IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ILLINOIS COMPUTER RESEARCH, LLC, *Plaintiff and Counterclaim Defendant,* *v.* **FISH & RICHARDSON P.C.,** *Defendant, Counterclaimant and Third-Party Plaintiff,* *v.* **SCOTT C. HARRIS,** *Third-Party Defendant and Counterclaimant,* *v.* **FISH & RICHARDSON P.C.,** *Defendant, Counterclaimant, Third-Party Plaintiff and Counterclaim Defendant.*	No. 07 C 5081 **Submitted Under Seal** Judge Rebecca R. Pallmeyer Magistrate Judge Maria Valdez

FISH & RICHARDSON P.C.'S MEMORANDUM OF LAW
IN OPPOSITION TO MR. HARRIS'S MOTION FOR A PROTECTIVE ORDER

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Introduction

Mr. Harris's motion asks the Court to adopt three remarkable propositions, none supported in law.

First, Mr. Harris asks the Court to enter a sweeping protective order applicable to *all* email communications between himself, "the Niro firm," and unspecified "other attorneys," without regard to the specific content and circumstances of any particular email. (*See* Dkt. No. 72, Harris Mot. at 1.) The Seventh Circuit has expressly rejected this "blanket" approach to issues of privilege. It is Mr. Harris's burden to prove on a document-by-document basis that every email he claims as privileged actually meets the legal and factual requirements for that status. By failing to provide the Court with that showing for any particular communication, Mr. Harris has failed to meet his burden and the Court should deny the motion for this reason alone.

Second, Mr. Harris asks the Court to find that the emails at issue were kept "confidential" from Fish & Richardson such that privilege may apply despite the fact that he sent and received all of the emails: (i) through his Fish & Richardson email account, (ii) using Fish & Richardson computers, (iii) over the Fish & Richardson email server, and (iv) subject to express workplace policies allowing Fish & Richardson to monitor and review his email. Given those facts, there is no legal basis to find that these emails were confidential. Indeed, Mr. Harris is unable to cite a *single case* upholding an assertion of privilege over email sent and received in a work-issued email account. On the other hand, multiple authorities—including the Seventh Circuit—have rejected claims of privilege or a reasonable expectation of privacy on analogous facts.

Third, Mr. Harris asks the Court to find that an attorney who breaches his fiduciary duties by engaging in unauthorized transactions involving lawyers at another firm can shield the evidence of that conduct by claiming privilege. Under the principles of the "crime-fraud"

doctrine and by virtue of his fiduciary duties, however, Mr. Harris may not hide communications undertaken in furtherance of his wrongful scheme merely by asserting the privilege. For each independent reason, the Court should deny Mr. Harris's motion.

Facts

A. Fish & Richardson's Technology Policies.

Fish & Richardson, like many other employers and organizations, maintains polices regarding the use of work-provided email accounts and computers. Mr. Harris expressly agreed to obey the Firm's policies, pledging that he would "abide by all policies, guidelines and procedures of the Corporation." (Employment Agreement, § 4(a), Ex. B to Dkt. No. 69, Harris Mot. to Compel.)

Under those policies, Fish & Richardson expressly reserves the right to review the email and Internet usage of its principals and employees when using the Firm's computers and network. Fish & Richardson has announced that rule in multiple policies distributed throughout the Firm. (*See* Ex. A, Smith Decl. ¶¶ 3-5.) For example, one of the Fish & Richardson policies in effect during the relevant time, the "Firm Confidentiality Policies and Procedures," provided:

> The computer systems and contents thereof are the property of Fish & Richardson P.C. ***All matters stored in the computers or on the network, and all communications on the system are subject to review and copying by Fish & Richardson P.C.*** Do not put anything on the system of such a personal nature that you would not want your employer to see it.

(*See* Ex. 1 to Smith Decl. at 3, emphasis added.)

Similarly, the Firm's "Employee Internet & E-Mail Policy" provided:

> ***Fish & Richardson P.C. reserves the right, at its discretion, to view, capture and use Internet and/or E-Mail correspondence, personal file directories and other information stored on its computers as it deems necessary for business-related purposes*** including, but not limited to, operational, maintenance, ***auditing, security and investigative activities*** and to comply with subpoenas and orders of courts and administrative agencies.

