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

LEAD PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL THE HOUSEHOLD DEFENDANTS TO PRODUCE DOCUMENTS IMPROPERLY WITHHELD ON THE BASIS OF PRIVILEGE

REDACTED VERSION

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I. INTRODUCTION

Prior to the time plaintiffs filed this motion, the Household Defendants had twice revised their privilege log and on four separate occasions re-classified relevant documents from privileged to non-privileged, without explaining any of the sudden changes. Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Documents Improperly Withheld on the Basis of Privilege ("Pltfs' Mot." or "Motion") at 1-2. Also, before this Motion was filed defendants unequivocally refused to further revise the then-existing privilege log ("Log III") and declined to produce any of the remaining improperly withheld documents. Pltfs' Mot. at 4.

On June 14, 2005, after plaintiffs' Motion was filed, the parties met and conferred again, and the Household Defendants confirmed their position that the meet-and-confer process on this Motion had been completed prior to the time it was filed. *See* Ex. A to the Declaration of Luke O. Brooks in Support of Lead Plaintiffs' Reply in Support of Motion to Compel the Household Defendants to Produce Source Logs for Documents Produced in This Litigation ("Brooks Reply Decl."). Indeed, defendants did not come to the June 14, 2005 meet and confer prepared to discuss the merits of plaintiffs' Motion, their reasons for opposing the Motion or their various assertions of privilege over individual documents, but rather to browbeat plaintiffs into agreeing to provide the Court with a sample of the disputed documents. *Id.* The parties did not reach an agreement and met and conferred again on June 21, 2005 to discuss each document identified on Log III. During the meet and confer, defendants determined that Log III required a fourth revision and informed plaintiffs that they had changed their mind yet again and would produce another 21 documents in their entirety and 12 more in partially redacted form. Plaintiffs received Log IV on June 23, 2005. Brooks Reply Decl., Exs. B-C. Defendants' constant revisions of their privilege log and flip-flopping with regard to whether documents withheld actually are privileged undermines the validity of the privileges they

continue to assert. *B.F.G. of Illinois, Inc. v. Ameritech Corp*., No. 99 C 4604, 2001 U.S. Dist. LEXIS 18930 (N.D. Ill. Nov. 8, 2001).

Defendants' conduct also highlights why their suggestion that the Court determine the adequacy of their log based on a sample of these documents provided to the Court *in camera* is unworkable. *In re Grand Jury Proceedings*, 220 F.3d 568 (7th Cir. 2000). Despite four bites at the apple, defendants still have failed to justify their assertions of privilege on the face of Log IV. If there is any doubt, however, the withheld documents should be reviewed on a case-by-case basis. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). "Only when the district court has been exposed to the contested documents and the specific facts which support a finding of privilege under the attorney-client relationship for each document can it make a principled determination as to whether the attorney-client privilege in fact applies." *Grand Jury Proceedings*, 220 F.3d at 571. This is especially true in a case such as this, where defendants have demonstrated their inability or unwillingness to properly designate documents as privileged, and were unable even to come to an internal consensus regarding more than a third of the documents initially withheld. Thus, the documents defendants have cherry-picked for *in camera* review should not be determinative of the veracity of their privilege claims. Indeed, in *American Nat'l Bank and Trust Co. v. Equitable Life Assurance Soc'y of the United States*, 406 F.3d 867 (7th Cir. 2005), a case relied on by defendants, the Seventh Circuit recently characterized a similar procedure as "imprudent." *Id.* at 880.

Because defendants' failure to justify their assertion of privilege on a document-by-document basis continues and because defendants' privilege logs are inherently unreliable they should be compelled to produce the remaining challenged documents identified on their privilege log.

