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

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I. INTRODUCTION

After recalling hundreds of documents on more than a dozen occasions, defendants do not even make an attempt to explain ***why*** these "inadvertent" productions occurred in the first place.[1] Defendants also have failed to demonstrate that they took reasonable steps to rectify their errors after more than a half-dozen recalls. They have offered no information regarding how quickly they moved to recall the so-called privileged documents once they were discovered. By failing to provide this contractual information, defendants have outright disregarded the burden of demonstrating their production of hundreds of so-called privileged documents was inadvertent. *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co*., 132 F.R.D. 204, 207-209 (N.D. Ind. 1990) (The producing party who claims inadvertent disclosure has the burden of proving that the disclosure was truly inadvertent.). Courts in this Circuit also adopted a five-factor balancing test to determine whether waiver has occurred. *Urban Outfitters, Inc. v. DPIC Cos*., 203 F.R.D. 376, 380 (N.D. Ill. 2001). Defendants completely ignore this test.

Defendants' failure to address the legal precedent regarding waiver set forth in the Class' brief is not surprising because, having had ample time to prepare for their document production, they have no excuse for their mistakes. Notably, four of the documents attached to the opening motion already contained redactions when originally produced.[2] Defs' Mem. at 2. Defendants later added new redactions and recalled these documents as "inadvertently" produced. *Id.* Defendants have

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[1] In an attempt to downplay the impact of their unjustifiable recalls, defendants claim the hundreds of state agency documents that they sought to recall should not be considered. Defs' Mem. at 1 ("Defs' Mem." refers to defendants opposition to the instant motion). However, the real issue here is whether defendants have taken reasonable steps to prevent unnecessary recalls which prejudice the Class. The fact that defendants recalled hundreds of state agency documents demonstrates that defendants have not done so.

[2] These documents bear the following bates numbers: HHS 03357762-66; HHS-ED 484832-34; HHS-ED 492296-492305; HHS-ED 492322-31. Declaration of Janet A. Beer in Support of Defs' Mem ("Beer Decl."), Exs. 1-2, 4-5.

provided no justification for failing to perform a comprehensive privilege review in the first instance. Nor can they. Moreover, the record demonstrates that defendants failed to take reasonable steps to prevent future recalls. To illustrate, in the time since the Class filed this motion on December 6, 2006, defendants have sought to recall yet another seven documents on three different occasions. Consistent with their prior practice, defendants' recall letters do not even attempt to set forth the basis for their asserted privileges. Because defendants have failed to demonstrate that they have taken reasonable steps to protect any privilege that might conceivably be attached to the documents recalled as "inadvertently" produced, they have waived any such privilege.

Further, defendants' recalls have followed a consistent pattern – the documents are generally detrimental to their case. As discussed herein, moreover, a careful reading of the recalled documents discussed in the Class' opening brief shows that they are not protected by any privilege. Thus, the Class, which has already relied on these documents, should be permitted to make full use of these documents.

II. ARGUMENT

A. By Failing to Demonstrate that the Disclosure Was Truly Inadvertent and that They Have Taken Reasonable Steps to Protect the Asserted Privilege, Defendants Have Waived Any Privilege Over the "Inadvertently" Produced Documents

This portion of the Class' motion applies to all documents recalled by defendants as "inadvertently" produced that have not yet been returned by the Class. Defendants have waived any asserted privilege as to all these documents by failing to meet their burden of explaining why each disclosure was truly inadvertent. Defendants do not dispute that the producing party who subsequently claims inadvertent disclosure has the burden of demonstrating that the disclosure was inadvertent. Because defendants do not dispute the controlling Circuit authority, cited by the Class in its opening brief, and have not satisfied the burden imposed by this authority in order to protect

the asserted privilege associated with the "inadvertently" produced documents, the privilege – if it existed – is waived.

Indeed, defendants have refused to measure themselves against the five factors of the balancing test adopted by this Circuit to determine if a waiver has occurred. *Urban Outfitters*, 203 F.R.D. at 380. As to the first factor of the balancing test, *i.e.*, the reasonableness of the precautions taken to protect the privilege, the only precaution defendants claim that they have taken is to "explain the nature of the privilege behind the recalls." Defs' Mem. at 8. That falls far short of explaining why these documents were produced in the first place, why there was a need to further redact documents that had already been produced in redacted form or why the additional redactions are reasonable. Defendants provide no explanations because they have none.

