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' MEMORANDUM OF LAW IN SUPPORT OF PRODUCTION OF THE WORK PAPERS CREATED BY ERNST & YOUNG LLP AND DRAFT REPORT

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I. INTRODUCTION

Pending before the Court is the issue of whether the 400 boxes of Ernst & Young LLP ("E&Y") work papers and its draft final report relating to the July 1, 2002 Compliance Engagement are protected by the attorney-client privilege and the work product doctrine. As the Class has previously stated, defendants' assertion of the attorney-client privilege over these documents should not be sustained as defendants have failed to identify any confidential client communication upon which to found the privilege in the context of the Court's prior rulings respecting the *Garner* exception. Further, defendants have not established that these documents reflect legal advice or were necessary to render legal advice after October 2002. Finally, based on the Court's prior rulings with respect to the attorney work product doctrine, specifically the February 27, 2007 Order, the Class has shown good cause to overcome this qualified privilege. Accordingly, the work papers and draft final report should be produced.

Defendants' assertions of privilege are based on a categorical approach. As has been made clear in their briefings and at oral argument, defendants contend that the E&Y documents are privileged because "the work papers created in the course of the Compliance Engagement [] collectively constitute and reveal the substance of E&Y's work as agent for Household's General Counsel." Defs' Mem. at 4.[1] Defendants argue that based on this Court's findings in the December 6, 2006 Order, which related to communications between E&Y and Household International, Inc. ("Household"), they need show no more.

Defendants' position with respect to the attorney-client privilege has no substantive legal or factual merit. In essence, defendants are trying to protect E&Y's work product using the wrong

[1] "Defs' Mem." refers to the Memorandum of Law of the Household Defendants in Support of the Privileged Nature of the Ernst & Young Compliance Engagement Work Papers (Dkt. No. 1065).

theory. The attorney-client privilege protects communications, not work product. Accordingly, to assert the attorney-client privilege, defendants must identify a confidential client communication reflected in these documents. This Court has already held that communications taking place during the Class Period are not privileged with respect to the Class under the *Garner* exception. December 6, 2006 Order at 19; April 27, 2007 Order at 2. In light of this ruling, defendants must establish a confidential client communication after October 11, 2002. Defendants have not provided this Court with evidence as to any such communications revealed in the work papers or the draft report. Indeed, defendants' privilege log establishes that the work papers and draft report were not provided to any recipient. Nor have defendants established these documents reflect legal advice. No attorney-client privilege attaches to the work papers or draft report.

Recognizing the weakness of the attorney-client privilege assertion, defendants also assert the work product doctrine. Unlike defendants' attorney-client privilege assertion, this assertion of work product doctrine makes sense because what defendants seek to protect is E&Y's work product as agent of counsel. Further, the Court's prior rulings support the factual foundation for the assertion of the work product doctrine. However, at the same time, this Court's prior rulings found this work product to be fact work product and the Class to have shown good cause to overcome the qualified protection afforded such work product. Indeed, in the February 27, 2007 Order, the Court specifically held that the Class has shown good cause to overcome the work product doctrine as to documents after October 11, 2002. February 27, 2007 Order at 2. Accordingly, the work product doctrine issue has already been addressed and resolved by this Court in the Class' favor.

II. FACTUAL AND PROCEDURAL BACKGROUND

As the Court is familiar with the factual and procedural history of these documents, the Class will only briefly touch upon that portion of the history of particular relevance here.

Following this Court's December 6, 2006 Order and Judge Guzman's February 1, 2007 affirmance of that Order, the Class brought a motion to compel and for sanctions. That motion raised two issues, defendants' failure to produce approximately 187 documents on their privilege log and the issue of the unproduced E&Y work papers. *See* 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. 974) at 2 *and* Exhibit C thereto.

