

Plaintiffs, in their January 8, 2007 Motion to Compel (“Pl. Br.”), again attempt to violate Household’s attorney client privilege and work product protection by requesting the production of what they say are 852 privileged documents on the basis of a supposed delay in logging.¹ These documents, which collectively amount to only .02% of Defendants’ total production, were identified when Defendants undertook the time-consuming process of sorting through two enormous lists of possibly privileged documents allegedly omitted from privilege logs, which Plaintiffs sent to Defendants on December 4, 2006.² Large swaths of the documents contained on Plaintiffs’ lists were either non-responsive documents that did not have to be produced or logged, non-privileged responsive documents that had already been produced, or privileged documents that had already been logged. Nonetheless, Defendants quickly undertook the time-consuming process of sorting through these lists, in accordance with this Court’s order that it expected the parties to work out all issues regarding these lists without the need for judicial involvement. *See* December 15, 2006 Minute Order (Docket Entry 831). As of January 3, 2007, each and every entry appearing on Plaintiffs’ December 4, 2006 lists was accounted for by Defendants. For the Court’s convenience, a copy of the lists that Defendants sent to Plaintiffs on January 3, 2007, as revised on January 12, 2007, are attached hereto to the Declaration of Landis C. Best. Any privileged documents that had not previously been logged were promptly described on Defendants’ sixteenth privilege log, which was provided to Plaintiffs on January 12, 2007.

¹ Defendants note that it is not clear which 852 documents Plaintiffs are alleging are still in dispute.

² Plaintiffs initially provided a list of documents allegedly missing from Defendants’ privilege logs on October 20, 2006. However, these lists were so confusing and riddled with inaccuracies, such as the fact that while the Bates numbers in Defendants’ production are made up of whole numbers, more than 80 of the entries on Plaintiffs’ October 20 list contained decimal points, that it was not a worthwhile use of time, nor indeed possible, for Defendants to sort through and respond to these earlier lists. *See* October 24, 2006 letter of Samantha Sherman to Bing Ryan, annexed as Exhibit 15 to the January 8, 2007 Declaration of Bing Ryan). It was not until December 4, 2006, after this matter was discussed at the November 30, 2006 status conference before the Court, that Plaintiffs sent Defendants revised versions of the document lists to which Defendants were able to respond, which Defendants did, on January 3, 2007.

Rather than following up with Defendants regarding the lists and attempting to resolve any issues without Court involvement, Plaintiffs instead filed the instant Motion to Compel. At the January 10, 2007 status conference before this Court, Defendants stated that since all unlogged documents would be logged by January 12, 2007 (as they were), Plaintiffs' Motion to Compel was moot and should be stricken. Plaintiffs, however, argued that despite the fact that every document was accounted for on a privilege log, they wished to pursue their motion under the theory that the alleged delay in logging privileged documents constitutes waiver of any privilege. After Defendants noted that this Court had previously ruled against Plaintiffs on this precise issue, the Court requested a short brief on the subject of waiver, referring where applicable to its prior rulings on this issue. This brief is in response to that request.³

Defendants renew their request that the Court strike Plaintiffs' Motion to Compel.⁴ In the alternative, Plaintiffs' motion should be denied. This motion is (i) frivolous, as all of the documents at issue are currently accounted for on a privilege log in Plaintiffs' possession; (ii) harassing, as in many instances the documents at issue are from productions made in the latter half of 2006 and are thus timely logged (especially in the context of a production of nearly five million pages); and (iii) wasteful of the Court's resources (let alone the Defendants' time and effort in responding to the motion), because this Court has already found that any delay in providing a privilege log did not result in a per se waiver of the attorney client privilege and work product protection afforded those documents, especially given the sheer enormity of the production at issue. In short, Plaintiffs have attempted to manufacture a dispute. The current motion and the manner in which it has been pursued

³ Plaintiffs have stated that they will not file a reply brief. In the event that Plaintiffs attempt to file a reply brief raising new issues, or if the Court wishes briefing on other issues beyond the waiver argument in Plaintiffs' motion to compel, Defendants respectfully request the right to further brief this motion.