(*See* Ex. 2 to Smith Decl. at III, emphasis added.)

Fish & Richardson's email and confidentiality policies are posted on the Fish & Richardson computer system for all Firm personnel to review. (Smith Decl. ¶ 4.) Every Firm computer connected to the Fish & Richardson network has access to an internal Firm webpage or "intranet" called "Fishnet" that displays as the default page when Fish & Richardson personnel open a web browser. (*Id.*) The policies quoted above were displayed and accessible to all personnel on Fishnet. (*Id.*)

In addition, Fish & Richardson periodically circulates the policies to all Firm personnel. For example, in March 2005 (while Mr. Harris was at Fish & Richardson), Fish & Richardson distributed the Firm confidentiality policy to all personnel by email. (*Id.* ¶ 3 & Ex. 3 thereto.)

B. Fish & Richardson's Investigation of Mr. Harris.

Mr. Harris purported to sell patents to various parties that sued Fish & Richardson clients while Mr. Harris was still a Fish & Richardson principal. One of those transactions resulted in the instant litigation, initially a case against Fish & Richardson's client Google.

When Fish & Richardson learned of the Google lawsuit, it undertook an internal review of Mr. Harris's conduct to determine, among other things, whether Mr. Harris had engaged in misconduct and whether Fish & Richardson needed to take steps to protect its clients.

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Argument

I. Mr. Harris Fails To Meet His Threshold Burden To Show That Privilege Applies.

The standard applicable to Mr. Harris's motion is clear: "[a] claim of privilege must be made and sustained on a question-by-question or document-by-document basis; ***a blanket claim of privilege is unacceptable.***" *U.S. v. Lawless,* 709 F.2d 485, 487 (7th Cir. 1983) (emphasis added); *see also Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992). Rather than a "blanket" approach, a party asserting a claim of privilege must establish each specific element of the privilege for each communication at issue. *U.S. v. White*, 950 F.2d 426, 430 (7th Cir. 1991); *Christman v. Brauvin Realty Advisors, Inc.*, 185 F.R.D. 251, 255 (N.D. Ill. 1999). "[M]ere conclusory statements will not suffice." *ConAgra, Inc. v. Arkwright Mut. Ins. Co.*, 32 F. Supp. 2d 1015, 1017 (N.D. Ill. 1999). Likewise, a party seeking a protective order has the burden of showing that "good cause" exists for the order "by a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Flanagan v. Allstate Ins. Co.*, 2007 WL 2317178, at *3 (N.D. Ill. July 20, 2007) (attached as Ex. C).

Mr. Harris does not even attempt to meet those burdens. Rather, Mr. Harris asks for a sweeping protective order applicable to *all* emails exchanged between himself, the Niro firm, and some unidentified "other attorneys." (*See* Dkt. No. 72, Harris Mot. at 1.) This is precisely the "blanket" approach rejected by the Seventh Circuit as "unacceptable." *Lawless*, 709 F.2d at 487. For good reason—it is axiomatic that "[a] communication is not privileged simply because it is made by or to a person who happens to be a lawyer." *U.S. v. Evans*, 113 F.3d 1457, 1463 (7th Cir. 1997) (internal citations omitted). More is required, yet Mr. Harris provides the Court with no showing on multiple key elements required to establish the privilege. For example:

Does the content of the email reflect legal advice? The attorney-client privilege applies only to communications where legal advice is sought or rendered. *E.g.*, *White*, 950 F.2d at 430. If a communication is undertaken for some other purpose—for example, "business advice" or to discuss financial arrangements—it does not come within the privilege. *Christman*, 185 F.R.D. at 255. Mr. Harris, however, provides the Court with no way to determine whether any of the emails he seeks to protect actually reflect legal advice or rather show mere business dealings in which Mr. Harris sought to exploit patents to the detriment of Fish & Richardson's clients.

