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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION AND CLARIFICATION OF THE COURT'S APRIL 27, 2007 ORDER

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This reply memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Defendants"), in further support of their motion for (i) reconsideration of Part Five of the Court's April 27, 2007 Order requiring production or logging of all documents in Defendants' files regarding the privileged Compliance Engagement performed by Ernst & Young ("E&Y") during the period July 2002 through early 2004; and (ii) clarification that the Court did not intend to overrule its prior directives with respect to the one seven-hour day duration of the depositions of Messrs. Keller and Bianucci of Ernst and Young.

INTRODUCTION

Plaintiffs' opposition does not dispute the following points made in Defendants' opening brief:

- The additional discovery Plaintiffs now seek is cumulative of and/or tangential to (i) the millions of pages of loan-related documents and deposition testimony already in Plaintiffs' possession, (ii) the E&Y work papers created during the Class Period (which comprise the critical universe of E&Y's substantive work this Court found to be subject to the *Garner* exception), and (iii) the documents produced by E&Y from the files of the nine core individuals involved in the engagement.
- Most if not all of the newly-requested documents are likely privileged and would not even be seen by Plaintiffs, making this entire process nothing more than another expensive and burdensome logging exercise.
- Plaintiffs failed to enforce the subpoena served on E&Y following E&Y's objections.

Rather, Plaintiffs' opposition is devoted almost entirely to rehashing their already-rejected argument that their blunderbuss document demands implicitly included a request for E&Y Compliance Engagement documents and that Defendants should have already produced and/or logged all such documents on that basis. It is, of course, no surprise that Plaintiffs try

mightily to argue again that they have previously requested these documents from Household, because their failure to have done so during the multi-year discovery period weighs heavily against their belated request for such documents now. But this Court has expressly held that Plaintiffs' document demands did *not* "suffice to place Defendants on notice that Plaintiffs wanted documents from E&Y . . . ." April 27 Order at 3).[1] Plaintiffs' persistent attempts to refute that holding — replete with misconstrued arguments taken entirely out of context — is nothing more than an attempt to divert the Court's attention from Plaintiffs' own neglect in properly pursuing E&Y discovery during the fact discovery period. The Court should not reward Plaintiffs by granting them a thirteenth hour redo.

ARGUMENT

As an initial matter, Plaintiffs' claim that "[t]his situation is the same as the Court faced when [Plaintiffs] moved for reconsideration with respect to the Court's January 24, 2007 ruling on the KPMG audit letters" cannot be taken seriously. Pl. Opp. Br. at 3. The Court's March 5 Order denying Plaintiffs' motion for reconsideration of its January 24 ruling noted that "Plaintiffs have exhaustively briefed the issue of whether Household's attorney opinion letters are protected as work product, which culminated in two opinions from the Court. . . . In addition, Plaintiffs addressed the issue of waiver as to the KPMG audit letters in their January 10, 2007 status report, prompting the Court to conduct an *in camera* review of those documents."

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[1] *See also* this Court's February 27, 2007 Order: "At the same time, it is also not clear that Plaintiffs tendered a document request specifically asking for E&Y documents."; Judge Guzman's April 9, 2007 affirmance of this Court's February 27 Order: "[Plaintiffs] never previously requested Household to produce E&Y documents or challenged E&Y's objections to the May 2006 subpoena for production of E&Y documents relating to the Compliance Engagement."

March 5, 2007 Order at 2 (affirmed by Judge Guzman on April 12, 2007). In contrast, Defendants were not afforded the opportunity to respond in writing to Plaintiffs' motion on this subject, and Plaintiffs' motion was addressed only briefly at the end of the April 27 status conference.

A. Plaintiffs' Argument That They Had Previously Requested The Subject Documents Has Already Been Rejected by the Court.

Without addressing the points raised in Defendants' brief, Plaintiffs string together a handful of previously rejected arguments to support their groundless refrain that Defendants were required but failed to produce and/or log all documents relating to the E&Y Compliance Engagement pursuant to prior document demands. This argument flies in the face of the Court's unambiguous finding in its April 27 Order that Plaintiffs had not served any discovery demand on Defendants for E&Y documents. *See also* Judge Guzman's April 9, 2007 affirmance of this Court's February 27 Order at 2 ("[Plaintiffs] never previously requested Household to produce E&Y documents or challenged E&Y's objections to the May 2006 subpoena for production of E&Y documents relating to the Compliance Engagement.").[2]

It is axiomatic that a motion to compel can only seek discovery that has actually been requested, and Plaintiffs' October 2006 motion to compel cannot fairly be construed to have covered demands that had not been made by that time and arguments that were not raised on the motion. *See Mark* v. *Gustafson*, 05-C-279-C , 2005 U.S. Dist. LEXIS 32473, at *4 (W.D.

