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' REPLY IN SUPPORT OF ITS OBJECTION REGARDING MAGISTRATE JUDGE'S FAILURE TO ENFORCE THIS COURT'S FEBRUARY 1, 2007 ORDER REQUIRING PRODUCTION OF ERNST & YOUNG LLP COMPLIANCE AUDIT DOCUMENTS AND REQUEST FOR EXPEDITED CONSIDERATION

The issue before the Court on this objection is whether the Magistrate Judge may properly reconsider arguments previously rejected by this Court in its February 1, 2007 Order to limit the scope of that Order in a manner this Court rejected. In the February 1 Order, this Court found that defendants did not contest the Class' showing under the *Garner* exception as to the mutuality of interest between the parties and thus, rejected their arguments seeking to limit the Ernst & Young LLP ("E&Y") documents to be produced to a specific time frame, such as the Class Period (July 30, 1999 through October 11, 2002). As part of its ruling, this Court adopted the Magistrate Judge's December 6, 2006 Order as its own without limiting in any way the E&Y documents required to be produced by defendants. Subsequently, Household International, Inc. ("Household") refused to produce any E&Y documents generated after the Class Period and the Magistrate Judge improperly upheld this refusal by limiting this Court's February 1 Order to documents created during the Class Period, notwithstanding this Court's ruling and the record before this Court. *See* February 27, 2007 Order and March 12, 2007 Order.[1] This was legal error and this Court should sustain the Class' Objection (Dkt. No. 1020).

In their opposition, defendants do not dispute that the Magistrate Judge is bound by this Court's rulings. Instead, they engage in various sleights of word in a vain attempt to concoct an argument that the Magistrate Judge somehow had authority to reconsider a post-Class Period argument. They re-raise arguments that were rejected by this Court in the February 1 Order.[2] They mischaracterize the Magistrate Judge's actions as addressing only "her" Order despite this Court's February 1 adoption of that Order as its own. Defs' Resp. at 6. They suggest that somehow the

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[1] The Class has recently obtained the transcript of the March 12, 2007 hearing and is attaching it hereto as Exhibit A.

[2] Ironically, defendants continue to insist the application of the *Garner* exception to this case was erroneous. Household Defendants' Response to Plaintiffs' Objection to Magistrate Judge Nolan's February 27, 2007 Order (Dkt. No. 1026) ("Defs' Resp.") at 9 n.2.

Class waived the post-Class Period argument, notwithstanding it being defendants' obligation to raise this objection initially before the Magistrate Judge and more importantly, this Court's prior ruling that defendants waived this argument by not contesting it. They ignore their own interpretation of the Order expressed in their prior objection to this Court to contend that the Class' interpretation of the Court's Order is not "rational" and that the February 1 Order "was necessarily limited to the" Class Period. *Id*. at 1. These arguments lack merit.

Equally unconvincing are defendants' conclusory efforts to justify the Magistrate Judge's failure to impose sanctions for defendants' failure to comply with the February 1 Order and her refusal to find it unreasonable that defendants failed to identify or produce some 420 boxes of E&Y work papers. Defendants' reluctance to address these issues in detail was not due to page limits, since their brief is well under the 15-page limit, but reflects the recognition that the Magistrate Judge's findings on these points are not defensible.

This Court should sustain the Class' Objection in full.

I. LEGAL ARGUMENT

A. The Magistrate Judge Erred as a Matter of Law in Reconsidering Issues Decided by this Court in the February 1 Order

Defendants cannot dispute that this Court rejected their arguments to limit the production of the E&Y communications to the Class Period, finding that defendants had not contested this issue before the Magistrate Judge. February 1 Order at 2. Defendants also cannot dispute that notwithstanding defendants' arguments, this Court refused to impose any date limitation on the E&Y documents to be produced and adopted the December 6 Order in full without any alteration to its language, language that defendants argued required production of all E&Y compliance documents regardless of their date of generation. *Id.* at 1. These uncontested and uncontestable points demonstrate that the Class' Objection is well-taken and should be sustained.