Was there an attorney-client relationship? The attorney-client privilege also "extends only to communications between a client and a professional legal advisor '*in his capacity as such*.'" *Evans*, 113 F.3d at 1463 (emphasis in original). Here, however, Mr. Harris seeks a protective order governing all of his email with unidentified "other attorneys" without any suggestion that Mr. Harris was actually a *client* of these unnamed lawyers. For example, one of the email exchanges that Mr. Harris apparently seeks to protect is a communication between himself and a lawyer at Foley & Lardner. (*See* Dkt. No. 75, Harris Reply at 3.) But Mr. Harris has nowhere claimed (or proved) an attorney-client relationship with that firm—much less any additional unnamed "other attorneys."

Did the communication include third parties? The presence of a third party in an otherwise privileged communication defeats the privilege. *Evans*, 113 F.3d at 1462. Mr. Harris, however, provides the Court with no information as to who was privy to the emails he seeks to protect. In the emails that Fish & Richardson has reviewed, there are multiple parties "cc:ed" on several of the communications whose affiliation with Mr. Harris is unclear.

The above factors are not exhaustive, but amply demonstrate why a "blanket" protective order like the one that Mr. Harris seeks is not permitted in the Seventh Circuit. *Lawless*, 709

F.2d at 487. An order shielding *all* of Mr. Harris's email communications with *any* lawyer—without regard to the contents or circumstances of the email—would be overbroad and impermissible under that standard. And because Mr. Harris has failed to supply the Court with the information necessary to undertake the required analysis, there is no basis for any narrower order. Mr. Harris has failed to meet his burden.

II. Mr. Harris's Emails Were Not Confidential.

Even if Mr. Harris attempted to meet his threshold burden, that effort would fail because the emails were not kept confidential from Fish & Richardson, as required for Mr. Harris's assertion of privilege. *White*, 750 F.2d at 930. As Mr. Harris used his Fish & Richardson email account to send and receive the emails, transmitted the emails over the Fish & Richardson email server, and was subject to workplace policies making clear that Fish & Richardson could review the email, no confidentiality could apply.[1]

As shown below, uniform authorities from the Seventh Circuit and multiple other jurisdictions reject claims of privilege or a right to privacy in cases with similar circumstances to this one—Mr. Harris does not cite (and counsel has not located) a *single case* from any jurisdiction upholding a claim of privilege in email sent through a workplace account. (*See* § A, below.) None of Mr. Harris's cases holds otherwise, and his suggestion that California law supports his position is incorrect. (§ B.) Mr. Harris's effort to evade the Fish & Richardson email policy by claiming that he did not know about it also fails. (§ C.)

A. The Authorities Uniformly Reject Mr. Harris's Assertion Of Privilege.

In the circumstances applicable to this case, courts have uniformly rejected claims of privilege in workplace email. The controlling case in the Seventh Circuit is *Muick v. Glenayre*

[1] Because Mr. Harris's motion is limited to the subject of email, Fish & Richardson similarly limits its response brief, but does not waive and expressly reserves any other discovery rights it may have regarding other electronic and non-electronic materials.

Elec., 280 F.3d 741, 743 (7th Cir. 2002). There, the court considered whether an employee had a reasonable expectation of privacy (analogous to the confidentiality required for privilege) in files stored on his work-issued computer. *Id.* at 742. As in this case, the employer "had announced that it could inspect the laptops that it furnished" to its employees. *Id.* at 743. On those facts, Judge Posner held that the employee could have no "right to privacy in the computer," because the employer's announced policy had "destroyed" any expectation of privacy. *Id.*

Though *Muick* is a Fourth Amendment case, its analysis has been adopted by multiple courts considering privilege assertions. Indeed, Mr. Harris's own authorities state that Fourth Amendment cases, specifically including *Muick*, are "analogous" and "offer guidance" to courts analyzing the attorney-client privilege. *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 256 (S.D.N.Y. 2005) (cited in Dkt. No. 72, Harris Mot. at 6-7). Likewise, in *Sims v. Lakeside School,* 2007 WL 2745367, at *1 (W.D. Wash. Sept. 20, 2007) (Ex. D), the district court expressly relied on *Muick* in finding that the attorney-client privilege does not apply to "emails [the employee] sent and received using [the employer's] accounts." *Id.* (cited in Dkt. No. 72, Harris Mot. at 3-4).

