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

THE CLASS' MOTION FOR AN ORDER PERMITTING THE USE OF DOCUMENTS RECALLED BY DEFENDANTS AS "INADVERTENTLY" PRODUCED

REDACTED VERSION

The Class respectfully moves this Court for an order that the documents recalled by defendants as "inadvertently" produced are (i) not protected by the attorney-client privilege and the attorney work product protection and (2) that defendants have waived their privileges, if any, by failing to take reasonable and necessary steps to protect the asserted privilege.

I. INTRODUCTION

Defendants have continuously recalled numerous documents they claim were inadvertently produced. The documents at issue in this motion are those recalled by defendants without proper justification in their March 21, April 20 letters as well as documents defendants recalled during the Tim Titus deposition. A list of these documents is attached as Ex. 1 to the Ryan Decl.[1] These documents are not protected by the attorney-client privilege or the attorney work product doctrine. Furthermore, as defendants have failed to take reasonable precautions to protect the privileged information, if any, and refused to rectify the situation despite the passage of months, they have waived any privilege that may exist and should produce these documents immediately.

The frequency of defendants' recalls – more than a dozen occasions – raises serious questions. The circumstances of defendants' recalls – upon realization that the Class intends to use these documents in proving its case – are appalling. Allowing defendants to selectively claim privilege over harmful documents unfairly prejudices the Class.

Defendants, moreover, have not taken reasonable and necessary steps to protect their privilege, if any privilege exists. A reasonable person would certainly be alarmed and thoroughly evaluate and assess its document production process after the fifth recall, let alone the ninth. A reasonable person also would move to justify the asserted privilege immediately. However, defendants have taken none of these precautions. Moreover, the scope and the volume of defendants' alleged inadvertent production goes far beyond what one can expect from reasonable human errors. Defendants (and various third parties at the behest of defendants) have requested a return of documents covering a wide spectrum of subjects, including the document at issue here, documents related to the regulatory examinations of various federal and state agencies, documents concerning the Ernst & Young and Wilmer, Cutler & Pickering engagements, documents introduced by the Class during depositions, and documents prepared and provided to Household's outside

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[1] "Ryan Decl." refers to the Declaration of Bing Z. Ryan in Support of the Class' Motion for an Order Permitting the Use of Documents Recalled by Defendants as "Inadvertently" Produced.

auditors, Arthur Andersen and KPMG. Accordingly, the Class should be permitted to use the documents recalled by defendants as "inadvertently" produced.

II. PROCEDURAL HISTORY

Defendants throughout this litigation have continuously requested that the Class return numerous "inadvertently" produced documents. Ryan Decl., Exs. 2-4. Pursuant to the Protective Order dated November 5, 2004, the Class promptly challenged defendants' assertion of privilege and informed defendants why the documents at issue in this motion are not privileged. Ryan Decl., Exs. 5-7. During the November 30, 2006 status hearing, Patricia Farren, counsel for defendants, repeatedly accused the Class of failing to respond defendants' letters purporting to justify their privilege claims. The record tells a dramatically different story. Indeed, as defendants conceded at the December 5 meet and confer, the parties have engaged in extensive dialogue concerning the applicability of defendants' asserted privileges over these documents. Attached as Exs. 5-7, 8-16 to the Ryan Decl. are twelve letters between the parties discussing the documents at issue in this motion, including six letters from the Class explaining why the documents are not privileged and why any privilege has been waived.

Under prevailing legal authority, the burden is on defendants to demonstrate that their assertions of privilege are justified. Fed. R. Civ. P. 26(b)(5); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 86 (N.D. Ill. 1992). However, despite repeated requests, defendants have failed to take action to protect their privilege, including repeatedly refusing to file a motion supporting their request for a return of the documents. The parties further discussed the Class' challenge of defendants' asserted privileges over documents at issue here during the December 5, 2006 meet and confer session. The Class specifically inquired of defendants their basis for the claim that these documents were "inadvertently" produced, including the circumstances that led to their production. Defendants refused to answer the question. As the protective order requires a party seeking to recall inadvertently produced privileged documents to inform the opposing party in writing within ten days of discovering that it was produced, the Class also asked defendants when they discovered the "inadvertent" productions. Defendants refused to answer this question as well. Because the parties are at an impasse regarding these disputes, the Class respectfully requests the assistance of the Court.

