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 TO COMPEL ANDREW KAHR DOCUMENTS IMPROPERLY WITHHELD AS PRIVILEGED OR DESTROYED BY THE HOUSEHOLD DEFENDANTS

REDACTED VERSION

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I. INTRODUCTION

Lead Plaintiffs, on behalf of the Class, respectfully move this Court for an order compelling the Household Defendants to produce all documents relating to consultant Andrew Kahr ("Kahr"). Mr. Kahr was hired by CEO defendant William Aldinger beginning late 1998 "to introduce opportunistic methods to accelerate the growth" of Household International. Ex. 2.[1] Although Household produced some documents relating to Mr. Kahr, they have improperly withheld 32 documents on the basis of privilege (*see* Exhibit A attached hereto) and failed to produce a database of Kahr-related documents that they accumulated in June 2002, one month after the San Francisco Chronicle published a scathing exposé, revealing the contents of memos written by Mr. Kahr for Providian Financial Corporation ("Providian"). Ex. 26, 27.[2]

The 32 Kahr documents withheld by defendants are not privileged. With one exception (No. 2740), defendants have asserted the attorney-client privilege on all the remaining documents that they have withheld as privileged. Ex. 8 at 2. These documents do not reflect communications between an attorney and a client necessary to obtain legal advice and hence, are not privileged.

Additionally, given defendants' attempts to distance themselves from Mr. Kahr weeks after Mr. Kahr's guiding principle for sub-prime customers was revealed, *i.e.*, to "squeeze out enough revenue and get customers to sit still for the squeeze," this Court to scrutinize with grave suspicion Household's efforts to accumulate and dispose of all documents relating to Mr. Kahr. Ex. 27. Another crucial factor is that this "disposition" of documents occurred at a time when Household was attempting to negotiate a resolution with the various Attorneys General relating to – no surprise here – its predatory lending practices.[3] Further underscoring how critical Household regarded this

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[1] All references to exhibits are to the Declaration of Azra Z. Mehdi in Support of the Class' Motion to Compel Andrew Kahr Documents Improperly Withheld as Privileged or Destroyed by the Household Defendants, filed herewith, unless otherwise noted.

[2] Mr. Kahr was the founder, and later, a consultant with Providian, another sub-prime lender which paid more than $400 million to settle charges of unfair business practices. The Kahr memos prepared for Providian revealed Mr. Kahr as the mastermind behind the deceptive sales practices at Providian, portraying "a company bent on misleading and manipulating its customers in order to soak as much money from them as possible." Ex. 26.

[3] On October 11, 2002, Household announced a settlement with the group of Attorneys General for $484 million relating to the Company's predatory lending practices. Ex. 34 (preliminary settlement agreement).

matter is the fact that the Chief Information Officer Ken Harvey himself was responsible for communicating directly to (1) CEO defendant William Aldinger, (2) CFO defendant David Schoenholz, and (3) Household General Counsel, Kenneth Robin, the results of his efforts to accumulate the Kahr documents. *Id*.

As detailed below, the Court should order defendants to produce the 32 documents listed in their privilege logs as well as the documents accumulated in a separate database. In the alternative, defendants should be required to explain under penalty of perjury what happened to the Kahr documents in the database accumulated in June 2002.

II. FACTUAL AND PROCEDURAL BACKGROUND

Beginning late 1998, CEO defendant William Aldinger began conditioning investors and the market to expect 20% earnings growth by Household for most of the Class Period. *See* generally Complaint (For the year 2000, EPS growth was projected at 15% and 13%-15% for the next three years). To ensure that defendants' objective and promise to the market of growth was achieved, Aldinger retained Mr. Kahr in late 1998 as a consultant to come up with creative ideas to accomplish defendants' growth objective. Exs. 2, 25. Defendants then selected ten out Mr. Kahr's sixty initiatives "further review and potential immediate implementation. Ex. 2.

