

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN,)	
On Behalf of Itself and All Others Similarly)	
Situated,)	
)	
Plaintiffs,)	
)	
v.)	No. 02 C 5893
)	
HOUSEHOLD INTERNATIONAL, INC., et al.,)	Judge Nan R. Nolan
)	
Defendants.)	

ORDER

Plaintiffs have filed this securities fraud class action alleging that Defendants Household International, Inc., Household Finance Corporation, and certain individuals (collectively, "Household") engaged in predatory lending practices between July 30, 1999 and October 11, 2002 (the "Class Period"). Currently before the court is Plaintiffs' Motion for an Order Permitting the Use of Documents Recalled by Defendants as "Inadvertently" Produced. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

Once again, the court is being asked to determine whether Plaintiffs must return documents that Defendants inadvertently produced during the course of discovery. Defendants have recalled portions of several email chains, and additional emails transmitting information prepared in connection with Household's response to the Washington Department of Financial Institutions regarding an investigation and threatened claims. Defendants insist that the recalled information is protected by the attorney-client and/or work product privileges, but Plaintiffs disagree. The court has now conducted an *in camera* review of the relevant documents and issues the following rulings.

DISCUSSION

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. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). The purpose of the privilege is to “encourage full disclosure and to facilitate open communication between attorneys and their clients.” *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003). The attorney-client privilege extends to corporate in-house counsel, but only where the corporate lawyer is functioning as a lawyer and giving advice that is predominantly legal, as opposed to business, in nature. *Breneisen v. Motorola, Inc.*, No. 02 C 50509, 2003 WL 21530440, at *3 (N.D. Ill. July 3, 2003). Generally, “there is a presumption that a lawyer in the legal department of the corporation is giving legal advice,” but the lawyer’s position in the company is not necessarily dispositive. *Id.*

A. HHS 03357762-66

This document is a five-page email chain among Household employees between August 9 and 27, 2001. Defendants seek to redact three sections on HHS 03357765, one section on HHS 03357764, and two sections on HHS 03357763.

1. HHS 03357765

The three sections at issue on HHS 03357765 are portions of email exchanges between Household employees Jean Raisbeck, Steve Hill, Ned Hennigan and others. The statements reflect Raisbeck’s, Hill’s, and Hennigan’s understanding of advice rendered by Household’s Legal Department about a sales initiative then under consideration. The court agrees that all of these sections are covered by the attorney-client privilege and the redactions are proper.

2. HHS 03357764

The section at issue on HHS 0337764 is a request from Household employee Jeff Hood to Household attorney Andrew Budish to provide a written opinion regarding the sales initiative. This is a request for legal advice, but it does not in fact reveal any client confidences or legal opinions. This section is not protected by the attorney-client privilege and cannot be redacted.

3. HHS 03357763

The two sections at issue on HHS 03357763 reflect and comment upon the advice provided by attorney Budish. These sections are protected by the attorney-client privilege.

B. HHS-ED 484832-34

Defendants seek to redact a section of this email exchange found on HHS-ED 484833, in which a Household employee recounts information from a meeting he had with other employees and in-house attorney Kathleen (“Kay”) Curtin. Plaintiffs insist that the statements reflect only business, as opposed to legal, advice and are not protected by the attorney-client privilege. The court agrees. “[C]ommunications made by and to a corporate in-house counsel with respect to business matters, management decisions, or business advice are not protected by the privilege.” *Breneisen*, 2003 WL 21530440, at *3. Here, the communication relates to the contents of a Household audit and the company’s related business decisions. Defendant has not established that the statement is protected by the attorney-client privilege and it cannot be redacted.

C. HHS-ED 492296-305; HHS-ED 492322-331

Defendants seek to redact three sections of this 10-page email chain on HHS-ED 492296 (a small portion of the chain is also found on HHS-ED 492322). The first section (proceeding chronologically in reverse) is an email between Household employees indicating that Robin Allcock is going to discuss the AG settlement with Household attorney John Blenke. The second section reflects Blenke’s response that “some people do not have the correct facts.” Defendant has not demonstrated that either statement divulges legal advice or client confidences for purposes of the attorney-client privilege. Defendants may not redact these sections. The third section, on the other

hand, contains a specific request for legal advice regarding five matters and is protected by the attorney-client privilege.

D. HHS-ED 491162-65

Defendants seek to recall the statements on HHS-ED 491165 as they constitute an explicit request to attorney Curtin for legal advice on the proper application of a new Indiana telephone solicitation law. The court agrees that this document is protected by the attorney-client privilege and redaction is proper.

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

Defendants recalled all of these documents at the deposition of Tim Titus, Director of Household's Insurance Services. The documents consist of emails from a Household employee to in-house attorney Donna Radzik, among others, transmitting information prepared in connection with Household's response to the Washington Department of Financial Institutions regarding an investigation and threatened claims. Each email has the same two attachments: the first is a draft chart containing statistics; the second is a draft response regarding one of the subjects under investigation. Household ultimately produced a final statistics chart to Washington, but not the draft, and apparently never produced the draft response in any form.

Having reviewed the documents in question, the court agrees that they are protected by the attorney-client privilege. The mere fact that Household produced a final version of the statistics chart to Washington does not waive the privilege as to the draft versions in question. *See In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 518 (N.D. Ill. 1990) (“[S]imply because a final product is disclosed to the public (or a third person) an underlying privilege attaching to drafts of the final product is not destroyed.”) Defendants properly recalled these documents.

F. Waiver

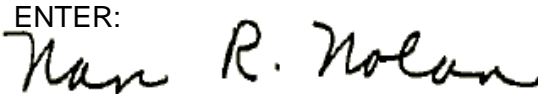
Plaintiffs again raise the objection that Defendants have waived the privilege with respect to these and any other inadvertently-produced documents by failing to take the necessary steps to

protect them. Courts must balance five factors to determine whether waiver has occurred under such circumstances: (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 Companies, Inc.*, 203 F.R.D. 376, 380 (N.D. Ill. 2001). The court remains aware that Defendants' inadvertent productions in this case have complicated discovery and prompted numerous motions. Of course, so have the parties' unprofessional disputes and unwillingness to cooperate on any level, contrary to the interests of their clients. Given the volume of documents produced in this case, "[i]t was not unexpected that Defendants and their agents would inadvertently produce some privileged materials and, indeed, the parties' agreed protective order outlines a procedure for returning such materials." *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006). The court declines to find waiver of the privilege in this case.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for an Order Permitting the Use of Documents Recalled by Defendants as "Inadvertently" Produced [Doc. 798] is granted in part and denied in part.

Dated: January 10, 2007

ENTER:


NAN R. NOLAN
United States Magistrate Judge