Defendants also fail to explain why they allowed this problem to persist as it became evident that their production was rife with so-called inadvertently produced documents. Even at this late stage, defendants apparently have taken no steps to rectify the problem. Incredibly, in the time since the Class filed its opening papers on December 6, 2006, defendants have sent three letters demanding the recall of an additional seven documents. As is their practice, defendants have provided no basis for the privileges they assert over these documents. Ryan Reply Decl., Exs. A-C.[3] Absent an order from the Court, there is no reason to believe defendants will ever end their ceaseless demand for the return of documents harmful to their case.

As to the second factor, defendants remain silent on the time taken to rectify the myriad errors except to baldly assert that they did so "promptly." *Id*. This assertion is both unsupported and false. Defendants have provided no information regarding when they discovered they had produced

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

privileged documents. Nor did defendants take further action once the Class challenged their assertions of privilege. With respect to the scope of the discovery, defendants have failed to show why they repeatedly recalled documents after taking years to review and produce them. Lastly, the fairness factor also militates in the Class' favor due to defendants' consistent pattern of belatedly asserting privilege over documents detrimental to their case. As the totality of relevant factors weighs heavily in favor of waiver, the Class should be permitted to use the "inadvertently" produced documents defendants now seek to recall.

B. Contrary to Defendants' Claims, the Attorney-Client Privilege and the Work Product Protection Are Not Applicable to the Documents at Issue

As discussed below, defendants' desire to conceal documents containing facts adverse to them must fail because these documents are not protected by the attorney-client privilege and/or the work product doctrine.

1. HHS 03357762-66

On HHS 03357765, defendants seek to redact three emails between sales employees discussing which sales tools should be adopted by Household International, Inc. ("Household" or the "Company") to demonstrate to its customers their potential savings on their loans. These discussions are not privileged. For example, the second redaction on HHS 0337765, an email from Household's District General Manager, Steve Hill, to Household's Sales Tools Manager, Jean Raisbeck, reflects Mr. Hill's intention to push for implementation of certain sales techniques. The issue of defendants' failure to inform investors that deceptive sales practices were rampant throughout Household's corporate culture and contributed to the Company's growth, are keys in this case. Contrary to defendants' suggestion, this email does not reflect "Legal's concern" about anything. Defs' Opp. at 4. Instead, it contains a discussion between Household non-lawyer employees regarding how they can implement their preferred sales technique. Defendants, who failed to address this specific email

in their opposition, have not demonstrated that this communication between sales employees contained legal advice, nor any employees' understanding of legal advice. The statement that the legal department said "no" on several occasions, does not reveal the subject matter of any prior advice. Likewise, the sentence stating that certain sales practices were "legal just 3 months ago" does not constitute legal advice or the employers' "understanding" of legal advice. *Id*. Apparently, defendants' privilege is based entirely on the fact that the email contains the word "legal." This is not enough. The Class should be permitted to use this email in the form it was originally produced.

While the first and the third redactions on this page state the "concern" from the legal department, this "concern" is not legal in nature and is therefore not protected by the attorney-client privilege. Beer Decl., Ex. 1 at HHS 03357765; *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980) (for the attorney-client privilege to apply, the confidential communications must be primarily legal in nature). The "advice" that defendants reference is only related to a business matter, *i.e.*, whether Household employees could use an effective rate to present the Company's products to its customers, and does not contain any legal analysis, such as potential risks and liabilities to the Company, if it adopts the effective rate as a sales tool. Beer Decl., Ex. 1 at HHS 03357765. Plaintiffs allege that the "effective rate" scam was one of the deceptive sales practices used by Household to confuse and mislead borrowers. Complaint, ¶¶55-60.[4] It is, therefore, highly relevant.

Defendants' claim of attorney-client privilege over the two redactions on HHS 03357763 also must fail. Defs' Mem. at 4. The redactions on this page do not contain legal advice. Again,

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

these emails explicitly discuss "sales strategy" and concern the same business matter as the one discussed on HHS 03357765. *Id*; *Sneider*, 91 F.R.D. at 4.