The Magistrate Judge lacked any authority to limit the scope of the February 1 Order to only E&Y communications within the Class Period as this Court had already refused to impose this limitation in response to defendants' objection, which relied on the very same arguments that defendants subsequently presented to Magistrate Judge Nolan as if they had not been rejected by this Court. Defendants argued to this Court that:

> [I]n making the pivotal and supposedly undisputed finding that Household and the Jaffe class had a mutuality of interest throughout the period the privileged communications were created (*see* December 6 ruling at 14), the Magistrate Judge made two clear errors. *First,* contrary to the record on the motion, the Ruling implicitly assumed that all of the privileged communications at issue were created during the Class Period, which ran from July 31, 1999 to October 11, 2002. . . . Plaintiffs made no showing that they and their putative class represented a majority of the shareholders at any time after October 11, 2002, and the fact that they filed this lawsuit in August, 2002 put them in an openly adversarial position to Household thereafter.
>
> *Second,* even as to the Class Period, Plaintiffs made no showing that would justify a conclusive finding of mutuality of interest between the class and Household through October 2002. . . .

Household Opening Brf. at 10-11.[3] In making these arguments, defendants stressed to this Court that the December 6 Order as written would require the production of post-Class Period documents based on the Magistrate Judge's finding that a mutuality of interest existed at the time of the communications. *See, e.g.*, *id*. at 2, 11 ("because Plaintiffs submitted . . . no evidence at all for the period [after October 11, 2002], the ruling that such mutuality of interest existed at the time the privileged E&Y material was created is clearly erroneous and must be reversed."). This Court rejected defendants' mutuality arguments, holding "the Court agrees with Magistrate Judge Nolan that Household did not contest the issue." February 1 Order at 2. Further, this Court adopted the

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[3] "Household Opening Brf." refers to the Household Defendants' Objection to Magistrate Judge Nolan's December 6, 2006 Order Compelling Production of Certain Attorney-Client Communications and Work Product (Dkt. No. 841).

December 6 Order in full as its own without limiting in any fashion the scope of the E&Y documents to be produced. *Id.* at 1.

These rulings of this Court in its February 1 Order are law of the case that the Magistrate Judge had no discretion to alter. Defendants try to avoid this inevitable logic by asserting that the post-Class Period argument was not decided by this Court. As noted above, this argument flies in the face of the fact that defendants squarely put the post-Class Period nature of the documents at issue before this Court as part of their mutuality of interest arguments. This Court rejected those arguments *in toto* and thus, even if this Court did not mention each specifically in its Order, they are all rejected under Seventh Circuit precedent. *Burlington N. R.R. v. City of Superior, Wis.*, 962 F.2d 619, 620 (7th Cir. 1992) (implied rejection of an argument by a superior court triggers the law of the case doctrine and binds the lower court).

Defendants try to get around this issue by suggesting that the law of the case doctrine would not prevent Magistrate Judge Nolan from reconsidering her own decision should she chose to do so. Defs' Resp. at 7. However, the December 6 Order was adopted in full by this Court, making the applicable order this Court's Order and thus, a ruling that the Magistrate Judge could not reconsider. "Principles of authority [] do 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." 18B Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure*, §4478 at 637 (2002); *id.* §4478.3 at 733 ("an inferior tribunal is bound to honor the mandate of a superior court within a single judicial system").

Thus, it was legal error for the Magistrate Judge to reconsider arguments already rejected by this Court. Indeed, Defendants' efforts to stress the discretion accorded a magistrate judge acknowledge that an objection properly lies where the magistrate judge's decision is "contrary to law." Defs' Resp. at 6 (citing 12 Charles Alan Wright *et al.*, *Federal Practice and Procedure 2d*

§3069 (1997)). These points establish that this Court should sustain the Class' Objection. We now turn to the remainder of defendants' arguments, which prove equally meritless.

