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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

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

(PLAINTIFFS' MOTION *IN LIMINE* NO. 4)

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz and Gary Gilmer (collectively, the "Defendants"),[1] in partial opposition to Plaintiffs' motion *in limine* Number 4. As described below, *Defendants consent to an Order precluding their introduction of or reliance on certain privileged documents withheld from Plaintiffs during discovery pursuant to Magistrate Judge Nolan's Order of January 25, 2007.*[2] Because the relief requested in Plaintiffs' motion impermissibly extends far beyond the subject matter of those privileged documents, however, Defendants are compelled to file this limited opposition.

INTRODUCTION

Plaintiffs include on their list of allegedly false statements for trial certain statements by Household spokespeople to the effect that Household was not a "predatory lender" and did not engage in "predatory" lending practices. Numerous facts demonstrate that those statements were not made with scienter,[3] not least among them the fact that each such spokesperson knew that Household maintained a Legal Department that reviewed all lending practices and proposed products for compliance with applicable laws and regulations. Those circumstances and

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1 Defendants Joseph A. Vozar and Household Finance Corporation ("HFC") join in this opposition and expressly reserve the right to amend, supplement or re-assert objections to any future motions by Plaintiffs to exclude documents and testimony from any proceeding or submission.

2 Plaintiffs failed to file a formal motion setting forth either the procedural justification for or the specific relief requested by their motion *in limine*. For the Court's convenience, Defendants have prepared a [Proposed] Order specifying the precise relief to which they have no objection and to whose entry they consent. The [Proposed] Order is attached to this memorandum at Exhibit A.

3 Defendants advance this argument notwithstanding (and without prejudice to) the threshold legal impediment, articulated by Defendants elsewhere in various places, that such statements are inactionable puffery and cannot serve as a basis for any Defendant's liability for securities fraud as a matter of law.

others support the fact that Household spokespeople reasonably believed that their statements were true when made and, consequently, undermine Plaintiffs' untenable assertion to the contrary.

Unable to cure the infirmities in their case, Plaintiffs once again ask this Court to silence their opposition and instruct the jury to believe what Plaintiffs cannot prove and is not true. They identify a narrow body of correspondence between independent consultant Andrew Kahr and Household's in-house counsel, which those counsel then used as a starting point to develop their legal advice to the Company related to one specific proposal. *See, e.g.*, Order at 4, *Jaffe* v. *Household Int'l, Inc.*, No. 02 Civ. 5893 (N.D.Ill. Jan. 25, 2007) (Nolan, M.J.) (Dkt. No. 933). Defendants properly withheld this legal advice documentation as privileged and, following an *in camera* review of all of the subject documents, Magistrate Judge Nolan denied Plaintiffs' motion to overrule that assertion of privilege. *See id.* at 5.[4] Yet because Defendants withheld that narrow category of communications, argue Plaintiffs, the Court should now bar Defendants from introducing *any* "documents or testimony relating to *any* advice received from counsel, including *any* putative consultations with counsel." (*See* Plaintiffs' 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 ("Pls.' Mem.") at 1 (Jan. 30 2009) (emphasis supplied).) For good measure, Plaintiffs also seek to fill that proposed void — not with evidence of their own, but with an instruction to the jury requiring it to

[4] In their motion before Magistrate Judge Nolan, Plaintiffs requested an adverse inference instruction based upon Defendants alleged destruction of certain Kahr documents that were not produced to Plaintiffs. Magistrate Judge Nolan rejected that request, *see* Order at 6, *Jaffe* v. *Household Int'l, Inc.*, No. 02 Civ. 5893, and Plaintiffs did not file with this Court an objection to either of her conclusions. Their current implicit attack on Magistrate Judge Nolan's ruling (without even acknowledging it in their instant motion) is untimely, to say the least.

draw an adverse inference from "any communications with counsel that were withheld pursuant to the attorney-client privilege." (*See id.* at 7.) Thus, in true Orwellian fashion, Plaintiffs seek to erase Household's entire legal compliance infrastructure from this case and, in its place, substitute their own counter-factual *ipse dixit*.

