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 REGARDING (1) THE ERNST & YOUNG LLP DATA VALIDATION AND SAMPLING WORK PAPERS AND (2) THE MANUAL SIGN-OFF DATE

(Redacted Version)

The Class submits this memorandum to address (1) the Ernst & Young LLP ("E&Y") data validation and sampling work papers and (2) defendants' use of the manual sign-off date for a folder to withhold documents created or revised during the Class Period document. This memorandum supplements the Class' prior submissions, including the May 11 and May 28, 2007 memoranda, and demonstrates why the Court should order production of the E&Y data validation and sampling documents, which are important evidence for which the Class has no substitute. As to the manual sign-off date, defendants cannot alter 149 log entries or 75% of the total Class Period entries to avoid the production of Class Period documents ordered by the Court. We discuss each issue below.

I. The E&Y Data Validation and Sampling Work Papers

A. The Nature of the Documents at Issue

The data validation and sampling work papers were documents prepared by E&Y for its own use. Although lumped together by defendants in two categories, these work papers actually represent three different steps in the Compliance Engagement:

1. Data validation. This step consisted of E&Y testing the data contained in extracts from Household's loan accounting systems against the data in the systems **themselves**. April 24, 2007 Affidavit of John M. Keller, ¶9.

2. Data integrity testing. This step consisted of comparing information in the extracts against the underlying source documents. *Id*. at ¶10.

3. Data sampling. In this step, E&Y used a sample of approximately 200 loans per state to test whether to determine the "queries" that E&Y wrote to replicate Household's calculations of loan fees and charges were working correctly. *Id*. at ¶¶12, 15.

Both the data integrity documents and the sampling documents are in the "sampling" or "S" boxes referenced in the index provided to the Court. *Id.* at ¶14.

These documents represent important evidence for which the Class has compelling need and for which there is no substantial equivalent. These documents have clear importance in terms of understanding the Compliance Engagement. In the December 6 opinion, this Court held that "Plaintiffs have demonstrated a substantial need for the E&Y [Compliance Engagement] information

in that it may assist Plaintiffs in establishing falsity, scienter, and materiality. Plaintiffs do not have the underlying data E&Y utilized in preparing its report, and without this information, it is not clear that witness depositions would provide Plaintiffs with the substantial equivalent of the materials." December 6, 2006 Order at 17. Given that these documents are part of the Compliance Engagement, the Court should apply these findings to these work papers.

Additionally, these documents have an independent evidentiary value sufficient to overcome the qualified protection afforded fact work product. The data integrity documents reveal the types and causes of errors in Household's loan accounting systems as well as the prevalence of such errors. Thus, these documents are probative on the relative strength of internal controls (or lack thereof) as well as the extent of predatory lending activities (customers being overcharged because a loan was "misclassified" so as to permit larger fees and charges).

The sampling documents have similar evidentiary value. They reflect the loan fees and charges to be assessed under Household's policies and more specifically, particular instances where the actual fees and charges were not in compliance with those policies. E&Y used this sampling process to develop statistical models during the Class Period. *See* Ex. A at 3 (Memorandum from S. Hicks' June 19, 2002 to R. Allcock dated June 19, 2002).[1] Whether these statistical models yielded reliable and trustworthy refund information naturally depends on the results and reliability of the underlying sampling studies. Without the sampling documents, the Class will be handicapped in deposing Mssrs. Keller and Bianucci on these statistical models and on the reliability and accuracy of the ultimate refund calculations. Additionally, defendants have made no statements regarding their intentions with respect to use at trial of the E&Y materials, including the draft final report.

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[1] All exhibits are attached to the Declaration of D. Cameron Baker ("Baker Decl."), filed herewith.

Defendants' document production does not include equivalent information. Defendants point to the volume of their document production as if that somehow were enough. However, as this Court implicitly found in the December 6, 2006 Order, the volume of defendants' production means nothing in this context. It is noteworthy that defendants do not provide the Court with any previously produced document that allegedly provides equivalent information.