Defendants suggest that it is irrational to interpret the February 1 Order to call for production of post-Class Period documents. This argument is refuted by defendants' own briefs to this Court, which interpreted the Order in precisely the same way. Indeed, defendants based their objection on this interpretation. Household Opening Brf. at 1-2. Defendants cannot now argue that the February 1 Order called for anything other than a complete production of all documents relating to the E&Y compliance engagement, regardless of when they were created.

Similarly, there is no merit to defendants' claims that somehow the Class waived its right to obtain post-Class Period documents. This claim cannot stand factually because the Class in its initial motion to compel (Dkt. No. 708) sought all E&Y documents regardless of the date of creation. Further, as a legal matter, the Class does not have the obligation to raise defendants' arguments – that is defendants' obligation. Defendants do not dispute that they failed to raise this argument before the Magistrate Judge in the first briefing. Nor do defendants dispute that their own exhibits in the initial briefing demonstrate that ***defendants themselves knew*** the E&Y documents extend past the Class Period but elected not to raise any arguments based on this fact in opposing the Class' motion to compel. *See, e.g.*, Buckley Decl. Ex. 3[4] (asserting a lack of relevance in these documents because they extended past the Class Period). Under the very case law cited by defendants, this constitutes knowing waiver of these arguments. Defs' Resp. at 8 (citing *United States v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000)). We note that defendants do not contest the Class' explanation

[4] "Buckley Decl." refers to the Declaration of Susan Buckley in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP (Dkt. No. 749).

for this decision by defendants, namely a recognition that this post-Class Period argument undercuts their privilege arguments. Class' Objection at 8 n.6.

Defendants also suggest that the Class is improperly blaming the Magistrate Judge for not "piec[ing] together clues" to discern that the E&Y documents went beyond the Class Period. Defs' Resp. at 9. This argument is hypocritical and contradicted by their own brief to this Court in support of their objection, wherein defendants cited their own exhibits as evidence that the Magistrate Judge's findings were "contrary to the record on the motion." *See* Household Opening Brf. at 10. In that brief, defendants cited to a different meet and confer letter for the same proposition they now dispute, that the record evidence showed the post-Class Period nature of some of the documents. *Id.* (citing Buckley Decl., Ex. A). Additionally, one of the "clues" before the Magistrate Judge was the privilege log entries for the documents at issue. Privilege log entries are traditionally used by courts to assess privilege issues. *See Muro v. Target Corp.*, No. 04 C 6267, U.S. Dist. LEXIS 86030, at *6-*7 (N.D. Ill. Nov. 28, 2006) (citing *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992)).

Defendants' last gasp is to cite a snippet of the Class' response to their initial objection as a basis to limit the documents at issue to the Class Period. This argument fails utterly. Defendants ignore (and do not apprise this Court of) the entire section of the Class' brief devoted to contesting any temporal limitation with respect to the documents at issue. *See* Class' Resp. at 12.[5] In that section, the Class argued that the Magistrate Judge's refusal to limit the documents to the Class Period was reasonable and appropriate in light of the factual record below, including defendants' failure to raise any contrary arguments or otherwise contest the issue. *Id.* In the February 1 Order,

[5] "Class' Resp." refers to the Class' Response to Household Defendants' Objections to Magistrate Judge Nolan's December 6, 2006 Order (Dkt. No. 911).

this Court reached the same conclusion based on defendants' failure to contest the issue. February 1 Order at 2 (rejecting defendants' arguments respecting mutuality of interest at the time the documents were created – "the Court agrees with Magistrate Judge Nolan that Household did not contest the issue.").

For the foregoing reasons, the Magistrate Judge's orders limiting the E&Y production to documents generated during the Class Period are contrary to law.