Except as indicated by the [Proposed] Order attached hereto as Exhibit A, Plaintiffs' motion should be denied because (i) Defendants are not advancing an "advice of counsel" defense; (ii) even if they were, Plaintiffs' request sweeps far beyond the subject matter of that advice; and (iii) an adverse inference may not be drawn from a party's invocation of the attorney/client privilege.

ARGUMENT

I. DEFENDANTS ARE NOT ADVANCING AN "ADVICE OF COUNSEL" DEFENSE

Reliance on advice of counsel may be a defense to securities fraud where a defendant shows, as to the conduct alleged to comprise securities fraud, "that he made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith." *Markowski* v. *SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *see also SEC* v. *McNamee*, 481 F.3d 451, 455-56 (7th Cir. 2007); *U.S.* v. *Urfer*, 287 F.3d 663, 666 (7th Cir. 2002). Defendants have not invoked an advice of counsel defense in this action. That fact has not changed. Plaintiffs argue to the contrary by seizing upon, and misrepresenting, a brief passage in a since superseded preliminary draft of Defendants' Statement of Contested Issues of Fact and Law, which Defendants shared with Plaintiffs in late October 2008. That draft listed facts supporting the conclusion that "Defendants had a reasonable basis to believe that their public statements denying 'predatory lending' were accurate . . . ." (The House-

hold Defendants' [Proposed] Statement of Contested Issues of Law and Fact at 22 (Oct. 31, 2008 draft).)[5] One listed fact was Defendants' awareness that "Household's Legal Department and Policy and Compliance Department reviewed all lending practices and proposed products and practices for compliance with applicable laws and regulations . . . ." (*See id.* at 24.)

Correctly understood, explaining that truthful aspect of Defendants' state of mind does not constitute advancing an "advice of counsel" defense. Plaintiffs confuse Defendants' awareness of the *existence* of a Legal Department and its routine participation in the company's internal review and approval procedures with the *solicitation of and reliance on specific legal advice* from that department.[6] In this action, knowledge of the rigorous approval process in place in the Legal Department, the Internal Audit Department, and the Policy and Compliance Department, among others, makes reasonable the belief, held by relevant Household employees at the time they spoke, that Household was not a "predatory lender" and did not condone "predatory" lending practices. That is altogether different from the assertion that, before making such statements, Household spokespeople solicited legal advice from any department as to the validity of the statement "Household is not a 'predatory lender'" or "Household does not engage in

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5 A copy of the relevant portions of the October 31, 2008 draft of Defendants' [Proposed] Statement of Contested Issues of Law and Fact is attached to the Declaration of Thomas J. Kavaler in Opposition to Plaintiffs' Motions In Limine Nos. 1, 3-10 ("Kavaler Declaration") as Exhibit 44. Defendants later changed the format of the Statement to more clearly convey that Plaintiffs bear the burden of proof on all issues material to their Rule 10b-5 claims.

6 For that reason, Plaintiffs' citation to *In re ML-Lee Acquisition Fund II, LP*, 859 F. Supp. 765 (D.Del. 1994), is misplaced. In that case, the plaintiffs argued that the defendants had waived attorney/client privilege as to certain communications with counsel by raising an "advice of counsel" defense. The defendants argued against waiver by suggesting that they had not put the *content* of those communications in issue, but only the *fact* that the communication had taken place. *See id.* at 767. Unlike that case, there is no communication here — that is, Defendants distinguish between any individual *communication* with counsel and *the fact that counsel existed at all.*

'predatory' lending practices." Indeed, there is not currently, nor has there ever been, any suggestion that any Defendant relied on undisclosed advice of counsel in making a statement alleged by Plaintiffs to be false or misleading — let alone the particular advice contained in the particular documents withheld as privileged.

