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' STATUS REPORT FOR THE MARCH 30, 2007 TELEPHONIC STATUS CONFERENCE

The Class hereby lists the issues that it wishes the Court to address at the March 30, 2007 telephonic status conference.

I. E&Y Work Papers

The Court has been grappling with the issues presented by the recent disclosure that defendants had not produced or logged some 400 boxes of Ernst & Young LLP ("E&Y") work papers. These boxes have been bifurcated into two sets by defendants: 1) data sampling and data validation boxes (approximately 250 boxes); and 2) the remainder (approximately 115 boxes). Defendants have declined to produce a privilege log as to this first set and the Court has not required them to do so. As to the second set, defendants are to produce a privilege log and any non-privileged documents on a rolling basis commencing on March 23 and ending on March 30. On March 23, defendants did not produce any documents or provide the Class with a privilege log. Today, March 29, defendants provided their "first installment" of the privilege log.

Defendants have provided the Class (and the Court) with a proposal to address the first set of sampling/validation documents. The Class rejected that proposal for a number of reasons, including the lack of information provided to the Class as to the documents at issue and its concerns that the selection process would not provide the Court with a representational sample. Defendants have not responded to the Class' letter respecting this rejection nor provided the Class with additional information about the boxes. Additionally, defendants provided this Court with a copy of the index to the boxes. The Court has made no rulings as to whether this index is privileged and to date, the Class has not received a copy of the index. The Class requests that the Court order defendants to provide the Class with this index.

The Court has been presented by defendants with a conundrum. Defendants as asserters of the privilege bear "the burden of demonstrating that all of the requirements for invoking the attorney-client privilege have been met." *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir.

2000); *see also United States v. South Chicago Bank*, No. 97 CR 849-1, 1998 U.S. Dist LEXIS 17445, at *4 (N.D. Ill. Oct. 30, 1998). However, defendants refuse to produce a privilege log for the data sampling and data validation documents, but insist that they can make a categorical assertion of privilege. In the Class' view, the Court must either force defendants to prepare a privilege log for all the documents or find waiver of the privilege.

Defendants' approach and resistance to providing a privilege log under Seventh Circuit precedent requires a finding of waiver by this Court. In *United States v. White*, the Seventh Circuit held that the attorney-client "privilege must be made and sustained on a document-by-document basis. A blanket claim of privilege that does not specify what information is protected will not suffice." 970 F.2d 328, 334 (7th Cir. 1992); *see also United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992); *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974); *United States v. El Paso Co.*, 682 F.2d 530, 541-42 (5th Cir. 1982); *In re Rospatch Sec. Litig.*, No. 1:90-cv-805, 1991 U.S. Dist. LEXIS 3270, at *14 (W.D. Mich. Mar. 14, 1991) ("It is the burden on the asserter of the privilege to establish that each document in question involves a communication made in confidence."). Even the case law cited by defendants undercuts their assertion that they can make a blanket assertion. '"Only when the district court has been exposed to the contested documents and the specific facts which support a finding of privilege under the attorney-client relationship ***for each document*** can it make a principled determination as to whether the attorney-client privilege in fact applies.' An assertion of privilege therefore must be made on a ***document-by-document*** basis." *Grand Jury Proceedings*, 220 F.3d at 571 (quoting *Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990) and citing *White*, 970 F.2d at 334) (emphasis added).

Recently, the Seventh Circuit extended its document-by-document approach further, holding that the party "asserting privilege must timely support that claim with a 'privilege log' which

describes the nature of each document being withheld." *Hobley v. Burge*, 433 F.3d 946, 947 (7th Cir. 2006). Unless defendants agree to provide a privilege log, this Court must find waiver.

Defendants also have insurmountable factual issues to address with respect to their assertion of privilege. Defendants have stated in their letters to the Court and at the last conference that no privilege is apparent from the face of the documents, but that such privilege results from the "general nature of the engagement." Defendants cannot base a privilege on the general nature of the engagement given this Court's prior rulings wherein this Court has directed defendants to produce to the Class all documents relating to communications with E&Y that took place during the Class Period.

