

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

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

ORDER

Plaintiffs have filed this securities fraud class action alleging that Defendants Household International, Inc., Household Finance Corporation, and certain individuals (collectively, "Household") engaged in predatory lending practices between July 30, 1999 and October 11, 2002 (the "Class Period"). Currently before the court are (1) Class' Motion to Compel Andrew Kahr Documents Improperly Withheld as Privileged or Destroyed by the Household Defendants, and (2) Plaintiffs' Motion to Unseal Exhibit Nos. 1-24 and 28-32, Filed with the Declaration of Azra Z. Mehdi in Support of the Class' Motion to Compel Andrew Kahr Documents. For the reasons set forth here, the motions are both denied.

BACKGROUND

Andrew Kahr was a founder of, and consultant for, Providian Financial Corp., a subprime lender that reportedly paid more than \$400 million to settle charges of unfair business practices in 2002. In 1999, Household CEO William Aldinger retained Mr. Kahr "to introduce opportunistic methods to accelerate the growth of U.S. Consumer Finance." Mr. Kahr apparently provided Household with a list of 60 potential consumer finance initiatives, 10 of which Household selected for "further review and potential immediate implementation." According to Household, very few of

Mr. Kahr's ideas were in fact implemented, and none were implemented in the form suggested by Mr. Kahr. (Def. Resp., at 1.)

During the course of discovery, Household produced "hundreds of pages of memoranda and other communications to and from Mr. Kahr." (*Id.* at 2.) Household claims that it withheld as privileged "[o]nly one small subset of Kahr-related documents [that were] created in the course of one particular assignment in which Mr. Kahr interfaced directly with Household's in-house counsel to assist them in providing legal advice to the Company regarding whether the Federal Parity Act (which had recently been enacted) did or did not preempt certain state consumer lending regulations or statutes." (*Id.*) Plaintiffs insist that the documents do not reflect communications between an attorney and client necessary to obtain legal advice. Plaintiffs also question the circumstances surrounding the apparent destruction of numerous Kahr documents in or around June 2002.

Defendants have submitted the 32 withheld Kahr documents for *in camera* inspection. The court has carefully reviewed each document and now enters the following rulings.

DISCUSSION

The attorney-client privilege provides that (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). The purpose of the privilege is to "encourage full disclosure and to facilitate open communication between attorneys and their clients." *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003).

A. Existing Kahr Documents

Plaintiffs argue that Mr. Kahr's role as an outside consultant to Household management is not sufficient to establish that his communications with Household's attorneys are protected by the attorney-client privilege. In support of this assertion, Plaintiffs cite *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515 (N.D. Ill. 1990), in which the court held that "the attorney-client privilege, as applied by the courts of Illinois, does not extend to communications with former employees of a client corporation now employed as 'litigation consultants.'" *Id.* at 518. *Barrett* is inapplicable, however, in that it was a diversity case involving the application of Illinois' "control group" test for the attorney-client privilege. *Id.* at 516-17. As this court has previously noted, the Supreme Court has soundly rejected the control group test in federal question cases such as the one at issue here. *Upjohn Co. v. United States*, 449 U.S. 383, 392-92 (1981) ("[T]he 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.") In addition, courts have construed *Barrett* narrowly, finding that the attorney-client privilege can extend to non-employee agents who communicate with attorneys on behalf of a corporate principal for the purpose of receiving legal advice. See, e.g., *Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 192 F.R.D. 263, 267 (N.D. Ill. 2000); *Trustmark Ins. Co. v. General & Cologne Life Re of America*, No. 00 C 1926, 2000 WL 1898518, at *5 (N.D. Ill. Dec. 20, 2000).

In this case, the court finds that Mr. Kahr was serving as an agent of Household management. He was hired by CEO Aldinger to give advice about consumer financing initiatives, and was working on behalf of the corporation at the time of the relevant communications. Cf. *United States v. Evans*, 113 F.3d 1457, 1462 (7th Cir. 1997) ("[T]he attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party who is not an agent of either the client or attorney.") Thus, disclosure to Mr. Kahr did not alone waive the attorney-client privilege.

Plaintiffs claim that the Kahr documents are nevertheless discoverable because Household's attorneys did not provide any legal advice. Rather, Plaintiffs argue, "[i]t is apparent that Household lawyers were merely conduits for the exchange of ideas that related to deceptive sales, marketing and training ideas promulgated by Mr. Kahr, and not because there was any legal advice being communicated." (Pl. Mot., at 9.) It is true that "a corporation cannot shield its business documents by routing them through an attorney." *B.F.G. of Illinois, Inc. v. Ameritech Corp.*, No. 99 C 4604, 2001 WL 1414468, at *6 (N.D. Ill. Nov. 13, 2001). Having reviewed the documents in question, however, the court concludes that they all relate to legal advice regarding the interpretation and application of the Federal Parity Act. In each document, Mr. Kahr is either requesting or receiving legal advice about whether proposed policies comply with federal and/or state laws.

