

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

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**THE CLASS' MOTION TO COMPEL HOUSEHOLD DEFENDANTS TO PRODUCE
MISSING DOCUMENTS, DOCUMENTS IMPROPERLY WITHHELD OR REDACTED
AND FOR A FINDING OF WAIVER DUE TO DEFENDANTS' FAILURE TO ASSERT
PRIVILEGE OVER WITHHELD OR REDACTED DOCUMENTS THAT ARE NOT ON
THEIR PRIVILEGE LOGS**

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The Class respectfully moves this Court for an Order compelling the Household Defendants to produce all missing documents within their document production, documents improperly withheld or redacted due to non-responsiveness and for a finding of waiver due to defendants' failure to assert privilege over withheld or redacted documents that are not on their privilege logs despite the passage of years and the Court's specific instructions.

I. INTRODUCTION

As detailed in the procedural background, the Class informed defendants that there were significant gaps in their production and that a large number of documents were identified as "Withheld for Privilege" or redacted without a corresponding entry on defendants' privilege logs.

At issue here are (1) 870 documents that defendants have either withheld or produced in redacted form but failed to include on their privilege logs years after their production, (Ryan Decl., Exs. 1 and 2),¹ (2) 247 documents that defendants have omitted, withheld, or produced in redacted form due to non-responsiveness, (Ryan Decl., Exs. 3-4), and (3) 438 documents that defendants claimed to have produced, but which the Class does not have. Ryan Decl., Ex. 5.²

Despite certifying that defendants' "document productions are complete with respect to Plaintiffs' First, Second, and Third Document Demands," defendants now concede that they have yet to produce documents to the Class and that their privilege logs are woefully deficient. Ryan Decl., Exs. 1-4, 6-8.

Defendants simply cannot ignore their discovery obligations for more than two and a half years. The Class informed defendants as early as October 20, 2006 that they have failed to include on their privilege logs about 2,000 documents that have been withheld in their entirety or redacted. Ryan Decl., Ex. 9. The Class also provided defendants a list of withheld and redacted documents that do not appear on defendants' privilege logs. Ryan Decl., Ex. 10.

On December 4, 2006, the Class further split the combined list into two separate lists, *i.e.*, the withheld and redacted lists, and provided a copy of the lists to defendants. Ryan Decl., Ex. 11. With

¹ "Ryan Decl." refers to the Declaration of Bing Z. Ryan in Support of the Class' Motion to Compel Household Defendants to Produce Missing Documents, Documents Improperly Withheld or Redacted and for a Finding of Waiver Due to Defendants' Failure to Assert Privilege over Withheld or Redacted Documents that are not on their Privilege Logs.

² With respect to documents that defendants claim they have produced but the Class does not have, the Class suggests a simple solution, *i.e.*, that defendants provide the date that they have produced or in cases where they have re-produced as a result of eliminating prior redactions.

the Court-ordered fact-discovery cut-off in less than four weeks and the most important depositions, *i.e.*, those of the Individual Defendants, yet to be taken, defendants' persistent delay results in serious prejudice to the Class. As supported by well-settled legal authority, defendants' failure to timely provide a privilege log constitutes waiver. Having chosen to ignore their discovery obligations years after they withheld documents, depriving the Class from using these documents in depositions that have been ongoing, defendants should produce immediately all documents that are not on their privilege logs in their entirety.

Moreover, defendants' assertion that they can unilaterally omit, withhold, or redact documents on the grounds of relevancy runs afoul of well-established legal precedent that the producing party is not allowed to use non-responsiveness as an excuse to intentionally withhold or alter documents. *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1165 (W.D. Wash. 1986); *In re Atlantic Fin. Fed. Sec. Litig.*, No. 8-0645, 1991 U.S. Dist. LEXIS 11049 (E.D. Pa. Aug. 6, 1991). Indeed, allowing defendants to do so will enhance the possibility of nondisclosure of significant information. *Id.*

Finally, defendants' document production also contains voluminous unexplained gaps. When informed of this issue, on the very day that the Court ordered defendants to give an explanation to the Class, defense counsel Craig Kesch informed Class counsel, that they "do not intend to waste [their] time with a list that so far has an error rate of 100%." Ryan Decl., Ex. 12. As is customary, defendants provided no support for this statement. Accordingly, these documents must also be produced promptly.