Following oral argument at the February 27, 2007 status conference, the Court addressed defendants' work product assertion over E&Y-related documents created after October 11, 2002. "As for any of the 187 documents covered only by the work product privilege, the court affirms that 'Plaintiffs have demonstrated a substantial need for the E&Y information in that it may assist Plaintiffs in establishing falsity, scienter and materiality.'" February 27, 2007 Order at 2 (quoting December 6, 2006 Order at 11 and citing Judge Guzman's February 1, 2007 Order).

Following this ruling, defendants withheld E&Y work papers dated prior to the end of the Class Period based on the contention that their agreement to produce post-Class Period documents did not extend to the E&Y work papers. By Order dated April 27, 2007, the Court rejected defendants' position and held that "[t]he appropriate cut-off date for the *Garner* exception is October 11, 2002." April 27, 2007 Order at 2. As a result of these rulings, defendants and E&Y have been ordered to produce all documents, including work papers, relating to the Compliance Engagement that were created on or before October 11, 2002.

These rulings leave open the issue of whether E&Y-generated documents dated after October 11, 2002, including the work papers and the draft report, are privileged. This brief summarizes the arguments the Class has presented to the Court with respect to these documents.

III. LEGAL ARGUMENTS

A. The Seventh Circuit's Standard and Defendants' Evidentiary Burden

"In the Seventh Circuit, the general principle of the attorney-client privilege takes the following form: 'Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or the legal adviser, except the protection be waived.'" *American Nat'l Bank and Trust Co. of Chicago, v. AXA Client Solutions, LLC*, Case No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805, at *3-*4 (N.D. Ill. Mar. 22, 2002) (quoting *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (quoting 8 Wigmore, Evidence §2922 at 554)). The attorney-client privilege is construed narrowly and the burden falls upon defendants to establish via evidence the existence of each element, including non-waiver. *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997); *see also Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, Case No. 01 C 4366, 2003 U.S. Dist. LEXIS 13816 (N.D. Ill. Aug. 7, 2003); *American Nat'l Bank*, 2002 U.S. Dist. LEXIS 4805, at *3-*4. Defendants fail to meet their burden of proof.

As the Court noted in the April 27, 2007 status conference, the privilege analysis commences with a review of defendants' privilege log. *See, e.g., Mold-Masters Ltd. v. Husky Injection Molding Sys. Ltd.*, Case No. 01 C 1576, 2001 U.S. Dist. LEXIS 20152, at *7-*8 (N.D. Ill. Dec. 6, 2001) (if information in log is insufficient, then disclosure of document is an appropriate sanction and citing numerous cases). Defendants have produced a log for the 400 boxes of E&Y work papers and the draft final report. This log, which improperly lumps groups of documents together as single entries,[2]

[2] As stated and held in *Mold-Masters*, failure to identify a document on a privilege log alone is a sufficient basis to compel disclosure of the unidentified document. *See, e.g., id.* at *11, *41 (compelling production of documents not listed on log, including P223, which was described as single report but was actually 27 separate documents). Further, defendants' privilege log is improper under the Seventh Circuit's

reveals that all the work papers and the draft report were authored by E&Y and not provided to any recipients. *See, e.g.*, Exhibit 1 attached hereto. Defendants have not provided any privilege log as to the second set of boxes.[3]

Defendants have also submitted the Supplemental Affidavit of John M. Keller dated May 4, 2007 ("Supplemental Affidavit" or "Supp. Aff."). This Court cannot rely upon this affidavit, which is not based upon Mr. Keller's personal, first-hand knowledge. Rather, this Supplemental Affidavit is "based on my review and that of several of my colleagues at E&Y." Supp. Aff., ¶2. By contrast, the first paragraph of his initial affidavit dated April 24, 2007 ("Keller Affidavit" or "Keller Aff.") contains an express representation of personal and first-hand knowledge of the facts recounted. Accordingly, Mr. Keller's statements in the Supplemental Affidavit are not competent evidence upon which the Court may rely. *United States v. Northrop Grumman Corp.*, Case No. 89 C 6111, 2002 U.S. Dist. LEXIS 17939, at *8 (N.D. Ill. Sept. 20, 2002) (applying personal knowledge requirement of Federal Rule of Evidence 602 to motions); *Toledo Edison v. G.A. Techs., Inc.*, 847 F.2d 335, 339 (6th Cir. 1988) (a factual showing with respect to work product "can be made in any of the traditional ways in which proof is produced in pretrial proceedings such as ***affidavits made on personal knowledge***") (emphasis added).