II. ARGUMENT

A. Defendants' Constantly Shifting Position and Inaccurate Descriptions Render Their Privilege Logs Inherently Unreliable

Parties withholding documents based on privilege are charged with justifying that privilege ***at the time the documents are withheld***. Fed. R. Civ. P. 26(b)(5). Defendants have now revised their first privilege log three times, dramatically altering their descriptions of the documents withheld despite the fact that, presumably, the documents themselves have not changed. *See* Brooks Reply Decl., Ex.C. In addition, defendants have conceded that 25 documents originally withheld and identified as privileged on their log are, in fact, not privileged (and that another 12 originally withheld in their entirety could be produced in redacted form). *See* Ex. 5 to the Declaration of Luke O. Brooks in Support of Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Documents Improperly Withheld on the Basis of Privilege ("Brooks Decl."); Brooks Reply Decl., Ex. C. Although defendants claim their *ad hoc* approach to asserting privileges "reflect[s] well" on them, it does not. Memorandum of Law in Opposition to Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Documents Withheld on the Basis of Privilege ("Defs' Opp.") & 1-2 & n.1. Defendants' ever-changing definition of which documents are privileged leads to the unmistakable conclusion that their privilege logs are inherently unreliable.[1] *B.F.G.*, 2001 U.S. Dist. LEXIS 18930. Because "***[t]he accuracy of the descriptions in the privilege log is the foundation of the entire process***," defendants' approach here is problematic. *Id.* at *11.[2]

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[1] Defendants' conduct implicates not only Log IV, but the Household Defendants' six subsequent logs, covering defendants' production through February 2005 which defendants admit are deficient. Defs' Opp. at 15 n.12.

[2] Here, as elsewhere throughout, any emphasis has been added and citations and footnotes omitted unless otherwise indicated.

In *B.F.G.*, a case with facts strikingly similar to this one, the court found that where "plaintiffs have demonstrated that they had good reason to be skeptical about the descriptions in the defendants' privilege log," the "appropriate remedy may be the abrogation of defendants' privilege log and an order to produce all withheld documents." *Id.* at **11, 13. By subsequently producing documents they originally claimed were privileged, defendants admit that they improperly withheld non-privileged communications. In addition, a review of these belatedly produced documents reveals that defendants' prior logs contain a number of inaccurate descriptions. Plaintiffs' skepticism of defendants' descriptions is well justified.

For example, on Log III defendants describe Document No. 40 (produced only after plaintiffs filed their Motion), as a "[f]acsimile demonstrat[ing] request and receipt of legal advice re: loan chart report."[3] Brooks Decl., Ex. 14. Defendants apparently based their description and original assertion of privilege over Document No. 40 on a handwritten note faxed to the Household legal department that reads: [redacted] and the response [redacted] purportedly "authored" by Nancy Bromley, a member of the Household legal department. Brooks Reply Decl., Ex. D. Contrary to defendants' description, Document No. 40 clearly does not contain a request for "legal advice." Nor does it contain a "receipt of legal advice," as represented by Household in its logs. Brooks Reply Decl., Ex. D.

The court in *B.F.G.* rejected an almost identical assertion of privilege where the document was described as an employee "seeking legal advice from counsel . . . with respect to the uncollectible process." 2001 U.S. Dist. LEXIS 18930, at **17-18. In that case, "[t]he veneer of privilege [was] applied via one sentence on the last page stating, 'If you agree with the above, please

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[3] The fax cover sheet in Document No. 41 is identical to Document No. 40, but it is described differently as seeking "legal advice re: loan document language." Brooks Decl., Ex. 14. Document No. 41 also was not produced until after plaintiffs filed their opening papers on this Motion.

approve from a legal perspective and so forward.'" *Id*. The court found that "[w]hen [counsel] forwarded the document . . . she was not communicating legal advice. *Id.* Similarly, here, Bromely's notation [redacted] is not a communication of legal advice.

In addition to rejecting defendant's assertion of privilege, the court in *B.F.G.* found that this inaccurate description, among others, cast doubt on the accuracy of the other descriptions in the log. *Id.* at *11 ("A particular problem with this scenario is that ***there is no way that the party seeking the documents can detect that improper use merely from the description on the privilege log***."). Because of this, counsel has "an important professional responsibility . . . to police the anticipatable desire of corporations to shield as much as possible from their adversaries in litigation." *Id.* at *16. And, in order to avoid "an unbearable burden on the courts and other litigants" defendants must be "scrupulous in their assertion of privilege." *Id.* at *19.