II. PROCEDURAL HISTORY

A. Defendants Have Withheld Documents Yet Failed to List Them on Privilege Logs

Notwithstanding defendants' obligation under Fed. R. Civ. P. 26 to provide a log for all documents withheld or redacted, the Class has had to request, on numerous occasions, that defendants produce privilege logs that include all withheld and redacted documents. Ryan Decl., Exs. 9, 13-14. The Class went so far as to prepare a list of documents that defendants have withheld or redacted, but failed to provide a log or any explanation as required by *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992). Ryan Decl., Ex. 10. Yet, defendants refused to inform the Class whether and when they would produce a privilege log for these documents. Ryan Decl., Exs. 15-16.

Due to defendants' unwillingness to provide a log, the Class raised this issue in Court during the November 30, 2006 status conference. Ryan Decl., Ex. 17. The Court ordered the parties to meet and confer concerning this matter. *Id.* On December 1, 2006, more than a month after possessing the Class' withheld and redacted list, defendants belatedly provided the Class the Fourteenth Privilege Log, which included 98 documents from the Class' original withheld and redacted list. Ryan Decl., Ex. 18.

On December 4, 2006, the Class sent defendants revised versions of the withheld and redacted lists, which provided them more detailed information. Ryan Decl., Ex. 11. On the same day, the Class compared the entries on its withheld and redacted lists with entries on defendants' Fourteenth Privilege Log and provided defendants updated versions of the lists. Ryan Decl., Ex. 19.

On December 5, 2006, the parties met and conferred concerning the Class' withheld and redacted lists, during which defendants admitted they had only just started reviewing these lists though they had possessed the original list since October 20, 2006. Ryan Decl., Ex. 20. Without support, defendants asserted that most entries on the Class' withheld and redacted lists were erroneous, and refused to provide examples despite the Class' requests.

On the same day, defendants informed the Class that the documents they referred to during the December 5, 2006 meet and confer were re-produced to the Class either in their entirety or in less redacted form than they had been earlier produced on September 30, 2005 and October 4, 2005. Ryan Decl., Ex. 21. However, none of these two production cover letters lists the Bates numbers of the re-produced documents. Ryan Decl., Exs. 22-23. Upon the Class' further request that defendants provide the Bates numbers of the documents produced in connection with these two letters, defendants have refused to do so, claiming that it is "an unnecessary and wasteful exercise." Ryan Decl., Exs. 25-26. The Class, on the other hand, willingly provided red-lined versions of the withheld and redacted lists upon defendants' request, comparing the versions sent by the Class in the morning and in the evening of December 4, 2006. Ryan Decl., Exs. 24-25.

On December 14, 2006, defendants persisted in their refusal to provide a straight answer. Ryan Decl., Ex. 26. On December 15, 2006, when defendants admitted that the upcoming depositions were implicated by documents at issue, the Court ordered defendants to provide the Class with an explanation, a log or produce documents by January 3, 2007. Ryan Decl., Ex. 27. On December 19, 2006, defendants sent the Class the Fifteenth Privilege Log, which included 50 documents from the Class' withheld and redacted lists. Ryan Decl., Ex. 28.

On January 3, 2007, defendants informed the Class via letter that from the Class' various lists, defendants would either produce the documents, eventually log about 722 documents on a supplemental privilege log at some uncertain date, would not log 34 documents because defendants deemed them "non-responsive," and took the position that they had already produced certain documents, without listing the date on which such documents were purportedly produced. Ryan Decl., Exs. 1, 3, 5, 29, 31. Notably, defendants only faxed Class counsel the letter without including the lists themselves, a log, or the documents that were to be produced. Ryan Decl., Exs. 30-31. Defendants did not send the Class the lists until the Class requested so. *Id.*

B. Missing Documents

On November 22, 2006, the Class provided defendants with a list of voluminous gaps within defendants' production and requested that defendants either provide an explanation for the omission, or produce the documents. Ryan Decl., Ex. 32. The Class received no response and followed up with defendants a second time concerning the same issue on December 11, 2006. Ryan Decl., Ex. 33. Defendants made two generalized assertions with respect to the Class' list: (1) some of the Bates numbers have already been produced; and (2) some of the Bates numbers were omitted because they were not responsive, Ryan Decl., Exs. 7-8, 12. Defendants, however, refused to provide specific Bates numbers for documents they claim have already been produced and for Bates numbers they claim were omitted from their production due to non-responsiveness. *Id.* Instead, they assert that the Class' gap report "has an error rate of 100%," again without any evidentiary support. Ryan Decl., Ex. 12.

