evade state regulations. Plaintiffs moved for production of these documents and defendants opposed on the grounds of privilege. *See* The Household Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Andrew Kahr Documents Allegedly Improperly Withheld as Privileged or Destroyed by the Household Defendants at 2-3, Docket No. 921. By Order dated January 25, 2007, Magistrate Judge Nolan upheld defendants' assertion of privilege over 32 Kahr memoranda. January 25, 2007 Order at 2-5, Docket No. 933.[1]

Having used the privilege as a shield during discovery, defendants now seek to use communications with counsel and counsel's legal advice as a sword to negate scienter. In their proposed statement of contested issues of fact, defendants propose to rely upon Household's Legal Department's review and approval of predatory lending practices. *See* The Household Defendants' [Proposed] Statement of Contested Issues of Law and Fact at 24 (¶(c)) (Ex. B-2 to [Proposed] Final Pretrial Order).

As an example of this, in defendants' opposition to plaintiffs' spoliation motion, defendants assert that the Legal Department reviewed all of Mr. Kahr's proposals prior to implementation. *See*

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[1] Additionally, as detailed in Lead Plaintiffs' Motion and Memorandum Requesting Evidentiary Sanctions for Household Defendants' Destruction of Evidence at 45-54, filed November 26, 2008, Docket No. 1260, defendants destroyed copies of Mr. Kahr's memoranda.

Memorandum of Law in Opposition to Plaintiffs' "Spoliation" Motion at 4, Docket No. 1281 (asserting "Kahr's ideas were always subject to rigorous testing, review . . . by Household's Office of The General Counsel"). As noted above, however, defendants withheld from discovery the communications between Mr. Kahr and the Legal Department on privilege grounds and successfully opposed plaintiffs' motion to compel on that basis.

Defendants also withheld as privileged documents reflecting communications between the Legal Department and other Household employees, including defendants, concerning Mr. Kahr's proposals. [redacted] However, defendants provided only a completely redacted copy of this memorandum during discovery. HHS03066434-36 (redacted opinion of Andrew Budish), attached hereto as Ex. B.

Plaintiffs did not have access to this privileged document nor to any other privileged documents regarding the Legal Department's "review" of any of Mr. Kahr's proposals during discovery. This conduct precludes the argument at trial that defendants believed adoption of Mr. Kahr's proposals (and other predatory practices) did not violate federal and state laws based upon the advice of their attorneys. To hold otherwise would allow defendants to use the attorney-client privilege and attorney work product privilege as both a sword and a shield.

II. Defendants' Previous Assertion of the Attorney-Client Privilege Prevents Defendants from Now Using Attorney-Client Communications and Attorney Work Product as Evidence

As the Second Circuit has noted, a defendant can assert advice of counsel as a partial defense to a claim of securities fraud. *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994). However, in order to assert this defense, defendants have the burden to demonstrate that: (1) they made complete disclosure to counsel; (2) they sought advice as to the legality of their conduct; (3) they received advice that their conduct was legal; and (4) they relied on that advice in good faith. *Id.* During discovery, defendants did not provide the underlying documents necessary to mount this defense nor provide the discovery that plaintiffs would need to properly test and rebut the defense. Simply put, defendants consistently objected to producing documents or allowing deposition testimony that would go to the authenticity, content or reliability of the alleged advice received. Therefore, allowing defendants to introduce the previously-withheld evidence would be unfairly prejudicial to plaintiffs.

"The attorney-client privilege cannot be used as both a shield and a sword and [defendant] cannot claim in his defense that he relied on [his counsel's] advice without permitting the prosecution to explore the substance of that advice." *United States v. Workman*, 138 F.3d 1261, 1264 (8th Cir. 1998) (citation omitted). By this same standard, a party that withholds during discovery privileged materials is precluded from asserting advice of counsel at trial. *Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) (precluding advice of counsel defense where party refused to answer questions about that advice until the "'eleventh hour'") (citation omitted); *Trouble v. Wet Seal, Inc.*, 179 F. Supp. 2d 291, 304 (S.D.N.Y. 2001) (party waived any available advice of counsel defense by objecting, based on attorney-client privilege, to discovery requests); *Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club, L.P.*, 210 F.R.D. 673, 676-77 (D. Minn. 2002) (same).

This Court has held that a party who asserts a privilege to preclude its opponent from obtaining information in discovery relinquishes the ability to use that information in its favor at trial. *See Manning v. Buchan*, 357 F. Supp. 2d 1036, 1048 (N.D. Ill. 2004). "Ordinarily when a party asserts a privilege to preclude its opponent from obtaining information in discovery, it relinquishes the ability to use that information in its favor at trial. The rationale is that it is unfair to allow a party to make selective use of information helpful to him while blocking inquiry into other aspects of the information that might be unhelpful." *Id.* (citation omitted). The rationale in *Manning* applies to the present case – defendants cannot use the fact that they purportedly obtained legal opinions or relied upon their counsel's advice because they prevented plaintiffs from discovering the contents of that advice and the information considered by counsel in rendering that advice. In other words, defendants want to have their cake after they already ate it. This would work manifest prejudice to plaintiffs, who do not even know what the purported legal opinions state, who they were disseminated to, when they were written, what they were based on, or what weight the defendants gave the opinions, which are all issues that plaintiffs would have probed during discovery.