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[2] As "support" for their claim that they requested these documents, Plaintiffs inexplicably refer the Court to Request 34 of Plaintiffs' Third Document Demand (Pl. Opp. Br. at 4), which contains language virtually identical to that already rejected by the Court as being too "generic" to have put Defendants "on notice that Plaintiffs wanted documents from E&Y". April 27 Order at 3.

Wis. Dec. 12, 2005) ("A motion to compel is not proper unless plaintiff can show that he served defendants with [discovery] seeking the information he wants compelled and that the defendants failed to respond to his request within the time allowed under the Federal Rules of Civil Procedure."); *Kmoch* v. *Klein*, No. 95 C 2256, 1996 U.S. Dist. LEXIS 3916, at *8 (N.D. Ill. Mar. 28, 1996) (Motion to compel was premature when no formal discovery requests had been propounded.); *Kean* v. *VanDyken*, No. 4:05-cv-64, 2006 U.S. Dist. LEXIS 10316, at *17 (W.D. Mich. Feb. 16, 2006) ("Plaintiff has not served any request for production of documents upon defendants as provided by Rule 34. Any motion to compel production of documents by plaintiff at this juncture is premature."). Indeed, Plaintiffs' own briefs confirmed that their motion was directed only to those E&Y documents that had previously been listed on Defendants' privilege log, and did not encompass a non-existent earlier request for the entire universe of documents relating to the E&Y Compliance Engagement. *See, e.g.*, Plaintiffs' February 22 Brief in Support of Their Motion to Compel (which sought production of the same documents at issue in Plaintiffs' October motion) at 2: "after reviewing defendants' privilege log, [Plaintiffs] ascertained that defendants had failed to produce over 187 responsive documents." *See also* the Court's February 27, 2007 Order (making continuous references to "the 187 documents" at issue).

Undaunted by the factual record, Plaintiffs contend that the Court's unrelated instruction regarding a privilege log during the October 19, 2006 status conference amounted to "evidence" that Plaintiffs had previously requested all E&Y documents. (Pl. Brief at 5-6.) This is sheer nonsense. The Court issued its instruction on October 19 in direct response to Plaintiffs' complaint that Defendants' rolling privilege log, which followed their rolling production of requested documents, was too slow. *See* Transcript excerpt of October 19, 2006 status conference, attached as Exhibit A to Pls. April 24, 2007 Motion. As Plaintiffs' lack of a prior request for

E&Y documents was not a subject of discussion that day, there is no rational basis to assume that the Court implicitly issued an order that somehow cured Plaintiffs' lapse. *Cf.* the Court's December 6, 2006 Order at 19 (finding a delay in submitting privilege logs acceptable in light of the amount of documents at issue).

Plaintiffs also argue disingenuously that the Declaration of Susan Buckley dated November 3, 2006 conceded that the Compliance Engagement was "the subject of the [October] motion" (Pl. Opp. Br. at 6). The cited reference simply indicated that of the E&Y documents included on Defendants' privilege logs, Plaintiffs were seeking only those relating to the Compliance Engagement, as opposed to those relating to two other engagements commenced during the Class Period.[3] *See* Buckley Declaration dated November 3, 2006 at ¶ 4, attached hereto as Exhibit 1. This is clearly supported by the Court's February 27, 2007 Order, which held that "Defendants need not produce any of the 187 documents that do not relate to the Compliance Engagement. Defendants noted early on that Household retained E&Y to conduct two additional studies, but it is clear that Plaintiffs sought only those documents relating to the Compliance Engagement." February 27, 2007 Order at 2. Here too, because Plaintiffs' failure to issue an E&Y-related document demand to Defendants was not at issue at that time, Ms. Buckley had no occasion to remark on that omission, and certainly said nothing to suggest that Defendants were implicitly acknowledging a non-existent demand.

