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, *- against -* HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFFS' MOTION FOR AN ORDER PERMITTING THE USE OF DOCUMENTS RECALLED BY DEFENDANTS AS INADVERTENTLY PRODUCED

CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar

From their immense production of documents in this matter, Defendants have recalled in the neighborhood of only 115 documents (including duplicates and later released documents) on the ground of privilege and/or work product protection. [1] (Almost half of these had been created in connection with a privileged Ernst & Young retention.) Following extensive correspondence about Defendants' bases for such recalls, and related meet and confer sessions, Plaintiffs now challenge Defendants' recall or redaction of only *eight* of these documents. (Although Plaintiffs annex these documents to the December 6, 2006 Affidavit of Bing Z. Ryan, they fail to show the Court which portions contain redactions to which they object. Accordingly, we are submitting a marked set of the redacted documents under seal as Exhibits 1-5 to the accompanying Declaration of Janet A. Beer.)

As demonstrated below and in the numerous letters from defense counsel annexed to Ms. Ryan's Declaration, the recalled material in each of the eight documents is protected from disclosure by the attorney client privilege and/or work product doctrine, and Defendants have not waived such protection. Accordingly, Plaintiffs' motion for an order permitting the use of these documents should be denied in full.

THE GOVERNING STANDARDS

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); *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc.*, No. 02-C-5893, slip op. (N.D. Ill. Dec. 9, 2005) (Nolan, M.J.) ("December 9 Opinion"), at 1. "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.'" December 9 Opinion at 2, quoting *Rehling* v. *City of Chicago*, 207 F. 3d 1009, 1019 (7th Cir. 2000). *See generally, American Nat'l Bank and Trust Co. v. Equitable Life Assurance Society of the United States*, 406 F.3d 867 at 878-79 (7th Cir. 2005).

[1] Plaintiffs attempt to artificially inflate this figure by incorporating documents that were recalled on the instructions of various state agencies on the basis of their respective regulations or laws. Defendants asserted no privilege in their own right with respect to such documents, and the now-resolved issues regarding the states' respective positions are unrelated to the attorney client privilege and work product protections that are the subject of Plaintiffs' instant motion.

The work product doctrine, codified under Federal Rule of Civil Procedure 26(b)(3), protects material "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)...." Fed. R. Civ. P. 26(b)(3). As the Supreme Court has observed, "the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Hickman* v. *Taylor*, 329 U.S. 495, 512 (1947). Work product may be categorized as either opinion work product, which "includes counsel's mental impressions, conclusions, or legal theories," or ordinary work product, which "includes raw factual information." *Hollinger International Inc.* v. *Hollinger Inc.*, 230 F.R.D. 508, 511 (N.D. Ill. 2005) (Nolan, M.J.) (citations and internal quotation marks omitted). Courts value work product so highly that the privilege may only be overcome upon a "showing of 'substantial need' and 'undue hardship'. *National Jockey Club* v. *Ganassi*, No. 04 C 3743, 2006 WL 733549, at *1 (N.D. Ill. Mar. 22, 2006) (Nolan, M.J.) (citations omitted).

ARGUMENT

As the Court will see from the marked set of documents submitted under seal with the Beer Declaration for the Court's review, for the most part this dispute relates to a handful of new redactions within lengthy e-mail chains, large portions of which were produced to Plaintiffs with no redactions at all. (The exceptions are the final three documents, which were recalled in full.) The redactions shown in grey on some of these e-mails were made in connection with the original production, and because they mask certain direct communications between Household employees and one or more of the Company's in-house attorneys, we do not understand Plaintiffs to be challenging them on this motion or otherwise. At a later point in time, however, Defendants identified additional privileged material in these emails that had been initially overlooked in the press of reviewing millions of pages of material for production, and took prompt action to recall such material, as expressly contemplated and allowed by the terms Protective Order in this matter. The new redactions that are the subject of this motion are bordered in ink in the set annexed to the Beer Declaration.