Multiple other courts have reached the same conclusion. For example, in *Scott v. Beth Israel Med. Ctr. Inc.*, 2007 WL 3053351 (N.Y. Sup. Ct. Oct. 17, 2007) (Ex. E), the court rejected a claim of privilege applicable to emails the plaintiff doctor sent to his attorney through an email system supplied by the defendant hospital. *Id.* at *1-5. Like Fish & Richardson, the hospital had announced a policy allowing the hospital to monitor and review materials on the hospital's computer system. *Id.* at *2. On that basis, the court denied the doctor's motion for a protective order, finding that the emails were not privileged because messages sent over the hospital's email system were not kept confidential from the hospital. *Id* at *4; *see also Long v. Marubeni*

Am. Corp., 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (Ex. F) (rejecting claim of privilege related to emails created on employer-issued computer).

Likewise, in *Kaufman v. SunGard Inv. Sys.*, 2006 WL 1307882 (D.N.J. May 10, 2006) (Ex. G), the court rejected a claim of privilege over email sent and received using the plaintiff employee's work-issued laptop computer. *Id.* at *4. As here, the defendant employer had a technology policy expressly reserving the right to monitor and inspect computer and email usage. *Id.* Based solely on that internal policy, the court affirmed the magistrate judge's ruling that the emails were not made in confidence, and thus were not privileged. *Id.*

Further, in *Sims* the court similarly rejected a privilege claim related to email sent with a work-issued laptop. 2007 WL 2745367, at *1-2. The employer in that case, a school, had announced a policy allowing the school to inspect the computer systems it furnished. *Id.* at *1. Citing *Muick*, the court held that the plaintiff "ha[d] no reasonable expectation of privacy in the contents of the laptop that was furnished by [the school], *including emails he sent and received on his [school-issued] account.*" *Id.* at *1-2 (emphasis added).[2]

The same analysis as in each of those cases applies here. As in *Scott*, *Kaufman*, and *Sims*, it is undisputed that Mr. Harris used his Fish & Richardson email account and the Fish & Richardson email server to send and receive the emails at issue. (*See* Volz Decl. ¶¶ 1-2.) And as in each case above, including *Muick*, it is also undisputed that Fish & Richardson had announced policies expressly permitting Fish & Richardson to monitor and review electronic files on its system. (Smith Decl. ¶¶ 3-5.) Thus, as matter of law and consistent with the weight of authority

[2] Although the Court excluded from this analysis certain emails the plaintiff sent to his wife on a *private* email account and certain non-email documents the plaintiff created for counsel, those items were not sent via the work-issued email account and therefore do not support Harris's motion. *Id.* at *1.

cited above, Mr. Harris's emails were not sent or received "in confidence," as required for his assertion of privilege. His motion should be denied.

B. Mr. Harris Cites No Case Supporting His Position.

Mr. Harris attempts to avoid the above uniform authority by citing several cases, none of which actually supports his motion. Mr. Harris also suggests a conflict of law, but there is no conflict because Mr. Harris's motion fails under the law of every relevant jurisdiction.

1. No Authority Supports Mr. Harris's Motion.

Of the seven cases that Mr. Harris cites in support of his assertion of privilege (Dkt. No. 72, Harris Mot. at 3-7), *none* actually supports a claim that email sent through a work-issued email account and subject to a policy allowing employer inspection is confidential such that privilege may apply. Three of Mr. Harris's seven cases do not even address work email at all, but rather concern non-analogous circumstances such as papers locked in desks or file cabinets, or emails sent at home through *private* email accounts such as America Online.[3] Those factual circumstances are plainly inapposite to the situation where, as here, a person voluntarily transmits communications he allegedly wishes to keep secret from his employer over his employer's own email server and subject to a policy allowing employer inspection. (*See* Smith Decl. ¶¶ 3-5.)