Defendants have been far from scrupulous in their assertions of privilege to date. Indeed, Document No. 40 is only one of many examples of defendants' inaccurate descriptions. Others, which, with the exception of Document No. 10, were all produced after plaintiffs filed the Motion include:

- Document No. 4, described on Log III as an "email relaying ***legal review*** of training worksheets," contains no legal advice, only an indication that counsel [redacted] *Compare* Brooks Decl., Ex. 14 (Log III) *with* Brooks Reply Decl., Ex. F.

- Document No. 6, described on Log III as "handwritten notes regarding ***legal review*** of an attached training video transcript," contains no legal advice, only a note stating, [redacted] and the response [redacted] *Compare* Brooks Decl., Ex. 14 (Log III) *with* Brooks Reply Decl., Ex. G.

- Document No. 10, described on Log III as "draft FDCPA manual, ***prepared for attorney review***, and including handwritten comments," contains no indication it was prepared for an attorney and clearly contains no legal advice. *Compare* Brooks Decl., Ex. 5 (Log I, Document No. 10) *with* Brooks Reply Decl., Ex. H.

- Document No. 17, described on Log III as "reflect[ing] ***attorney comments*** and attorney sign-off re: loan agreement," contains no attorney comments or legal advice, only a statement that [redacted] *Compare* Brooks Decl., Ex. 14 (Log III) *with* Brooks Reply Decl., Ex. I.

- Document No. 18, described on Log III as "reflect[ing] ***attorney comments*** and attorney sign-off re: prepayment section of loan agreement," contains no attorney comments or legal advice, only a statement that the [redacted] *Compare* Brooks Decl., Ex. 14 (Log III) *with* Brooks Reply Decl., Ex. J.

- Document No. 41, described as seeking "***legal advice*** re: loan document language," contains no request for legal advice, only [redacted] *Compare* Brooks Decl., Ex. 14 (Log III) *with* Brooks Reply Decl., Ex. E.

These examples alone are enough to cast doubt on the credibility of defendants' log. Defendants' production of 37 additional documents and third revision of their log ***after*** plaintiffs' Motion, erodes their credibility even further. *B.F.G.*, 2001 U.S. Dist. LEXIS 18930, at *10 ("[t]he fact that 309 pages of documents were produced ***after*** the plaintiffs filed their June 15, 2001 motion objecting to the ***second*** privilege log further supports plaintiffs' argument" for disclosure) (emphasis in original).

Because defendants' privilege logs are inherently untrustworthy, the challenged documents identified therein should be produced. *Mold-Masters Ltd. v. Husky Injection Molding Sys.*, Case No. 01 C 1576, 2001 U.S. Dist. LEXIS 20152, at **2-3 (N.D. Ill. Dec. 5, 2001) ("If the description falls below this standard and fails to provide sufficient information for the court and the party seeking disclosure to assess the applicability of the attorney-client privilege or work-product doctrine, then disclosure of the document is an appropriate sanction.").

B. Defendants Have Failed to Justify the Privileges Asserted in Log IV

1. Household Has Not Established It Had an Expectation of Privacy as Required by the Seventh Circuit's Standard Governing Attorney-Client Privilege

(Document Nos. 2, 5, 7-9, 11-14, 16, 19-20, 22-28, 30-39, 44-52, 56, 58-59, 61, 63-70, 72-76, 78-84, 86-99, 102-103, 105-112)

Defendants do not dispute that the "expectation of confidentiality . . . [is] an essential element of the attorney-client privilege" ***under the Seventh Circuit standard***. *United States v. BDO Seidman*, 337 F.3d 802, 812 (7th Cir. 2003), *cert. denied*, 540 U.S. 1178 (2004); *see also White*, 950 F.2d at 430. Defendants also do not dispute that ***under the Seventh Circuit standard*** any party

invoking the attorney-client privilege is charged with the burden of establishing that it expected the withheld communications would remain confidential when made. *Id.* Finally, defendants do not dispute that ***under the Seventh Circuit standard*** only a party which has control over whether the communications remain confidential can invoke the attorney-client privilege. *Id.* Instead, defendants argue that due to the venue of this lawsuit, externalities bearing on the confidentiality of their communications simply can be ignored. *See* Defs' Opp. at 4-6. They cannot.