Before turning to Plaintiffs' vague complaints about the substance of these additional redactions, it is important to note at the outset that inadvertent omissions of this sort are guaranteed to happen in a document production of this magnitude, especially given the prevalence, sheer density and difficulty of reviewing lengthy email chains. Indeed the new amendments to the Federal Rules of Civil Procedure implicitly recognized such difficulties in codifying a party's right to recall inadvertently produced privileged documents upon a proper showing. *See* Rule 26(b)(5); *see also* Committee Note to amended Rule 26 at 24:

> "[The problems of detecting all privileged material and material under review for production "often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that it attends use of e-mail and some other types of electronically stored information, may make privileged determinations more difficult, and privilege review correspondingly more expensive and time consuming."

This Court itself has recognized the difficulties of identifying every possible privileged reference in a production as expansive as this. In its words, "Defendants have produced some four million pages of documents in this case. . . . It 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). See also *Lawrence E. Jaffe Pension Plan* v. *Household Int'l, Inc.*, No. 02-C-5893, slip op. at 19, 26 (N.D. Ill. Dec. 6, 2006). The fact that so few recalls were necessary in a production this immense is a tribute to counsel's rigorous efforts to screen out privileged material at the initial production stage, and a dispositive rebuttal to Plaintiffs' attempt to depict a reckless failure by Household to protect its privilege. Plaintiffs' absurd argument that the relatively few (and inevitable) exceptions support a finding of wholesale waiver is plainly out of step with the spirit — and now the letter — of the Federal Rules, and their vague application for relief on that basis should be summarily denied.

A. The Recalled Material in the Eight Subject Documents Is Protected By The Attorney Client Privilege and/or the Work Product Doctrine

1. Redactions in HHS 03357762-66

This is a five-page email chain among Household employees beginning on August 9, 2001 and ending on August 27, 2001, in all comprising approximately 15 exchanges, only a handful

of which have been redacted. The first three of these (proceeding chronologically from the back of the document) appear on page HHS 03357765. Each of them describes a Household employee's understanding of advice rendered by the Company's Legal Department about a sales initiative then under consideration. Among other things, these passages paraphrase "Legal's concern" and explain why the Legal Department is not "in love" with the proposed idea. The only portions of these three emails to be redacted are the specific sentences that summarize the advice previously rendered by the Legal Department on the subject of the proposed sales initiative.

An email on page HHS 033577764 was properly redacted as a request for legal advice immediately preceding the previously redacted email that incorporates legal advice from attorney Andrew Budish and the follow-up discussion on the same page. The next two (unredacted) emails (starting at the bottom of page HHS 03357763) show that attorney Budish's advice was forwarded to certain non-lawyers with a request for further discussion. The two-sentence response of recipient Ned Hennigan on August 20, 2001 was properly redacted because it discloses the essence of Mr. Budish's legal opinion. Two out of the six sentences in the response of another recipient, Thomas Detelich, were properly redacted because they too reveal and comment on the substance of Mr. Budish's advice, and suggest seeking further guidance from Mr. Budish. The remaining entries in this email chain contain no references to legal advice and have been produced in full, with no redactions.

Plaintiffs' objections to these modest redactions appear to turn on the fact that the persons who summarized, described and otherwise conveyed the essence of the attorney's legal advice were not themselves lawyers. It is well settled, however, that a lawyer does not have to be the author or recipient of a communication in order to render its contents privileged *See Kodish* v. *Oakbrook Terrace Fire Protection District*, 235 F.R.D 447, 452 (N.D. Ill. 2006) (holding that a privileged communication "does not lose its status as such when an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation." (citation and internal quotations marks omitted). Plaintiffs objections should be overruled because the contested redactions protect the substance of employees' direct request for and explicit sharing of legal advice of counsel.