⁴ Pursuant to this Court's January 10, 2007 Minute Order, Plaintiffs' motion to compel is "entered and continued". (Docket Entry 910)

demonstrate that Plaintiffs see this as some sort of sport. The Court should reject such gamesmanship.

ARGUMENT

This Court has consistently recognized the importance of preserving the attorney client privilege and work product protection, and has repeatedly rejected Plaintiffs' attempts to abrogate this privilege. Notably, in its December 6, 2006 Opinion regarding Plaintiffs' motion to compel the production of documents pertaining to Household's consultations with Ernst & Young LLP, this Court, *inter alia*, declined to find waiver because of alleged delay in entering documents on a privilege log. See *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, No. 02-C-5893, slip op. at 19 (N.D. Ill. Dec. 6, 2006) (Nolan, M.J.). This decision is especially notable because the documents at question in that decision, as here, had been logged as of the date of the Court's decision on Plaintiffs' motion. As this Court stated "[s]ignificantly, Defendants have now provided privilege logs covering all documents in question as of September 8 and October 25, 2006. . . . Given that more than four million pages of documents are at issue in this case, the court declines to find waiver based on the delay in submitting a privilege log." *Id.*

Indeed, this Court has repeatedly declined to abrogate the attorney client privilege and work product doctrine in this action due to any ill-founded charges of "waiver". In its July 2006 ruling, the Court said that "Given the volume of documents at issue in this case, the court does not view this delay [of between four and eighteen months from inadvertent production to recall of certain documents] as unreasonable." *Lawrence E. Jaffe Pension Fund v. Household International, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006). And in a January 10, 2007 order, the Court reiterated this point: "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'. The court declines to find waiver

of the privilege in this case.” *Lawrence E. Jaffe Pension Plan*, slip op. at 5 (N.D. Ill. January 10, 2007) (Nolan, M.J.), (internal citation omitted.)

In a different action, this Court similarly rejected the proposition that “a delay in providing [a privilege] log constitutes a waiver of the right to assert a privilege.” *EEOC v. Staffing Network, LLC*, No. 02 C 1591, 2002 WL 31473840, at *1 (N.D. Ill. Nov. 4, 2002) (Nolan, M.J.). There, this Court stated that “[i]t is true that defendant delayed some three months. . . in providing the privilege log. . . . Nevertheless, the cases cited by the EEOC establish only that an inadequate privilege log cannot be the basis for a claim of privilege, not that a delay in providing the log constitutes a waiver of the right to assert a privilege.” *Id.* Other courts have similarly refused to hold that a delay in providing a privilege log, without more, is a sufficient basis for finding a waiver of the attorney-client privilege and/or work product protection. *See, e.g., Kovacs v. Hershey Co.*, No. 04-CV-01881-WYD-BNB, 2006 WL 1980291, at *11 (D. Colo. July 13, 2006) (“the circumstances under which the late production of a privilege log may result in a waiver of the attorney-client privilege has been carefully analyzed in numerous cases in this circuit, and those cases generally require the presence of an unjustified delay, inexcusable conduct, or bad faith”), *rev’d in part on other grounds*, 2006 WL 2781591 (D. Colo. Sept. 26, 2006).

Here, Defendants are not guilty of either unjustifiable delay, inexcusable conduct, or bad faith in logging their privileged documents. Throughout the course of this litigation, Defendants have diligently worked to regularly produce detailed privilege logs consistent with the requirements of *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992). As the Court ruled more than a year ago, the privilege logs produced by Defendants here contain full explanations of the privileged status of the documents and are not mere simplistic listings of documents. Rather, these logs, nearing nearly 8000 entries, are highly detailed, with columns listing the name and title of each author and recipient, the subject matter of the document, the purpose for the document’s production,

