UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

THE CLASS' MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 27, 2007 ORDER

I. INTRODUCTION

The Class respectfully moves the Court for reconsideration of its February 27, 2007 Order (Dkt. No. 999).[1] A motion for reconsideration is appropriate here because the Court relied on erroneous facts in reaching its conclusion that Household need not produce attorney-client privileged documents relating to the Ernst & Young LLP ("E&Y") July 1, 2002 compliance engagement ("Compliance Engagement") that were created after the Class Period. Evidence in the record clearly showed that documents pertaining to the E&Y engagement were created after the Class Period. Further, defendants did not dispute the Class' showing that the Class and Household's management had a mutuality of interest at the time the subject communications were made. Defendants thus waived any argument that the fiduciary exception under *Garner* does not extend past October 11, 2002. Finally, defendants raised the same argument before Judge Guzman, who rejected it.

The Court also relied on erroneous facts when it concluded that there is no reason to doubt that Household and/or its lawyers were aware prior to February 2007 that Household had in its possession 425 boxes of work papers from the Compliance Engagement which were never disclosed to the Class. The record demonstrates that Household requested the return of these documents in 2004, and has known it had these documents throughout discovery in this action.

Finally, it appears the Court inadvertently precluded the Class from submitting rebuttal reports in the revised expert discovery schedule. For these reasons, the Court should grant the Class' motion and reconsider its February 27, 2007 Order.

II. ARGUMENT

A. Standard on a Motion for Reconsideration

A motion for reconsideration is appropriate where "(1) the court has patently misunderstood a party; (2) the court has made a decision outside the adversarial issues presented to the court by the parties; (3) the court has made an error not of reasoning but of apprehension; (4) there has been a controlling or significant change in the law since the submission of the issue to the court; or (5) there has been a controlling or significant change in the facts since the submission of the issue to the court." *United States v. Ligas*, No. 04 C 930, 2005 U.S. Dist. LEXIS 12365, at *1 (N.D. Ill. May 17, 2005) (citing *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)).

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[1] The Order is dated February 27, 2007 but was entered and received by the parties March 5, 2007.

B. The Record Before This Court Included Numerous Facts Showing that the Documents Pertaining to the Compliance Engagement Were Created Outside the Class Period

In its October 16, 2006 Motion to Compel Production of Documents Pertaining to Household's Consultations With Ernst & Young LLP ("Motion to Compel"), the Class argued that the *Garner* exception applied to ***all*** privileged communications relating to the Compliance Engagement. Motion to Compel at 6-7 (Dkt. No. 708). In response, defendants presented evidence that many of the documents related to the Compliance Engagement were created after October 11, 2002, the end of the Class Period. For example, the privilege log submitted by defendants reflects numerous entries dated after October 11, 2002. Buckley Decl., Ex. 13.[2] Defendants also attached to their opposition an exhibit indicating that "most of [E&Y's] work was completed after the conclusion of the class period and . . . [E&Y's] findings were relayed to Household's General Counsel after the class period as well." Buckley Decl., Ex. 3. Although this information was in the record, the December 6, 2006 Order did not include any temporal limitation on the application of the fiduciary exception under *Garner*. Instead, the Court applied the exception to all communications between E&Y and Household. December 6, 2006 Order at 14.

Furthermore, although defendants submitted evidence that many of the communications between Household and E&Y occurred after the Class Period, they did not argue before this Court that the mutuality of interest between the Class and Household's management did not exist after the Class Period. Thus, defendants waived the very argument this Court adopted in the February 27, 2007 Order. *United States v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000) ("[A]rguments not made before a magistrate judge are normally waived.") In reaching the conclusion that Household need not produce attorney-client communications that occurred after the Class Period, the Court noted that the December 6, 2006 Order did not "specifically address[ ] whether the E&Y production should include post-Class Period documents." February 27, 2007 Order at 2. The Court made no such distinction because defendants never raised the issue in response to the Class' argument that the fiduciary exception applied to all communications pertaining to the E&Y engagement. It is not the

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[2] "Buckley Decl." refers to the Declaration of Susan Buckley in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Households' Consultations with Ernst & Young, filed on November 3, 2006 (Dkt. No. 749).