2. Redactions in HHS-ED 484832-34

This is a three-page printout of approximately ten entries in an email chain, initially among non-legal employees at Household, but later including Kathleen K. Curtin, an in-house lawyer

(referred to as "Kay"). The first four emails in the sequence contain or forward business information and have been produced without redaction. However, a redacted email dated November 27, 2001 from Walt Ryback to Ms. Curtin recounts the substance of a meeting held the previous day among three business people and the attorney, and summarizes the attorney's legal advice. That quintessentially privileged communication was properly redacted. The following email, a business discussion, was produced intact and the next two entries, a request to Ms. Curtin for legal advice and her answer, dated November 28, 2001, and Mr. Ryback's follow-up communication with Ms. Curtin, were previously redacted with no objection from Plaintiffs — reinforcing the clear inference that the executives' consultations with Ms. Curtain on the underlying subject were privileged communications and properly redacted as such.

Plaintiffs' insistence that the consultation was a mere "business meeting" is flatly wrong, as the context of the redacted document shows. Household, as a company making decisions in a highly regulated industry, necessarily conferred regularly with members of its Legal Department in order to ensure that its business decisions were made in accord with applicable laws and regulations. Such conversations, and emails memorializing such conversations, such as HHS-ED 484833, are unquestionably privileged. *See, e.g, Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 21, 34 (N.D. Ill. 1980) ("in providing legal advice an attorney may incorporate relevant nonlegal, or business, considerations without losing the privilege"); *Weeks* v. *Samsung Heavy Indus. Co.*, No. 93 C 4899, 1996 WL 341537, at *2-*3 (N.D. Ill. June 20, 1996) (Guzman, J.) (finding a document to privileged despite the fact that it included information about the plaintiff's compensation in addition to legal advice, because the business data was included for the "limited purpose" of giving or receiving legal advice concerning legal obligations and potential litigation risks with respect to the plaintiff). Indeed, Ms. Curtin's role in this discussion renders the summary of the meeting presumptively privileged, as she is a member of Household's Legal Department. *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, and an opposite presumption for a lawyer who works on the business or management side.") The redacted portion of HHS-ED 484833 is therefore privileged and was properly recalled.

3. Redactions in HHS-ED 492296-305 and HHS-ED 492322-331

The former document is a ten-page printout of an email chain with approximately 42 entries, covering the time period September 13, 2002 through October 21, 2002. (Document HHS-ED 492322 contains a small portion of that chain.) Many entries contain no apparent privileged material, and have been produced intact, with no redactions. The text of certain emails reflecting legal advice on a waiver issue was previously redacted as privileged, with no objection from Plaintiffs. The instant dispute relates to new redactions on the first page of the larger document, HHS-ED 492296 (the bottom paragraph of which also appears on HHS-ED 492322). These redactions were required because the subject emails are primarily communications between in-house attorney John Blenke, Esq. with certain Household employees on the subject of explicitly requested legal advice.[2] (The bottom email on this page expressly indicates that "John" would be consulted on the underlying issue so that people would not be making decisions "in a vacuum" — that is, without the input of in-house counsel.) That a layman employee wrote that "we need all impacted parties to get together to make a sound business decision" does not somehow turn this request for legal advice into a "pure business matter" as Plaintiffs argue. (Pl. Br. 5) As noted above, the need to receive legal advice before making a "sound business decision" is of particular importance for any company that operates in a highly regulated industry.

4. Redactions in HHS-ED 491162-65

This is a four-page printout of an email chain consisting of approximately nine entries, including (on the final page) a forwarded email from earlier in the day. That attachment has been redacted in full because on its face it is an explicit request to in-house counsel, Ms. Curtin, for legal advice on the proper application of a new Indiana telephone solicitation law. Plaintiffs have offered no principled reason for contesting attorney client protection fro this document. See *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d at 291. Indeed, their assertion that "[t]his email does not seek any legal advice" (Pl. Br. 6) is mystifying.

---

[2] That previous entries of the same sort were redacted in other parts of the document supports the strong inference that the initial failure to redact this page was a clerical error rather than proof of an intention to waive the attorney client privilege inherent in this document.