It is axiomatic that one who makes a communication which is freely discoverable in court proceedings cannot have an expectation that the communication will remain confidential. Similarly, one who makes such a communication certainly cannot assure that it will remain confidential at his instance – it is, after all, freely discoverable in court proceedings. Indeed, defendants do not dispute that communications between Household's employees and in-house counsel, which are plainly discoverable under the law of the state in which it is headquartered, do not carry with them an expectation of confidentiality. Defs' Opp. at 4-9. Apparently, defendants wish the Court to ignore "an essential element of the attorney-client privilege." *BDO Seidman*, 337 F.3d at 812. It cannot. *Id*. Because defendants cannot demonstrate they had an expectation of privacy at the time the challenged communications were made, their assertions of attorney-client privilege must fail.

Defendants' argument that plaintiffs seek to "trump" or "modify" federal law "to deprive defendants of otherwise valid claims of privilege under federal law" is simply wrong. Defs' Opp. at 4. As discussed, unless the Household Defendants can establish that they had an expectation of confidentiality ***as required by federal law***, their claims of privilege are not valid ***under federal law.*** *BDO Seidman*, 337 F.3d at 812; *White*, 950 F.2d at 430. That defendants' failure to establish the elements of the attorney-client privilege is because the communications are freely discoverable in the courts of Illinois – where Household is headquartered and has its principal place of business and is subject to general jurisdiction (*Alderson v. Southern. Co.*, 321 Ill. App. 3d 832, 849 (2001)) – is of

no consequence. This is because the underlying theory of the attorney-client privilege – that the benefits of encouraging clients to make full disclosure to their attorneys outweigh the harm of barring full revelation in court – does not apply where there is no expectation of confidentiality. *In re Grand Jury Proceeding, Cherney*, 898 F.2d 565, 567 (7th Cir. 1990); *White*, 950 F.2d 426. In other words, where, as here, information is transmitted between attorney and client without the expectation of confidentiality, the purpose of the privilege – encouraging the client's full disclosure to the attorney – is not furthered by shielding such information from discovery. And, mindful of the Supreme Court's admonishment that "[b]ecause 'the privilege has the effect of withholding relevant information from the fact finders, it applies only where necessary to achieve its purpose,'" courts have refused to apply the privilege to communications made with no reasonable expectation of privacy. *Fisher v. United States*, 425 U.S. 391, 405 (1976); *White*, 950 F.2d 426; *BDO Seidman*, 337 F.3d at 812. Thus, regardless of whether information was communicated in front of a third party (*In re Walsh*, 623 F.2d 489, 495 (7th Cir. 1980)), was intended for later publication (*Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 477 (N.D. Ill. 2002)), can be compelled by the government (*BDO Seidman*, 337 F.3d at 812), or can be compelled in state court over the client's objection (as in this case), if there is no expectation of confidentiality, the attorney-client privilege does not protect it from disclosure. *BDO Seidman*, 337 F.3d at 812.[4]

Because communications which are fully discoverable in state court proceedings cannot possibly have been made with an expectation of privacy, a fact which defendants do not dispute, they have not sustained their burden of establishing that the attorney-client privilege applies.

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[4] It is telling that, in their opposition, defendants completely ignore *BDO Seidman*, in which the Seventh Circuit held that a party who cannot establish that the information over which it seeks to assert a privilege would not be disclosed, cannot establish the attorney-client privilege. 337 F.3d at 812.

Accordingly, Document Nos. 2, 5, 7-9, 11-14, 16, 19-20, 22-28, 30-39, 44-52, 56, 58-59, 61, 63-70, 72-76, 78-84, 86-99, 102-103 and 105-112 must be produced.