During the course of discovery, defendants withheld numerous documents either authored or sent to Mr. Kahr. Upon issuance of the Court's Order granting the Class' Motion for Authorization Pursuant to the Walsh Act for Issuance of Subpoena for Andrew Kahr on December 13, 2006, the Class counsel promptly sent a letter asking defendants to produce the Kahr documents withheld on the basis of privilege.[4] Ex. 38. Defendants refuse to produce these documents, and have further refused to clarify the basis of their privilege. Ex. 39. Meanwhile, the Class has been engaged in diligent efforts to serve Mr. Kahr, both locally as well as internationally. In anticipation of successfully serving Mr. Kahr as well as preparing for his deposition, defendants should be compelled to produce these documents to the Class. In the event that the Class is unable to find Mr. Kahr, the production of these documents becomes that much more critical, so the Class has the benefit of the documentary evidence.

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[4] The Class had previously challenged defendants' basis for redacting Ex. 7. *See* Exs. 36-37.

III. LEGAL ARGUMENT

A. The Attorney-Client Privilege Does Not Apply to the 32 Kahr Documents Withheld by Defendants

This Court has previously opined that the "attorney-client privilege provides that (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc*., 2006 U.S. Dist. LEXIS 88826, at *11-*13 (N.D. Ill. Dec. 6, 2006), citing *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). The 32 Kahr documents withheld by defendants do not fall within the protection of the attorney-client privilege because they do not reflect communications between an attorney and its client necessary to obtain legal advice. Moreover, defendants' privilege log demonstrates its own confusion as to the identity of the client and that of the attorney. Upon review of the memos relating to or prepared by Mr. Kahr that were actually produced to the Class (*see* Exs. 1-24); it will become apparent that the only advice that Mr. Kahr was giving Household was sales and marketing advice on how to improve Household's loan growth through questionable sales and accounting practices. The Seventh Circuit has construed the scope of the attorney-client privilege to be narrow, "as it is in derogation of the search for the truth." *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980); *see also United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992) (attorney-client privilege is in derogation of search for truth and must be strictly construed). Stripped of the terms "legal advice" casually used to describe the 32 Kahr documents in the privilege log, it is apparent that defendants' real intent here is to prevent the Class from obtaining critical evidence of defendants' fraud.

1. The Kahr Documents Do Not Reflect Communications Between an Attorney and Its Client Necessary to Obtain Legal Advice

In order for the 32 Kahr documents to be privileged under the attorney-client privilege, they must reflect communications between a lawyer and a client for the purpose of obtaining or providing legal assistance to the client. Here, Mr. Kahr was hired by defendant Aldinger to work with Household business units to "introduce opportunistic methods to accelerate growth of U.S. Consumer Finance." Exs. 2, 25. In this capacity, Mr. Kahr provided new ideas to various business units by designing new mortgage and unsecured loan products and helped get his ideas implemented. Ex. 24. Defendants selected ten out of sixty initiatives proposed by Mr. Kahr for "further review and

potential immediate implementation." Ex. 2. These initiatives included [redacted] minimizing disclosures that were given to customers; the usual "bait and switch" by luring customers into branches with a promotional offer, only to launch into a heavy sales pitch to commit the customer into getting a bigger loan; reduce attrition through heavy prepayment penalties; designing an alternative mortgage product to be able to impose prepayment penalties in states where such penalties were prohibited; making Household more competitive through loans made through Household banks to [redacted] selling bad loans before they approached charge-off to manipulate credit quality, and many more. *See e.g.*, Exs. 1-24. These initiatives did not include legal advice. Mr. Kahr himself explained his relationship with Household as one that "involves providing new ideas and helping to get them implemented" and not providing legal advice. Exs. 21-22. Mr. Kahr was neither retained to provide legal advice, nor did he provide legal advice as is apparent from the few Kahr documents that defendants have produced. Under these facts, Household cannot establish the elements of the attorney-client privilege.