Even assuming the communications relate to legal advice, Plaintiffs argue, Defendants cannot show that Mr. Kahr was necessary to the Company obtaining such advice. "[W]hen the third party is a professional, such as an accountant, capable of rendering advice independent of the lawyer's advice to the client, the claimant must show that the third party served some specialized purpose in facilitating the attorney-client communications and was essentially indispensable in that regard." (Pl. Mot., at 10 (quoting *Cellco P'ship v. Certain Underwriters at Lloyd's London*, No. Civ. A. 05-3158 (SRC), 2006 WL 1320067, at *2 (D.N.J. May 12, 2006).) To the extent that Mr. Kahr had specialized expertise in the area of consumer finance initiatives, the court is satisfied that Defendants have demonstrated the necessity of his services in this case. Indeed, Household limited dissemination to only a handful of individuals whose duties related to the document contents, and it is clear that Household intended all of the communications to remain confidential. "[W]hen a corporation provides a confidential document to certain specified . . . contractors with the admonition not to disseminate further its contents . . ., absent evidence to the contrary we may reasonably infer that the information was deemed necessary for the . . . contractors' work." *F.T.C.*

v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002). As the *GlaxoSmithKline* court explained, “we can imagine no useful purpose in having a court review the business judgment of each corporate official who deemed it necessary or desirable for a particular . . . contractor to have access to a corporate secret. It suffices instead that the corporation limited dissemination to specific individuals whose corporate duties relate generally to the contents of the documents.” *Id.* Thus, the documents in question are all protected by the attorney-client privilege.

B. Destroyed Kahr Documents

The court briefly addresses Plaintiffs’ additional concern that Defendants improperly destroyed Kahr documents after the start of this litigation. Plaintiffs direct the court to a June 24, 2002 email from Household Chief Information Officer Ken Harvey to William Aldinger, David Schoenholz, and attorney Ken Robin, with the subject line “Kahr Memos”:

We will be deleting 620 emails from over 90 employee mailboxes shortly. Most of these were forwarded internally after being received.

We will also block all incoming memos from that e-mail account. Mr. Kahr could still send e-mail from another account should he figure out that he is blocked.

We have created a database containing all these notes and will work with Ken Robin on the disposition.

(Ex. 27 to Pl. Mot.) Ken Robin responded to this email four days later, stating: “I think you should send out a note on disposing of all memos.” (*Id.*) Plaintiffs argue that these email exchanges demonstrate that Household improperly destroyed Kahr documents. (Pl. Mot., at 12-13.)

Defendants respond that they “have no reason to believe that any Kahr-related documents were destroyed after the start of this litigation” on August 19, 2002. (Def. Resp., at 4.) Plaintiffs claim that as of June 24, 2002, Defendants knew about threatened litigation from the state attorneys general. Plaintiffs are correct that “[a] party has a duty to preserve evidence, including any relevant evidence over which the party has control and reasonably knew or could reasonably foresee was material to a potential legal action.” *Krumwiede v. Brighton Associates, L.L.C.*, No. 05

C 3003, 2006 WL 1308629, at *8 (N.D. Ill. May 8, 2006). Plaintiffs' evidence in this regard, however, is not sufficient to establish all of the elements required to justify an adverse inference.

"A prerequisite to the imposition of sanctions for spoliation is a determination that the party, which destroyed the documents, had an obligation to preserve them." *Cohn v. Taco Bell Corp.*, No. 92 C 5852, 1995 WL 519968, at *5 (N.D. Ill. Aug. 30, 1995). To find an adverse inference, moreover, the court must find that the documents were destroyed in "bad faith," meaning destroyed "for the purpose of hiding adverse information." *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998). A party's "destruction or inability to produce a document, standing alone, does not warrant an inference that the document, if produced, would have contained information adverse to [the party's] case." *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002).

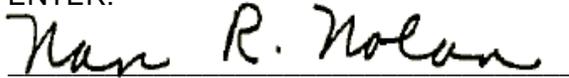
On the current record, the court is unable to determine whether Plaintiffs are entitled to an adverse inference in this case based on the destruction of Kahr-related documents. Plaintiffs' motion is thus denied.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Compel Andrew Kahr Documents Improperly Withheld as Privileged or Destroyed by the Household Defendants [Doc. 895], and Plaintiffs' Motion to Unseal Exhibit Nos. 1-24 and 28-32, Filed with the Declaration of Azra Z. Mehdi in Support of the Class' Motion to Compel Andrew Kahr Documents [Doc. 898] are both denied.

Dated: January 25, 2007

ENTER:



NAN R. NOLAN

United States Magistrate Judge