This is not coincidental. Defendants did not conduct a similar study, whether internal or otherwise, that comprehensively assessed overcharges and the refunds owed as the result of predatory lending activities engaged in during the Class Period. The deposition testimony of Ms. Allcock, the head of the Consumer Finance Policy and Compliance department, is informative. When asked who determined the [redacted] she responded that [redacted] *See* Ex. B (Allcock Depo. at 92-93). Ms. Allcock also testified:

[redacted]

Id. at 93 (objection by Ms. Best as to form of the question omitted).

We address defendants' arguments in the context of this factual background.

B. Defendants' Privilege Arguments

It is defendants' burden to establish the elements of any applicable privilege. *See* February 27, 2007 Order at 3 (citing *United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003) and *Ocean Atlantic Dev. Corp. v. Willow Tree Farm, L.L.C.*, No. 01 C 5014, 2002 WL 1968581, at *2 (N.D. Ill. Aug. 23, 2002)). Defendants fail to meet that burden here. First, defendants do not provide an adequate privilege log. Second, as to the attorney-client privilege, defendants cannot establish a client communication revealed by these documents that is confidential with respect to the

Class in light of this Court's *Garner* rulings. Third, as to the work product privilege, the Class can show good cause to overcome the factual work product doctrine under these facts and in light of this Court's prior rulings.

Defendants have provided this Court with no privilege log except as to the 21 boxes being reviewed *in camera.* Even this privilege log is inadequate as it does not reflect a document-by-document approach, but rather lumps documents together by folder. This is inappropriate under Seventh Circuit case law and warrants a finding of waiver for each document not specifically listed on the log. *Mold-Masters Ltd. v. Husky Injection Molding Sys.*, Case No. 01 C 1576, 2001 U.S. Dist. LEXIS 20152, at *7-8 (N.D. Ill. Dec. 6, 2001). This Court's February 27 Order directed that the privilege log be on a document-by-document basis. February 27, 2007 Order at 3 (privilege log should include, among other things, date of document and any attachments, and the type of document). Defendants' failure to prepare a proper privilege log has hampered this Court's and the Class' ability to assess the privilege and reflects defendants' unwillingness to shoulder the burden necessary to support an assertion of privilege. If defendants will not expend the efforts necessary to support their privilege, the Court should not sustain the asserted privileges. Further, to the extent that defendants' brief can be read as now requesting the opportunity to prepare a privilege log, *see* Household Mem. at 3 (Dkt. No. 1102), it is too late – defendants had their opportunity and should not be allowed to foster yet more delay in the schedule.[2]

As to the attorney-client privilege, these documents do not meet the elements of that privilege. Defendants acknowledge that these documents "embody the analytical work that

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[2] Defendants' argument that the Class waived this argument by stipulating to the protocol for *in camera* review is nonsensical. This stipulation, which was submitted prior to defendants' submission of the privilege log, was pursuant to this Court's express direction. Further, the Class has expressly reserved these arguments. *See* Class' May 11 Memorandum at 5 n.3 (Dkt. No. 1078).

accountants performed as agents for Household's General Counsel." Household Mem. at 2. The attorney-client privilege does not cover an agent's work product unless it reveals a prior confidential client communication to the agent.[3] *See* the Class' May 11 Memorandum at 7-14 and cases cited therein.

There is no underlying confidential client communication here, particularly in light of this Court's prior *Garner* rulings. Defendants have been ordered to produce all Class Period documents, including any communications between E&Y and Household.[4] To fall within the privilege in this case, therefore, defendants must establish a confidential, post-Class Period client communication between E&Y and Household. This is true regardless of the date of creation or amendment of the document. Nothing in defendants' privilege log nor in the two affidavits of John Keller demonstrates that these work papers reflect the substance of any post-Class Period client communication. Accordingly, defendants do not show a required element of the attorney-client privilege.

Nor can defendants rely upon the work product doctrine. Putting aside the issue of what, if any, anticipated litigation is involved,[5] this Court has already found that the Class has shown good

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[3] As noted in the Class' prior submissions, some courts also find the privilege applicable to inter-attorney communications where the document would reveal legal advice. This approach, which the Class believes is inconsistent with Seventh Circuit case law, is not applicable here since the documents at issue contain only "empirical data" and not legal advice. Household Mem. at 3.