Assuming *arguendo* the Court were to consider the Supplemental Affidavit, that affidavit demonstrates the numerous errors and unreliability of defendants' privilege log as to the entries it

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standards, which require a privilege log be prepared on a document by document basis. *Hobley v. Burge*, 433 F.3d 946, 947 (7th Cir. 2006).

[3] Defendants' failure to provide a privilege log as to these documents warrants a finding of waiver. Where defendants will not make the requisite effort to properly assert the privilege, this Court should not sustain the privilege assertion. As directed by the Court, the Class has worked with defendants to suggest a protocol for the Court to use to review a sample of the unlogged documents *in camera*. The Class believes an *in camera* review is unwarranted without an accompanying privilege log and does not waive this argument in providing suggestions on how to conduct the review.

discusses, which have already been reviewed *in camera* by the Court. Although the log indicates E&Y is the author of all the work papers, Mr. Keller indicates that documents within log entries include Household-authored material. *See, e.g.*, Supp. Aff., ¶¶4, 6-8; *see also id*., ¶16. Also, although no recipients are listed on the privilege log, Mr. Keller asserts versions of certain entries were provided to unidentified Household representatives. *See, e.g.*, Supp. Aff., ¶¶3, 5, 9, 11-15; *see also id.*, ¶17 (unclear whether status report and agenda was provided to Household's in-house counsel). Finally, Mr. Keller changes the document dates reflected on the privilege log. While some of these date changes relate to a "manual sign-off date" when E&Y completed its analysis as opposed to the date of creation of the documents, others do not. *See, e.g.*, Supp. Aff., ¶3 (changing date range of First Installment No 75 from 9/23/02-1/30/03 to 9/23/02-1/17/03); ¶10 (changing dates of Second Installment No. 137 from 9/16/02-4/24/03 to 4/03-5/03). Given Mr. Keller's statements, the Court cannot rely upon defendants' privilege log that he establishes is unreliable and inaccurate. Ironically, Mr. Keller attaches excerpts from the privilege log as an exhibit to the Supplemental Affidavit without any alteration. *See* Supp. Aff., Ex. A.

The issue of the adequacy of defendants' privilege logs has already been before the Court and defendants have been on notice that their privilege log must meet certain standards. Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Documents Improperly Withheld on the Basis of Privilege (Dkt. No. 233) and Order thereto (Dkt. No. 375). As stated in a case cited in the prior briefing, "The accuracy of the descriptions in the privilege log is the foundation of the entire process." *B.F.G. of Illinois, Inc. v. Ameritech Corp.*, Case No. 99 C 4604, 2001 U.S. Dist. LEXIS 18930, at *11 (N.D. Ill. Nov. 13, 2001).

We proceed to the substantive issues below.

B. There Is No Attorney-Client Privilege Against the Class as to the E&Y Work Papers or the Draft Report

The E&Y work papers are in essence memos to file not revealing any confidential client communication and should be produced. Likewise, for the same reason, the draft report should be produced. Defendants' memorandum does not address this issue in substance, dismissing the Class' contentions in conclusory fashion as irrelevant or absurd. Defs' Mem. at 4. However, as the Court will appreciate, this central issue is in dispute.