B. The Magistrate Judge Should Have Imposed Sanctions for Defendants' Willful Withholding of E&Y Documents

Defendants do not deny that they withheld approximately 187 documents because they were generated after the end of the Class Period. Defendants contend that they were not in a position to "know" that this Court had rejected their arguments in support of their objection. Defs' Resp. at 10-11. Defendants also contend that this conduct was not sanctionable because the Magistrate Judge found no violation on the part of defendants with respect to the February 1 Order. *Id.* at 10. Both of these arguments are meritless on their face. Under the undisputed facts, the Magistrate Judge's refusal to sanction defendants was clearly erroneous and contrary to the law.

First, this Court rejected defendants' objection on all grounds. Moreover, this Court refused to limit the scope of documents to be produced to those generated within the Class Period despite defendants' arguments to the contrary. Instead, this Court adopted the December 6 Order in full and required production of all the E&Y compliance documents regardless of the date of creation. In this situation, there is no basis for a prominent New York City law firm to assert that it did not "know" that this Court rejected the post-Class Period argument. *See Burlington,* 962 F.2d at 620 (implied rejection of an argument by a superior court, such as this Court, triggers the law of the case doctrine and binds the lower court). Nor can Household with its own sophisticated General Counsel's Office claim that it failed to comprehend this Court's rejection of the post-Class Period argument.

Second, defendants cannot rely upon the Magistrate Judge's orders. Defendants led the Magistrate Judge into error by not fully and accurately informing the Magistrate Judge as to the true state of affairs, particularly the record before this Court. Further, as noted above, defendants knew that this Court had already ruled against them and thus, had no basis to withhold production of the documents in the first place, much less seek a "reconsideration" by the Magistrate Judge.

Nor can defendants hide behind their miscited snippet from the Class' prior brief to the Court. Defs' Resp. at 11. As indicated above, the Class devoted an entire section to repudiating defendants' effort to limit the E&Y production to Class Period documents. Thus, defendants could have been under no misapprehension that the Class only sought E&Y documents generated during the Class Period.

In sum, the undisputed evidence establishes that defendants willfully disobeyed this Court's February 1 Order. Such willful disobedience of a court order mandates the imposition of sanctions. This Court should remand the issue of appropriate sanctions to the Magistrate Judge for her consideration.

C. The Court Should Find Defendants' Conduct with Respect to the 420 Boxes of "New" E&Y Documents to be Inexcusable

In the February 27 Order, the Magistrate Judge acknowledged that it was "disturbing" that the "Defendants did not discover the existence of these documents in a timely manner" and that "[i]t is not clear how Defendants failed to discover the existence of the 425 boxes" previously. February 27 Order at 2-3. Nonetheless, the Magistrate Judge excused defendants' conduct based upon the oral statement of defense counsel that "they" had no prior knowledge of these boxes. *Id*. This finding was clearly erroneous based on the undisputed evidence establishing that Household (specifically the General Counsel's Office) did know about these documents. Accordingly, this Court should find defendants' conduct inexcusable and order complete production of these work papers.

The evidence clearly establishes that Household, specifically its General Counsel's Office, ***did know*** about these work papers. The Magistrate Judge had before her 1) sworn representations that the General Counsel's Office at all times had control over the E&Y documents, and 2) uncontradicted evidence that Household requested E&Y to provide these work papers in October 2004. Given this evidence, the Magistrate Judge should not have accepted a conclusory "lack of knowledge" statement made by defense counsel at oral argument, particularly where, accepting the truth of the statement, that "they" in the statement could only have referred to defense counsel.

To bolster their flimsy lack of knowledge argument, defendants assert that the Class did not propound a specific document request directed to E&Y work papers. This is nonsensical. The Class' first document requests, which the Class quoted in its opening memorandum in support of this objection, were broad requests directed to investigations of Household's predatory lending practices by anybody. Defendants do not contest that the E&Y documents are responsive to those requests and indeed, did not dispute that point in any of the prior briefings before the Magistrate Judge. Further, defendants produced E&Y documents in response to these requests.