Furthermore, it was only upon realizing how damaging these emails are, that defendants concocted their belated privilege argument. Indeed, defendants admitted these damaging emails are not privileged when they decided to produce them in the first instance. Having redacted the emails sent to and from Household's counsel Andrew Budish in their initial review, defendants cannot now claim that they were unaware of the damaging emails they contend are privileged.[5] Defendants cannot simply hide documents from the Class because they expose defendants to risk. *See Isaacson v. Keck, Mahin & Cate*, 875 F. Supp. 478, 480 (N.D. Ill. 1994) (defendants cannot withhold information when release of certain facts is detrimental to them).

2. HHS-ED 484833

The redacted email dated November 27, 2001 from Walt Rybak to Kathleen Curtin recounts the substance of a business meeting among four business people. One of them, Ms. Curtin, happens to be an attorney. Beer Decl., Ex. 2 at HHS-ED 484833. Contrary to defendants' contention, this email does not contain any legal advice from Ms. Curtin. Defs' Mem. at 5. Defendants contend that simply because Ms. Curtin is a member of Household's legal department, her participation in a business meeting renders the content of the meeting presumptively privileged. Defs' Mem. at 5. The case they quote to support this contention, however, clearly states that "communications made by and to a corporate in-house counsel with respect to business matters, management decisions, or business advice ***are not protected*** by the [attorney-client] privilege." *Breneisen v. Motorola, Inc.*, No. 02 C 50509, 2003 WL 21530440, at *3 (N.D. Ill. July 3, 2003) (emphasis added). The

[5] In order for the Court to obtain the full context of this document, the Class believes that this document should be produced to the Court in its entirety without ***any*** redactions.

Breneisen court also held that "[t]o be entitled to the privilege, a corporate lawyer must not only be functioning as a lawyer, but the advice given must be predominantly legal, as opposed to business, in nature." *Id*. The court further cautioned that "the lawyer's position in the corporation is not necessarily dispositive." *Id*. Here, there is no evidence that Ms. Curtin rendered any legal advice. Instead, Mr. Rybak's email reveals that the meeting among Mr. Detelich, Mr. Rybak and Ms. Curtin discussed Household's revolving loans and reached a business decision concerning these loans; that is, Household decided "not to increase the credit limit" on these loans. Beer Decl., Ex. 2 at HHS-ED 484833. Because the attorney-client privilege is narrow and does not protect communications of an executive just because that person happens to be a member of the bar, this redacted email is not protected under the attorney-client privilege. *Radio Corp. of America v. Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955).

The other cases defendants cite support only the unremarkable assertion that when providing legal advice, an attorney may consider business information without losing the attorney-client privilege. Defs' Mem. at 5. Absent any evidence of legal advice, however, these cases are meaningless here. In fact, these cases further support the Class' position. Indeed, this Court, in *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21 (N.D. Ill. 1980), upheld the Magistrate's holding that documents prepared by an attorney were not protected under the attorney-client privilege when the attorney acted "predominantly business in nature." *Id*. at 34. Accordingly, the email defendants seek to redact is not privileged.

3. HHS-ED 492296; HHS-ED 492322

Defendants assert that the three redactions on HHS-ED 492296 are protected by the attorney-client privilege because they constitute communications between in-house attorney John Blenke and certain Household employees, including William Markwat, "on the subject of explicitly requested

legal advice."[6] Defs' Mem. at 6. This statement is puzzling as no legal advice can be found in any of these three emails. Beer Decl., Ex. 4 at HHS-ED 492296, HHS-ED 492322. Instead, Mr. Markwat and Mr. Blenke discussed the impact of the attorneys general settlement on how to handle prepayment penalties when a loan payoff was originated from a Household affiliate. *Id.* This is a pure business matter relating to Household's operations. Because communications pursuant to business matters do not contain advice from a lawyer at all, the three redactions on HHS-ED 492296 must be disclosed. *Sneider*, 91 F.R.D. at 4.