The linchpin of the attorney-client privilege is the client's communication to the attorney. The "privilege only 'prohibits the disclosure of the substance of communications made in confidence by a client to his attorney for the purposes of obtaining legal advice.' . . . [It] is intended 'to be strictly confined within the narrowest possible limits consistent with the logic of its principle' and the privilege is designed to protect only such information a client communicates to his attorney . . . ." *United States v. Weger*, 709 F.2d 1151, 1154 (7th Cir. 1983) (citations omitted).[4] "Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence." *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990); *see also United States v. Segal*, Case No. 02-CR-112, 2004 U.S. Dist. LEXIS 6616, at *2-*3 (N.D. Ill. Apr. 16, 2004).

The case of *United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961), which this Court relied upon in its December 6, 2006 Order, fits within this framework. Recognizing that "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases," *id.* at 922, *Kovel* authorizes client communications directly to a professional hired by counsel "to enable the lawyer, with the technical assistance of the accountant, to render more

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[4] All citations omitted unless otherwise noted.

informed legal advice." *United States v. Schwimmer*, 738 F. Supp. 654, 657 (E.D.N.Y. 1990). Thus, cases, like *Kovel* and its progeny, where the third-party professional relays information from the client to the lawyer in order to facilitate legal advice may fall within the attorney-client privilege.

However, all this does not mean, as defendants assert, that every document authored by the third party is privileged. Indeed, not even the attorney-created documents receive such treatment. To the contrary, documents are only privileged under the attorney-client privilege (as opposed to the work product doctrine) to the extent they expose an underlying confidential client communication. For example, "memos to file prepared by counsel do not reflect an intention to confidentially communicate with a client. Notwithstanding the source of the memo, therefore, it cannot fall within the ambit of the privilege." *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 6 (N.D. Ill. 1980). In *American Nat'l Bank*, the court held:

> We dismiss this assertion of the attorney-client privilege because the handwritten notes were not communicated by in-house counsel to anyone and disclosure of the handwritten notes would not reveal any confidential communication that was made for the purpose of obtaining legal advice. The handwritten notes merely reflect in-house counsel's own uncommunicated thoughts, and such recorded and uncommunicated thoughts fall outside the province of the attorney-client privilege.

2002 U.S. Dist. LEXIS 4805, at *7-*8; *compare id.* at *16 (finding privileged a memorandum between in-house counsel that reflected underlying confidential communication). Similarly, in *United States v. South Chicago Bank*, Case No. 97 CR 849-1, 2, 1998 U.S. Dist. LEXIS 17445 (N.D. Ill. Oct. 30, 1998), the court required production of the work papers prepared by KPMG to assist outside counsel (Barack Ferrazzano) in its investigation of the defendant. *Id.* at *6. "Advance generally contends [these work papers] are 'privileged.' I find Advance has not sustained its burden of showing that these communications, which did not occur between attorney and client and were created by a third party, meet the privilege requirements. Therefore, Advance must produce them." *Id*.

In a recent opinion, *Stafford Trading, Inc. v. Lovely*, Case No. 05 C 4868, 2007 U.S. Dist. LEXIS 13062 (N.D. Ill. Feb. 22, 2007), Magistrate Judge Keys analyzed this issue in some depth. With respect to a memorandum between outside counsel, the court noted two lines of cases, one represented by *Sneider* and the other by *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. 2000). Relying on *McCook*,[5] Magistrate Judge Keys concluded that "although communications between [] counsel are not communications directly to or from the client," the memorandum was nonetheless privileged because it reflected legal advice compiled by outside counsel that was shared with other outside counsel. *Stafford*, 2007 U.S. Dist. LEXIS 13062, at *22-*23 (quoting and relying upon *McCook*).