2. Documents Not Relating to Communications Made by a Client Seeking Legal Advice Are Not Privileged

(Document Nos. 5, 16, 23-28, 39, 49, 74-76, 79-80, 82, 91-96, 99, 102-103, 105, 111)

The attorney-client privilege is not a "cloak of protection" over all communications between attorney and client, but protects only confidential communications by a client to an attorney made in order to obtain informed legal assistance. *Cherney*, 898 F.2d at 567. For the attorney-client privilege to apply, the withheld communications must be primarily legal in nature. *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980). "It is well established that a corporation cannot shield its business documents by routing them through an attorney." *B.F.G.*, 2001 U.S. Dist. LEXIS 18930, at *18. Thus, courts in this district do not "tolerate the use of in-house counsel to give a veneer of privilege to otherwise non-privileged business communications." *Id.* at *15 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 16523 (N.D. Ill. Nov. 3, 1995)). It appears, however, that this practice was rampant at Household.

Documents produced by defendants (again, only after plaintiffs filed this Motion) lead to the conclusion that Household routinely funneled all manner of communication through its legal department in an attempt to attach privilege. *See, e.g.*, Brooks Reply Decl., Exs. D-G, I-O. The email exchange in Document No. 100 between Keith Clardy, an employee in the Policy and Compliance department, and Household in-house lawyer Andrew Budish highlights this policy:

[redacted]

[redacted]

Brooks Reply Decl., Ex N (Document No. 100).

A policy dictated by in-house counsel that documents are to be run through the legal department is indicative of an attempt to shield documents from future disclosure. Such communications are not protected. Indeed, for most of the challenged documents, the only potential indication of legal advice are descriptors such as "as per legal requirements" (Document Nos. 25-27, 28), "comments . . . based on legal requirements" (Document Nos. 16, 111), "legal advice . . . re: appropriate language" (Document No. 39) and "legal advice . . . regarding necessary requirements" (Document Nos. 5, 49, 99, 102-103). Brooks Reply Decl., Ex. C. These descriptions were added to the log only ***after*** plaintiffs filed the instant motion.[5] And, contrary to a number of other entries, none of the challenged documents purports to include the analysis or interpretation of a specific law. *See*, *e.g.*, Document Nos. 20 (email regarding "application of Arizona law") and 33 (communication regarding "interpretation of California law"). These added descriptions do not establish the attorney-client privilege, especially in light of defendants' loose definition of "legal advice" and other similar terms.

Defendants' reliance on *Weeks v. Samsung Heavy Indus. Co., Ltd.*, No. 93 C 4899, 1996 U.S. Dist. LEXIS 8554 (N.D. Ill. June 20, 1996), is misplaced. *Weeks* involved a communication between a corporation and ***outside*** counsel. More importantly, in *Weeks*, Judge Guzman upheld the claim of privilege only after reviewing the challenged document and finding that "[o]bviously, this information is in Document 2 to facilitate the analysis of defendants' ***potential litigation risks*** and ***legal obligations*** with respect to plaintiff." *Id*. at *7. Similarly, in *Breneisen v. Motorola, Inc.*, No.

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[5] To require an opposing party to file a motion to compel in order to trigger any obligation to even respond to discovery requests in the first instance violates every tenet of the discovery rules. *Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004).

02 C 50509, 2003 U.S. Dist. LEXIS 11485 (N.D. Ill. July 3, 2003), also relied on by defendants, the court documents determined to be privileged were "communications from attorneys in Defendant's corporate law department ***which contain advice regarding the impending litigation***." *Id.* at *12.

