

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	Nan R. Nolan
CASE NUMBER	02 C 5893	DATE	01/30/07
CASE TITLE	Jaffe vs. Household Intl Inc, et al		

DOCKET ENTRY TEXT

For the reasons stated below, 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 [Doc. 885] is denied.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

In this latest motion, Plaintiffs urge the court to find that Defendants have waived the attorney-client and work product privileges as to hundreds of documents that Defendants did not timely identify on a privilege log. Specifically, Plaintiffs claim that there are (1) 870 documents that Defendants withheld or produced in redacted form but did not list on a privilege log “years after their production”; (2) 247 documents that Defendants improperly omitted, withheld, or produced in redacted form due to non-responsiveness; and (3) 438 documents that Defendants claimed to have produced but which Plaintiffs did not receive. (Pl. Mot., at 1.) Defendants insist that as of January 12, 2007, they have produced privilege logs for all such documents. They note that many of the documents at issue are from productions made within the past six months, and that the failure to log certain entries earlier was the result of mechanical and/or human error as opposed to bad faith or neglect. (Def. Resp., at 4-5.)

In support of their waiver argument, Plaintiffs again direct the court to *Burlington Northern & Santa Fe Ry. Co. v. United States Dist. Court*, 408 F.3d 1142 (9th Cir. 2005), in which the Ninth Circuit upheld the lower court’s finding of waiver where a privilege log “not only was not filed during the Rule 34 time limit [30 days], but was filed *five months* later,” and there were no mitigating considerations. *Id.* at 1149. The Ninth Circuit rejected, however, a *per se* waiver rule in favor of “using the 30-day period as a default guideline” in making a “case-by-case determination.” *Id.* Here, Defendants have produced nearly five million pages of documents and have provided Plaintiffs with privilege logs on a rolling basis. *Cf. Universal City Dev. Partners, Ltd. v. Ride & Show Eng’g, Inc.*, 230 F.R.D. 688, 695-96 (M.D. Fla. 2005) (privilege waived due to three and a half month delay in providing a privilege log where case involved “review and production of 13,000 pages of documents.”) With the January 12, 2007 log, moreover, Defendants have now accounted for all outstanding documents.

Plaintiffs have not demonstrated that they will suffer or have suffered any prejudice from the delay in receiving complete privilege logs. Plaintiffs argue that they have taken some 15 depositions “without the benefit

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of these documents.” (Pl. Mot., at 6.) To the extent the documents are privileged, however, Plaintiffs would not have been able to use them in any event.

Defendants do not directly address Plaintiffs’ arguments regarding documents withheld or redacted as “non-responsive,” and it is not clear from the briefs whether these documents are also privileged. To the extent they are privileged, Plaintiffs’ motion is denied. As for non-privileged documents, most of Plaintiffs’ cited cases preclude a party from withholding documents on relevance grounds and do not address whether a party must produce materials that are not requested. *See, e.g., McCurdy v. Wedgewood Capital Mgmt. Co.*, No. Civ. A. 97-4304, 1998 WL 961897, at *3 (E.D. Pa. Dec. 31, 1998) (defendant could not redact certain information from document production “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 Atlantic Financial Fed. Sec. Litig.*, Civ. A. No. 89-0645, 1991 WL 153075, at *3 (E.D. Pa. Aug. 6, 1991) (“Given that relevancy is broadly construed for discovery purposes, . . . and that plaintiffs have indicated the possibility of additional relevant information within the redacted documents, it is within this Court’s discretion to order the documents produced in unredacted form.”)

With respect to documents withheld in their entirety due to non-responsiveness, the court agrees that they need not be produced. Redacted documents are more problematic in that there is a concern that the redacted information is truly responsive, or that the redactions “delete meaningful context for the information that is provided.” *Nauman v. Abbott Labs.*, No. 04 C 7199, 2006 WL 1005959, at *8 (N.D. Ill. Apr. 12, 2006). *See also In re Medeva Sec. Litig.*, No. 93-4376-KN AJWX, 1995 WL 943468, at *3 (C.D. Cal. May 30, 1995) (“The Court does not welcome unilateral editing of documents by the producing party.”); *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1165 (W.D. Wash. 1986) (“[D]isclosure of some possibly irrelevant material will cause no harm. In contrast, partial disclosure may tend to distort the tenor of the reports.”) The parties are ordered to meet and confer to resolve any disputes regarding redacted documents that are not otherwise privileged. Plaintiffs’ motion is denied without prejudice to renewal as to any few, specific documents still at issue. The court cautions that it will not consider any motion covering what it deems to be an unreasonable number of documents at this late stage of litigation.

As for documents that Defendants re-produced to Plaintiffs but that Plaintiffs cannot locate, the court accepts Defendants’ offer to “simply re-produce these documents to Plaintiffs if Plaintiffs certify that they cannot find these documents in their production.” (Def. Resp., at 5-6 n.6.) Given the magnitude of the production in this case, the court declines to find that Defendants waived the privilege due to a delay in submitting complete privilege logs.