IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on behalf of itself and all others similarly situated,	)	**Lead Case No. 02 C 5893 (Consolidated)**
Plaintiff,	)	
vs.	)	**Judge Ronald A. Guzman**
	)	**Magistrate Judge Nan R. Nolan**
HOUSEHOLD INTERNATIONAL, INC, et al.,	)	
Defendants.	)	

ORDER

This matter is before the court for ruling on *Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Documents Improperly Withheld on the Basis of Privilege* ("motion to compel"). For the reasons that follow, plaintiffs'[1] motion to compel is denied.

I. DISCUSSION

A. The Attorney-Client Privilege and the Attorney Work Product Doctrine

In opposing production of certain documents, defendants have asserted both the attorney-client privilege and the attorney work product doctrine. The attorney-client privilege "protects confidential communications made between clients and their attorneys for the purpose of securing legal advice." *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 291 (7th Cir. 2002). According to the Seventh Circuit, "(1) [w]here 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 [the client's] instance

[1]For purposes of this order, the court refers to lead plaintiffs simply as "plaintiffs."

permanently protected (7) from disclosure by [the client] or the legal adviser, (8) except the protection [may] be waived." *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). The purpose of the privilege is "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). In addition to protecting statements made by the client, the privilege also protects statements from the lawyer to the client "where those communications rest on confidential information obtained from the client, or where those communications would reveal the substance of a confidential communication by the client." *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000) (internal citations omitted).

Attorney work product, on the other hand, is material "prepared in anticipation of litigation or for trial" by or for a party or its representative, including but not limited to that party's attorney. Fed. R. Civ. P. 26(b)(3). The attorney work product doctrine is a qualified privilege that "exists because 'it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" *Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D. Ill. 2002) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)). The doctrine, now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, draws a distinction between "opinion" work product—which reflects the "mental impressions, conclusions, opinions, or legal theories of an attorney"—and ordinary "fact" work product. *Id.* (quoting Fed. R. Civ. P. 26(b)(3)); *Caremark, Inc. v. Affiliated Computer Serv., Inc.*, 195 F.R.D. 610, 616 (N.D. Ill. 2000). If the materials at issue constitute fact work product, the materials are discoverable, but only if the party seeking discovery

demonstrates "a substantial need for the material and an inability to obtain the substantial equivalent of the information without undue hardship." *Eagle Compressors*, 206 F.R.D. at 478. Opinion work product, on the other hand, "is protected even when undue hardship exists" and thus, for all intents and purposes, receives absolute protection. *Id.*

The party invoking the attorney client privilege and/or the attorney work product doctrine bears the burden of establishing that the privileges apply, s*ee White*, 950 F.2d at 430 (attorney-client privilege), and must produce a privilege log that separately lists each document that has been withheld on privilege grounds, *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992); Fed. R. Civ. P. 26(b)(5). Accordingly, before the current dispute arose, the court referred the parties to *Allendale* for guidance regarding the court's requirements for privilege logs. Under *Allendale*, for each document, the privilege log must specifically identify the date, the author and all recipients (along with their capacities or roles), and should specifically describe the document's subject matter, the purpose of its production, and the reasons why the document is privileged or immune from discovery. *Allendale*, 145 F.R.D. at 88.

B. The Parties' Dispute

At issue in this dispute is the Household Defendants' first privilege log, which defendants have revised three times since they originally provided the log to plaintiffs on February 23, 2005. In response to concerns raised by plaintiffs in various efforts to meet and confer, defendants produced a revised version of the privilege log on April 6, 2005 and a second revised version on May 18, 2005. On June 6, 2005, plaintiffs filed their motion to compel, arguing that the Household Defendants have failed to justify the privileges asserted in the second revised privilege log. Specifically, plaintiffs argue that (1) defendants have failed to establish that there

was an expectation of confidentiality for any of the communications withheld pursuant to the attorney-client privilege, (2) that non-communications are not protected by the attorney-client privilege, (3) that communications not relating to legal advice are not privileged, (4) that documents not reflecting confidential client communications are not privileged, (5) that documents intended for publication or disclosed to third parties are not privileged, (6) that communications exchanged in the course of document searches are not privileged, and (7) that Household should be ordered to provide an updated privilege log encompassing all documents that have been withheld to date.

After the motion to compel was filed, the parties met and conferred again. According to defendants, as the result of their discussions, plaintiffs dropped certain objections, defendants dropped the privilege designation they had asserted for certain categories of documents and produced those documents, and defendants also agreed to add greater detail to the remaining descriptions on the privilege log. Defendants then produced their Third Revised First Privilege Log ("Privilege Log") on June 23, 2005.