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

These documents were recalled at the deposition of Timothy Titus on May 9, 2006. All are protected under the attorney client privilege and the work product doctrine.[3] The documents consist of emails from a Household employee to, *inter alia*, a Household attorney (Donna Radzik, Esq.), transmitting information prepared in connection with Household's response to the Washington Department of Financial Institutions in connection with an investigation and threatened claims. Each email has the same two attachments. One is a draft chart containing statistics (HHS-E 0037553, HHS-E 0037601), a final version of which was produced to the regulatory agency (**and** to Plaintiffs, at document no. H008569-71). The other (HHS-E 0037602, HHS-E 0037554), a draft response regarding one of the subjects under investigation, ultimately was not provided to the regulator. (In their moving papers, Plaintiffs refer only to the "statistics", but list the Bates numbers for all of the attachments in their headings (Pl. Br. 6), creating some confusion as to the focus of their complaint.)

Plaintiffs argue that "to the extent the statistics were provided to Washington, any privilege covering *the manner in which they were compiled* has been waived." (Pl. Br. 6-7) (emphasis added). Plaintiffs cite no authority — and none exists — for this vastly overreaching proposition that responding to a regulatory report somehow waives a company's privileges as to the underlying manner in which the response was created. Although Defendants do not claim any privilege over *final* copies of any material that was sent to the Washington Department of Financial Institutions, the *drafts* of that material are inherently protected. *See, e.g*, December 9 Opinion at 11 ("Although Household's final response to the Civil Investigation 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."); *In re Air Crash Disaster*, 133 F.R.D. 515, 518 (N.D. Ill. 1990) ("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"). This tenet rings particularly true in this instance, because documents HHS-E 0037552-53, HHS-E 0037600-02 and HHS-E 0037554 were produced in native format, and thus contain not just the attorney-client and

[3] Plaintiffs' complaint that they have relied on recalled documents in preparing for depositions rings hollow. If Plaintiffs continued to base their preparation on documents bearing indicia of privilege, they proceeded at their own peril, especially having rejected the Court's suggestion that they provide Defendants with copies of deposition exhibits in advance, precisely to avoid the possibility of recalls during the deposition.

work product protected information that appears on the face of the document, but also potentially contain privileged metadata that is extractable but not visible to the naked eye.[4]

B. Defendants Have Vigorously Defended The Privilege Attached to These Documents and Redactions In Accord With The Protective Order

Defendants have actively and thoroughly explained and defended the protection they claim for recalled and redacted documents, in accord with the requirements of the Protective Order. Plaintiffs make little real argument to the contrary, as Defendants' diligence is borne out by the extensive and detailed correspondence that Plaintiffs attach to their papers.

Documents HHS 03357762-66, HHS-ED 484832-34, HHS-ED 492296-305, HHS-ED 492322-331, and HHS-ED 491162-65 were recalled promptly upon the discovery of the inadvertent production of contents requiring redaction or recall. (*See* Ryan Declaration at Exs. 2, 3). Whenever asked by Plaintiffs to further explain the nature of the privilege behind the recalls, Defendants did so in explicit detail, citing relevant caselaw where appropriate. (*See* Ryan Declaration, Ex. 9, 11, 14). Nonetheless, as to these and other privileged materials recalled under the Protective Order, Plaintiffs unilaterally announced that they "will give defendants until Monday, July 31, 2006 to move the Court...[or else] we will consider your assertions of privilege withdrawn and reincorporate these documents into our database and continue to use them in our discovery process." (Ryan Declaration, Ex. 15, p. 2-3). Defendants responded to this ultimatum (and blatant flouting of the Protective Order) on July 31, 2006, inviting Plaintiffs to raise any disagreements at the upcoming meet and confer, and informing Plaintiffs that "we will vigorously protest any further violations of the Order or disregard of our client's privilege. Until your objections are resolved by the Court, we fully expect you to comply with the Protective Order and refrain from in any way using the disputed documents listed above. Please be prepared to tell us at Tuesday's meet and confer whether you intend to comply." (Ryan Declaration, Ex. 12, pp. 3-4) Plaintiffs then agreed to meet and confer about these documents,