Of the remaining four cases cited by Mr. Harris, one actually *rejects* a claim of privilege regarding emails sent over a work-supplied account. *Sims*, 2007 WL 2745367, at *1. Another, *Bedwell v. Fish & Richardson P.C.*, discusses neither the attorney-client privilege nor the reasonable expectation of privacy, and also finds in Fish & Richardson's favor—holding that the

[3] *See O'Connor v. Ortega*, 480 U.S. 709 (1987) (regarding privacy in employee's desk and file cabinets); *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (regarding privacy in hidden computer files (not email), where employer never announced it could search company computers); *Curto v. Med. World Commc'ns, Inc.*, 2006 WL 1318387 (E.D.N.Y. May 15, 2006) (Ex. I) (regarding emails sent and received at the employee's home, using the employee's *personal* America Online email account).

Firm had an ownership interest in an employee's emails that implicated the Firm's business interests. 2007 WL 4258323, at *1 (S.D. Cal. Dec. 3, 2007) (Ex. J). The third case, *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (S.D.N.Y. 2005), did not reach any conclusion regarding whether the emails at issue were privileged because it was unclear whether the employer actually had a technology policy, unlike Fish & Richardson. *Id.* at 259.

Mr. Harris's remaining case, *People v. Jiang*, 2005 Cal. App. LEXIS 1095 (Cal. App. Ct. June 16, 2005) (Ex. K), has been expressly de-published by the California courts and is grossly off-point. *Jiang* did not concern email, but rather found that privilege applied to files stored on a computer in a special folder expressly marked "Attorney." *Id.* at *39-41. Each file was password protected and inaccessible without the password. *Id.* at *41. The documents were *never* transmitted over the employer's email server. *Id.* at *41 n.13. Moreover, though a company technology policy applied to use of the computer, the policy did not "mention anything about [the employer] copying or disclosing the contents of the computer." *Id.* at *51.

The *Jiang* case thus has nothing to do with the facts of this case:

- None of the *Jiang* documents were sent by workplace email. All of Mr. Harris's emails were sent and received through the Fish & Richardson email system. *Compare* 2005 Cal. App. LEXIS 1095, at *41 n.13 and *52 n.16, *with* Volz Decl. ¶ 1.

- All of the *Jiang* documents were specially segregated and password-protected in an electronic folder expressly marked "Attorney."

  2005 Cal. App. LEXIS 1095, at *41 REDACTED PURSUANT TO STIPULATED PROTECTIVE ORDER

- The court in *Jiang* found that the employer's technology policy did not authorize "copying or disclosing" the files. Fish & Richardson has express policies making clear that it "*reserves the right, at its discretion, to view, capture and use Internet and/or E-Mail correspondence*[.]" *Compare* 2005 Cal. App. LEXIS 1095, at *51 *with* Ex. 2 to Smith Decl. at III.

In all events, the *Jiang* case was expressly "de-published" by the California Supreme Court and cannot be cited or relied upon.[4]

Mr. Harris also argues that his emails were "statutorily protected," under California Evidence Code § 917(b). (Dkt. No. 72, Harris Mot. at 4.) Mr. Harris, however, misreads that statute, which states only that a communication "does not lose its privileged character for the *sole reason* that it is communicated by electronic means." Cal. Evid. Code § 917 (emphasis added). That provision, however, does not negate the requirement that any privileged communication (electronic or otherwise) must be *confidential*. Mr. Harris's communications lost any privileged status, not for the "sole reason" that they were transmitted via email, but because the emails themselves were not confidential. For the same reasons, a recent decision rejected the very same argument regarding Section 917(b). *See Scott*, 2007 WL 3053351, at *3-4 (discussing § 917(b) and examining the New York statute on which it is based).

2. Mr. Harris's claimed conflict of law does not support his motion.

Mr. Harris nonetheless suggests a conflict of law and argues that California law controls his motion. (*See* Dkt. No. 75, Harris Reply at 2.) Mr. Harris is mistaken.

There is no conflict because *every* court to have ruled on the issue has held that email sent via a work-issued account, over the workplace email server, and subject to a policy allowing employer monitoring, is not privileged. The *Jiang* case—the *only* California privilege decision that Mr. Harris cites—is inapposite as shown above, and has been expressly "de-published" by the California Supreme Court. Mr. Harris cannot create a conflict where none exists.