III. ARGUMENT

A. The Documents at Issue Are Not Protected by the Attorney-Client Privilege or the Work Product Doctrine

1. HHS 03357762-66

Defendants recalled portions of this email in their March 21, 2006 letter, claiming attorney-client privilege. This entire document discusses a pure business matter, *i.e.*, what sales tools can be used by Household sales force to demonstrate to its customers their potential savings on their loans. *See* Ryan Decl., Ex. 17. This document is relevant to the Class' allegation concerning defendants' predatory lending practices. Complaint ¶¶51-106.[2]

Specifically, on HHS 03357765, defendants seek to redact an email from Household's District General Manager, Steve Hill, to Household's Sales Tools Manager, Jean Raisbeck, in which Mr. Hill stated:

[redacted]

Ryan Decl., Ex. 17.

It is obvious why defendants would like keep this email out of the record. The portion they seek to redact provides compelling evidence that Household employees understood the effective rate scam – used by Household salespeople to mislead borrowers into believing their interest rates were lower than they actually were – was sanctioned by management until June 2001. This evidence conflicts squarely with defendants' story that Household never sanctioned use of the effective rate technique and employees were instructed not to use the effective rate to sell loans after 1999.

This email does not reveal any legal advice "provided by Household's Legal Department" as claimed by defendants and, therefore, is not protected under the attorney-client privilege. *Id.*; *Trepanier v. Chamness*, No. 00 C 2393, 2005 U.S. Dist. LEXIS 23293, at *4 (N.D. Ill. Oct. 12, 2005) (the attorney-client privilege is narrow and "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."). The email is a communication between two Household employees, neither of whom is a lawyer, discussing plans for a push to continue using the effective rate sales technique. The fact that the content of the email

[2] "Complaint" refers to the [Corrected] Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws.

contains the word "legal" does not mean that the whole message automatically falls under the protection of the attorney-client privilege. This communication was not necessary to obtain legal advice, nor is there any evidence that it would not have been made absent the privilege. Indeed, during the December 5 meet and confer, when asked to pinpoint the "legal advice" given in this email, defendants could not do so, other than claiming the reference to past "no's" from legal reflect privileged communications. The fact that legal has in the past said "no" to unidentified, non-specific requests from sales is not privileged. Nor does reference to past "no's" from legal justify redacting the next sentence that indicates the effective rate scam was approved by the company three months prior and was included in the original training materials on selling first mortgages. Because communications not relating to legal advice are not considered privileged, this particular redaction is not protected from disclosure under the attorney-client privilege. The Class should be permitted to use this document in the form it was originally produced.

2. HHS-ED 484833

The document bearing the bates number HHS-ED 484833 is part of an email chain that discusses Household's revolving loans, often used as the second loans for its customers. *See* Ryan Decl., Ex. 18. Defendants seek to redact the November 27, 2001 email from Walt Rybak to Kathleen Curtin stating: [redacted] This email provides evidence supporting the Class' allegation that Household improperly up-sold second loans which its customers would not have needed but for the unconscionable and often undisclosed fees Household regularly charged on the first loans. Complaint ¶75. Specifically, the email indicates that numerous revolving loans tested resulted in ***no cash*** to the customer. Again, it is not surprising that defendants would like to keep this incriminating email away from the trier of fact; however, it is not privileged.

