

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	Nan R. Nolan
CASE NUMBER	02 C 5893	DATE	04/27/07
CASE TITLE	Jaffe vs. Household Intl Inc, et al		

DOCKET ENTRY TEXT

Status hearing held. The parties are to comply with all orders as set forth below and in open court. In-person status set for May 31, 2007 at 10:00 a.m. CST.

■ [For further details see text below.]

Notices mailed by Judicial staff.

02:01

STATEMENT

1. Cut-Off Date for *Garner* Exception

The parties continue to dispute the proper cut-off date for the *Garner* exception to the attorney-client privilege. In its February 27, 2007 Order, this court stated as follows:

As of August 2002, Plaintiffs had filed this lawsuit against Household and were no longer in a fiduciary relationship with the Company. Thus, any communications between E&Y and Household dated after that time are not subject to the *Garner* exception and remain privileged. This is true even if the communications related to the Compliance Engagement. The court's decision to extend the production through the Class Period is based on the fact that Defendants have already agreed to produce such documents.

(Minute Order of 2/27/07, Doc. 999.) Judge Guzman subsequently affirmed this ruling on April 9, 2007, without elaborating on the issue of Defendants' agreement to produce documents within the Class Period. (Minute Order of 4/9/07, Doc. 1039.) Defendants now claim that their agreement only related to documents at issue at that time, and did not include the 425 boxes of documents that were belatedly disclosed to this court and to Plaintiffs.

The court has carefully considered the parties' arguments on this issue and concludes that Defendants must honor their agreement to produce E&Y documents that were prepared within the Class Period. The court accepted Defendants' assertion that they were unaware of the 425 boxes of documents until recently, and declined to find a blanket waiver of their privilege. At the same time, the court recognizes that Defendants, as the undeniable custodians of the documents in question, are responsible for the new issues that have now arisen after the close of fact discovery.

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As noted, Defendants agreed to produce E&Y documents within the Class Period. Defendants did not discover the additional 425 boxes of documents until after they made this agreement, but they must now live with the consequences. Significantly, the court is not aware that Defendants expressly limited their agreement to documents already under discussion. Indeed, any such stated limitation would be suspect given Defendants' assertion that they were unaware of any additional documents at the time. The appropriate cut-off date for the *Garner* exception is October 11, 2002.

2. Ernst & Young Documents and Depositions

In light of this cut-off date, Ernst & Young will produce any relevant documents from the paper and/or electronic files of the nine "core" individuals mentioned in open court, that were created, received, reviewed, or revised up through October 11, 2002. To the extent Plaintiffs never filed a motion to compel with respect to the E&Y subpoena, Plaintiffs may not obtain any further documents from the company. In addition, as fact discovery is closed, Plaintiffs may not take any additional depositions of any E&Y representatives aside from John Keller and Chris Bianucci.

John Keller and Chris Bianucci will make themselves available for deposition immediately after outstanding E&Y issues have been resolved. Assuming the parties appeal this court's decision, E&Y issues will be considered resolved after Judge Guzman has ruled upon any objections. Absent leave of the court, each deposition will not exceed two, consecutive seven-hour days. Plaintiffs' Motion to Compel Deposition Dates for John Keller, Chris Bianucci, and E&Y, Including Production of E&Y Documents [Doc. 1051] is granted in part and denied in part.

3. Privilege Matters

Defendants will provide the court by May 4, 2007 with an affidavit from E&Y explaining the nature of the particular charts that are contained within the privileged documents Defendants produced for the court's *in camera* review on April 18, 2007. To the extent any portion of such affidavit is produced to Plaintiffs in redacted form due to a claim of privilege, Defendants must submit a detailed explanation for any such claim. Plaintiffs will produce to the court by May 4, 2007 a list of any documents from the privilege log of the 115 substantive boxes that they wish the court to review to confirm that the documents are what they purport to be.

Defendants will submit a brief by May 4, 2007 responding to Plaintiffs' claims that none of the E&Y documents is privileged. Defendants will include in this brief an explanation as to why the redacted portions of the affidavit from John Keller of April 24, 2007 are privileged. Plaintiffs' reply is due May 11, 2007.

4. Agreed Protocol for Sampling of Non-Substantive Boxes

The parties will submit to the court no later than May 7, 2007 a letter setting forth an agreed protocol for creating a sampling of the non-substantive boxes of documents to place on a privilege log.

5. Document Production and Identification Issues

Plaintiffs remain concerned that Defendants have not identified some documents relating to the E&Y Compliance Engagement on any privilege log. Plaintiffs also want Defendants to confirm whether they have any work papers from the PriceWaterhouseCoopers ("PwC") and Jefferson Wells audits, that relate to this lawsuit but which have not yet been produced or logged. Defendants respond that they have produced and/or logged all documents that are "responsive to Plaintiffs' discovery requests," noting that no request specifically mentions

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E&Y, PwC or Jefferson Wells.

As noted many times, Defendants have produced more than four million pages of documents in this case pursuant to some very broad discovery requests. The court disagrees that Plaintiffs' generic requests for "All documents and communications concerning or relating to Household's lending practices and policies related to loans secured by real property . . ." and for "Documents that track, analyze or describe communications related to state regulatory examinations and investigations . . ." suffice to place Defendants on notice that Plaintiffs wanted documents from E&Y, PwC, and Jefferson Wells in particular. Plaintiffs' request for further documents or information relating to PwC and Jefferson Wells, requested after the close of fact discovery, is denied.

The court is more concerned with documents from E&Y. Unlike PwC and Jefferson Wells, E&Y received a separate subpoena from Plaintiffs, and it was certainly clear to Defendants by October 2006 that Plaintiffs wanted documents relating to that entity. As noted, Defendants recently discovered for the first time some 425 boxes of additional documents relating to E&Y. As a result, the court cannot be certain that Defendants have now accounted for all E&Y documents in their possession. Defendants are ordered to produce any additional E&Y documents in their possession that are related to the Compliance Engagement and dated within the Class Period. Any additional such documents dated after the Class Period must be identified on an appropriate privilege log. The production and log must be completed by May 11, 2007. Plaintiffs' Motion to Compel Production of E&Y Compliance Engagement Documents Not Listed on Defendants' Privilege Log, or for a Privilege Log as to Such Documents [Doc. 1049] is granted in part and denied in part.

6. Expert Discovery Schedule

The previous expert discovery schedule is vacated pending resolution of the outstanding E&Y issues. The parties, however, should be prepared to proceed with expert discovery immediately after those issues have been resolved.

7. Interrogatories

Defendants may file a motion by May 4, 2007 regarding objections to Plaintiffs' interrogatory responses. Plaintiffs to respond by May 11, 2007; Defendants to reply by May 18, 2007.