Class' job to advance defendants' arguments for them, and the Class should not be punished for defendants' failure to make this argument.

Indeed, defendants could not argue in their original opposition that the majority of the E&Y engagement was completed after the Class Period because they would have jeopardized their underlying privilege claims. In the December 6, 2006 Order, this Court adopted defendants' argument that communications related to the E&Y compliance audit were privileged (both as to attorney-client privilege and under the work product doctrine) because "the engagement was to assist in-house counsel in providing legal advice regarding pending or anticipated litigation." December 6, 2006 Order at 8. The Court specifically cited the State of California's lawsuit against Household alleging lending abuses and found that E&Y was hired in response to the concern that similar claims might arise in other states. *Id.* at 1. The Court also noted that at the time Household hired E&Y, Household "had already received formal inquiries from the Attorneys General of Arizona and Washington" and "was involved in negotiation sessions with a Multistate Working Group of state Attorneys General . . . regarding threatened claims arising from the Company's consumer lending practices." *Id.* at 1-2. The October 11, 2002 settlement extinguished the threat of further litigation on these issues. This fact seriously undercuts defendants' assertion that documents created after October 11, 2002 constitute communications made for the purpose of obtaining legal advice.

Thus, defendants in their briefing before this Court downplayed the existence of post-Class Period communications in order to gain an advantage, *i.e.*, a finding that the communications were privileged. It was only after the underlying question of privilege had been decided in their favor that defendants argued to Judge Guzman that the mutuality of interest could not continue after the end of the Class Period. By that point, however, defendants already had waived this argument. In any event, as discussed below, Judge Guzman specifically rejected defendants' argument.

C. Judge Guzman Explicitly Rejected Household's Argument that There Was No Mutuality of Interest at the Time the Communications Were Made

In their objection to Judge Guzman, defendants dedicated an entire section to the argument that this Court's December 6, 2006 Order was incorrect as a matter of law because the Court did not limit defendants' production to E&Y documents prepared prior to the end of the Class Period. Defs' Objection at 9-11 (Dkt. No. 841). In making this argument, defendants conceded that the December 6, 2006 Order applied to ***all*** documents related to the Compliance Engagement. *Id.* at 10. Specifically, defendants acknowledged that this Court's "pivotal" finding was that "Household and the Jaffe class had a mutuality of interest throughout the period the privileged communications were

created." *Id.* Defendants urged Judge Guzman to overturn the December 6, 2006 Order on the grounds that this conclusion was erroneous.[3] *Id.*

Contrary to this Court's finding in the February 27, 2007 Order, Judge Guzman specifically considered and rejected defendants' argument that there was no mutuality of interest when the documents were created. We quote from Judge Guzman's Order:

> Household also argues that it was clear error for Magistrate Nolan to hold that there was mutuality of interest ***when the E&Y documents were created***. . . . [T]he issue was broached in plaintiffs' opening brief when the class argued that the *Garner* exception should apply because the action is being brought on behalf of a large percentage of shareholders and ***Household did not contest or address this assertion in its response brief.***
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> * * *
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> Household also argues that the evidence that the class represents a substantial majority of shareholders who owned stock ***at the time of the communications at issue*** was unreliable and thus Magistrate Judge Nolan's reliance on that evidence was clearly erroneous. As stated above, however, the issue whether a large percentage or a substantial majority of shareholders is/are represented by the class was uncontested . . . .

February 1, 2007 Order at 2 (emphasis added). Judge Guzman thus specifically addressed defendants' argument that there was no mutuality of interest at the time the relevant communications were made, and rejected it.[4] Even if he had not specifically rejected defendants' arguments, the Seventh Circuit holds that implied rejection of an argument by the superior court triggers the law of the case doctrine. *Burlington N. R.R. Co. v. City of Superior*, 962 F.2d 619, 620 (7th Cir. 1992) ("In

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[3] Defendants' subsequent refusal to produce post-Class Period E&Y documents was premised on the exact ***opposite*** interpretation, *i.e.*, that the December 6, 2006 Order was limited to documents created before plaintiffs filed suit. This position is wildly inconsistent with their representation to the District Court. Additionally, the manner in which Household went about seeking reconsideration – simply refusing to produce documents, as opposed to seeking reconsideration or clarification – was highly improper. Defendants, cannot be permitted to argue to this Court and Judge Guzman that the same order has two completely different meanings simply to suit their end goal of suppressing highly relevant documents.