Every document listed on Ex. A purports to justify the assertion of the attorney-client privilege to the Kahr documents on the basis that it either requests or seeks "legal advice." Presumably, defendants will make the argument that Mr. Kahr was Household's agent, and thus communications between Mr. Kahr and Household's attorneys fall under the attorney-client privilege. However, under Illinois law, an attorney's representation of a corporation does not create an attorney-client relationship with the "shareholders, investors, agents, and consultants" of the corporation. *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 517-18 (N.D. Ill. 1990). Additionally, when considering whether a nominal third party is an agent of the attorney, the crucial question is whether a communication to that party was made for a legal purpose. If the third party consultant is involved in the giving of legal advice, the privilege obtains. *See SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476-77 (E.D. Pa. 2005) (consultants including testifying experts). If the third party agent or consultant is retained by the client for non-legal purposes, as here, there is no privilege. *Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-L1786 JSW, 2004 U.S. Dist. LEXIS 17117, at *5 (N.D. Cal. Aug. 23, 2004); *McCaugherty v. Siffermann*, 132 F.R.D. 234, 237-40 (N.D. Cal. 1990). In considering the applicability of the attorney-client privilege to outside consultants, "courts have been cautious in extending its application." *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc.*, No. 03-1496, 2004 U.S. Dist. LEXIS 10048, at *15-*16 (E.D. La. June 2, 2004), citing *United States Postal Service v. Phelps Dodge Refining*

Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (finding that outside scientific consultants hired to conduct an environmental audit and to oversee remedial work were not agents for the purposes of the privilege; and citing discussion in *Federal Trade Comm'n v. TRW, Inc.*, 202 U.S. App. D.C. 207, 628 F.2d 207, 212 (D.C. Circuit 1980)).

Throughout the Class Period, Mr. Kahr's work as a consultant demonstrates that he had substantial input in many of the programs underlying the Class' predatory lending allegations, such as hiding prepayment penalties and using bi-weekly payment to mislead borrowers about their true interest rates. Not only did he design some of Household's deceptive sales practices with the knowledge and explicit approval of the officer defendants, he was instrumental in ensuring their implementation. The following are just some examples of Mr. Kahr's ideas that were implemented by defendants during the Class Period.

a. Prepayment Penalties

One of Mr. Kahr's growth initiative was to make detailed loan terms, focusing on lock-in provisions like the prepayment penalty, not highly visible to customers. Ex. 2 (Initiative #10). In the summer of 2002, the Washington State AG David Huey, on behalf of the Multi-State Group of AGs informed Household that based upon the findings of a number of states through their state regulators as well as through their AGs, it was their conclusion that Household was engaged in a widespread lending patterns and practices that violated both state and federal law. Ex. 32. Mr. Huey noted that "despite HFC's assertion to the contrary, numerous consumers in our states have complained that they were not made aware that their HFC loans contained prepayment penalties." Ex. 33 at WA AG 018799. Several of the state examiners also noted that during the course of regular examinations, customers were not informed of the harsh prepayment penalties. Numerous other states similarly, cited the lack of disclosure of the existence of the prepayment penalty as a violation.[5]

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[5] Mr. Kahr had a penchant for minimal disclosure and as a consultant to Household, that is precisely what he advocated to Household. Rather than monthly statements, Mr. Kahr advocated quarterly statements for open-end loans with minimal information that was not highly visible to the customer: [redacted] Ex. 6; *see also* Exs. 11, 21.

The Multi-State AG Group noted:

> HFC claims that the justification for assessing prepayment penalties is because of the higher origination, servicing and collection costs involving subprime loans, as well as the higher liquidation rates. Given the amount of up-front points and fees charged to HFC's subprime borrowers without any true reduction in rates (as set forth earlier in this response), this alleged justification appears tenuous and self-serving at best. In fact, prepayment penalties serve to discourage consumers from refinancing with another lender, thereby keeping HFC's borrowers captive and unable to refinance at lower rates.

Ex. 33 at WA AG 018799.