In these circumstances, the Class was under no obligation to propound a specific request aimed at E&Y work papers as the responsive documents were already covered by a prior document request. If, as required by the Federal Rules of Civil Procedure, defendants had conducted a diligent search for studies done of predatory lending practices, that search should have located the E&Y work papers, particularly since the General Counsel's Office was already aware of their existence. The "discovery" of these documents after E&Y disclosed their existence to the Class, thus, demonstrates that defendants did not conduct a diligent search despite their obligation to do so. (This also raises issues about the thoroughness of the "investigation" undertaken by defense counsel in the summer of 2006, which resulted in the assertion that the relevant documents were at all times carefully monitored so as to preserve the privilege. Buckley Decl., Ex. 3.)

Equally implausible are defendants' arguments based on the assertion that the Class never moved with respect to E&Y's objections to its subpoena. First, as noted above, defendants had their own independent obligation under the Federal Rules to locate and produce these documents. What the Class did or did not do vis-à-vis E&Y was irrelevant to defendants' obligation to search for and locate these documents. Second, the Class moved to compel production of these documents from defendants last October. Since E&Y's objections were asserted on behalf of Household, it was most efficient for the Class to resolve Household's objections (and thus E&Y's) via a motion to compel before Magistrate Judge Nolan. This approach does not and cannot serve as an excuse for why defendants did not disclose these documents prior to the close of discovery.

Finally, defendants suggest that they had to await E&Y's telling them of the documents to learn their existence. Defs' Resp. at 12. This suggestion does not pass the red face test. It was Household that told E&Y in October of 2004 to provide the documents. Household (including the General Counsel's office) knew that these work paper boxes existed at the Iron Mountain storage facility in October of 2004 and did not need E&Y to tell defendants about the boxes in February of 2007.

In sum, there can be no reasonable explanation for defendants' failure to identify these work papers relating to a predatory lending compliance study before the end of fact discovery. To the contrary, the undisputed evidence demonstrates that defendants improperly and purposefully withheld them from production. They would have succeeded with this scheme if E&Y had not disclosed the existence of these documents.

In these circumstances, putting aside the Court's February 1 Order requiring production of these documents, defendants' conduct warrants waiver of any applicable privilege. The Class has suffered substantial prejudice on this issue and will suffer more. Fact discovery is nearly closed as all of the relevant Household witnesses have already been deposed. The Class could seek to reopen

some depositions as appropriate but such a course would likely involve a delay with respect to completion of expert disclosures, which this Court has made clear are a necessary step to obtaining a trial date. This case has been pending since 2002 and thus, the Class wishes to avoid further delays. Additionally, current resources are being spent on this issue, including status conferences and briefings.

II. REQUEST FOR EXPEDITED CONSIDERATION

The parties have now completed the briefing on this objection. Defendants have not objected to expedited consideration, which could save the parties and the Magistrate Judge from expending resources unnecessarily. The Class thus believes there is good cause for this Court to expedite its review of this objection if possible and respectfully requests such consideration.

III. CONCLUSION

As demonstrated above, the Magistrate Judge erred as a matter of law in issuing the February 27 Order and the March 12 bench ruling given this Court's February 1 Order and the record before her. Household defendants should be directed to produce all E&Y compliance study documents, including the newly "discovered" boxes of E&Y work papers, immediately. The Court should find defendants' conduct in withholding these documents in violation of the February 1 Order to be sanctionable and direct the Magistrate Judge to determine the appropriate sanctions. The Court should also find Household's failure to disclose these documents previously despite nearly three years of document discovery, investigations and Court orders to be inexcusable given the undisputed evidence in the record.

DATED: March 28, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on March 28, 2007 declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' REPLY IN SUPPORT OF ITS OBJECTION REGARDING MAGISTRATE JUDGE'S FAILURE TO ENFORCE THIS COURT'S FEBRUARY 1, 2007 ORDER REQUIRING PRODUCTION OF ERNST & YOUNG LLP COMPLIANCE AUDIT DOCUMENTS AND REQUEST FOR EXPEDITED CONSIDERATION**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of March, 2007, at San Francisco, California.

s/Pamela Jackson
PAMELA JACKSON