III. ARGUMENT

A. Defendants Must Produce All Withheld or Redacted Documents that Are Not on Their Privilege Logs

1. Defendants Have Waived Any Privilege on Documents Withheld and Redacted that Are Not on Their Privilege Logs

Parties withholding documents based on privilege are obligated to justify that privilege at the time the documents are withheld. Fed. R. Civ. P. 26(b)(5). Here, with respect to 870 documents, defendants have failed to explain the asserted privilege despite the passage of two and a half years. *See Hoble v. Burge*, 433 F.3d 946, 947-48 (7th Cir. 2006) ("An attorney asserting privilege must timely support that claim with a 'privilege log' which describes the nature of each document being withheld."); *Granger v. McBride*, No. 2:04 CV 8, 2006 U.S. Dist. LEXIS 34689, at *7 (N.D. Ind. May 24, 2006) (citing and following *Hoble*). Indeed, defendants failed to log these documents even after the Class provided them with a list of such documents. Ryan Decl., Ex. 10. Rather than

immediately updating their privilege log based upon the Class' list, defendants would not even consider the Class' efforts to obtain an explanation unless the list was prepared in a manner and form to their liking. Ryan Decl., Exs. 15-16. As usual, defendants put form over substance in an effort to distract the Court's attention from the core issue – defendants' improper withholding of documents and other relevant information from the Class.

Over two months after possessing the Class' list, and only after being ordered by the Court to provide an explanation, defendants now admit, that they failed to list about 722 documents on their privilege log. Ryan Decl., Exs. 1, 29, 31. Despite conceding in Court that the documents at issue impact upcoming depositions, defendants failed to fulfill even their most basic discovery obligations until the Class persistently maintained its demand for an explanation for documents withheld by the defendants. Accordingly, defendants have waived the privilege and the documents listed on Exs. 1 and 2 should be produced in their entirety.³

A party's failure to timely provide a privilege log to support its asserted privilege has the effect of waiving the privilege. *See Hobley*, 433 F.3d at 947-48; *see also Ritacca v. Abbott Labs.*, 203 F.R.D. 332, 336 (N.D. Ill. 2001) (noting that failure to produce a privilege log is grounds for waiver); *Granger*, 2006 U.S. Dist. LEXIS 34689, at *7 (citing and following *Hobley* and *Ritacca*). The Ninth Circuit recently addressed this issue in *Burlington N. & Santa Fe Ry. v. U.S. Dist. Court*, 408 F.3d 1142 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 428 (2005), formulating a standard using the 30-day limit of Rule 34 as a guideline in conjunction with other factors particular to the litigation. *Id.* at 1148-49. In discussing this standard, the Ninth Circuit noted that filing a privilege log five months later was "alone" sufficient to support a Court's finding of waiver. *Id.* at 1149. In *Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688, 696 (M.D. Fla. 2005), the court found waiver where, *inter alia*, no privilege log was provided nearly three and a half months after the disclosure of a privileged document.

Here, defendants have failed to provide a privilege log for the documents identified by the Class literally years after they withheld the documents, and much longer than the five months found sufficient for waiver in *Burlington* and three and a half months in *Universal City*. Accordingly,

³ This same rationale applies to the 148 documents from the Class' original lists belatedly listed in defendants' Fourteenth and the Fifteenth Privilege Logs. Ryan Decl., Exs. 18, 28.

defendants' failure to timely provide a privilege log supporting their assertion of privilege constitutes waiver and they should be ordered to produce these 870 documents immediately.

2. Allowing Defendants to Supplement Their Privilege Logs Weeks Before the Discovery Cut-off Will Greatly Prejudice the Class

Throughout the discovery, defendants have engaged in countless delay techniques to stall discovery. Specifically here, defendants sat on the Class' withheld and redacted list for more than two months, after being put on notice by the Class, before conceding that they had withheld more than 700 documents without listing them on a privilege log. Defendants' delay tactics have seriously prejudiced the Class – just from October 20, 2006 to the end of December 2006, the Class has taken fifteen depositions without the benefit of these documents, or the opportunity to explore defendants' basis for withholding these documents. Indeed, defendants are well aware of this prejudicial effect on the Class. During the December 15, 2006 status conference, when this Court asked defendants whether the documents listed on the Class' withheld and redacted lists might be related to the upcoming depositions, defendants answered affirmatively. Ryan Decl., Ex. 34. Defendants cannot be rewarded for their unjustifiable delay.