Additionally, a critical element of the attorney-client privilege is the element of a communication between an attorney and a client. If there is no communication, there is no attorney-client privilege. *South Chicago Bank* is an example of a case finding no privilege as to the accountants' work papers because they did not reflect any communication between an attorney and a client. 1998 U.S. Dist. LEXIS 17445, at *6; *see also In re Grand Jury Subpoena*, 731 F.2d 1032, 1038 (2nd Cir. 1984) (internal document from outside by counsel not privileged as it did not reflect communications or reveal legal advice). Work papers generally do not reflect communications but are documents created by and for the auditing firm itself. *See United States v. Lockheed Martin Corp.*, 995 F. Supp. 1460, 1464 (M.D. Fla. 1998).

Defendants have described these work papers as reflecting data sampling and data validation done with respect to a database provided by defendants to E&Y. Apart from the original communication relating to the provision of the database, defendants have identified no communication between E&Y on the one hand and Household (excluding its General Counsel) on the other hand. As defendants have acknowledged that they provided the database to E&Y, *see* March 15, 2007 letter from L. Best to C. Baker, there is no confidential communication at issue with

respect to any of the work papers. Nor would there be any confidential communication between attorney and client with respect to any source documents provided to E&Y.

Another element of the privilege that defendants are required to prove is the steps taken to preserve the confidential nature of the documents. Defendants have provided no declaration or affidavit with respect to the steps taken to preserve the confidentiality of these work papers. Such a declaration is particularly necessary here where according to defendants, these documents were lost in a warehouse for over two years. An *in camera* review by the Court cannot address this issue. *Grand Jury Proceedings*, 220 F.3d at 571-72 (discussing limitations of *in camera* review); *see also Amway Corp. v. Procter & Gamble Co.*, No. 1:98cv726, 2001 U.S. Dist. LEXIS 4561, at *13 (W.D. Mich. Apr. 3, 2001) ("privileges and immunities do not prove themselves. 'Simply offering documents to the court for an *in camera* inspection will not be sufficient to carry the party's burden"') (internal citations omitted).

For these reasons, defendants have not met their burden as to all of the elements necessary to found an attorney-client privilege argument as to the E&Y work papers. Accordingly, this Court should not undertake any *in camera* review of the documents. If notwithstanding these points, the Court elects to proceed with the *in camera* review, it should do so recognizing defendants' burden of identifying some confidential communication that is revealed by the documents, which communication has not already been in substance revealed to the Class as the result of the Court's prior orders. Further, the Court should only do so after defendants have submitted declarations and affidavits with respect to the necessary elements of the attorney-client privilege including non-waiver. *See In re Uranium Antitrust Litig.*, 552 F. Supp. 517, 518 (N.D. Ill. 1982) (ordering production of 40,000 documents where privilege assertions were generalized and declining to reconsider privilege issues unless accompanied by personal certification of lead counsel that he or she has personally inspected the documents in question and asserts the privilege in good faith).

In addition to these issues, the Class believes the proposal made by defendants to be inappropriate and premature. There is a lack of accurate and consistent information about the documents at issue sufficient for this Court to determine a protocol. The Class identified some of these informational issues as well as other issues to defendants in a letter dated March 27, 2007, which letter was copied to the Court. These informational issues, which would be resolved by the index or a privilege log, hamper the Class' ability to participate in this process. Essentially, the Class is not in a position to advise the Court affirmatively, but can only criticize the proposals made by defendants.

In this regard, the Class notes that defendants have indicated that the sampling documents are organized by state and by attribute. As part of selection of a representational sample, the Court will need to know the breakdown of documents in these categories and the reasons. For example, Texas may have seven sampling documents with respect to attribute 1, but one hundred for attribute 2, whilst Oklahoma has the exact reverse, and Vermont has none in either category.

The reasons for the breakdown will bear not just on the protocol for selecting random documents, but also on the evidentiary importance of these documents. The Class has pondered why there are some 200 boxes of these sampling documents. This volume evidences a long and involved process. To the extent this sampling process found errors in the database, the Class believes the extent and type of such errors would be relevant evidence at trial. Defendants' ability to rely on their own database and the internal controls with respect to that database would be undercut at trial by evidence that the database was full of inaccurate information and reflected poor internal controls in capturing loan data, which the volume indicates is a distinct possibility. Similarly, evidence that this database does not correctly reflect the type or amount of administrative fees is relevant to the materiality issues in this case.