The Privilege Log, which consists of entries relating to 112 documents, shows that defendants have withdrawn their privilege assertions and produced 25 of those documents. For each of the remaining documents, however, plaintiffs dispute defendants' privilege assertions. In response to plaintiffs' remaining objections (listed above), defendants counter with arguments opposing each of those objections. Additionally, in response to the motion to compel, defendants acknowledge that they need to provide privilege logs for documents withheld in later document productions, and agree to promptly provide those logs upon receiving the court's ruling on the motion to compel (so they can ensure that subsequent privilege logs comply with

the court's ruling).

C. Analysis

Plaintiffs contend that the Household Defendants have failed to justify the privileges asserted in the Privilege Log. After reviewing the Privilege Log and each of plaintiffs' arguments, however, the court cannot agree.

According to plaintiffs, defendants have failed to establish that there was an expectation of confidentiality for any of the communications withheld pursuant to the attorney-client privilege. In support of this argument, plaintiffs explain that under Illinois law where a corporation is the client, "only communications between corporate counsel and the company's control group are privileged," (Pls.' Mot. Compel at 6, citing *Consol. Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982)), yet defendants have made no attempt to demonstrate that the employees listed on its Privilege Log were members of its control group. This argument is fatally flawed, however, because the control group test does not apply in this case. In federal question cases like the case at bar, "the contours and exceptions of . . . privileges are clearly a matter of federal common law; state-created principles of privilege do not control." *In re Pebsworth*, 705 F.2d 261, 262 (7th Cir. 1983) (citing Fed. R. Evid. 501). The control group test is inapplicable under the federal common law regarding the attorney-client privilege. *Upjohn Company v. United States*, 449 U.S. 383, 392 (1981). Indeed, the Supreme Court explicitly rejected the control group test in *Upjohn*. As the Supreme Court explained, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 391. But under the control group test, the middle and lower-level employees who often possess the

relevant information corporate counsel needs to provide informed legal advice fall outside of the group protected by the privilege. *Id.* (control group limited to officers and agents responsible for directing corporation's actions in response to legal advice). As a result, the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392. Because the control group test has no bearing on the case at bar, plaintiffs' reliance on the test is unpersuasive.[2]

Because the court rejects plaintiffs' control group argument, there was no need for the court to review the Privilege Log entries for the withheld documents that plaintiffs challenged

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[2]Plaintiffs also contend that because communications between counsel and employees outside of Household's control group would not be protected under Illinois law, defendants could not reasonably have expected that the communications would remain confidential. This argument is unpersuasive. Notably, plaintiffs do not cite a single case in which a court held that if communications would not be protected under the attorney-client privilege in a state court, then a corporate party could not have had a reasonable expectation that the communications between its counsel and its employees would remain confidential.

Moreover, the one case cited by plaintiffs, *United States v. BDO Seidman*, 337 F.3d 802, 812 (7th Cir. 2003) is distinguishable on its facts. In *BDO*, BDO's clients attempted to invoke a statutory privilege analogous to the attorney-client privilege to bar BDO from producing documents to the IRS that would reveal their identities as BDO clients who had invested in certain types of tax shelters. In rejecting the privilege claim, the Seventh Circuit explained that a federal statutory provision required BDO to maintain a list identifying each person to whom it sold an interest in tax shelters. *Id.* at 812. That statutory list-keeping provision, by its nature, "precludes [BDO's clients] from establishing an expectation of confidentiality in their communications with BDO . . . ." *Id.* (emphasis omitted). In other words, because BDO had an affirmative statutory duty to disclose the names of its clients who participated in tax shelters, BDO's clients could not establish that they reasonably expected their communications (or their identities) to be kept confidential, and thus failed to establish an essential element of the statutory privilege. *Id.* The Seventh Circuit's decision in *BDO* is not only factually dissimilar from the case at bar. There is also nothing in that decision suggesting that there can be no expectation of confidentiality for communications between a corporation's counsel and its employees simply because such communications might be discoverable in a state court that applies the control group test.

solely based on that argument. Plaintiffs challenged many documents on more than one basis. For those documents, the court has reviewed each individual entry on the Privilege Log to determine whether defendants complied with *Allendale* and whether they properly asserted the attorney-client privilege and/or work product doctrine. Without exception, the court finds that defendants complied with *Allendale* and properly withheld the challenged documents.[3] In other words, defendants have sufficiently established their privilege claims on a document-by-document basis. *See White*, 950 F.2d at 430. Although tempted to end this order with that finding, because the parties will be producing additional privilege logs in the course of this litigation, the court shall address plaintiffs other objections with the hope of providing some guidance in order to avoid similar motions in the future.