[4] The two cases cited in the February 27, 2007 Order do not support the assertion that Judge Guzman failed to consider defendants' newly presented argument. *Melgar*, 227 F.3d at 1040; *American Family Mut. Ins. Co. v. Roth*, No. C 3839, 2006 U.S. Dist. Lexis 57100, at *24 (N.D. Ill. July 27, 2006). Instead, they support a finding of waiver. *Id.* Indeed, in *American Family*, Judge Guzman explicitly wrote: "the Court does not have to entertain this objection and finds no compelling reason to do so." *Id.* Notably, the February 1, 2007 Order contains no such language. To the contrary, Judge Guzman entertained defendants' objections and rejected them. February 1, 2007 Order at 2 ("Based on the facts and arguments before her, the magistrate judge properly found that plaintiffs had established good cause to invoke the *Garner* exception to the attorney-client privilege.")

rejecting the narrow interpretation, we necessarily rejected all the reasons that the city gave for its interpretation, whether or not we mentioned each and every one of them.") (internal citations omitted). Once defendants made this argument and Judge Guzman overruled their objection, the issue was decided and reconsideration of Judge Guzman's decision by this Court was improper. *See* 18B Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §4478, at 637 (2d ed. 2002) ("Principles of authority . . . inhere in the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal. The very structure of a hierarchical court system demands as much."); *id.*, §4478.3, at 733 ("an inferior tribunal is bound to honor the mandate of a superior court within a single judicial system").

As this Court exceeded its authority when it reconsidered arguments that defendants made to Judge Guzman but were rejected by him, whether explicitly (as shown above) or implicitly, the Court should reconsider its decision allowing defendants to withhold "the 187 documents which are covered by the attorney-client privilege . . . and dated after the Class Period" and order defendants to produce all documents pertaining to the Compliance Engagement immediately.

D. The Court's Conclusion that Defendants Did Not Know About the 425 Boxes of E&Y Work Papers Prior to February 2007 Is Not Supported by the Factual Record

As the Court is aware, counsel for defendants and E&Y informed the Class for the first time in February 2007 that in October 2004, ***at Household's request***, E&Y tendered all of its work papers related to the Compliance Engagement to Household.[5] Household's 2004 demand that E&Y return its work papers (analyzing the very predatory practices the Class alleges in its Complaint) occurred just months after the Class' first document request was served in this action. At that time, Household must have been gathering documents for review and production, ***yet the Class was never informed these documents existed.***

Without any explanation, defendants represented during the February 27, 2007 hearing that "they" had no knowledge that E&Y's work papers were stored in a Household warehouse until February 2007. It is unclear whether this representation, was made with respect to Household, its outside counsel Cahill Gordon & Reindel LLP ("Cahill Gordon") or only Ms. Best herself. Whether lawyers from Cahill Gordon were aware of the 425 boxes in Household's possession is, in some

[5] On February 26, 2007, the day before argument was heard, defendants informed the Class that E&Y's work papers withheld by Household consisted of an astonishing 425 boxes.

respects, beside the point. At bottom, Household requested the documents from E&Y who sent them to Household. Household therefore knew these documents existed and where the boxes were located. Hiding the existence of these boxes from Household's outside counsel would be just as inexcusable as acting in concert with outside counsel to suppress them. Either way, Household should be sanctioned for its conduct. Specifically, due to Household's deleterious conduct, this Court should find that any privilege attaching to these documents has been waived and order Household to produce them immediately.

Other than disclaiming any knowledge of these documents, moreover, counsel for defendants still have offered no explanation as to why they were not previously produced to the Class or listed on a privilege log. Counsel for E&Y has represented that Household requested E&Y return the work papers in 2004:

> "***As I made steadfastly clear to Jason***, and now put in writing, many years ago, in approximately October 2004, Ernst & Young LLP sent the work papers pertaining to the July 2002 state regulatory engagement to Household (specifically to Household's outside storage vendor, Iron Mountain), ***as Household had requested***."