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[4] *See People v. Jiang*, 2005 Cal. LEXIS 11250 (Cal. Sept. 28, 2005) (ordering de-publication) (attached as Ex. L.). Courts in this District have held that unpublished cases from the California Court of Appeals may not be considered "even for their persuasive value." *Minuteman Intern., Inc. v. Great Am. Ins. Co.*, 2004 WL 603482, at *5 n.2 (N.D. Ill. Mar. 22, 2004) (Ex. M).

Even under an (unnecessary) choice-of-law analysis, Mr. Harris's motion fails. Federal Rule of Evidence 501 provides that the federal common law of privilege will typically apply in federal cases, unless "State law supplies the rule of decision" with respect to the issues in the case. Fed. R. Evid. 501. Where a case involves a mix of federal and state legal issues, the federal rule applies because it would be impracticable to apply different rules of privilege to the same communications. *E.g.*, *Mem'l Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981) (applying federal rule where both federal and state issues were present, because it would be "meaningless" to apply two different rules); *Hancock v. Hobbs*, 967 F.2d 462, 466-67 (11th Cir. 1992) ("federal law of privilege governs even where the evidence sought might be relevant to a pendent state claim").

Thus, as here, where Mr. Harris's communications are likely relevant to multiple issues—both under federal law (such as whether the federal common law "bona fide purchaser" rule applies to Mr. Harris's patent sales[5]) and state law (such as Mr. Harris's breach of his fiduciary duties), the federal law of privilege applies. The federal common law—exemplified by the Seventh Circuit's decision in *Muick*—firmly rejects Mr. Harris's position. *E.g.*, *Muick*, 280 F.3d at 742; *see also Sims*, 2007 WL 2745367, at *1.

The same result would apply even if the Court looked to state law. Under the relevant choice-of-law rules, the Court would look to the law of *both* Illinois and California and apply the law that *least* supported Harris's claim of privilege.[6] Though counsel has located no Illinois or

[5] Mr. Harris has asserted that Niro-represented entities like ICR were "bona fide purchasers" of the patents (Ex. N, 09/24/07 D. Sheikh Ltr. ¶ 2), a status that depends on federal common law. *E.g., Rhone-Poulenc Agro v. DeKalb Genetics Corp.*, 284 F.3d 1323, 1328 (Fed. Cir. 2002). Communications at issue in the motion go to that issue. In all events, Mr. Harris has admitted that Fish & Richardson's claims arise under the federal patent statutes. (*E.g.*, Dkt No. 28, Harris Answer ¶ 13.)

[6] Under Rule 501, if the Court looks to state law, it first applies the choice-of-law principles applicable in the forum state, in this case, Illinois. *E.g.*, *Tucker v. Steele & Assoc.*, 1994 WL 127246 (N.D. Ill. Apr. 12, 1994) (Ex. O). Illinois courts apply Section 139 of the Restatement (Second) of Conflicts to determine

California case that has expressly addressed a claim of privilege regarding email sent via a work-issued account, the law of both states requires "confidentiality" of communication in order to preserve the privilege. *E.g.*, *2,022 Ranch, LLC v. Super. Ct.*, 113 Cal. App. 4th 1377, 1388 (Cal. Ct. App. 2003); *Consol. Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 120 (1982). As shown, every court applying the same "confidentiality" requirement has rejected privilege claims related to email sent through a workplace email account and subject to a policy allowing review. *E.g.*, *Scott*, 2007 WL 3053351; *Kauffman*, 2006 WL 1307882; *Sims*, 2007 WL 2745367. Mr. Harris cites no contrary authority. There is thus every reason to conclude that courts applying Illinois or California law would reach the same conclusion. In any jurisdiction, Mr. Harris's motion fails.

C. Mr. Harris's Attempt To Evade Fish & Richardson's Policies Is Unavailing.

Mr. Harris's only remaining argument is a self-serving claim that he was unfamiliar with the Fish & Richardson policies governing his use of the Firm's email system and other technology. (*See* Dkt. No. 72, Harris Mot. at 3.) Mr. Harris cannot so easily avoid the policies. The undisputed evidence shows that Fish & Richardson's policies were announced and widely distributed within the Firm through the Firm's internal web-site or "intranet." (Smith Decl. ¶¶ 3-5.) Precisely that type of distribution has been held to provide sufficient notice of workplace email policies. *See Scott*, 2007 WL 3053351, at *5; *see also Garrity v. John Hancock Mut. Life Ins. Co.*, 2002 WL 974676, at *1 (D. Mass. May 7, 2002) (Ex. P).