Not only should defendants be compelled to produce the 870 documents, to the extent that the Class was deprived the use of documents relevant to the depositions, the Court should permit the Class to reopen and question deponents on any of the subsequently produced documents.

B. Defendants Cannot Improperly Withhold or Alter Documents Based Upon Unilateral Determinations of Non-Responsiveness

Defendants have withheld or redacted documents claiming that these documents are not responsive to the Class' document requests. Ryan Decl., Exs. 29, 31. They make a similar claim with respect to the missing documents in Ex. 4. Ryan Decl., Ex. 7. However, defendants' conduct violates well-established legal authority.

It is well-settled that the party producing documents is not allowed to redact portions of documents based on their unilateral determination of relevancy or responsiveness and should produce responsive documents in their complete and unredacted form. *See, e.g., McCurdy v. Wedgewood Capital Mgmt. Co.*, Civil Action No. 97-4304, 1998 U.S. Dist. LEXIS 20628, at *9 (E.D. Pa. Dec. 30, 1998) (defendant is not entitled to redact information because “defendant has not shown that the information does not come within the broad scope of relevance as defined in Fed. R. Civ. P. 26(b)(1)”); *In re Medeva Sec. Litig.*, Master File No. 93-4376-Kn(AJWx), 1995 U.S. Dist. LEXIS 21895, at *8 (C.D. Cal. May 30, 1995) (“The Court does not welcome unilateral editing of

documents by the producing party.”); *Amoco Corp. v. Exxon Chem. Corp.*, Civil Action No. C87-242A, 1987 U.S. Dist. LEXIS 14198, at *6-*7 (N.D. Ga. Sept. 17, 1987) (ordering defendant to unredacted portions of documents withheld on relevance grounds); *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1165 (W.D. Wash. 1986) (“The court concludes that the best course of action is to require production of whole reports. . . . It also protects the litigants from possible nondisclosure of information they might consider significant.”).

In *Medeva*, plaintiffs, on behalf of investors in another securities lawsuit, filed a motion to compel production of unredacted versions of all redacted documents. 1995 U.S. Dist. LEXIS 21895, at *7-*8. The court criticized the redaction process: “The Court does not welcome unilateral editing of documents by the producing party.” *Id.* at *8. Redacting documents “gives rise to suspicion that relevant material harmful to the producing party has been obscured.” *Id.* It also leads to more litigation, more in camera review and more “wasted” time. *Id.* Given these problems, defendants should not redact documents on relevancy grounds due to the “minimal harm that may result.” *Id.*

In *Seafirst*, a securities fraud class action like this one, the court rejected a request by the Comptroller of the Currency (“OCC”) to produce documents in redacted form. With regard to the OCC’s objection to the production of overbroad and irrelevant information, the court reasoned that “disclosure of some possibly irrelevant material will cause no harm. In contrast, partial disclosure may tend to distort the tenor of the reports.” 644 F. Supp. at 1165.

Likewise, in *Atlantic Fin.*, another securities fraud class action, the plaintiffs moved to compel the production of the board of directors’ minutes and unredacted copies of documents already produced. *Atlantic Fin.*, 1991 U.S. Dist. LEXIS 11049 at *3-4. Like here, the plaintiffs in *Atlantic Fin.* claimed that the defendants deleted and withheld highly relevant information from documents produced. Defendants responded “that the vast majority of the documentation would be provided in unredacted form,” and “only those documents containing irrelevant information . . . were . . . redacted.” *Id.* at *13. The court rejected defendants’ approach, ordering defendants to produce complete and unredacted sets. *Id.* at *14.

Defendants are similarly not allowed to withhold or omit documents from their production “due to non-responsiveness.” Ryan Decl., Ex. 7. Here, defendants have withheld and/or redacted about 247 documents as “non-responsive.”⁴ Courts on numerous occasions have ruled that

⁴ This count includes the 34 documents from Ex.3 as well as the documents from Ex. 4 (gap list).

defendants' unilateral withholding of information on the grounds that it is not relevant or is non-responsive is improper. *In re Oracle Corporation Sec. Litig.*, Case No. C-01-09888-MJJ (JCS), at 12-16, (N.D. Cal. Dec. 19, 2006) (Ryan Decl., Ex. 35); *see also In re Vitamins Antitrust Litig.*, Misc. No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 8904, at *71 (D.D.C. June 20, 2001) (“[I]t is problematic to give defendants absolute discretion to withhold” documents that it deems to be irrelevant); *Xaphes v. Merrill Lynch*, 102 F.R.D. 545, 550 (D. Me. 1984) (determination of relevancy is solely within the province of the court and defendant is not entitled to make its own determination); *Sellon v. Smith*, 112 F.R.D. 9 (D. Del. 1985) (court agrees that the producing party should not be the final arbiter of what is relevant or irrelevant in a particular document).