On March 20, 1999, again referring to "Project #10," Mr. Kahr sent a memorandum to defendants Vozar, Gilmer and Schoenholz, among others, detailing his plan for Household to circumvent state laws in order to "[redacted]." Ex. 3. In this memorandum, entitled: "Redoing HFC Mortgage Forms to Impose High Prepayment Penalties," Mr. Kahr proposed that Household make changes to its 'mortgage forms' in order to qualify Alternative Mortgage Transaction Parity Act and "[redacted]." *Id.* The memo indicates that defendant Gilmer "expressed strong interest and support" for Mr. Kahr's scheme. *Id.* Mr. Kahr was of the opinion that Household should rely as much as possible on increased prepayment penalties because Household could impose unlimited prepayment penalties in over 40 states under the Parity Act. Indeed, Mr. Kahr was even involved in the drafting of the contractual language for the alternative mortgage product and for revenue recognition for prepayment penalties. Exs. 3, 12, 16. In doing so, he recognized that there were disclosure problems under the contract language under Regulation Z and that Household's technology systems did not support disclosures based on declining rate. Ex. 12.

In October 1999, Household rolled out the Alternative Mortgage product in all states, with the exception of California and Ohio as a result of regulator scrutiny. Ex. 14. Defendants Gilmer and Vozar were informed that this product would increase the prepayment penalty and late fees in all states. *Id*. Then in early 2000, Kahr reported to CFO defendant Schoenholz that retail and wholesale loans with prepayment penalties constituted an important part of Household's anticipated return. Ex. 16. Mr. Kahr emphasized to defendant Schoenholz that "[redacted]." *Id*. Schoenholz agreed with Mr. Kahr's sense of urgency on this project. *Id*.

Household's Pay Right Rewards ("PRR") Program was an example of such a product and operated in 34 states on Closed-end Real state products only. Ex. 31. In a description of the

program, Household documents note that the PRR Program "[redacted]." *Id*. The state of New Jersey had serious issues with Household's use of the PRR Program to circumvent state laws against the imposition of prepayment penalties.

b. The "Effective Rate" or "Equivalent Rate" EZ Pay Plan Scam

Mr. Kahr introduced the concept of bi-weekly payments to reduce the "effective" rate in his growth strategies meeting which occurred on December 18, 1998, memorialized in defendant Gilmer's memo of January 27, 1999. Exs. 1-2. A January 1, 1999 email from Tom Detelich included in training materials stating that "[redacted]." Ex. 28. Mr. Detelich also noted: "[redacted]." *Id*. Household even designed training worksheet entitled "Steps to Finding equivalent interest rate." Ex. 6.

The bi-weekly EZ Pay initiative was implemented as is apparent from Mr. Kahr's February 25, 2000 memo to Dick Schaffer and copied to defendants Gilmer, Schoenholz and Vozar stating: "[redacted]." Ex. 17. Indeed, Kahr's motto was "[redacted]." *Id*.

Although Household claims the "effective" rate training was discontinued in late 1999, Household branches were employing this training even in 2001. In Minnesota, for example, Household was subpoenaed for the records of a customer. Ex. 30. Internally, Household concluded that the loan was booked in February 2001 using the "effective rate" sales technique "[redacted]." *Id*. Household concluded that therefore there would have been no corrective or disciplinary action for the employee. *Id*.

In the summer of 2002, the Washington State AG David Huey, on behalf of the Multi-State Group of AGs, informed Household that based upon the findings of a number of states through their state regulators as well as through their AGs. It was their conclusion that Household was engaged in a widespread lending patterns and practices that violated both state and federal law. Among some of violations he noted was that:

> ***HFC misrepresents the rate of interest and monthly payments*** required on the HFC loan. . . . ***Another example of this practice is the promotion of the bi-weekly payment program***. HFC misleads consumers by comparing the total interest the consumer will pay over a 30-year term of monthly payments, against the total interest a consumer would pay making bi-weekly payments. ***HFC deceptively asserts that the effective interest rate is lower under the bi-weekly program because the loan is paid off sooner***.

Ex. 33 at WA AG 018793. The AG group further noted:

> Members of the working group have consistently found that HFC misleads consumers by representing the contract rate of loans promoted under the HZ Pay Program as an "effective interest rate." HFC calculates this "effective interest rate" by (i) finding the amount of interest which would be payable over the term of the loan if payments were made bi-weekly or semi-monthly, and (ii) finding a corresponding rate on a loan paid monthly over the term of the loan, which results in the same amount of interest paid. HFC discloses this rate to consumers without adequately disclosing the loan's much higher "true" interest rate.