Though Ms. Curtin was an attorney and was present during the November 26, 2001 meeting as discussed in Mr. Rybak's email, pure utterances by an attorney or made in the presence of an attorney do not make a statement privileged. The key inquiry here is whether there is any legal advice contained in Mr. Rybak's email. *Trepanier*, 2005 U.S. Dist. LEXIS 23293, at *4 (the attorney-client "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."). The answer is no. Indeed, the email discusses a business meeting among several Household employees and the business decision that was reached during the meeting. During the parties' meet and confer, defendants could not explain why this

email or the meeting it describes were necessary to obtain legal advice.[3] The mere presence of lawyers at a meeting does not render all communication at that meeting privileged.

3. HHS-ED 492296; HHS-ED 492322

The document bearing bates numbers HHS-ED 492296-492305 contains a chain of emails among Household employees discussing the impact of the AG settlement on how to handle prepayment penalties when a loan payoff was originated from a Household affiliate, such as Decision One. *See* Ryan Decl., Ex. 20. On its face, this document confirms that the matters discussed relate to a "business decision." *Id.*

On HHS-ED 492296 and HHS-ED 492322, Defendants seek to recall an email from William Markwat to Douglas Friedrich and John Blenke, stating [redacted] *See* Ryan Decl., Exs. 20-21. On HHS-ED 492296, defendants also seek to recall an email from Mr. Blenke to Mr. Markwat stating [redacted] *See* Ryan Decl., Ex. 20.

Defendants' recall of the above portions is puzzling as none of these emails contains any legal advice. The fact that Robin Allcock planned to call Mr. Blenke to discuss this issue does not render the email privileged. Mr. Blenke' email to Mr. Markwat merely stated that he would look into this issue. No legal advice was discussed in these emails. Indeed, at the end of this email chain, Mr. Markwat invited several Household employees to a meeting [redacted] concerning this problem, indicating that this particular issue is a pure business matter. Therefore, these emails are not protected under the attorney-client privilege and should be produced in unredacted form.

4. HHS-ED 491165

The document bearing the bates numbers HHS-ED 491162-65 contains a chain of emails among Household employees, discussing Household's compliance with the Indiana telephone solicitation laws. *See* Ryan Decl., Ex. 19.

Defendants seek to recall the entire email on HHS-ED 491165. Although this email was sent to Ms. Curtin, an attorney, the content of the email was to inform her and Paul Creatura the gist of

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[3] Any *post hoc* attempt to do so in opposition to this motion should be rejected.

the Indiana telephone solicitation law and Household's change of policy in reaction to this law. This email does not seek any legal advice from Ms. Curtin. Nor does this email relay any of Ms. Curtin's advice concerning the Indiana law. Because this email does not contain legal advice sought from or legal advice given by an attorney, it is not protected under the attorney-client privilege. *Trepanier*, 2005 U.S. Dist. LEXIS 23293, at *4. Defendants should produce a copy of the document with this particular email unredacted.

5. HHS-E 0037552-53; HHS-E 0037600-02; HHS-E 0037554

Defendants recalled HHS-E 0037552-53, HHS-E 0037600-02, and HHS-E 0037554 during Tim Titus's May 9, 2006 deposition and instructed the witness not to answer questions related to their contents. Defendants claim these documents are protected by the attorney-client privilege and the work product protection over these documents. *See* Ryan Decl., Ex. 4.

These documents appear to be statistics compiled by Household employees. According to this document, these statistics are an alternative set of life insurance penetration rates to be provided to officials in the State of Washington. Ryan Decl., Exs. 22-25. The documents indicate that the statistics were compiled by Household in an effort to demonstrate to state officials that an examination report issued by Washington incorrectly relied on statistics which had previously been provided to the state by Household. *Id.* Improper sales of single premium credit life insurance is one of the predatory lending practices that the Class alleged in the Complaint. Complaint ¶¶71-82. Accordingly, the high penetration rate of Household's credit life insurance reflected in these documents and the Washington Report is evidence of the extent of defendants' abusive practices. Furthermore, these documents are necessary to refute any claim that Washington relied on inadequate statistics in reaching its conclusions with respect to Household's insurance sales practices.