Based upon this well-settled case law, defendants should be compelled to produce all 247 documents they withheld, omitted or redacted on relevancy or non-responsive grounds. To enable defendants to unilaterally alter or withhold documents as they have done here will cause relevant information to be obscured, render documents confusing and devoid of context, and result in discovery disputes that will waste the Class' and this Court's time.

C. Defendants Must Also Produce All Missing Documents from Their Document Production

Less than one month before the discovery cut-off, defendants' document production is still missing a significant number of documents. Defendants do not appear to have withheld these documents based upon privilege as none of these missing documents is listed on their privilege logs. Quite contrary, defendants appear to have collected these documents throughout the discovery, Bates stamped them, and then unilaterally decided not to produce them to the Class. Despite the Class' repeated requests, defendants refuse to explain these gaps claiming they “do not intend to waste their time.” Ryan Decl., Exs. 12, 32-33.

Defendants contend that for every Bates number that has been omitted from the production due to non-responsiveness, a skip sheet is included to indicate so. Ryan Decl., Ex. 7. Not so. Further, as discussed above in §B above, defendants cannot unilaterally withhold information on the ground of relevancy or non-responsiveness. Defendants have not included a skip sheet for a large number of the entries on the Class' gap report, which only begs the question – why not?⁵ The fact

⁵ Where occasionally included, all the skip sheets indicates is that a particular Bates number “has been omitted.” *See* Ryan Decl., Ex. 36 (A sample of a skip sheet, stating that “Production Number HHS 03177705 has been omitted”).

that defendants have produced skip sheets for some of the missing documents, but not for all of them, at the minimum, casts doubt on their explanation.

Defendants further claim in a conclusory manner that they have already produced “many if not all of the ‘voluminous gaps’” on the Class’ gap report. Ryan Decl., Ex. 7. Nevertheless, they have refused to provide any evidence to support this contention. When the Class requested defendants simply go through the gap report and mark the entries that they claim have already been produced, they refused to do so claiming it was not “a useful exercise.” Ryan Decl., Ex. 12.

Courts have held that defendants must produce all the missing documents from their production when they have failed to assert any privilege to these documents and have further failed to provide evidentiary support to their justification of the omission. *Ritacca*, 203 F.R.D. at 332. In *Ritacca*, defendants’ document production also contained gaps. *Id.* at 334. As in this case, though defendants claimed that the gaps were the result of removing duplicates from their document production, they failed to verify their statement by providing the duplicates to plaintiff upon numerous requests. *Id.* As a result, the court granted plaintiff’s motion to compel defendants to produce the missing documents. *Id.* The *Ritacca* holding squarely applies to this case. Accordingly, defendants must produce all the missing documents listed in Ex. 4 immediately.

D. Defendants Must Provide the Date of Re-production for the Documents They Claim They Have “Produced” on Ex. 5

On January 3, 2006, defendants have provided their response to the Class’ revised withheld and redacted lists. Ryan Decl., Exs. 29, 31. Though defendants claim they produced the documents listed in Ex. 5, they have failed to provide basic information, such as the date of re-production. *Id.*

The Class has provided the original date of production of the withheld or redacted documents in its lists. Ryan Decl., Ex. 11. Although defendants now claim that they have “produced” some of the documents contained in the Class’ revised lists either in their entirety, or “in unredacted form,” they refuse to provide the date of such re-production. Ryan Decl., Exs. 29, 31. As a result, the Class cannot verify the information contained in defendants’ response. Because defendants have data readily available to support their assertion of production, the Court should order defendants to provide this information to the Class.

IV. CONCLUSION

For the foregoing reasons, the Court should compel defendants to produce all documents listed in Exhibits 1-4, and provide dates of production for Ex. 5.

DATED: January 8, 2007

Respectfully submitted,

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