Id. at WA AG 018794-95.

Thus, Mr. Kahr's self-described relationship with Household was one that involved providing new ideas and helping to get them implemented. Ex. 24.[6]

2. Communications Not Relating To Legal Advice Are Not Confidential

Additionally, for the attorney-client privilege to apply, counsel must be involved in a legal, not business, capacity, and the confidential communications must be primarily legal in nature. *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980). Accordingly, documents created pursuant to business matters do not contain advice from a lawyer at all, and must be disclosed. *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 152 F.R.D. 132, 137 (N.D. Ill. 1993). The explanations in Ex. A do not relate to legal advice, and hence, must be produced.

Courts do not permit a corporation to merely funnel papers through the attorney in order to gain attorney-client privilege. *See Radiant Burners, Inc. v. American Gas Ass'n.*, 320 F.2d 314 (7th Cir. 1963). In his dealings with defendants and Household's senior management, Kahr expressed his own professional view and opinions not that of attorney, although he seemed pretty confident that Household's lawyers would not disapprove of anything that he described as "legal:" [redacted]

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[6] Exs. 2-24 illustrate other initiatives designed by Mr. Kahr for Household.

[redacted] Ex. 22. Indeed, Mr. Kahr expressed disdain for Household's legal department in some of his communications with Household senior management. *See* Ex. 21 ([redacted]). This disdain was also apparent in the manner in which Mr. Kahr manipulated Household's legal department to obtain approval for any policy or practice that he advocated Household should adopt:

[redacted]

Ex. 23. *See also* Ex. 13 ([redacted] [mortgage product] [redacted]).

It is apparent that Household lawyers were merely conduits for the exchange of ideas that related to deceptive sales, marketing and training ideas promulgated by Mr. Kahr, and not because there was any legal advice being communicated. Courts do not permit a corporation to merely funnel papers through the attorney in order to gain attorney-client privilege. *See Radiant*, 320 F.2d at 314. 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. *In re Grand Jury Proceeding, Cherney*, 898 F.2d 565, 567 (7th Cir. 1990). "It is well established that a corporation cannot shield its business documents by routing them through an attorney." *B.F.G. of Illinois, Inc. v. Amentech Corp.*, No. 99 C 4604 (N.D. Ill. Nov. 8, 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)).

Here, the Class has amply demonstrated that Household attorneys were mere puppets for Mr. Kahr. Thus, the Class urges this Court to review in camera the 32 documents withheld by defendants to ascertain if they indeed fall within the protection of the attorney-client privilege.

3. Defendants Cannot Show that Mr. Kahr was Necessary to the Company Obtaining Legal Advice

Where third party professionals are involved, such as Andrew Kahr, defendants must show that Mr. Kahr was necessary to the Company obtaining legal advice, *i.e.*, they "bear the burden of showing that the person in question worked at the direction of the lawyer, and performed task relevant to the client's obtaining legal advice, while responsibility remained with the lawyer. Moreover, when the third party is a professional . . . capable of rendering advice independent of the lawyer's advice to the client, the claimant must show that the party served some specialized purpose in facilitating the attorney-client communications and was essentially indispensable in that regard." *Cello P'ship v. Certain Underwriters at Lloyd's London*, No. 05-3158, 2006 U. S. Dist. LEXIS 28877, at *5-*6 (D.N.J. May 11, 2006) (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶503(a)(3)[01] at 503-31 to 38 (1993); *see also Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3rd Cir. 1991) ("When disclosure to a third party is necessary for the client to obtained informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege."); *DiPalma v. Medical Mavin, Ltd.*, No. 95-8094, 1998 U.S. Dist. LEXIS 1747, at *7-*8 (E.D. Pa Feb. 10, 1998) (third party was not "essential or necessary 'conduit' for the transmission of communications" between client and attorney and therefore, no privilege attached). Defendants cannot establish that Mr. Kahr was necessary for their attorneys to understand the initiatives proposed by Andrew Kahr.