Defendants attempt to keep these emails out of the record because they reveal that limitations or the elimination of the prepayment penalties had a huge impact on Household's business and financial performance. Indeed, the impact was so significant that Mr. Markwat suggested in one of his emails that "we need all impacted parties to get together to make a ***sound business decision***." Beer Decl., Ex. 4 at HHS-ED 492296 (emphasis added). This "business decision" is not privileged and HHS-ED 492296 and HHS-ED 492322 are discoverable. *See Isaacson*, 875 F. Supp. at 480.

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

Lead Plaintiffs' Complaint alleges that insurance was tacked onto loans without the customer's knowledge or consent. Complaint, ¶¶71-82. HHS-E 0037552-53 and HHS-E 0037600-02 consist of emails from Tim Titus, Director of Household's Insurance Services, to nine Household employees, including a Household attorney (Donna Radzik).[7] Ryan Decl, Exs. 22-23.[8] Each email has attached charts containing Household's Customer Acceptance Rate ("CAR") for its insurance

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[6] The redaction on HHS-ED 492322 is the same as the third redaction on HHS-ED 492296.

[7] HHS-E 0037554 is the exact copy of HHS-E 0037602.0001.

[8] "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, filed on December 6, 2006.

products. *Id*. This issue is directly relevant to plaintiffs' allegations because both state and federal regulations found that Household's high insurance acceptance rates indicated that purchase of insurance was not truly optional. HHS-E 0037600-02 also includes Household's response concerning one of the subjects investigated by the Washington Department of Financial Institutions ("WDFI"). *Id*. These emails, charts and responses do not reflect any legal advice from Ms. Radzik or other Household attorneys. *Id*. Therefore, they are not protected under the attorney-client privilege.

Moreover, Ms. Radzik is the only attorney among nine recipients. *Id*. Even when "a document is sent to an attorney, if the role of counsel is 'minor or perfunctory or was intended merely to immunize the documents from production, the privilege would not apply.'" *In re Air Crash Disaster*, 133 F.R.D. 515, 519 (N.D. Ill. 1990). Lastly, as Household emphasized in its response to the WDFI, the Company prepared the CAR report during its ordinary course of business and used it "as a sales tool." Ryan Decl., Ex. 23 at HHS-E 0037602.0001. Therefore, these documents are not protected by the work product doctrine. *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 371 (N.D. Ill. 1972) ("[S]tatements or reports made by parties and their employees in the regular course of business are not work-product and should be produced for discovery when so requested by the opposing party.").

Even if these documents are privileged, moreover, any privilege has been waived. While defendants do not dispute that the attorney-client privilege is waived upon disclosure of privileged information to a third party, they now claim that Household has never produced HHS-E 0037553, HHS-E 0037601, HHS-E 0037602, and HHS-E 0037554 to the WDFI as they are merely drafts of final documents. Defs' Mem. at 7. They further claim that an underlying privilege attaching to drafts of a final product is not destroyed even after the final product is disclosed to a third party. *Id*. Defendants misstate the law. The "production of some privileged documents waives the privilege as

to all documents of the same subject matter." *Vardon Golf Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 533 (N.D. Ill. 2003); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1314 n.18 (7th Cir. 1984); *Blanchard v. EdgeMARK Financial Corp.*, 192 F.R.D. 233, 236 (N.D. Ill. 2000); *Fujisawa Pharm. Co. v. Kapoor*, 162 F.R.D. 539, 541 (N.D. Ill. 1995). Because drafts and final versions of these documents relate to the same subject matter, any privilege that might attach to the drafts of a final product was waived when defendants produced the final versions to the WDFI. The Class should be permitted to use them in full.

III. CONCLUSION

For the reasons stated above, this Court should allow the Class to make full use of all "inadvertently" produced documents which defendants seek to have returned and find that the documents specifically discussed in this motion are not protected by the attorney-client privilege and the work product doctrine.

DATED: December 19, 2006

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DECLARATION OF SERVICE BY EMAIL 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 December 19, 2006, declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' REPLY IN SUPPORT OF MOTION FOR AN ORDER PERMITTING THE USE OF DOCUMENTS RECALLED BY DEFENDANTS AS "INADVERTENTLY" PRODUCED**. 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 19th day of December, 2006, at San Francisco, California.

s/ Marcy Medeiros
MARCY MEDEIROS