and an explanation of the document's privilege.⁵ Further, Defendants' privilege logs have been drafted while Household also has had to contend with Plaintiffs' incessant spate of frivolous motions, new document demands (including three in the fall of 2006), more than 300 Requests for Admission and bad faith deficits in Plaintiffs' discovery compliance, necessitating repeated follow up with the Court. As stated above, many of the privileged documents at issue in Plaintiffs' motion to compel are from productions made in the past six months, which can hardly be considered proof of inexcusable delay given the other concurrent demands of this case. As for privileged documents that relate to earlier productions, mechanical error in generating lists of the privileged documents to be logged (the bulk of which were processed electronically), or human error caused by tired eyes skipping over certain entries while logging were to blame, not bad faith or inexcusable conduct. It also bears noting that the sheer volume and breadth of Plaintiffs' document demands — calling for virtually all documents regarding consumer lending practices, policies and results of a highly regulated company — necessarily yielded an unusually large number of privileged documents, which compounded the burden of creating accurate detailed logs accordingly. Plaintiffs suffer no harm from any "delay" in receiving this January 12, 2007 privilege log (which accounts for only two hundredths of one percent of Defendants' total production, which now nears almost five million pages). The privileged nature of these documents is not open to dispute; thus, Plaintiffs would not have had access to these documents in any event.⁶

⁵ In considering Plaintiffs' challenge to Defendants' privilege logs, the Court ruled that the logs were compliant "with the requirements of *Allendale*." See *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, No. 02-C-5893, slip op. at 13 (N.D. Ill. Dec. 9, 2005) (Nolan, M.J.).

⁶ Household has been scrupulous in evaluating the privileged nature of its documents. Household, in its logging process, reviewed its claims of privilege, and, in certain instances, decided to produce documents previously withheld as privileged. Plaintiffs quibble even with this act, and ask the Court to order defendants to provide the date of re-production of these documents. This would be an extremely time consuming and pointless exercise. Despite the fact that these documents have been produced to Plaintiffs already, and despite the fact that Defendants should not be subject to unnecessary work as a result of Plaintiffs' failure to properly maintain their documents, Defendants are more than willing to

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Finally, in support of their motion Plaintiffs again (as they have done in a prior unsuccessful motion to this Court seeking waiver of privilege due to delay) cite *Burlington Northern & Santa Fe Ry. v. United States District Court*, 408 F.3d 1142 (9th Cir. 2005) for the proposition that “filing a privilege log five months later [is] ‘alone’ sufficient to support a Court’s finding of waiver.” (Pl. Br. 5). However, in *Burlington*, the court explicitly rejected a *per se* rule that failure to provide a privilege log in a timely manner triggers a waiver of privilege. 408 F. 3d at 1147. Instead, *Burlington* holds that a court should take into account “the magnitude of the document production” in determining whether a waiver had occurred. *Id.* at 1149. Similarly, plaintiffs again rely on *Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 696 (M.D. Fla. 2005), which found waiver after a delay of three and a half months in providing a privilege log. However, as has been previously pointed out to Plaintiffs, that case involved only the “review and production of 13,000 pages of documents.” *Id.* at 695. The insubstantial, harassing nature of Plaintiffs current motion is highlighted by their reliance on *Burlington* and *Universal City*, notwithstanding the fact that this Court distinguished both cases in its December 6, 2006 opinion concerning Ernst & Young documents. See *Lawrence E. Jaffe Pension Plan*, No. 02-C-5893, slip op. at 19 (N.D. Ill. Dec. 6, 2006), and the discussion of this decision on page 3, above.

CONCLUSION

In light of the foregoing, Defendants respectfully request that the Court strike Plaintiffs’ motion to the compel production of privileged documents on the basis of Plaintiffs’ claim of a delay in logging by Defendants. In the event that this Court chooses not to strike Plaintiffs’ motion to compel as moot, Defendants respectfully request that Plaintiffs’ motion be denied.

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simply re-produce these documents to Plaintiffs if Plaintiffs certify that they cannot find these documents in their production.

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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