Here, Andrew Kahr did not work at the direction of Household's attorneys, nor was he hired by them. Mr. Kahr was retained directly by defendant Aldinger. Ex. 25. Further, Kahr did not "serve some specialized purpose in facilitating the attorney-client communication" nor was he "indispensable" in that regard. Mr. Kahr was a sales consultant peddling his deceptive sales ideas so Household and its senior executives could show Household had record growth. Thus, defendants cannot show that Mr. Kahr was necessary to the Company obtaining legal advice.

B. Kahr Document 2740 on the Privilege Log Is Not Protected by the Work Product Doctrine

Defendants are asserting both work-product as well as attorney client privilege with respect to Document 2740. Ex. A at 2. This document was authored by Mr. Kahr and sent to Household General Counsel Ken Robin and it discussed "super parity and the preemption of late fees under the Parity Act." *Id.* For the reasons outlined above, the attorney-client privilege does not apply to Mr. Kahr's communications with Household. Additionally, defendants cannot hide behind the work-product doctrine to conceal this documents from this investor Class.

This Court has recognized that "a document may be protected by the work-product privilege if it is created by an attorney "in anticipation of litigation." *See Jaffe*, 2006 U.S. Dist. LEXIS 88826 at *13, citing Fed. R. Civ. P. 26(b)(3); *Logan v. Commercial Union Ins. Co*., 96 F.3d 971, 976 (7th Cir. 1996). Thus, defendants have the burden of demonstrating that Doc. 2740 was created by an attorney and in anticipation of litigation. Whether documents are protected depends on the "nature of the document and the factual situation in the particular case." *Binks Mfg. Co. v. National Presto Indus., Inc*., 709 F.2d 1109, 1119 (7th Cir. 1983). The "threshold determination" in the evaluation of the work product privilege is whether the documents were "prepared in anticipation of litigation." *Id*. at 1118 (analyzing 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil §2024); Fed. R. Civ. P. 26(b)(3) (codifying *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). Here, defendants cannot make this showing.

Mr. Kahr was not Household's attorney, but an "external consultant," as identified on the privilege log. *See* Ex. A at 2. Significantly, even the description for Doc. 2740 demonstrates that it was not created "anticipation of litigation," but rather to devise opportunistic ways for the Company to charge prepayment penalties or late fees under the Parity Act in states where such fees were not legally permitted. Moreover, this Court has held that "to be subject to work product immunity, documents must have been created in response to "a substantial and significant threat" of litigation, which can be shown by "objective facts establishing an identifiable resolve to litigate."' *Smithkline Beecham Corp. v. Pentech Pharms., Inc*., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at *7-*9 (N.D. Ill. Nov. 5, 2001) ("documents created in the ordinary course of business [] cannot be withheld as work product"), citing *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc*., 145 F.R.D. 84, 87 (N.D. Ill. 1992). Documents are not work product simply because "litigation [is] in the air" or "there is a remote possibility of some future litigation." *Id*. (citations omitted). The objective facts here demonstrate that litigation was not even a consideration in the creation of the document.

To the extent that defendants may claim that the document served both a business and legal purpose, such documents are not afforded protection. *See In re General Instrument Corp*., 190 F.R.D. 527, 530 (N.D. Ill. 2000) ("[A] document prepared for both legal and non-legal review is not privileged."); *IBJ Whitehall Bank & Trust Co., v. Cory & Assocs., Inc.*, No. 97 C 5827, 1999 U.S. Dist. LEXIS 12440, at *4 (N.D. Ill. Aug. 10, 1999) (quoting *Loctite Corp. v. Fel-Pro, Inc*., 667 F.2d 577, 582 (7th Cir. 1981)) (holding that only documents "'primarily concerned with legal assistance'" are cloaked with immunity). In this Circuit, even "the mere fact that litigation does eventually ensue does not, by itself, cloak materials . . . with the work product privilege; the privilege is not that broad." *Logan*, 96 F.3d at 976-977, citing *Binks*, 709 F.2d at 1118.