Defendants assert privilege over these documents on the grounds that the information they contain was gathered at the request of Household in-house counsel. However, defendants have failed to identify which attorney instructed the preparation of these documents and which litigation was anticipated when these documents were prepared. Under the Seventh Circuit law, the burden is on Household to establish that these documents were "prepared in anticipation of litigation." *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 767-68 (7th Cir. 2006), *r'hrg en banc denied*, No. 04-4270, 2006 U.S. App. LEXIS 8147 (7th Cir. Mar. 31, 2006); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1983). Because defendants have failed to satisfy this burden, their assertion of the work product doctrine is unjustified. In addition, to the extent the

statistics were provided to Washington, any privilege covering the manner in which they were complied has been waived.

Defendants make no serious argument that these documents are protected under the attorney-client privilege. They do not contain any legal advice. *Trepanier*, 2005 U.S. Dist. LEXIS 23293, at *4. They are merely emails and attachments from Tim Titus, Director of Household's Insurance Services, to various Household employees, delivering the calculation of the insurance acceptance rates prepared either by Mr. Titus or his subordinates. Because these documents are not protected by the attorney-client privilege or the work product doctrine, the Class should be permitted to use them in full.

B. Defendants Waived Any Privilege over the "Inadvertently" Produced Documents

Defendants have failed to take the steps required to protect any privilege applicable to the documents they "inadvertently" produced. Accordingly, this portion of the Class' motion applies to the documents discussed above as well as all others "inadvertently" produced documents which have not yet been returned by the Class.[4] The producing party who claims inadvertent disclosure has the burden of proving that the disclosure was truly inadvertent. *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204, 207-209 (N.D. Ind. 1990). To determine whether inadvertent production waives any privilege a document may have enjoyed, the court uses a "balancing test looks to five factors to determine if waiver has occurred: 1) the reasonableness of the precautions taken to protect the document; 2) the time taken to rectify the error; 3) the scope of discovery; 4) the extent of the disclosure; and 5) the overriding issue of fairness." *Urban Outfitters, Inc. v. DPIC Cos.*, 203 F.R.D. 376, 380 (N.D. Ill. 2001). This test applies to both the work-product doctrine and attorney-client privilege. *Id.* at 380 n.3.

Although defendants have demanded the return of more than 450 documents on more than a dozen separate occasions, they have never met their burden of showing that the disclosure was indeed inadvertent. Their recall letters are nothing but a list of documents that they request the Class to return without stating any details regarding why the documents were produced in the first place.

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[4] During the December 5, meet and confer and in a subsequent communication the Class requested that defendants provide a list of (1) those documents which defendants have sought to recall and the Class has challenged pursuant to the provisions of the Protective Order and (2) a comprehensive list of all of the "inadvertently" produced documents defendants have to date sought to recall. Defendants refused to provide either list.

Ryan Decl. Exs. 2-4. Indeed, even as late as December 5, defendants have refused during meet and confers to provide any detail to the Class regarding what precautions were taken to protect the privileges they now assert. As defendants continue at this late date to seek the recall of "inadvertently" produced documents, moreover, there is no indication that they or their counsel have taken steps to rectify the problems that have led to countless recalls and created substantial side-issues in this litigation, draining the resources of the Court and the Class.[5] Defendants' continued failures in this regard constitute waiver. *Golden Valley*, 132 F.R.D. at 207-209 (found waiver when the producing party failed to meet its burden of proving that the disclosure was truly inadvertent.); *Mattenson*, 2003 U.S. Dist. LEXIS 21373, at *8 (held that the producing party waived the privilege when it failed to "set forth any explanation why the disclosure was inadvertent.").