With respect to two other documents, however, Magistrate Judge Keys refused to find privilege where the document was not communicated to other attorneys or the client and where the document did not memorialize such communications. *Id.* at *24-*25 (discussing document 2 and document 4 and distinguishing *McCook* on this basis). Further, in rejecting this privilege claim, the court found insufficient a generalized statement that some unspecified portion of the document were "notes" that reflected an attorney-client communication. *Id.*

This ruling was affirmed by Judge Coar after the party claiming privilege (Stafford) objected. *Stafford Trading, Inc. v. Lovely*, Case No. 05 C 4868, 2007 U.S. Dist. LEXIS 31079 (N.D. Ill. Apr. 26, 2007). Judge Coar agreed that "a memorandum [] prepared for an attorney's own use [] is not a communication." *Id.* at *6. Further, Judge Coar highlighted the weakness of the declaration at issue. "In paragraph 5 of her affidavit, Chandra stated unequivocally that documents [] reflected

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[5] The *McCook* decision itself recognized that it was in conflict with prior decisions in the Northern District of Illinois, acknowledging and disagreeing with the prior decision of *C&F Packing Co. v. IBP, Inc.*, Case No. 93 C 1601, 1997 U.S. Dist. LEXIS 15389 (N.D. Ill. Sept. 29, 1997). *See McCook*, 192 F.R.D. at 255.

communications between Kirkland & Ellis and plaintiffs for the purpose of rendering legal advice. In contrast, here in paragraph 6, she equivocates. She states that it is her ***belief*** that the notes reflected communications between Kirkland & Ellis and Plaintiffs." *Id.* at *8 (emphasis in original). Significantly, defendants have not placed before this Court any declaration that plainly states the work papers or draft report memorialize or reveal confidential client communications.

The principal case relied upon by defendants, the Northern District of Ohio's decision in *In re OM Group Sec. Litig.*, 226 F.R.D. 579 (N.D. Ohio 2005), is inconsistent with the cases cited above. In *OM Group*, where the court labored without the assistance of legal citations by the plaintiff, the court reasoned that if the accountant's communications with the lawyer were privileged, then the accountant's work papers underlying those communications, whether communicated or not, were likewise privileged. *Id.* at 589 n.18. For the reasons noted above, both propositions are subject to criticism. Further, under this reasoning, all documents created by an investigator hired by attorney would be absolutely privileged under the attorney-client privilege as long as they related in some manner to what the investigator told the attorney, thus rendering unnecessary the work product doctrine. In any event, defendants cite no case law from this District or the Seventh Circuit adopting this sweeping privilege.

Even under the expansive view of the attorney-client privilege articulated in *Stafford*, the E&Y work papers and draft report are not privileged. *Stafford* and the other Northern District of Illinois cases make clear that it is not sufficient that E&Y was the author of the document for if a lawyer's notes are not privileged, certainly the lawyer's agents' notes are not privileged. Defendants' privilege log represents that there are no recipients for these documents and that they were not intended to be provided to anyone. Mr. Keller's affidavits are not to the contrary on this point and do not establish that the work papers and draft report were written with the intent of sharing them.

Moreover, the work papers do not memorialize any underlying confidential client communication or any legal advice. Indeed, defendants acknowledge that this Court will not be able to determine the privilege nature of the E&Y work papers from face of the documents. *See* Defs' Mem. at 10. Nor do Mr. Keller's affidavits suggest that the E&Y work papers reflect any confidential communication. To the contrary, it appears that the work papers are in the nature of abstract loan information and numbers so as not to reflect any substantive communication.

Defendants try to save their position by relying upon the provision of Household's internal loan data to E&Y. *Id.* at 9-10. However, this "communication" is not confidential with respect to the Class since it apparently occurred during the Class Period and falls within the Court's prior *Garner* rulings.[6] Indeed, in the initial motion, the Class submitted exhibits to the Court discussing the provision of these datasets. *See* Exhibits C-D to the Declaration of D. Cameron Baker in Support of the Class' Motion to Compel Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP (Dkt. No. 730). Also, defendants candidly admitted that the data was "communicated" to E&Y. These points further distinguish this case from the cases cited by defendants, including *Kovel*, 296 F.2d 918, and its progeny, such as *Ferko v. NASCAR*, 218 F.R.D. 125 (E.D. Tex. 2003).