[4] The Court's ruling referenced and was based upon defendants' agreement to produce all Class Period documents. As the Court noted, defendants did not limit that promise in any way, including with respect to the boxes of E&Y work papers. Therefore, defendants should abide by their promise and produce all Class Period documents, including those contained in the data validation and sampling boxes.

[5] This Court's initial finding of anticipated litigation was predicated upon the completion of the engagement during the Class Period. Defendants have identified no anticipated litigation that required the engagement to continue past October 2002, when they settled with the Attorneys General. Indeed, Mr. Keller's affidavits, like Mr. Robin's initial declaration, are vague on the subject and provide this Court with no evidence as to what, if any, anticipated litigation remained after October 2002.

cause to overcome any protection as to Compliance Engagement documents. December 6, 2006 Order at 15-17. In the February 27 Order, this Court extended that finding to post-Class Period documents. February 27, 2007 Order at 2. Even if one were to disregard these prior holdings of the Court (as Household seeks to do), for the reasons discussed above, there is good cause to overcome the work product doctrine given the evidentiary value of the Compliance Engagement documents and the lack of any equivalent documentary evidence. Indeed, as discussed above, these documents have evidentiary value both as part of the Compliance Engagement and as stand-alone documents. *See supra* at 2-3. Moreover, the Class has no adequate substitute.

Defendants cite the Class' waiver of its right to object to this Court's ruling as grounds to demonstrate that the Class does not really want these documents. *See* Household Mem. at 6-7. The foregoing should amply demonstrate that the Class truly does want these documents. Moreover, as the Court is aware, the Class has been engaged in nearly continuous motion practice over the E&Y documents since October of last year. However, at the same time, the Class cannot let this single issue further delay the completion of fact discovery and the commencement of expert discovery. Class members have been waiting to recover for defendants' fraud for over four years now. Thus, from the Class' perspective, it is time to resolve these issues and move forward with this case.

Moreover, defendants' argument is predicated upon some false assumptions. Rather than reflecting a lack of confidence in the Court as defendants assume, the Class has full faith in this Court's ability to decide correctly the E&Y issues before it. This Court has already demonstrated that ability in its prior orders on this subject, including those cited above. Indeed, Judge Guzman has affirmed this Court on every objection raised by the parties, including defendants' objection to the December 6, 2006 Order.

In sum, despite defendants' assertions of privilege, this Court should require defendants to produce the E&Y work papers at issue.

C. Defendants' Non-Privilege Arguments

Defendants also contend that these work papers are cumulative, that the Class never requested these documents and that under a proportionality argument, it is too late to require production. None of these arguments has merit.

As to the cumulative argument, defendants are factually wrong. This Court's December 6, 2006 finding of good cause included the recognition that the Class has no adequate substitute for the Compliance Engagement documents. Defendants' arguments now are the same arguments they raised and lost in the initial briefing. Even assuming defendants were now allowed to relitigate this point, defendants raise nothing new for the Court to consider. Indeed, as discussed above, defendants have produced no documents containing equivalent information.

Defendants also recycle their claim that the Class has not requested these documents. Household Mem. at 5. This Court rejected the argument in its April 27, 2007 Order, a ruling Household has challenged in its motion for reconsideration. In any event, the Class has made a number of document requests to which these documents are responsive, including the requests for documents constituting or relating to analyses of defendants' lending practices and documents relating to refunds. *See, e.g.*, Request Nos. 1, 7 of the First Set; Request No. 8 of the Second Set; Request No. 34 of the Third Set (discussed in the Class' Motion to Compel Production of Ernst & Young Compliance Engagement Documents (Dkt. No. 1049)).