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[3] As with the E&Y Compliance Engagement, references to these other engagements appeared in documents produced or logged in response to one or more of Plaintiffs' myriad requests, for example Plaintiffs' demand for all documents produced to the Securities and Exchange Commission. Defendants' good faith compliance with Plaintiffs' discovery requests cannot be used by Plaintiffs to create a document request that simply did not exist.

Had Plaintiffs made a timely demand to Defendants for E&Y Compliance Engagement documents, and followed the prescribed meet and confer process for identifying and narrowing discovery disputes, Defendants' objections could have been addressed and resolved well before the close of fact discovery. Plaintiffs' failure to assess their alleged needs during the protracted fact discovery period should not be rewarded by the grant of an onerous new search for privileged material and a related logging exercise that will serve no valid objective.

B. Plaintiffs Have Not Disputed the Cumulative Nature and Undue Burden of Their Request.

For all Plaintiffs' emphasis on their discredited argument that they had previously requested the subject material, Plaintiffs' opposition is far more notable for its failure to address the immense burden, cost and delay that would be involved in searching for and logging all E&Y Compliance Engagement documents months after the close of fact discovery. These considerations are especially compelling here, as Plaintiffs are seeking documents that: (i) are highly likely to be privileged, in view of this Court's previous findings that the Compliance Engagement was undertaken by E&Y as agent of Household's General Counsel to facilitate the rendering of legal advice to Household (*see* Dec. 6, 2006 Order at 7-10; *see generally*, Memorandum of Law of the Household Defendants in Support of The Privileged Nature of the Ernst & Young Compliance Engagement Work Papers dated May 4, 2007 at 5-12 and cases cited therein); and (ii) largely if not entirely post-date the end of the Class Period, some by as much as 18 months, and therefore cannot possibly have informed the state of mind or been included in the information base of Household executives when allegedly fraudulent disclosures were made. *See Pommer* v. *Medtest Corp.*, 961 F.2d 620, 625 (7th Cir. 1992) ("The truth (or falsity) of defendants'

statements and their materiality, must be assessed *at the time the statements are made*, and not in the light of hindsight") (emphasis added).[4]

Plaintiffs half-heartedly try to impugn the Best Declaration's explanation of burden by pointing to Defendants' investigation of the Compliance Engagement during the Summer of 2006. But as Plaintiffs well know, that investigation was conducted in connection with Plaintiffs' subpoena to E&Y for the purpose of determining whether the Compliance Engagement was privileged. The conclusion that it was a privileged retention was later supported by this Court, and did not involve the collection and review of documents that Plaintiffs never requested from Household. Plaintiffs do not offer any basis to discredit the showing in the Best Declaration that in order to fully comply with the Court's order, Defendants would have to identify each present or former employee who may have participated in or received information about the engagement (currently believed to be at least 30 individuals) and determine whether they have any potentially relevant documents or electronic correspondence, following which those documents would have to be located, collected, copied, bates numbered, reviewed for privilege and, in most cases, added to Household's privilege log, a process that Defendants currently believe would take two months to complete. *See* Best Declaration (submitted in support of Plaintiffs' opening brief) at ¶ 3.

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[4] Plaintiffs' steadfast reliance on Judge Guzman's statement that these documents "shed light on a number of issues in the case" (Pl. Opp. Br. at 3 n4) is misplaced insofar as that statement was predicated upon Plaintiffs leading the Court to believe that the investigation was concluded within the Class Period. But as the Court found in its February 27, 2007 Order, during the time of the this Court's December 6, 2006 Order and Judge Guzman's February 1, 2007 affirmance, the Court was not aware that "most of the documents were dated after the Class Period. Indeed, the court understood that the study 'was to be completed by September 30, 2002.'" February 27, 2007 Order at 1 (quoting Plaintiffs' October motion to compel at 2). *See also* Judge Guzman's April 9, 2007 second affirmance at 2 ("It is unknown whether the documents in these boxes are dated during the Class Period such that they would be relevant to the lawsuit.").

As Judge Guzman emphasized in his November 22, 2006 Memorandum and Opinion affirming this Court's denial of excessive post Class Period discovery, the interests of justice require the Court to place reasonable limits on fact discovery — especially in view of the cumulative nature of Plaintiffs' demands, and their unwillingness to let any issue rest. *See, e.g.*, *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc., et al*., 2006 WL 3445742, at *4 (N.D. Ill. Nov. 22, 2006) ("Discovery may be limited if it is 'unreasonably cumulative or duplicative . . . [or if] the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case.'").

Plaintiffs failed to respond to these proportionality considerations, which are especially compelling here and weigh strongly against granting Plaintiffs' motion for more discovery. Plaintiffs have already received millions of pages of documentary discovery addressing Household's lending policies and practices, including documents produced to the state Attorneys General regarding these matters. The belatedly-requested material cannot possibly speak to Household's scienter or knowledge base during the Class Period, as the E&Y Compliance Engagement concluded years after the relevant time period. The requested documents are undoubtedly privileged pursuant to the Court's prior rulings. Moreover, the E&Y Compliance Engagement work papers constitute the critical universe of substantive work on this subject, and Plaintiffs have already received those dated prior to the end of the Class Period which this Court found to be subject to the *Garner* exception. Plaintiffs have also received a production from E&Y on this subject from the files of the nine core individuals involved in the project. Anything in Household's files would be tangential to and/or cumulative of this material that is already in Plaintiffs' possession.

The fact of the matter is that Plaintiffs made a decision after the close of fact discovery to make a new, expansive demand that they are again trying to masquerade as having been encompassed within their blunderbuss discovery period demands, despite the Court's repeated and explicit rejection of this argument. They may be doing so to buy more time to create expert reports, to increase Defendants' burden, and/or because they realized as they tried to answer contention interrogatories that the five million pages of documents and voluminous deposition transcripts they already have do not support their claims. Their lack of any good faith motive is evident from Plaintiffs' adamant rejection of Defendants' alternative request to do only that which the Court required of E&Y — that is, search the files of the "core" individuals involved in the Compliance Engagement and produce only those documents dated before October 12, 2002 (the end of the Class Period).

C. Plaintiffs Should Not Be Permitted Additional Time for the Depositions of Keller and Bianucci.

Despite Plaintiffs' penchant for revisionist history, the simple fact is that at no time during the April 27 status conference did Plaintiffs request additional time for the depositions of Messrs. Keller and Bianucci. Rather, the only discussion that took place — as confirmed by the April 27 hearing transcript that Plaintiffs referenced in their brief but conveniently failed to annex — involved Plaintiffs' request that their one seven-hour day allotment with each witness be bifurcated to allow for an immediate half day with each witness on issues concerning their one-time work at Arthur Andersen, to be followed after the resolution of all E&Y issues of another half day for each witness on issues concerning E&Y. *See* Excerpt of April 27 Hearing Transcript at Exhibit 2 hereto. Once the Court vacated the expert schedule pending resolution of the E&Y issues — Plaintiffs' reason for making the bifurcation request — the entire issue became moot.

Plaintiffs simply ignore their prior unequivocal representations that these depositions would in fact be limited to one seven-hour day each. As the Court may recall, this limitation was a key determinant in its allowing these depositions to count as only two of Plaintiffs' allotment of 55 (*see* Exhibit A to the Best Declaration submitted in support of Plaintiffs' opening brief).

Moreover, Plaintiffs have failed to demonstrate why they would now need to double their deposition time with these witnesses. *See* August 10 Order at 5. ("[I]t would be premature to extend the deposition time before determining how much material Plaintiffs are actually able to cover during the seven-hour period."). Plaintiffs' newly-minted argument that they and the Court have reconsidered the necessary deposition length based on new knowledge about the scope of the E&Y Compliance Engagement deserves no credit because Plaintiffs knew the full scope of the engagement in July 2006 when they received a copy of the engagement letter. The main development since that time — this Court's ruling (affirmed by Judge Guzman) that the engagement was privileged — cuts the other way by *limiting* the scope of acceptable questions to these witnesses about the Engagement. Plaintiffs awareness of this fact is reflected in their statement during the April 27 status conference that "the bulk of what we're going to talk to them about is Andersen." April 27 Status Conference Tr. (Exhibit 2) at 8.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' opening brief, Defendants respectfully request this Court (i) to reconsider Part Five of its April 27 Order granting Plaintiffs' Motion to Compel Production of Ernst & Young Compliance Engagement Documents Not Listed on Defendants' Privilege Log Or In the Alternative Preparation of a Privilege Log As To Such Documents and to deny Plaintiffs' motion; and (ii) to clarify that it did not intend to overrule its prior directives with respect to the duration of the Keller and Bianucci depositions.

Dated: May 25, 2007
New York, New York

Respectfully submitted,

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