An application of the five factors of the balancing test to the facts and circumstances of this case further supports a finding of waiver. As an initial matter, "[i]t is difficult for a party to show that it took reasonable precautions to prevent production of privileged documents where those precautions obviously failed." *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 388 (S.D. Ind. 1997). Here, they have failed numerous times. Defendants have, thus far, repeatedly requested a return of voluminous documents concerning a variety of subjects, alleging inadvertent production. However, in the face of the continual "discovery" of "inadvertently" produced documents, defendants have apparently taken no steps to review their production to determine which additional documents were "inadvertently" produced. Surely after the third, fourth or fifth time that defendants "discovered" inadvertently produced documents, they should have taken steps to rectify the situation. *Urban Outfitters*, 203 F.R.D. at 381 (held that "the balancing tests places responsibility for protecting the confidentiality of sensitive documents squarely on the party asserting the privilege" and the party who failed to take adequate measures to insure the confidentiality of its documents waived the privilege as to these documents.) Based on their half-dozen subsequent recalls, it is clear that they did not do so. The volume, extent, and the frequency of the allegedly inadvertent production demonstrate that defendants have failed to take reasonable precautions to properly protect the purportedly privileged documents.

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[5] Again, as late as December 5, defendants, in the middle of a deposition, demanded the return of documents the Class sought to use for examination. The Class has brought this particularly troubling practice to the Court's attention numerous times. Defendants remain undeterred.

Second, although defendants informed the Class of the allegedly inadvertent production at issue in this motion as early as March 2006 and have known that the Class challenges their asserted privilege over these documents, they steadfastly refused to file a motion to justify their assertion of privilege. Such long delays favor a finding of waiver. *See MG Capital LLC v. Sullivan*, No. 01 C 5815, 2002 U.S. Dist. LEXIS 11803, at *10 (N.D. Ill. June 27, 2002) (failure to assert privilege for one month is unreasonable and favors waiver). Upon receiving defendants' recall letters, the Class immediately challenged defendants' unfounded assertion of privilege.[6] Ryan Decl., Exs. 5-7. As the Class outlined in numerous letters (and above), many of the documents from the allegedly inadvertent production are not privileged. *Id.*; *Trepanier*, 2005 U.S. Dist. LEXIS 23293, at *4 (communications not relating to legal advice are not considered privileged); *Eagel Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D. Ill. 2002) ("Factual information may not be withheld under the work product doctrine" and must be produced); *United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003) (the attorney-client privilege and work product privileges apply only to private communications). However, to date, defendants have yet to move for a ruling on their privilege assertions. This constitutes waiver. *MG Capital*, 2002 U.S. Dist. LEXIS 11803, at *8 (the time taken to rectify the error was inappropriate when the producing party merely demanded the return of the document and did not take further actions).

When considering the time taken to rectify the error, courts also look at how soon the producing party sought to recall the privileged documents. Here, it is unclear whether defendants have moved quickly to demand the return of the so claimed inadvertent production. This factor should weigh against defendants as they refuse to disclose when they discovered that the documents at issue were "inadvertently" produced.[7]

As for the extent of the disclosure, many documents were produced in their entirety to the Class. Moreover, the Class has already fully reviewed and analyzed these documents. As held by the court in *Draus*, disclosure of these documents "is a bell that has already been rung." 172 F.R.D.

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[6] The Class has returned numerous documents in circumstances where defendants' assertions of privilege appeared valid.

[7] Even assuming defendants were timely in their recall, this fact alone does not tip the balance in favor of finding waiver. *Draus*, 172 F.R.D. at 389 (found waiver when defendants demanded the return of the privileged document the day after it was produced); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985) (finding waiver of privilege under similar circumstances).

at 389. This court simply "cannot unring it by ordering that copies be returned to defendants." *Id.* This factor also weighs in favor of waiver. *Id.* (held that the extent of the disclosure weighed in favor of waiver when the "essence of document's contents" was produced to the opposing party "most interested in the contents of the document.").