Mr. Keller's affidavits indicate that some portion of the work papers may also have been reviewed subsequently by unidentified Household representatives. *See, e.g.*, Supp. Aff., ¶3. However, just as a client cannot make a non-privileged document privileged by providing it to an attorney, an attorney cannot make a non-privileged document privileged by providing it to the client. Further, since these documents have no recipients, they were not created with the intent of sharing

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[6] Defendant's privilege log contains a number of entries where no date is assigned. A list of such entries is attached hereto as Exhibit 2. As to each of these entries, defendants have failed to meet their burden and the documents should be produced.

them with defendants. Also, as noted above, since these are E&Y-generated documents, they are privileged only if they reflect on their face the substance of a prior confidential client communication. *Defazio*, 899 F.2d at 635 (communications from attorney to client only privileged if revealed prior client to attorney communication). Nothing in Mr. Keller's affidavit or defendants' brief even suggests this to be the case.

Further, Mr. Keller's affidavits are too nebulous for the Court to determine which documents were reviewed and which were not as well as who reviewed them.[7] "If there is no information provided about a person to whom the communication was intentionally transmitted, it is axiomatic that there cannot be a finding that the communication was intended to be and maintained confidential." *B.F.G.*, 2001 U.S. Dist. LEXIS 18930, at *14-*15. Since the defendants' burden is to establish the privilege as to each document, they have failed to meet their burden. *ConAgra, Inc. v. Arkwright Mut. Ins. Co.*, 32 F. Supp. 2d 1015, 1017-18 (N.D. Ill. 1999) (rejecting claim of privilege where party's conclusory assertions did not provide the court with sufficient information to assess the applicability of the privilege).

The draft report[8] presents a more complex analysis. According to the privilege log, this report was not provided to anyone. *See* Ex. 1 (identifying no recipients). As noted above, the privilege log is defendants' representation of what the document is and they should not be allowed to alter it via a conflicting declaration. Further, although Mr. Keller declares it was shared with counsel and other unspecified "Household representatives," he does not state this draft report was prepared

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[7] Mr. Keller's affidavits are not clear as to what percentage of work papers are represented by these reports or which boxes contain such reports. Nor can the Court rely upon the privilege log to divide the documents since some of the "analysis" entries are apparently "framework" entries. *Compare* Supp. Aff., ¶¶6-7 (identifying entries as containing framework for analysis) *with* Exhibit A thereto (same entries identified as "analyses"). Moreover, the Court has no details as to whom the unspecified representatives are.

[8] The Class seeks the portion of the draft report that discusses and reports on the Compliance Engagement and is not seeking the portions that deal exclusively with other E&Y engagements.

with the requisite intent of sharing it. In similar circumstances, *Sneider* found a draft affidavit to be outside the privilege since "it is not by its very nature a communication which was intended to be confidential." 91 F.R.D. at 6.

Further, defendants have not shown the draft report would reveal the substance of any prior confidential client communication. Defendants represent the draft report to be the compilation of the underlying work done. If the underlying work is not privileged because it does not reveal the substance of confidential client communications, the draft report is not either. Defendants' log indicates that the draft report at issue is the initial January 2004 draft, and not the revised "draft" report from March. *See* Ex. 1; Supp. Aff., ¶18. Thus, this version could not reflect the substance of the discussions between E&Y and Household's General Counsel in that time period.

Putting aside these hurdles, defendants could make a claim of attorney-client privilege (as opposed to work product) under *Stafford* and *McCook* if the draft report reflects legal advice. However, unlike the attorney memos at issue in those cases, this draft report was not prepared by an attorney. Further, based on Mr. Keller's affidavits, the draft report does not reflect legal advice. Mr. Keller describes E&Y's role as "to identify the overcharges so that refunds could be provided to any affected customer." Keller Aff., ¶2. Identification of overcharges and refunds is not legal advice.