II. PLAINTIFFS' REQUEST TO EXCLUDE DOCUMENTS IS OVERBROAD AND SHOULD BE DENIED TO THAT EXTENT

Plaintiffs derive their argument from the law of privilege and waiver, an undisputed principle of which is that the attorney/client privilege may not simultaneously be used as a shield and a sword. *See, e.g.*, *Fultz* v. *Federal Sign*, No. 94 Civ. 1931, 1995 WL 76874, at *2 (N.D.Ill. Feb. 17, 1995) (Guzman, J.). Under this principle, where a party intends to rely on the advice of counsel as a defense to liability, that party cannot withhold the very same advice of counsel on the ground of attorney/client privilege. *See, e.g.*, *Lorenz* v. *Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987) ("When the holder of a privilege relies on a legal claim or defense, the truthful resolution of which will require examining confidential communications, the holder is said to have waived that privilege."); *Panter* v. *Marshall Field & Co.*, 80 F.R.D. 718, 721 (N.D.Ill. 1978) (Will, J.). As a corollary to that rule, a party's failure to disclose its communications with counsel will waive the defense that the same party relied on those communications with counsel. *See, e.g.*, *Vicinanzo* v. *Brunschwig & Fils, Inc.*, 739 F. Supp. 891, 894 (S.D.N.Y. 1990).

These basic tenets are not in dispute, but they are not germane here because the scope of any such waiver extends only to the subject matter of the communications that were made to obtain the advice of counsel. *See, e.g.*, *Panter*, 80 F.R.D. at 721 ("Where, as here, a party asserts as an essential element of his defense reliance upon the advice of counsel, we believe the party waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel *concerning the transactions for which counsel's advice was*

sought." (emphasis supplied)). For instance, in *Manning* v. *Buchan*, the defendants argued that their reliance on legal advice from an Assistant U.S. Attorney precluded their liability, whereupon the plaintiff sought every document in the Assistant's entire file on the ground that all privileges had been waived by the assertion of the "advice of counsel" defense. *See* 357 F. Supp. 2d 1036, 1039 (N.D.Ill. 2004) (Kennelly, J.). The court rejected the plaintiff's argument, instead finding waiver only as to "the subject matter of the communications that were made to obtain the advice." *Id.* The same principle is prominently reflected in a decision cited by Plaintiffs, *In re ML-Lee Acquisition Fund II, LP*, 859 F. Supp. 765 (D.Del. 1994). Balancing "the competing policies of full, fair and complete discovery, and promoting full and complete consultation between clients and their legal advisers," the *ML-Lee* court concluded that the defendants' invocation of the "advice of counsel" defense waived privilege narrowly with respect to "only those communications relating to the specific areas which Defendants have asserted reliance on the advice of counsel." *Id.* at 768-69.

Defendants withheld on privilege grounds certain communications between Kahr and Household's in-house counsel relating to the legality of a proposal that involved designing certain loan products that would qualify for regulation under the federal Alternative Mortgage Transaction Parity Act ("AMTPA") and therefore not be subject to the diverse, and often more restrictive, regulations of individual states. *See* Order at 4, *Jaffe* v. *Household Int'l, Inc.*, No. 02 Civ. 5893. Defendants acknowledge that they cannot (and will not) rely at trial on the legal advice contained in those communications and have submitted a [Proposed] Order to that effect. (*See* Ex. A.) Furthermore, because the single document referenced in Plaintiffs' memorandum in support of the instant motion refers to the subject matter of those particular communications, De-

fendants consent to the partial redaction of that single document. (*See* Pls.' Mem. at 6-7.)[7] Although that solution should dispose of Plaintiffs' alleged concern, their motion goes substantially beyond the avoidance of sword/shield problems arising from the limited reference to AMPTA in the sole document they cite. Indeed, based on that single, easily cured example, they demand that literally *every* reference to communications with in-house counsel relating to *any* subject be eliminated from Defendants' evidence at trial. Even if Defendants were advancing an advice of counsel defense, that demand sweeps far beyond the narrow subject matter of Plaintiffs' purported showing on this motion and has no basis in law or fact. The motion should therefore be summarily denied.