Here, the challenged documents do not relate to imminent litigation, potential litigation risks or legal obligations. Brooks Reply Decl., Ex. B. Instead, as defendants concede, the challenged documents "concern business topics" such as employee training and loan and sales policies. Defs' Opp. at 8. Given Household's apparent policy of funneling policies and forms through the legal department, the inherent unreliability of defendants' log, and the fact that these descriptions were tacked on by defendants ***after*** this Motion was filed, defendants have not satisfied their burden. Thus, Document Nos. 5, 16, 25-28, 39, 49, 74-76, 79, 92-94, 96, 99, 102-103, 105 and 111 should be produced because defendants have failed to reliably establish that they relate to legal, rather than business, advice.[6]

3. Legal Advice Given by Paralegals Is Not Privileged

(Document Nos. 74-75, 79-80, 92-94 and 96)

"[T]o establish an attorney-client privilege, there needs to be a communication with an attorney where legal advice is sought." *Breneisen*, 2003 U.S. Dist. LEXIS 11485, at *11. Document Nos. 74-75, 79, 92-94 and 96 were all authored by paralegals, not lawyers. Brooks Reply Decl., Ex. B. Advice given by paralegals is not protected by the attorney-client privilege. *Byrnes v. Empire*

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[6] Defendants also belatedly changed the description of documents in response to plaintiffs' objection that many of the documents withheld did not reflect confidential client communications. Pltfs' Mot. at 11-12. For example, the description of Document No. 24 was changed from "email between lawyer and client regarding sign off on Iowa loan documents," respectively, to "email between lawyer and client ***requesting and providing legal advice***." Defendants' changes to these descriptions are equally egregious and fail to support their claim that these documents were created "in response to a specific request by a client." Defs' Opp. at 9. Document Nos. 5, 16, 23-24, 39, 49, 74-76, 79-80, 82, 91-96 and 111 should be produced for the additional reason that defendants have failed to reliably establish that they reflect confidential client communications.

Blue Cross Blue Shield, No. 98 Civ. 8520 (BSJ) (MHD), 1999 U.S. Dist. LEXIS 17281 (S.D.N.Y. Nov. 2, 1999). Accordingly, these documents should be produced.

The cases cited in defendants' opposition do not help them. In *Coltec Indus., Inc. v. American Motorists, Ins. Co.*, 197 F.R.D. 368 (N.D. Ill. 2000), the document at issue contained "legal advice provided by outside counsel." *Id.* at 376. In *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95 C 0673, 1996 WL 732522 (N.D. Ill. Dec. 9, 1996), the court found that documents authored and received by two German patent apprentices, who "were all qualified to give legal advice and were in fact often relied upon . . . in this capacity" were protected by the attorney-client privilege. *Id*. at *10. In neither case did the court hold, as defendants represent, that legal advice given by in-house paralegals is protected. Document Nos. 74-75, 79, 92-94 and 96, apparently containing legal advice from paralegals, must be produced.

Additionally, Log IV does not include any reliable indication that disclosure of Document Nos. 74-75, 79-80, 92-94 and 96 would reveal any confidential client communication. A party asserting the attorney-client privilege over documents containing legal advice must show that such advice relates to a prior confidential client communication. *Ziemack v. Centel Corp*., No. 92 C 3551, 1995 U.S. Dist. LEXIS 6942, at *13 (N.D. Ill. May 18, 1995). The question is: does the unchallenged document "reveal, directly or indirectly, the substance of a confidential communication by the client." O*hio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 28 (N.D. Ill. 1980). The answer appears to be no.

Defendants' statement that "the Arizona CID was forwarded to the legal department in confidence," even if true, is inapposite. Defs' Opp. at 10. The Arizona Civil Investigation Demand ("CID") is not a client communication, and, although defendants claim it is "obvious that the Arizona CID was forwarded to the legal department in confidence in order to draft a response," apparently the challenged documents themselves do not reveal this fact. Thus, their production

would not reveal "the ***substance*** of a confidential communication." *Ohio-Sealy Mattress*, 90 F.R.D. at 28.