Class' Supp., Ex. 3[6] (emphasis added).

Efforts to obtain a concrete explanation regarding the specific reasons why Household demanded E&Y turn over these documents in 2004 and who requested their return have been rebuffed. Thus, there is ***every*** "reason to doubt defendants' representation that they just learned about the 425 boxes." February 27, 2007 Order at 3.

First and foremost, ***Household requested that E&Y remand these highly relevant and likely damaging documents after discovery had commenced in this action***. Additionally, both the declarations of Ken Robin, Household's General Counsel, and Susan Buckley, outside counsel for defendants, make it clear that the E&Y Compliance Engagement work papers were always subject to Household's control. Mr. Robin swore without qualification or equivocation that "***[a]t all times*** while performing services to the Compliance Engagement, E&Y acted as my agent in my capacity as

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[6] "Class' Supp." refers to the Supplement to the Class' Motion to Compel Production of Ernst & Young LLP Documents and for Sanctions for Defendants Continuing Violations of Judge Guzman's February 1, 2007 Order and This Court's December 6, 2006 Order (Dkt. No. 989).

Household's General Counsel, ***subject to my control and direction***." Robin Decl., ¶5[7] (emphasis added). Mr. Robin also swore that "the Office of the General Counsel has taken care to hold the results of the Compliance Engagement and related privileged material in strictest confidence." Robin Decl., ¶8. These statements belie any assertion that the E&Y documents were placed haphazardly in some document repository without Household's knowledge.

Next, according to Ms. Buckley's declaration, "[d]uring the first two weeks of July 2006, [Ms. Buckley] ***conducted an investigation*** into Household's engagements of E&Y in order to determine whether communications and documents relating to those engagements were protected from disclosure" pursuant to various privileges. Buckley Decl., ¶4 (emphasis added). Ms. Buckley represented to the Class that this investigation included "***interviewing relevant personnel*** to confirm that appropriate steps were taken during the course of those engagements to preserve the privileged nature of Ernst & Young's work product and to determine if any such privilege as attached to that work was ***ever thereafter waived***." Buckley Decl., Ex. 2 (emphasis added). It would be nearly impossible to conduct such an investigation without discovering the (1) scope of documents created during the engagement, (2) the existence of 425 boxes of work papers, and (3) Household's 2004 request that E&Y return those work papers to Household, especially since defendants were in direct communication with E&Y.

Ms. Buckley also represented to the Class at the conclusion of her investigation that "extraordinary care was to be taken to maintain the privileged nature of the work. ***And it was***." Buckley Decl., Ex. 3 (emphasis added). Ms. Buckley could not have made this representation in good faith without first having discussions with Household about the scope of documents created, the nature of the care taken to preserve the purported privilege and ***where the documents were located***. At that point, Household either revealed to Ms. Buckley that it had in its possession 425 boxes of E&Y work papers, or it did not. Either way, these documents were concealed from the Class until mid-February when their existence was disclosed ***by a third party***. Defendants' failure to disclose these documents was a serious breach of their obligations under the Federal Rules and constitutes grounds for sanctions.

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[7] "Robin Decl." refers to the Declaration of Kenneth H. Robin in Opposition to Plaintiffs' Motion to compel the Production of Documents Pertaining to Households' consultations with Ernst & Young, filed on November 3, 2006 (Dkt. No. 749).

Instead of admitting their complete failure to disclose the existence of the 425 boxes in accordance with their duties, defendants seek to divert the Court's attention by claiming these documents were never specifically requested. This argument is nothing more than a ploy to avoid producing the materials and to avoid the consequences of defendants' failure to timely disclose their existence. The argument is, moreover, patently absurd given the history of this dispute.

As noted in the Class' Supplement, the concealed E&Y documents are responsive to no fewer than 30 document requests propounded by the Class. Class' Supp. at 1. For example, the following requests from the Class' first set of document requests served in May 2004, squarely require the E&Y work papers:

> "All documents and communications concerning or relating to Household's lending practices and policies related to loans secured by real property (as described in the Complaint), including, but not limited to, correspondence, analyses, statistics, presentations, training materials, public statements, memoranda and notes."