---

4 Further, Plaintiffs suffer no harm from not being able to use the draft version of statistics located at HHS-E 0037601 and HHS-E 0037553 at the Titus deposition. Plaintiffs could have easily questioned Mr. Titus about the final versions of this chart, which appears in the Response to the Washington Department of Financial Institutions Expanded Report of Examination For Household Finance Corporation III. The fact that Plaintiffs' counsel indicated his awareness of this fact suggests that his attempt to use the privileged versions was pure gamesmanship.

but at the October 26, 2006 meet and confer session, Plaintiffs did not pursue complaints about any specific documents, instead dwelling on their insistence that Defendants file a motion to defend its privilege designations. In consequence, Defendants had no way of knowing which documents Plaintiffs still regarded as improperly redacted or recalled in light of the parties' exhaustive communications, and which they were prepared to accept as privileged on the basis of Defendants' showing.

The other three documents (HHS-E 0037552-53, HHS-E 0037600-02 and HHS-E 0037554) were recalled at the deposition of Timothy Titus as soon as the documents were presented. On May 10, 2006, Plaintiffs sent a letter disputing this privilege, asserting, without basis or evidentiary support, that the documents had been disclosed to third parties. (Ryan Declaration, Ex. 7) On May 11, 2006, Defendants sent a letter asserting attorney client and work product protection over these and duplicate copies of these documents, and stating that they were aware of no evidence that these documents had ever been disclosed to third parties. (Ryan Declaration, Ex. 8) In the seemingly incessant exchanges that followed, Plaintiffs kept repeating the conclusory assertion that the documents were not privileged, and Defendants continued to spell out their valid legal and factual bases for recalling the documents. (*See* Ryan Declaration, Ex. 10, p. 2; Ex. 11, p. 3, Ex. 15, p. 2, Ex. 12.) Plaintiffs declined to address these (or any other) individual documents at the meet and confer the parties had suggested for that purpose. Instead they stood by their position that Defendants' "failure" to initiate motion practice (without knowing which recalls were still subject to challenge) constituted a waiver.

Plaintiffs' specious arguments on this subject defy common sense. Here, for example, it was fair for Defendants to assume — in this case correctly, it appears — that their detailed showings had persuaded Plaintiffs that it would not be necessary to burden the Court as to the validity of a great majority of initially contested recalls. Plaintiffs' novel position also finds no support in the Protective Order itself, which is silent on the parties' respective obligations in the case of an impasse — other than the obligation to cease using a recalled document pending judicial resolution of any disputes. Plaintiffs' proposal also runs contrary to normal practice and procedure, as most recently summarized in the Committee Notes to the new amendments to the Federal Rules of Civil Procedure.

Throughout its discussion of best practices for resolving disputes about recalled documents, the Committee expressly assumed that the burden of seeking judicial resolution of any impasse should fall squarely on the party that objects to the recall *See, e.g.*, Committee Notes to Rule 26 at 17-20. For example, the Committee indicated that Rule 26(b)(5)(B) had been added to provide

a procedure for a party to recall inadvertently produced privileged material and, "if the claim is contested, *permit any party that received the information to present the matter to the court for resolution.*" *Id.* at 18. That makes perfect sense of course, because as here, the requesting party is best able to determine its discovery needs and priorities, and focus any such motion on documents it may actually want or need to use in preparation for trial. In contrast, the blunderbuss approach Plaintiffs favor would obviously strain the Court's limited resources by requiring rulings on matters that may prove to be academic.

In sum, Plaintiffs have not substantiated any of their arguments on waiver, which at base amount to the unfounded premise (now formally rejected in the amendment of the Federal Rules) that inadvertent production in the context of a vast document production by itself destroys any underlying privilege. Defendants' timely and justified recall of the small number of inadvertently produced documents is in complete accord with the terms of the Protective Order and the proper administration of justice.

CONCLUSION

Defendants respectfully request that Plaintiffs' motion for an order permitting the use of documents recalled by defendants as inadvertently produced be denied in its entirety.

Dated: December 13, 2006
Chicago, Illinois

EIMER STAHL KLEVORN & SOLBERG LLP

By: /s/ Adam B. Deutsch
Nathan P. Eimer
Adam B. Deutsch
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600
-and-
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar