

Defendant Household International, Inc.'s ("Household") motion for partial reconsideration should be summarily denied. Household's motion attacks two rulings made by this Court in its April 27, 2007 Order: 1) the Court's requirement that Household search for and produce Class Period documents relating to the Ernst & Young ("E&Y") Compliance Engagement and prepare a privilege log for post Class Period documents; and 2) the Court's order extending the depositions of Msrs. Keller and Bianucci to two full days. The Court's decisions on these issues are well-considered in light of the record before the Court and the Court's prior experience on these issues. More importantly, the subjects were fully discussed at the April 27, 2007 status conference and Household provides this Court with no evidence or arguments that it did not make or could not have made then. The Court should deny this motion.

I. LEGAL ARGUMENT

A. Household Has No Basis to Seek Reconsideration of the April 27, 2007 Order

As this Court has noted, the Court's orders are not "first drafts, subject to revision and reconsideration at a litigant's pleasure." March 5, 2007 Order at 1 (quoting *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1985)). Household's motion for partial reconsideration represents precisely this attitude and should be denied.

Judge Guzman articulated the applicable standard in his April 12 Order: "our court of appeals has said that motions to reconsider should be presented only when the law or facts change significantly after the issue is presented to the Court, the Court has 'patently misunderstood a party,' has 'made a decision outside the adversarial issues presented' to it, or has 'made an error not of reasoning but of apprehension.'" April 12, 2007 Order at 1 (quoting *Bank of Waunakee v. Rochester*

Cheese Sales, 906 F.2d 1185, 1191 (7th Cir. 1990)). Household erroneously contends this Court committed an error of apprehension. Defs' Mem. at 3.¹

Household's claim that this Court did not apprehend the full impact of its ruling with respect to the Compliance Engagement documents rests on "the Plaintiffs' misleading papers and Defendants' inability to put in responsive papers and fully address the issues at the April 27 status conference." *Id.* None of the three articulated bases support this motion. First, there is no explanation of how the Class misled this Court, only the bold accusation.² Second, this Court has received extensive briefing on the E&Y issues, including from Household on the extent to which Compliance Engagement documents were responsive to the Class' document requests and the burden on Household associated with reviewing and producing these work papers. *See, e.g.*, Household's Memorandum in Opposition to Plaintiffs' Motion to Compel Production of Ernst & Young LLP Documents and for Sanctions at 11-13 (Dkt. No. 986). Third, defense counsel had a full opportunity to address the issues at the April 27 status conference. *See, e.g.*, April 27, 2007 Hearing Tr. at 66-68 (arguments of Ms. Best). Indeed, at the status conference, defense counsel raised the same issues as are made in the motion for reconsideration. *Id.* (arguing no document requests on point, burden, relevance and the kitchen sink). Moreover, at the conclusion of that discussion, the Class (not Household) asked if the Court wanted to set a briefing schedule. *Id.* at 73. The Court

¹ "Defs' Mem." refers to the Household Defendants Motion for Partial Reconsideration and Clarification of the Court's April 27, 2007 Order (Dkt. No. 1076)

² Household's bold accusation is the pot calling the kettle black. In its brief, Household argues that the Class brought the initial motion regarding the E&Y Compliance Engagement prematurely and without meeting and conferring. Defs' Mem. at 5. However, the Class brought the motion because Household had promised and failed to provide a privilege log, thus exercising a "pocket veto" on the Class' ability to bring the issue to a head in time for the January 31, 2007 discovery cut-off. This Court commented on the weakness of Household's meet and confer argument at the October 19, 2006 hearing, stating the Court "didn't want to hear about that." *See* October 19, 2006 Hearing Tr. at 100 (referencing the failure to provide the promised log in August). It is amazing that Household tries to recycle this old and factually inaccurate allegation in this context.

declined to do so. *Id.* If Household truly needed a further opportunity to argue these issues, Household should have raised this objection then, not after the Court has ruled.

The situation is the same as that the Court faced when the Class moved for reconsideration with respect to the Court's January 24, 2007 ruling on the KPMG audit letters (Dkt. No. 941). This Court affirmed that ruling on March 5, concluding it was within the Court's discretion to rule without a briefing by the Class given the prior briefings of similar issues and oral argument at the status conference. *See* March 5, 2007 Order at 2 (within Court's discretion to decide further briefing was unnecessary). Household does not mention the Court's March 5, 2007 Order or suggest that its request for reconsideration differs in any material fashion from the Class' earlier motion.

Household has no basis for claiming the Court failed to apprehend its ruling. To be sure, as explained below, Household's misapprehension argument is predicated upon its own misreading of the Court's ruling.

B. The Court Properly Required Household to Produce Compliance Engagement Documents and a Privilege Log

Household's arguments all arise from its contention that this Court erroneously based its ruling on the Class' "abandoned" E&Y subpoena. Defs' Mem. at 3. This contention misreads the Court's Order, which clearly relies upon the Class' own document requests and not the E&Y subpoena. In the April 27, 2007 Order, the Court found that while the Class' broad documents requests alone were not sufficient to put Household on notice to produce the Compliance Engagement documents, the Class' October 16, 2006 Motion to Compel Production of Documents Pertaining to Household Consultations with Ernst & Young LLP (Dkt. No. 708) did provide Household with that notice. "[I]t was certainly clear to Defendants by October 2006 that Plaintiffs wanted documents relating to that entity." April 27, 2007 Order at 3. Put differently, the October 16, 2006 Motion to Compel made it clear that Household should produce the E&Y Compliance Engagement documents in response to the Class' earlier broad document requests. The language of

the April 27, 2007 Order, thus, establishes that this Court relied upon the Class' own document requests and not the E&Y subpoena.

Additionally, the Court has before it Request No. 34 of the Third Set of Document Requests.³ As the Class explained during the April 27 status conference, this document request tracks the subject matter of the E&Y Compliance Engagement. *See* April 27, 2007 Hearing Tr. at 71 (statement of Mr. Baker: "we basically said give us the documents that relate to the subject matter that Ernst & Young was looking at"). This document request was propounded on March 6, 2006, two months prior to the E&Y subpoena. Thus, Household actually was on notice that the Class was seeking the Compliance Engagement documents by March 2006.

These points undercut Household's recycled argument that it is unfair for the Court to have it to search for responsive documents and produce or log them at this juncture. Defs' Mem. at 8. As the Court's Order makes clear, it is Household's own fault for not commencing this work in October of last year. Indeed, at that time, this Court directed Household to log all the E&Y documents. October 19, 2006 Hearing Tr. at 102. If Household had complied with this Court's October 19, 2006 directive to log these documents, the parties and the Court would not be left addressing these issues now. Indeed, Household would have completed this project at or around the same time as the Court's December 6, 2006 Order. In sum, Household is attempting to benefit from its own wrongs, which is the exact opposite of equity.

³ Request No. 34 provides "Documents that track, analyze or describe refunds related to state regulatory examinations and investigations, including, but not limited to, refunds for, prepayment penalties, origination fees, single premium credit life insurance, discount points, EZ Pay, finance charge, recording fees, and administration fees." This language tracks the description of the Compliance Engagement as described in Mr. Keller's affidavit and in Household's own internal documents. Affidavit of John Keller at 3-4 attached as Tab B to the Memorandum of Law of the Household Defendants in Support of the Privilege Nature of the Ernst & Young Compliance Engagement Work Papers (Dkt. No. 1065); *see also* Exhibit A to the Declaration of Cameron Baker to the October 16, 2006 Motion to Compel.

Further, it is the Class that has suffered by virtue of Household's failure to act appropriately. Despite this Court's numerous orders, Household still has not produced all Class Period documents relating to this engagement, which both this Court and Judge Guzman have found to be highly relevant to this litigation. *See* February 27, 2007 Order at 2; February 1 Order at 3.⁴ Indeed, by virtue of this motion for reconsideration, Household has effectuated a postponement of this Court's Order that these documents be produced or logged by May 11, 2007, a date that is already passed. Delaying this production impacts the depositions of Mssrs. Keller and Bianucci and the completion of fact discovery.

These points hold true with respect to post-Class Period documents. The burden on a party asserting privilege has always included the obligation to timely log the documents so that the opposing party and the Court can assess the assertion of privilege. *See* Fed. R. Civ. P. 26(b)(5); *see also* April 27, 2007 Order at 3 ("As a result, the court cannot be certain that Defendants have now accounted for all E&Y documents in their possession."). Here the log is particularly important since defendants can only assert the attorney-client privilege as to these documents and not the work product doctrine given the Class' showing of good cause. If Household does not wish to prepare a log, its alternative is to produce the documents.

Significantly, the Court already specifically directed Household on October 19, 2006 to log these documents. Household explains that it "read" the Court's directive to encompass only certain documents that had been withheld without being logged. Defs' Mem. at 5 & n.3. However, neither the Class' motion nor the Court's directive were so limited. Indeed, the Court's October 19 directive

⁴ "The 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. It would be nearly impossible for plaintiffs to obtain all of the specific data provided to E&Y or to re-create the investigation from depositions and other documents." February 1, 2007 Order at 3

was based on the Court's expressed desire at the October 19 status conference to know all documents at issue. October 19, 2006 Hearing Tr. at 99 (discussing one of the functions of a log). Similarly, Ms. Buckley's declaration makes clear that Household understood the Class' motion to be addressed to the Compliance Engagement generally (and not just previously produced or withheld documents). Buckley Decl. at 2.⁵ In her Declaration, Ms. Buckley stated: "One of the July 1, 2002 [E&Y] engagements was for a review of various state regulatory compliance aspects of Household's Consumer Lending operation (the 'Compliance Engagement'), *which I understand is the subject of the present motion.*" Buckley Decl., ¶4 (emphasis added). Household cannot use failure to provide a privilege log earlier as a basis to resist preparing one now.

Further, the Court should not rely upon conclusory assertions of burden contained in Ms. Best's declaration, which does not include any representation of personal knowledge. Those assertions are contrary to prior statements made to this Court. Household previously represented to this Court that it had conducted a "very thorough [investigation] over the summer" of 2006 as to the Compliance Engagement. October 19, 2006 Hearing Tr. at 98 (statement of Ms. Best). That 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." June 29, 2006 letter from S. Buckley to C. Baker, attached as Exhibit 2 to the Buckley Decl. Household, thus, should be in a position to produce these documents promptly as it already has done a "very thorough" investigation.

Further, when Household sought to establish that this engagement was privileged, it emphasized the role of the General Counsel's office. Now, to argue burden, it emphasizes the

⁵ "Buckley Decl." refers to the Declaration of Susan Buckley in Opposition to Plaintiffs' Motion to Compel Production of Documents Pertaining to Household's Consultations with Ernst & Young (Dkt. No. 749).

involvement of “several departments within Household’s Consumer Lending business Unit.” Best Decl., ¶4.⁶ (We note that the involvement of numerous departments undercuts the assertion of the attorney-client privilege.)

Finally, the Court should reject Household’s proposed alternative of searching only the “core” people. Unlike E&Y, Household is a party to this litigation and thus, it should bear a heavier discovery burden. Further, once again Household is trying to leverage its own prior neglect into a benefit, here limiting the documents produced to the Class. Household has been the one that has delayed and now cannot cite further delay as a reason for not doing what it should have done earlier.

To be sure, the Class is concerned about further delays and wishes to minimize them. However, the Class should not be penalized as a result of Household’s conduct. Accordingly, the Class requests that the Court reset the date for Household to produce and log these documents to June 12, 2007, two months after the April 12, 2007 status conference where this issue was first raised and discussed. This date also provides Household with approximately a month and a half after the April 27, 2007 Order, nearly the two months requested by Household in Ms. Best’s declaration.

C. The Court’s Order Regarding the Length of the Keller and Bianucci Depositions Is Clear

Household suggests that the Court clarify its ruling with respect to the two days allotted for each of the Keller and Bianucci depositions. However, that ruling is abundantly clear: “each deposition will not exceed two, consecutive seven-hour days.” April 27, 2007 Order at 2. In truth, Household seeks reconsideration of this ruling, but offers no basis for doing so.

⁶ “Best Decl.” refers to the Declaration of Landis Best in Support of the Household Defendants’ Motion for Partial Reconsideration and Clarification of the Court’s April 27, 2007 Order.

Putting aside the issue of why Household and not the deponents are raising this issue, Household's argument here rests on the underlying assumption that somehow the Court was not aware of its prior directives or didn't know what it was saying in the April 27, 2007 Order. There is no basis for this assumption. The dialogue between the Court and Class Counsel at the April 27, 2007 status conference demonstrates the contrary. *See* April 27, 2007 Hearing Tr. at 7-8 (colloquy between Mr. Brooks and the Court). That dialogue also refutes Household's assertion that the Class never asked for additional time with these witnesses. Defs' Mem. at 10.

Moreover, as the parties have devoted more and more time to the E&Y issues, it has become abundantly clear to all that additional deposition time would be needed with both Mr. Keller and Mr. Bianucci given their work on the Compliance Engagement. Thus, it is not surprising that both the Class and the Court should modify their views to reflect this new knowledge. Household cannot argue that this was error or an abuse of discretion for this Court to do so.

Finally, to the extent that Household is *sub silentio* seeking to relitigate how to count these depositions, this attempt fails. Whether a deposition lasts seven hours or fourteen hours is not relevant for purposes of the counting of depositions.

DATED: May 18, 2007

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DECLARATION OF SERVICE BY E-MAIL 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 18, 2007 declarant served by electronic mail and by U.S. Mail to the parties: **THE CLASS' OPPOSITION TO HOUSEHOLD'S MOTION FOR PARTIAL RECONSIDERATION AND CLARIFICATION OF THE COURT'S APRIL 27, 2007 ORDER.** 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 18th day of May, 2007, at San Francisco, California.

s/ Juvily P. Catig

JUVILY P. CATIG