Accordingly, Doc. 2740 does not fall under the protection of either the attorney-client privilege or the work-product doctrine, and must be produced.

C. In the Totality of the Facts and Circumstances Here, the Court Should View Defendants' Unsupported Explanation that There Was No Document Destruction with a Heavy Dose of Skepticism

Mr. Kahr is not your ordinary consultant, but a highly controversial figure within the subprime lending market. There are numerous press accounts, including an expose in the *San Francisco Chronicle* and an episode of *Frontline*, detailing Mr. Kahr's links with the predatory practices employed by Providian Financial Corp., a company founded by Mr. Kahr. *See* Exs. 26, 35. Indeed, after Mr. Kahr was publicly linked with predatory lending practices at Providian in May 2002, defendants were determined to distance Household from Mr. Kahr and to destroy their own internal documents relating to the Company's retention of Mr. Kahr to develop their own own predatory practices.

In their response to the Walsh Act motion, defendants have taken the position that the "disposition" was in fact "preservation" of documents, which were then produced in part to the Class. Dkt. 807 at 9. This assertion simply cannot withstand scrutiny. Ex. 27 is a June of 2002 email from Household Chief Information Officer Ken Harvey to defendants Aldinger and Schoenholz as well as Household General Counsel Ken Robin with the subject "Kahr Memos," which reads:

> ***We will be deleting 620 e-mails from over 90 employees [sic] mailboxes shortly***. Most of these were forwarded internally after being received.
>
> *We will also block all incoming memos from that e-mail account.* Mr. Kahr could still send e-mail from another account should he figure out that he is blocked.

> We have created a database containing all these notes and ***will work with Ken Robin on the disposition***.

Ex. 27. The plain text of this email demonstrates that after the database was created that Mr. Harvey worked with General Counsel Ken Robin on the "***disposition***" of this database. Four days later, CFO defendant Schoenholz forwarded this e-mail to Mr. Robin with instructions: "I think you should send out a note on ***disposing of all memos***." *Id*. There simply is no other way to interpret the plain meaning of this e-mail string.

There is other evidence that the Kahr documents were destroyed. Notwithstanding defendants' representations to this Court of production of hundreds of Kahr documents, they have only produced 23 unique memos from Mr. Kahr, and a handful of other emails discussing him and his initiatives. Moreover, Mr. Kahr appears to have numbered his memos consecutively. See e.g. Ex. 5 (L46), Ex. 6 (L55), Ex. 7 (L56), Ex. 9 (L57). Based just on the numbering, Mr. Kahr authored at least 266 memos, if not more. See Ex. 21 (LS 266). The Class was not provided all of these memos, but rather a sprinkling of them, most of which appear to have been sporadically produced from the hard copy files of employees.

Second, there were at least 620 emails relating to Kahr memos from 90 employees files according to Ex. 27. If Mr. Harvey was indeed charged with creating and "preserving" (as opposed to disposing) of a database, any production of documents from Mr. Harvey's files should have contained all of the memos and emails that related to Mr. Kahr. However, none of the Kahr memos came from Mr. Harvey's files. Given that defendants have consistently taken the position that their production of documents in this litigation was "as they are kept in the usual course of business," this failure to produce the database compilation should be dispositive of the fact that the documents were destroyed.

The Class urges the Court to examine this issue very seriously. There have been other issues relating to the loss of evidence in this matter - the self-described "blitz purge" of documents in all Household branches in the summer of 2001, the destruction of Lotus Notes emails shortly after the end of the Class period that occurred in early 2003, among others. Accordingly, the Class requests that defendants be required to explain under penalty of perjury what happened to the Kahr memos compiled in or about June 2002.

IV. CONCLUSION

For the foregoing reasons the Court should grant the Class' Motion and order defendants to produce the Andrew Kahr documents that defendants have improperly withheld on the basis of

privilege as well as those that were segregated into a separate database. At a minimum, defendants should be ordered to certify under oath what they did with the Kahr memos after compiling them in a database.

DATED: January 9, 2006

Respectfully submitted

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