> "All documents and communications concerning or relating to investigations by any state or federal governmental, administrative or regulatory agency, department or other body into Household's lending policies and practices."

Furthermore, the work papers memorialize E&Y's investigation into the very predatory practices the Class alleges occurred during the exact same time the Class alleges they occurred (1999-2002).[8] As Judge Guzman found, "[t]he documents shed great light on a number of issues in this case, *e.g.*, the falsity of Household's statements regarding predatory lending practices, as well as scienter and materiality." February 1, 2007 Order at 3. Yet, defendants now claim they are not responsive and they never bothered to look for them.

Most strikingly, throughout two full rounds of exhaustive briefing on the documents relating to the E&Y engagement, defendants never once raised the argument that they were not responsive to the Class' document requests. Nor did they ever make this claim in the extensive correspondence between the parties and numerous meet and confers regarding the E&Y documents. Household also listed numerous documents related to the Compliance Engagement on its privilege logs. This fact both demonstrates Household's acknowledgment that these documents are responsive and confirms

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[8] These issues include (1) Administrative fees; (2) involuntary unemployment insurance; (3) late fees; (4) recording fees; (5) prepayment fees; (6) "Points on Points" arising from refinancing; (7) Sales Finance Contracts and refinancing restrictions; and (8) inaccurate/inconsistent information on disclosure documents especially regarding points and appraisal fees. The Class has propounded numerous document requests concerning these issues.

that the Class had no reason to doubt that Household considered all documents relating to the E&Y Compliance Engagement responsive. Why would Household search for and list non-responsive documents on its privilege log?

Finally, defendants represented to the Class and the Court that they ***conducted an investigation*** into the Compliance Engagement in July 2006. Given defendants' recalcitrance in discovery, it is quite a stretch to imagine that they would undertake such an investigation with respect to documents they believed were non-responsive. In fact, it was only after E&Y revealed to the Class that Household had hidden 425 boxes of highly relevant material that defendants belatedly claimed that the E&Y documents were not responsive. This *post hoc* excuse is not credible and bespeaks defendants' overall lack of candor with respect to these issues.

Defendants' argument, cited by the Court, that Household failed to disclose the documents because the Class did not move to compel production from E&Y is similarly weak. The Class wisely focused its efforts to obtain all E&Y materials from Household because a ruling on Household's privilege claims would determine whether the Class could obtain any documents from E&Y. Thus, any motion to compel E&Y to produce documents Household claimed were privileged would have been an utter waste of resources and an exercise in futility prior to obtaining a ruling from the Court on defendants' privilege assertions.

Because the factual record demonstrates Household knew it had in its possession 425 boxes of highly relevant documents and concealed those documents from the Class, the Court should reconsider its February 27, 2007 Order and require production of these documents immediately.

E. Defendants Should Produce the Documents and Privilege Log on a Rolling Basis

Defendants were ordered to review the Compliance Engagement work papers, produce all non-privileged documents and provide a privilege log by March 30, 2007. The Class seeks a modification of the February 27, 2007 Order and requests the Court require defendants to produce all responsive documents and all privilege logs on a rolling basis. Given the volume of documents at issue, there is no reason to allow defendants to dump the lot on March 30. Defendants' failure to previously identify these documents has already resulted in substantial delay which can be mitigated at least somewhat by a rolling production. Accordingly, defendants should deliver to the Class the documents (and logs) in equal installments on March 15, March 22 and March 30.

Additionally, in modifying the expert discovery schedule, the Court omitted the Class' opportunity to submit rebuttal reports. The Class requests that the Court modify the February 27,

2007 Order to allow the Class an opportunity to file rebuttal reports 30 days after defendants submit their reports and that the period for expert depositions also be extended accordingly.

III. CONCLUSION

For all the foregoing reasons, the Court should grant the Class' motion to reconsider its February 27, 2007 Order.

DATED: March 8, 2007

Respectfully submitted,

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