Further, the segregation of the sampling/validation documents from the second set may be inadvisable. The Class believes that there must be summary documents reflecting both the results of the validation and sampling studies. The sheer volume alone of the underlying documents demonstrates the need for these summary reports. Based on defendants' comments to the Court, such documents may be in the second set. These summary documents will contain useful contextual information on the sampling and validation documents. To the extent that the Court wishes to review the sampling and validation documents *in camera*, it should do so in conjunction with a review of the related summary documents.

II. Deposition Issues

The Class has experienced difficulties in getting defense counsel to agree to proffer deposition dates of third parties due to "unavailability." As a result, these depositions are being pushed further and further out, thus impairing the Class' ability to complete the depositions in a timely manner, particularly with respect to the Class' initial expert disclosures due on May 15. While the Class recognizes that some counsel availability issues may arise, this excuse has been cropping up more frequently and hampering the timely completion of these remaining depositions. Accordingly, we seek the Court's assistance in directing Household to make its counsel available on the proffered dates. To provide background, we identify the relevant depositions and summarize the scheduling status of each.

The depositions of John Keller and Chris Bianucci (witnesses for Arthur Andersen and E&Y) were initially scheduled for March 6 and March 8. Their counsel cancelled those dates on account of the uncertainties surrounding the E&Y matters. Counsel for E&Y and Arthur Andersen has since offered to produce these witnesses on April 26 and April 27. The Class has requested one day in between the two depositions. Defendants refuse to advise whether they are available on any of these dates. At the same time, defendants are refusing to discuss how to address the expert discovery

deadline in light of these deposition issues. *See* Exhibits 1-2 attached hereto (correspondence regarding scheduling E&Y /Andersen depositions).

Third-party Wells Fargo has completed document production, but there are still deposition scheduling issues. The deposition was initially scheduled for March 5, 2007, in Minneapolis, MN, but was postponed at the request of counsel for Wells Fargo, who was unable to travel to the client's location and prepare the witness as planned on account of a large storm. Counsel for Wells Fargo proposed two additional dates – March 9 and March 15. Defendants stated they were "unavailable" on both dates.

Wells Fargo then offered April 13 as the ***earliest*** date on which its witness could be deposed. The Class accepted this date. Defendants accepted this date. Five minutes after accepting the date, defendants rejected the date due to unspecified "professional obligations" that make it inconvenient for defendants to attend on the date offered. Defendants should not make this excuse, particularly given the number of senior attorneys they have working on the case and the special consideration that should be given to third-party schedules and arrangements. The Court should order defendants to appear at the deposition on April 13.

After much back and forth, on March 28, defendants finally agreed to the deposition of Morgan Stanley proceeding on April 20 and April 23, in New York.

III. PwC and Jefferson Wells

During the Class Period, defendants hired two other outside firms to assess its predatory lending practices, PriceWaterhouseCoopers ("PwC") and Jefferson Wells. The engagements were made in response to state agency examinations. Defendants have produced some documents relating to these engagements and identified others on the privilege. After the disclosure of the 420 boxes of E&Y work papers, the Class sought reassurance from defendants that they had made a diligent search for the documents relating to these engagements. Defendants have not responded in

substance asserting that they do not understand what request these documents would be response to. Defendants' position is ridiculous in light of the number of document requested propounded by the Class seeking documents relating to their predatory lending practices. Indeed, the very first document request seeks all documents relating to any investigation of Household's predatory lending practices by any body. The PwC and Jefferson Wells documents are doubly responsive in that these firms were retained in response to state agency investigations and the documents relate to the firms' own investigations. At this point, the Class wants reassurance that there are not boxes of these firms' work papers sitting in some warehouse and that defendants have conducted a reasonable search for these documents. The Court should direct defendants to provide that reassurance.

DATED: March 29, 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 29, 2007 declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' STATUS REPORT FOR THE MARCH 30, 2007 TELEPHONIC STATUS CONFERENCE**. 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 29th day of March, 2007, at San Francisco, California.

s/Juvily P. Catig
JUVILY P. CATIG