Moreover, Mr. Harris had constructive notice of Fish & Richardson's email policies, even if he now disclaims actual knowledge. Mr. Harris expressly agreed to "abide by all

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which state's privilege laws apply. *E.g.*, *Sterling Fin. Mgmt., LP v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 903-904 (Ill. App. Ct. 2002). Section 139 of the Restatement, in turn, directs the court to assess the privilege rules of *both* the forum state (Illinois) and the state with the most contacts to the communication (Harris argues California) and apply the rule that favors the *greater* disclosure. *Id.* at 904-5.

policies, guidelines and procedures of the Corporation." (Employment Agreement, § 4(a), Ex. B to Dkt. No. 69, Harris Mot. to Compel.) Having so pledged, Mr. Harris cannot evade the Firm's policies merely by asserting that he did not know about them. *E.g.*, *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999) (constructive knowledge applies where reading and complying with an employer's policies are a condition of employment). Indeed, in *Scott*, the court expressly rejected a similar argument, finding constructive notice by virtue of the plaintiff's position within the organization. *Scott*, 2007 WL 3053351, at *5.[7]

III. Mr. Harris Cannot Shield His Breach of Fiduciary Duty With A Claim of Privilege.

Mr. Harris's motion fails for the additional reason that Mr. Harris is seeking to use the attorney-client privilege to shield evidence of his own misconduct and breach of fiduciary duties. The privilege is waived in those circumstances.

It is well-settled that principals and partners owe one another a fiduciary duty of the "utmost good faith and loyalty," *Meehan v. Shaughnessy*, 404 Mass. 419, 433-34 (1989), including a duty to disclose to their partners any self-interested dealings in which they were participating, *e.g.*, *Peskin v. Deutsch*, 134 Ill. App. 3d 48, 53-54 (1st Dist. 1985).

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[7] The *Scott* court also rejected a related argument similar to one Harris makes—that he was unaware of Fish & Richardson previously enforcing its email policy—finding that even if an employer did not review emails previously, the emails were nonetheless subject to review because the employer "retained the right to do so in the email policy." *Scott*, 2007 WL 3053351, at *4. In all events, Mr. Harris's argument is incorrect.

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Mr. Harris may not shield this evidence of his misconduct merely by invoking the attorney-client privilege.

The principles of the "crime-fraud exception" operate "as a waiver of the protections of the attorney-client and work-product privileges where the communications operated to further a crime or fraud." *Blanchard v. EdgeMark Fin. Corp.*, 192 F.R.D. 233, 241 (N.D. Ill. 2000). As the court noted in *Blanchard*, however, "the term 'crime-fraud' is a bit of a misnomer" because courts have applied the exception to a lawyer's unprofessional or unethical behavior, intentional torts, and sanctionable conduct. *Id.* (collecting cases). Indeed, the policy underlying the exception is that "it would be perverse to allow a lawyer to claim an evidentiary privilege to prevent disclosure of work product generated by *those very activities the privilege was meant to prevent*." *Blanchard*, 192 F.R.D. at 241 (internal citation omitted). Mr. Harris's motion, which seeks to hide communications he undertook to further his breach of fiduciary duties, runs afoul of those principles.[8] For this reason also, the Court should deny Mr. Harris's motion.

Conclusion

For the foregoing reasons, the Court should enter an order denying Mr. Harris's Motion for a Protective Order Regarding Privileged Email and grant any further relief as this Court deems just.

[8] Fish & Richardson previously briefed its crime-fraud argument in its Reply in Support of Its Motion to Compel and Memorandum of Law in Opposition to Harris's Cross-Motion to Compel (at 9-10).

Dated: January 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed with the Court by means of the Court's CM/ECF system, which will send notification of such filing to the following counsel at their email address on file with the Court:

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