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

REPLY 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]

Lead plaintiffs respectfully submit this reply brief in support of their motion for an order precluding defendants from introducing evidence at trial relating to advice received from counsel, including evidence regarding the Household Legal Department's ("Legal Department") alleged role in reviewing and approving policies and practices. Defendants withheld, on privilege grounds, communications with their counsel, including the Legal Department. Now defendants must be precluded from relying upon any advice of counsel at trial. Defendants' opposition concedes these points and attempts to defuse the import of this motion by disclaiming the reliance on any advice of counsel at trial. However, notwithstanding their disclaimer, defendants do in fact plan to use an advice of counsel defense at trial in the barely disguised form of a "good faith" defense predicated upon the Legal Department's alleged "routine participation in the company's internal review and approval procedures . . . ." Defs' Mem.[1] at 4. This "good faith" defense is barred by defendants' strategic decision during discovery to withhold the underlying communications with counsel, including documents relating to any review or approval by the Legal Department of products and policies.

Defendants argue that their "good faith" defense is not barred because the defense does not rely upon actual consultations with the Legal Department, but only the department's "routine participation in the company's internal review and approval procedures . . . ." *See id.* at 4 n.6. This Court rejected this very argument in *Claffey v. River Oaks Hyundai*, 486 F. Supp. 2d 776 (N.D. Ill. 2007). Because the Court's language is directly on point, plaintiffs quote it in full:

> COAF says it does not intend to use privileged communications to support its reasonable procedures argument. Based on the materials presented, however, it appears that COAF intends to rely on documents reflecting that its usual processes

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[1] "Defs' Mem." refers to 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, Dkt. No. 1402.

> included consultation with legal counsel. Though COAF says that it does not intend to argue that its personnel *actually* consulted with counsel, its introduction of such documents would leave a fact finder with the distinct impression that COAF relied on advice by counsel on the matters at issue in this case. Were COAF allowed to create this impression but still maintain its attorney-client privilege, it would in effect be using the privilege as both a shield and a sword, which is not permitted. COAF "cannot have it both ways: [it] cannot seek refuge in consultation with counsel as evidence of [its] good faith yet prevent [plaintiffs] from discovering the contents of the communication."

Id. at 778-79 (quoting *Dorr-Oliver, Inc. v. Fluid-Quip, Inc.*, 834 F. Supp. 1008, 1012 (N.D. Ill. 1993) (other citations omitted).

Plaintiffs' opening brief cited two other cases directly on point and likewise contrary to defendants' argument: *Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.*, 265 F.3d 1294 (Fed. Cir. 2001) and *In re ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765 (D. Del. 1994). In *Medtronic*, the Federal Circuit held the defendant could not offer evidence that it had followed its "corporate policies," which, like here, were code for obtaining legal advice because it withheld the resulting opinion. 265 F.3d at 1310. In *ML-Lee*, the court stated:

> The Lee Defendants assert that they have raised the "act" of consulting counsel to rebut Plaintiffs' allegations of acting in reckless disregard of the requirements from the 1940 Act, as opposed to relying upon any substantive advice received from counsel. The Court is unpersuaded by the Lee Defendant's distinction. Even if the Lee Defendants intend only to rely on the act of seeking advice from counsel to show they behaved in good faith, plaintiffs are entitled to test the validity and sincerity of that action. In order for plaintiffs to have a fair and adequate opportunity to test and rebut Defendants' allegations that they sought advice from counsel, plaintiffs are entitled to know, for example, whether the Lee Defendants disclosed all material facts to counsel, whether counsel gave an otherwise well-informed opinion, did the Lee Defendants follow the advice of counsel.

859 F. Supp. at 767.

Defendants respond by asserting that their good faith is based on the ***existence*** of the Legal Department, not any consultations with that department. Defs' Mem. at 4 n.6. Defendants' position makes no sense – the existence of the Legal Department *per se* cannot support a good faith basis in the legality of defendants' products and practices. Defendants admit as much in the body of their

brief: "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." Defs' Mem. at 1; *see also* Defs' Mem. at 4 (good faith belief based on Legal Department's "routine participation in the internal review and approval process").

Because defendants withheld their communications with counsel during discovery, they are now precluded from offering evidence about the company's review and approval process for products and policies.

Plaintiffs now address two other issues pertinent to this motion.

First, the scope of this Court's order should be defined by what defendants withheld during fact discovery. Defendants do not dispute their withholding of documents on every conceivable subject (there are 7743 entries on their privilege log) and do not cite to any documents produced during discovery that would permit them to present evidence regarding advice of counsel at trial. Thus, defendants should not be allowed to limit the scope of the preclusion to this Court's prior January 25, 2007 Order, Dkt. No. 933, regarding the Andrew Kahr documents. *See* defendants' Proposed Order, Defs' Mem., Ex. A.

Second, plaintiffs' request for an adverse inference was a limited one. "[I]f 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." Pltfs' Mem.[2] at 7. For the reasons discussed above, defendants should be precluded from introducing any evidence regarding advice of counsel or a "good faith" reliance on the Legal

[2] "Pltfs' Mem." refers to Plaintiffs' Motion in Limine to Exclude Defense Documents or Testimony Which Refer to Advice from Counsel that Defendants Complied with Federal and State Laws, Dkt. No. 1371.

Department, including evidence of the Legal Department's role, if any, in vetting lending practices and products. If the court grants this motion and orders that relief, plaintiffs do not seek an adverse inference. On the other hand, if defendants are allowed to present evidence as to any advice of counsel, the Court should issue an adverse inference to mitigate the prejudice to plaintiffs, who because of defendants' withholding of the underlying documents cannot effectively rebut this evidence. In these circumstances, an adverse inference is warranted.[3]

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[3] Defendants cite the Federal Circuit's decision in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004). However, that decision did not address whether the jury can be informed about any consultation with counsel if the underlying opinion is withheld. *Id.* at 1346-47. If, as defendants argue, *Knorr-Bremse* aimed to harmonize patent law with the other areas of law, Defs' Mem. at 8, then for the reasons discussed above in the text, a party cannot place a communication with its counsel at issue and also withhold the communication, which eviscerates the need for an adverse inference to level the playing field.

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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 Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on February 13, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **REPLY 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**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February, 2009, at San Francisco, California.

/s/ Marcy Medeiros
MARCY MEDEIROS