Further, to the extent that defendants have identified any legal advice at issue, they link it to the California Department of Corporations' lawsuit filed in November 2001 and settled in January 2002. Keller Aff., ¶3 ("It was my understanding . . . that the Compliance Engagement was a result of a lawsuit that had been brought by the State of California."). Neither Mr. Robin's declaration nor Mr. Keller's affidavit explains what if any were the pending legal issues in January 2004, well after defendants had reached agreements with the Attorneys General and other states. (The Class continues to believe this engagement could not have resulted in any legal advice. Once E&Y determined the amount of refunds, there would appear to be no role for any lawyer to provide legal

advice. To the contrary, at that stage, Household management could have simply issued the refunds without legal advice.)

Assuming *arguendo* there are some portions of that draft report that reflect legal advice, the draft report will also contain discrete factual portions or summaries of the refunds to be issued. These factual portions, which have great relevance to this case, should be produced. On this point, we note that defendants have concurrently filed a motion to compel the Class to identify the number or amount of improper prepayment penalties. The amount of refunds for improper prepayment penalties was part of the Compliance Engagement and the information developed by E&Y on this point would be responsive to defendants' interrogatory.

In these circumstances, defendants' categorical assertions of privilege are not well considered. Defendants have not met their burden of establishing all the foundational facts necessary to establish the privilege and have not provided evidentiary support for the Court to conclude that with respect to the documents at issue, there was a confidential client communication after the Class Period or that these documents reflect legal advice.

C. Defendants Have Failed to Adopt Adequate Precautions to Protect the Privilege

Defendants must take adequate steps to protect the privilege. Defendants were able to avoid sanctions by having this Court "rely on, and accept as true, Landis Best's declaration that Household was, until recently, unaware of the 425 boxes stored offsite at Iron Mountain." April 9, 2007 Order at 2; *see also* April 27, 2007 Order at 3 (noting "Defendants recently discovered for the first time some 425 boxes of additional documents relating to E&Y"). Given this prior representation to the Court, defendants cannot now attempt to suggest that only "defense counsel" were unaware of the storage of these boxes at Iron Mountain. Defs' Mem. at 12. Thus, the record before this Court is that over 400 boxes of allegedly privileged work papers lay forgotten and lost in an Iron Mountain warehouse for over two years. (Defendants have acknowledged to the Class that two boxes of work

papers remain lost and still have not been recovered.) Not only did defendants lose these documents, they proffer no evidence that these boxes were stored securely or treated differently from ordinary boxes stored in that facility, such as being segregated in any way. In these circumstances, defendants have failed to take adequate precautions to protect their privileges.

D. Defendants Cannot Alter the Dates on Their Privilege Log

On April 27, 2007, the Court ordered defendants to produce all E&Y documents created during the Class Period. To evade that Order, defendants are now amending their privilege log so that documents previously identified as created during the Class Period are now logged as post-Class Period documents. Having represented these as Class Period documents, defendants cannot now backtrack on that representation. (Defendants have not provided any explanation for these amendments nor any explanation as to why the prior dates were inaccurate.) Further, as indicated in the Supplemental Affidavit, Household's "new" document dates are the dates of E&Y's manual sign-off, which reflects the completion of E&Y's review, and not the date of creation of the document. *See, e.g.*, Supp. Aff., ¶4. The Court has used the document creation date as the basis for determining application of the *Garner* exception and should not allow defendants now to amend their privilege log to cite a later "completion" date to avoid the production ordered by the Court.