III. PLAINTIFFS' REQUEST FOR AN ADVERSE INFERENCE IS BASED ON INAPPOSITE LAW THAT HAS BEEN EXPLICITLY OVERRULED

In addition to their overbroad request for the exclusion of documents and testimony, Plaintiffs seek an "adverse inference as to the contents of any communications with counsel that were withheld pursuant to they attorney-client privilege." (Pls.' Mem. at 7.) For this outlandish demand, Plaintiffs rely solely on later-overruled authority from the federal law of patents — *L.A. Gear, Inc.* v. *Thom McAn Show Co.*, 988 F.2d 1117 (Fed. Cir. 1993), in which the Court of Appeals for the Federal Circuit stated that "the assertion of privilege with respect to infringement and validity opinions of counsel may support the drawing of adverse inferences." *Id.* at 1126.

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[7] For the Court's convenience, attached to the Kavaler Declaration as Exhibit 45 is a copy of the document bearing Bates Number HHS 02914803 reflecting the redactions to which Defendants consent.

The law of patents regarding the "advice of counsel" defense to infringement and the principles of discovery related thereto is unique to patent law and does not apply to this case. *See, e.g.*, *TiVo Inc.* v. *Echostar Commc'ns Corp.*, No. 04 Civ. 01, 2005 WL 4131649, at *3 (E.D.Tex. Sept. 26, 2005) ("[T]he advice of counsel defense and the disclosure of an infringement opinion appears to fall within the realm of subjects 'unique to patent cases.'"), *rev'd in part on other grounds*, 448 F.3d 1294 (2006). Even if that were not the case, that proposition peculiar to patent law on which Plaintiffs rely has since been expressly overruled: "[T]he assertion of attorney-client and/or work-product privilege and the withholding of the advice of counsel shall no longer entail an adverse inference as to the nature of the advice." *Knorr-Bremse Systeme Fuer Nutzfahrzeuge Gmbh* v. *Dana Corp.*, 383 F.3d 1337, 1345 (Fed. Cir. 2005) (en banc). In so holding, the Federal Circuit harmonized federal patent law with the general law that an adverse inference may ***not*** be drawn from a party's invocation of the attorney-client privilege. *See id.*; *see also Nabisco, Inc.* v. *PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir.1999) ("[W]e know of no precedent supporting such an [entitlement to an adverse] inference based on the invocation of the attorney-client privilege."), *abrogated on other grounds sub nom.*, *Moseley* v. *V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *Crosby* v. *U.S. Dep't of Labor*, No. 93 Civ. 70834, 1995 WL 234904, at *2 (9th Cir. 1995) (table) ("[I]t is not appropriate to draw adverse inferences from the failure to produce documents protected by the attorney-client and work product privileges." (citing *Wigmore on Evidence* § 291)); *accord* [Proposed] Fed. R. Evid. 513(a) ("The claim of a privilege . . . is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.").

CONCLUSION

For the foregoing reasons, except as indicated by the [Proposed] Order attached hereto as Exhibit A, the Court should deny Plaintiffs' motion *in limine* Number 4.

Dated: February 10, 2009
Chicago, Illinois

Respectfully submitted,

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EXHIBIT A

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,	02 C 5893 (Consolidated)
- against -	Judge Ronald A. Guzmán
HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	

[PROPOSED] ORDER

Defendants shall not introduce into evidence any document withheld by Defendants during discovery pursuant to Magistrate Judge Nolan's Order of January 25, 2007 permitting non-disclosure of the same. Furthermore, as to any statement that Plaintiffs allege is false or misleading and assert as a basis for liability under Sections 10(b) or 20(a) of the Securities Exchange Act of 1934, *see* 15 U.S.C. §§ 78j(b), 78t(a), no Defendant shall invoke as a defense a claim that the statement was made in reliance on legal advice from counsel contained in documents withheld pursuant to Magistrate Judge Nolan's Order of January 25, 2007 that such statement was true or that making such statement would not violate federal or state law.

SO ORDERED

ENTERED:

HON. RONALD A. GUZMÁN
United States District Judge