Furthermore, defendants' demonstrated haphazard assertion of privilege again counsels against relying on their descriptions. For example, Document No. 77, authored by a paralegal, was initially withheld pursuant to the attorney-client privilege and described as an "[e]mail to Household legal counsel asking question regarding responses to investigations of attorneys general." Brooks Decl., Ex. 10. It too was produced after plaintiffs filed their Motion. A review of Document No. 77 reveals that the question, posed by a Household paralegal working on responses to the Arizona and Illinois CIDs, was: [redacted] Clearly, this document does not contain or refer to a confidential client communication. Neither, it appears, do Document Nos. 74-75, 79-80, 92-94 and 96. They must be produced.

4. Communications Exchanged in the Course of Document Searches and/or Produced to Third Parties Are Not Privileged

(Document Nos. 60, 76, 80, 92-94 and 96)

Faced with the Seventh Circuit's ruling that "[t]here is no need for a privilege to cover information exchanged in the course of document searches, which are mostly mechanical yet which entail great risks of dishonest claims of complete compliance," defendants simply eliminated reference to the production of documents from the descriptions of Document Nos. 60, 76, 80 and 92-94. *In re Feldberg*, 862 F.2d 622, 627 (7th Cir. 1988). In their place, defendants substituted terms such as "legal strategies" (Document No. 60), and "regarding scope of responsive documents" (Document Nos. 92-94). Brooks Reply Decl., Ex. B. These alterations do not change the fact that Document Nos. 60, 76, 80, 92-94 and 96 contain information regarding Household's search for and production of documents in response to the Arizona CID – information which is relevant to the determination of Household's compliance with the demand, and not privileged in the Seventh Circuit. *Feldberg*, 862 F.2d at 627. For this reason, Document Nos. 60, 76, 80, 92-94 and 96 should

be produced. Additionally, to the extent that these documents, and Document Nos. 74-75, 79, 81-82 and 95, were prepared with the intention of disclosure, or actually disclosed to third parties, the attorney-client privilege does not apply. *Eagle Compressors*, 206 F.R.D. at 477.

5. Defendants Failed to Timely Assert the Work-Product Privilege Over Document Nos. 63-70, 72-73, 75, 83-84, 86-87 and 91

Despite the parties' numerous meet and confers leading to multiple revisions of defendants' privilege log, defendants did not assert work product protection over Document Nos. 63-70, 72-73, 75, 83-84, 86-87 and 91 on the first three versions of their privilege log. It was not until after plaintiffs filed their Motion, and plaintiffs again communicated the reasons why defendants' assertion of attorney-client privilege over these documents was bound to fail during the June 25, 2005 meet and confer, that defendants first raised work product protection with respect to these documents.

By failing to timely claim the protection, defendants have waived it. Pursuant to Fed. R. Civ. P. 26(b)(5), a party withholding information based on work product protection "shall make the claim expressly." Indeed, "the privilege log is not an after-thought to claiming privilege or protection, it is the claim of privilege or protection. 'To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.'" *Hobley v. Burge*, No. 03 C 3678, 2005 U.S. Dist. LEXIS 911, at **27-28 (N.D. Ill. Jan. 12, 2005) (quoting Advisory Committee Notes, 1993 Amendments to Rule 26(b)(5)).

Defendants' belated assertion of work product protection is further evidence of their use of the meet-and-confer process to tailor their document descriptions to the legitimate objections raised in plaintiffs' Motion, apparently without regard to the actual substance of the documents themselves. This practice is contrary to the Federal Rules of Civil Procedure and should not be countenanced. Document Nos. 63-70, 72-73, 75, 83-84, 86-87 and 91 must be produced.

III. CONCLUSION

For the foregoing reasons plaintiffs' motion to compel documents improperly withheld on the basis of privilege should be granted. Further, defendants should be ordered to comply with the Court's guidelines in revising all subsequent logs.

DATED: July 21, 2005

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DECLARATION OF SERVICE BY UPS OVERNIGHT DELIVERY

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 July 21, 2005, declarant served by UPS, next day delivery, the **LEAD PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL THE HOUSEHOLD DEFENDANTS TO PRODUCE DOCUMENTS IMPROPERLY WITHHELD ON THE BASIS OF PRIVILEGE** to the parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of July, 2005, at San Francisco, California.

/s/

MARCY MEDEIROS

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