Even if defendants do not seek to introduce or refer to the specific attorney-client communications, any testimony or documents regarding defendants' ***beliefs*** based on advice of counsel should still be excluded. The defendants' communications with counsel regarding legal issues, which they withheld, are directly relevant in determining the extent of defendants' knowledge with respect to those issues and, therefore, good faith reliance upon such communications. *In re ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765, 767-68 (D. Del. 1994) (treating defense based on consultation with attorney the same as an advice of counsel defense). Plaintiffs were denied discovery regarding the reliability and scope of these attorney-client communications. Thus, they do not have any basis on which to challenge the reliability of defendants' alleged beliefs or to diminish the impact of defendants' purported reliance on their attorneys' alleged advice.

In this regard, this case parallels *Advanced Cardiovascular Sys. v. Medtronic, Inc.*, 265 F.3d 1294 (Fed. Cir. 2001). In that case, defendant wanted to present evidence that it followed its corporate policies, by which it meant that "it obtained legal opinions." *Id*. at 1310. The district court did not permit the evidence because the defendant asserted its attorney-client privilege. *Id.* The Federal Circuit affirmed, because defendant "neither disclosed nor relied upon any opinion of counsel." *Id.*

Similarly, because defendants asserted the attorney-client privilege over their counsel's opinions regarding the legality of their lending practices and products, defendants should not be allowed to introduce evidence or testimony at trial regarding any claimed reliance on counsel's advice defenses or their purported "good faith" belief that such practices and products were legal based upon the advice of counsel. As noted in the case law, this preclusion includes any belief based on following "corporate policies," where, as here, corporate policy including a purported review and approval by counsel. *See id.*; *see also ML-Lee Acquisition Fund*, 859 F. Supp. at 767-68 (treating defense based on consultation with attorney the same as an advice of counsel defense). Any such claims would be unfairly prejudicial to plaintiffs at this stage of the litigation. Defendants may argue that they will be prejudiced if evidence regarding their beliefs is not admitted. However, any prejudice that defendants may encounter from the barring of such testimony is the consequence of their own conduct and decisions.

In addition to barring defendants from introducing any evidence regarding their consultations with counsel or reliance on any legal advice, plaintiffs request that the Court permit plaintiffs to redact exhibits that contain references to such consultations. In particular, plaintiffs seek to redact an e-mail from defendant Gilmer to defendant Aldinger. HHS02914803-04, attached hereto as Ex. C. Mr. Gilmer's e-mail contains a reference to prior consultations with the Household Legal Department regarding the applicability of the Parity Act to the Pay Right Rewards program. This

document is important to plaintiffs' case with respect to the element of scienter and plaintiffs would be prejudiced if they had to introduce an exhibit containing references to privileged communications that they were not allowed to explore. Significantly, defendants themselves have redacted portions of the document as "privileged," thus highlighting defendants' inappropriate use of the privilege as both sword and shield.

Finally, if this Court allows defendants to reference the Legal Department's role in vetting Mr. Kahr's ideas or any other lending practices, the Court should also instruct the jury that they are to draw an adverse inference as to the contents of any communications with counsel that were withheld pursuant to the attorney-client privilege. In *L.A. Gear v. Thom McAn Shoe Co.*, 988 F.2d 1117 (Fed. Cir. 1993), the court held:

> Although a party to litigation may indeed withhold disclosure of the advice given by counsel, as a privileged communication, it will not be presumed that such withheld advice was favorable to the party's position. We have held that the assertion of privilege with respect to infringement and validity opinions of counsel may support the drawing of adverse inferences.

Id. at 1126. In other words, because defendants have withheld the legal opinions under an assertion of the attorney-client privilege, the jury should be instructed to draw an adverse inference regarding the content of those attorney communications and opinions.

III. Conclusion

For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for an Order excluding documents and testimony relating to advice of counsel or any consultations with counsel. Additionally, the Court should permit plaintiffs to redact exhibits that reference such advice or consultations.

DATED: January 30, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway Suite 1900, San Diego, California 92101.

2. That on January 30, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' *MOTION IN LIMINE* TO EXCLUDE DEFENSE DOCUMENTS OR TESTIMONY WHICH REFER TO ADVICE FROM COUNSEL THAT DEFENDANTS COMPLIED WITH FEDERAL AND STATE LAWS (REDACTED VERSION)**.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of January, 2009, at San Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE

EXHIBITS A-C FILED UNDER SEAL