The scope of the discovery also favors in a finding of waiver. Although this is a complex litigation that involves a large volume of documents, defendants have had more than two years to produce documents and on which to assert a privilege. *Central Die Casting & Mfg. Co. v. Tokheim Corp.*, Case No. 93 C 7692, 1994 U.S. Dist. LEXIS 11411, at *15 (N.D. Ill. Aug. 12, 1994) (found waiver after considering both the scope of the discovery and the time given for the document production); *Urban Outfitters*, 203 F.R.D. at 381 (found waiver when the document was produced in the context of formal discovery and the producing party had ample time to carefully consider and review the documents before releasing them); *MG Capital*, 2002 U.S. Dist. LEXIS 11803, at *12 (found waiver when the producing party "had the opportunity to review the document production and identify the inadvertent disclosure."). Further, defendants did not simply turn over the entire production in one fell swoop. Instead they rolled their production over a span of years so that they could perform a "careful" review for privilege before each document production. Indeed, when the Class requested defendants to produce Housemail files in electronic format, defendants insisted on conducting a "responsiveness review and a privilege review" before they produced any documents and informed the Class that defendants could not expedite the process due to these reviews. However, despite having years to sift through their documents, defendants have failed to protect the allegedly privileged documents and have had to repeatedly sought to recall the so-called inadvertent production.[8] The scale tips further in favor of the Class as defendants counsel, Cahill Gordon, as claimed on its website, regularly defends large-scale securities litigation and is well familiar with its discovery obligations and production process in large cases. Having had ample time and experienced counsel, defendants have no excuse for their mistakes.

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[8] Further illustrating that defendants had plenty of time to conduct their document production, is the fact that the Class requested all documents related to the "investigations by any state or federal governmental, administrative or regulatory agency, department or other body into Household's lending policies and practices" in its first document request served on May 17, 2004. Ryan Decl., Ex. 26. Yet more than two years later, defendants recalled certain documents concerning various federal and state regulatory agencies. Ryan Decl., Exs. 27-36.

Lastly, the fairness factor also weighs in favor of waiver. Under the Protective Order, the Class cannot use the disputed documents until the dispute is resolved. Protective Order ¶30. Thus, by refusing to move to justify the asserted privilege, defendants have been able to tie up these documents indefinitely. Condoning such conduct runs afoul of principles of fairness. Defendants' conduct resulted in the alleged inadvertent production of these documents and a significant passage of time leading to the Class' detrimental reliance at this late stage of fact discovery. Defendants should have remedied the situation long ago by filing a motion justifying their assertions of privilege. It is unfair to punish the Class for defendants' laziness. Defendants' consistent pattern of alleging privilege over documents that are detrimental to their positions only after realizing the Class' intention to rely on them, further unfairly prejudices the Class. *Isaacson v. Keck, Mahin & Cate*, 875 F. Supp. 478, 480 (N.D. Ill. 1994) (a party cannot produce documents when it is helpful and then claim a privilege over related documents when it is harmful). For example, during Curt Cunningham's deposition, defendants asserted privilege, for the first time, over a document (HHS03393049-03393051) that the Class had relied upon in preparing for the deposition and sought to introduce as an exhibit. Due to defendants' last minute privilege assertion, the Class had to withdraw the exhibit from the deposition and was unable to question Mr. Cunningham concerning this document. This process has been repeated at numerous depositions, including the deposition of Ken Hicks just yesterday.

Because defendants have failed to take reasonable precautions to protect their "privileged" documents, and then refused to rectify their error, they have waived any privilege that might be associated with these documents. Moreover, fairness factors dictate that defendants should not be allowed to utilize the "inadvertent production" as a tactic to unjustifiably withhold damaging documents. *Isaacson*, 875 F. Supp. at 480. Thus, an analysis of all waiver factors weighs in favor of production of the documents.

IV. CONCLUSION

For the foregoing reasons, the Court should allow the Class to make full use of all "inadvertently" produced documents which defendants seek to have returned.

DATED: December 6, 2006

Respectfully submitted,

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