Plaintiffs, for example, argue that defendants have asserted the attorney-client privilege for documents that do not reflect any communication between attorney and client. This argument is now moot, however, because the only document that remained the subject of this argument after the parties met and conferred was document 76. Regarding document 76, defendants have withdrawn their assertion of the attorney-client privilege and now rely solely on the attorney work product doctrine. Plaintiffs have not challenged the work-product designation

[3]As noted earlier, after the motion to compel was filed, defendants agreed to produce 25 previously withheld documents and also revised the descriptions of the withheld documents. This suggests there were likely some deficiencies in the earlier versions of privilege log. Unlike plaintiffs, the court does not consider the fact that defendants decided to turn over previously withheld documents and opted to revise their privilege log as an indication that the defendants' other privilege assertions are untrustworthy. The court appreciates defendants' efforts to address plaintiffs' concerns about the earlier privilege logs and resolve some of the disputes. The court does, however, expect defendants to make every reasonable effort to ensure that its future privilege logs are as descriptive and accurate as possible in the first instance. In other words, the court expects that future privilege logs will not require multiple revisions.

for document 76, and in any event, after reviewing the description of document 76 on the Privilege Log, the court finds that defendants have properly invoked the work product doctrine.

Plaintiffs also state that counsel must be involved in a legal, not business capacity and the confidential communications must be primarily legal in nature for the attorney-client privilege to apply. *E.g., Sneider v. Kimberly Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980). Based on that fundamental premise, plaintiffs object that defendants have withheld documents without establishing that the communications relate to legal rather than business matters. Defendants acknowledge that communications must relate to legal advice to fall within the protection of the attorney-client privilege, but respond that all of the challenged documents are primarily legal in nature and involved an attorney acting in a legal capacity. The court agrees. Although the challenged documents concern business topics, the descriptions demonstrate that the documents (or redacted portions) were withheld because they contain thought processes and interpretations of attorneys regarding compliance with the law and reduction of potential litigation risks with respect to Household's day to day business. For example, the challenged documents include communications requesting and relaying legal advice regarding training materials, communications requesting and relaying legal advice regarding price options training and what requirements employees must follow when discussing discount points, and communications regarding legal review of a training manual to ensure compliance with federal law, etc. As for the documents relating to Household's response to the Arizona Attorney General's Civil Investigative Demand (documents 74-75, 79, 92-94 and 96),[4] the attorney general's investigation

[4]In addition to asserting the attorney-client privilege, defendants asserted the attorney work product doctrine for each of these documents. Notably, plaintiffs have not challenged defendants' work product assertion.

into various Household loan products was obviously legal in nature. Furthermore, there is no information suggesting that the lawyers involved in the challenged communications were acting in anything other than a legal role. *See Breneisen v. Motorola, Inc.*, No. 02 C 50509, 2003 WL 21530440, at *3 (N.D. Ill. July 3, 2003) (there is a general presumption that "a lawyer in the legal department of the corporation is giving legal advice").

Plaintiffs also challenge defendants' decision to withhold certain documents authored by paralegals (documents 74-75, 79, 92-94 and 96), arguing that advice given by the paralegals is not protected by the attorney-client privilege. Plaintiffs' argument is misplaced. The Privilege Log descriptions for the challenged documents clearly indicate that the paralegal was coordinating information from the client's employees, at an attorney's direction, to incorporate into the response to Arizona Attorney General's Civil Investigative Demand. The attorney-client privilege applies to a client's confidential communications to persons acting as the attorneys agents, including paralegals. *See, e.g.*, Jack B. Weinstein & Margaret A. Berger, 3 Weinstein's Federal Evidence § 503.12[3][a] at 503-526 (2d ed. 2005) ("A representative of a lawyer is someone employed to assist the lawyer in the rendition of legal services. Confidential communications to such a person are privileged.")

Noting that documents must either directly or indirectly reflect confidential client communications in order to be protected by the attorney-client privilege, *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 28 (N.D. Ill. 1980), plaintiffs next contend that defendants have failed to establish that element for numerous documents. Defendants respond that they have not asserted the attorney-client privilege for any document that merely states the law or does not appear to be in response to a specific request by a client. After reviewing the Privilege

Log description for each of the challenged documents, the court finds that the attorney-client privilege applies. Plaintiffs acknowledge that entries which clearly indicate that the client sought legal advice are sufficient. (*See* Pls.' Mot. Compel at 11.) Yet many of the challenged descriptions, on their face, similarly indicate that the client requested legal advice.[5] For example, the Privilege Log entry for document 49 describes an "email exchange between attorney and client seeking advice regarding legal requirements for Truth in Lending Application Disclosure, and attaching attorney comments to said document." For other entries, even if the description does not explicitly reference a confidential client communication, it is clear from the description that the material is privileged. For example, the material redacted from document 16 is described as "attorney's edits and comments to draft loan language to client, based on legal requirements of state and federal law." It is difficult to fathom how plaintiffs could object that this document should not have been withheld. As defendants point out, "drafts prepared by or commented upon by an attorney necessarily contain legal advice from the attorney as to the wording of the contracts for the benefit of the client, and thus are privileged." *McCook Metals L.L.C. v. Alcoa, Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. 2000).