E. Defendants' Assertion of the Work Product Privilege Has No Merit

As suggested above, the work product doctrine is the more appropriate analysis for determining whether the E&Y work papers and draft report are privileged. *Zenith*, 2003 U.S. Dist. LEXIS 13816, at *8 (an attorney's memorandum to file is not protected by the attorney-client privilege, but could be protected by the work product doctrine). Indeed on December 6, 2006, the Court held E&Y were the agents of Household's General Counsel and that communications with it were subject to a claim of work product. However, in that same Order, the Court concluded that defendants had not met their burden to show opinion work product and that the Class had shown

good cause to overcome the work product privilege. On February 27, 2007, the Court extended these rulings as to post-Class Period documents relating to the E&Y Compliance Engagement. "[T]he court affirms that 'Plaintiffs have demonstrated a substantial need for the E&Y information in that it may assist Plaintiffs in establishing falsity, scienter, and materiality. Thus, these [post-Class Period documents covered only by the work product doctrine] must be produced.'" February 27, 2007 Order at 2. Defendants' arguments on the work product are precluded by this Court's prior rulings.

Defendants acknowledge that the "starting point for any discussion of E&Y's work papers must be the prior rulings issued by this Court," Defs. Mem. at 1, but do not mention or even acknowledge the February 27, 2007 Order's ruling with respect to work product. Defendants cannot now ask the Court to reconsider this ruling. Further, even if they could, defendants' arguments about the relevance and significance of the refund information are pure nonsense. The points made by the Class in its initial point continue to hold true. Additionally, defendants' own contemporaneous motion to compel the Class to identify improper prepayment penalty information involves the very information generated by E&Y in this Compliance Engagement. Accordingly, defendants' arguments to the effect that the Class has not shown good cause to overcome the work product doctrine are meritless.

Further, defendants cannot seek reconsideration of the "opinion work product" finding in the December 6, 2006 Order. As noted in that Order, defendants failed to meet their burden of proof on that issue. This Court reaffirmed this holding in the February 27, 2007 Order when it found the Class had shown good cause. Defendants' bald assertion that the work papers reflect "the decisions, mental impressions and insights of Household's counsel" fails. Defs' Mem. at 14. Defendants' authority for their position, the Supplemental Affidavit, does not meet their burden. That affidavit states only that unidentified Household representatives "reviewed and validated" some entries. *See*

Supp. Aff., ¶18. There is no testimony that these representatives were attorneys. Further, both the affidavit and the privilege log represent that these work papers are E&Y-generated material and not authored by counsel. And, as defendants have acknowledged, the documents on their face do not reflect any privilege, thus it is impossible that they would reflect counsel's mental impressions so as to be worthy of opinion work product protection.

F. The Keller Affidavit Was Improperly Redacted and Provided Untimely

On April 24, 2007, defendants provided this Court *in camera* with the initial Keller Affidavit without the Court's prior request or permission. Defendants subsequently provided the Class with a redacted version. On April 27, 2007, defendants were directed to provide an "explanation as to why the redacted portions of [that affidavit] are privileged." April 27, 2007 Order at 2. Defendants' response is a conclusory "because." *See* Defs' Mem. at 15-16. Defendants admit that their redactions were due to an "excess of caution." *Id*. at 15. Nonetheless, defendants did not agree to provide the Class with the full declaration unless the Court immunized its production, which the Court did on Wednesday, May 9 at 10:00 a.m. Even then, defendants did not provide the full affidavit until 2:15 p.m. after the Class counsel called and requested it. As a result, the Class obtained this declaration only two days prior to the due date for this brief and has been prejudiced by defendants' withholding of this affidavit for spurious reasons. (Defendants played a similar game with respect to the index of the E&Y work papers, which they also withheld based on an equally wholly unsubstantiated claim of privilege.) Further, defendants have refused to file the complete Keller Affidavit with the Court so it is not part of the record. The Court, therefore, should not consider the unredacted Keller Affidavit.

DATED: May 11, 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 May 11, 2007 declarant served by electronic mail and by U.S. Mail to the parties: **THE CLASS' MEMORANDUM OF LAW IN SUPPORT OF PRODUCTION OF THE WORK PAPERS CREATED BY ERNST & YOUNG LLP AND DRAFT REPORT**. The parties' email addresses are as follows:

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and by U.S. Mail to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of May, 2007, at San Francisco, California.

s/ Marcy Medeiros
MARCY MEDEIROS