The next issue is whether defendants waived the protection of the attorney client privilege and attorney work product doctrine by disclosing otherwise privileged information to a third-party. *Eagle Compressors*, 206 F.R.D. at 477, 479 (both the attorney client privilege and the attorney work product doctrine may be waived). According to plaintiffs, the descriptions on

[5]For some of the challenged documents, defendants may have clarified their descriptions in the third revision, after plaintiffs filed the motion to compel. But plaintiffs did not withdraw their objections after receiving the Privilege Log, as revised, so they evidently remain unsatisfied with the defendants' descriptions.

the Privilege Log indicate that certain documents were disclosed to adverse third parties or were created with the intention of such disclosure. Plaintiffs' argument is unpersuasive, however, because there is no information whatsoever indicating that the challenged documents (documents 60, 74-75, 79, 81-82, 86 and 92-96) were disclosed to third parties. All but one of the challenged documents are internal emails requesting and relaying information in order to prepare a response to the Arizona Attorney General's Civil Investigative Demand. Although Household's final response to the Civil Investigative Demand would not be privileged because it was communicated to a third party (*i.e.*, the attorney general), communications between the attorney/agents of the attorney and the client gathering information for the response and addressing drafts of the response are protected by the attorney-client privilege.[6] *See McCook*, 192 F.R.D. at 255 (final executed contract was not privileged, but previous drafts were); *In re Air Crash Disaster*, 133 F.R.D. 515, 518 (N.D. Ill. 1990) ("Most courts have held . . . that simply 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."). The remaining document, document 60, also relates to Household's response to the Civil Investigative Demand. According to the Privilege Log, the redacted material contains a lawyer's notes in preparation of the response to Arizona Attorney General's requests; the redacted notes included legal strategies, requests to be clarified, and objections to requests. Defendants properly asserted work product protection for this document. Compelling production of the redacted material would reveal the attorney's mental impressions, conclusions, opinions, and/or legal theories regarding how to respond to the

[6]Defendants also asserted the protection of the attorney work product doctrine for these documents.

Civil Investigative Demand. Furthermore, despite plaintiffs' argument to the contrary, there is no information suggesting that this document was disclosed, or intended to be disclosed, to third parties. Plaintiffs' objections based on purported disclosures to third parties are simply misplaced.

In their final objection, plaintiffs argue that certain documents relate to the search for documents in response to inquiries from the Arizona Attorney General (documents 60, 76, 80, 92-94 and 96), and thus should be produced because communications exchanged in the course of document searches are not privileged. In support of this position, plaintiffs rely on *In re Feldberg*, 862 F.2d 622, 627 (7th Cir. 1988), a case in which the Seventh Circuit ruled that "[t]here is no need for a privilege to cover information exchanged in the course of document searches, which are mostly mechanical yet which entail great risks of dishonest claims of complete compliance." Plaintiffs, however, have overlooked the distinction the Seventh Circuit made between communications regarding the mechanics of a search (*e.g.*, who searched, how, when, where), and communications regarding a search for documents that contain legal advice (such as whether a document is responsive and needs to be produced). *Id.* at 627-628. Although the former category of communications are not privileged, communications in the latter category are protected. *Id.* Based on that distinction, defendants explain that they have adhered to the holding of *In re Feldberg* by producing any documents that relate solely to document production or document searches. The challenged documents, in contrast, relate to more than the mere mechanics of document production or document searches, as indicated in the descriptions provided in the Privilege Log. For example, documents 79 and 81 are emails relaying information to be incorporated into the draft response to the Civil Investigative Demand.

Because the challenged documents are not merely communications regarding the mechanics of a document search, the court agrees that the documents were properly withheld.

II. CONCLUSION

After reviewing the Privilege Log and plaintiffs' objections, the court finds that defendants' Privilege Log (as revised) complies with the requirements of *Allendale* and that defendants have properly withheld the challenged documents under the attorney-client privilege and/or the attorney work product doctrine. *Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Documents Improperly Withheld on the Basis of Privilege* is therefore denied.

ENTERED:

Nan R. Nolan

NAN R. NOLAN
United States Magistrate Judge

Dated: December 9, 2005