Defendants attempt to invigorate this argument by suggesting that they have not produced documents relating to individual loans or discrete groups of loans. That is untrue – defendants have produced countless documents describing individual loans involving predatory lending and discrete groups of loans. Baker Decl., ¶3 at 1. For example, the state agency documents fall within this description. Similarly, defendants have produced documents relating to individual consumer's complaints and defendants' analysis and response thereto.

Even if true, this argument has no merit here. E&Y only looked at loan samples, which may not be considered "discrete groups of loans," to develop statistical models for the entire loan portfolio and to validate the accuracy of the information contained in the loan systems. Thus, these work papers relate to the entire loan portfolio, not individual loans or a discrete groups of loans.

With respect to the proportionality argument, there is real irony (and lots of sheer bravado) in defendants' claim that it is now too late to compel production of these work papers. This Court has twice found that defendants "are responsible for the new issues that have now arisen [respecting these work papers] after the close of fact discovery." April 27, 2007 Order at 1; *see also* February 27, 2007 Order at 3. Indeed, the Court has informed defendants that they have an "obligation to rectify this matter." February 27, 2007 Order at 3. Defendants cannot cast the blame on the Class for their own failings and should not be allowed to profit for their own wrong, which would be the case if they were allowed to withhold these documents importantly on proportionality grounds.

In any event, defendants' proportionality argument makes no sense. Defendants acknowledge that the Court only reaches this argument if the Court overrides the privilege assertions. Household Mem. at 7. However, if the Court find that the Class has good cause to obtain these documents because of their evidentiary value and the lack of an adequate substitute, it cannot at the same time find the documents to be cumulative or of limited relevance so as to support the proportionality argument. *Id.*

II. The Manual Sign-Off Date and Related Privilege Log Issues

On April 27, 2007 this Court directed defendants to produce Class Period documents from the E&Y work papers. April 27, 2007 Order at 1-2. Defendants' then-existing privilege log identified some 200 entries as containing Class Period documents. After the April 27 Order, defendants altered the date on 149 entries to a post-Class Period date and produced documents from only 49 entries. Thus, defendants withheld 75% of the E&Y Class Period documents they were

ordered to produce. Further, there remain approximately 40 log entries where defendants have assigned no date, which should also be produced. We discuss these points below.

The assertion of the "manual sign-off" date is a discovery trick that does not bear scrutiny. Mr. Keller in his affidavit states that the manual sign off date "signif[ies] the completion of the project overview." May 4, 2007 Supplemental Affidavit of John M. Keller, ¶4 at 3. Further, he explains that this date "applies to [a] folder" as opposed to individual documents therein. *Id.* Defendants acknowledge this, noting the manual sign-off date reflects the "date on which the information in a folder that appears on a given entry on the privilege log was accepted for use" by E&Y. Household Mem. at 9. Thus, the manual sign off date does not reflect the date the document was "created, received, reviewed or revised," which is the standard used in the Court's April 27 directive to E&Y. April 27, 2007 Order at 2. Significantly, the Court employed this language because it tracks defendants' authorization to E&Y to produce "documents ... that were created, received, reviewed, or revised up through October 11, 2002." *See* Ex. C (February 12, 2007 letter from Susan Buckley to Lucia Nale).

Additionally, it is noteworthy that defendants do not contend that the prior date entries in the privilege log were incorrect. Thus, the prior log entry dates reflect defendants' admission as to proper dating of the documents.

Defendants attempt to minimize the impact of their sleight of hand by suggesting it is only 149 out of 1400 entries (or 10%). However, the relevant statistic is 75%, which is the percentage of Class Period entries changed by defendants to post-Class Period entries after this Court ordered the production of the Class Period documents on April 27. As noted above, defendants changed 149 entries out of a total of 198 and produced only documents from 49 entries. Defendants' alteration, thus, had a substantial impact on the documents produced to the Class and reflects an ongoing effort to withhold production despite the Court's orders.

The Court should hold defendants to their commitment to produce all Class Period documents and not allow defendants to withhold such documents on the grounds that the document was contained in a folder that was "manually signed off" on after the Class Period.

Additionally, the Court should know that there are 40 entries on defendants' logs without a date entry, which should be produced. Defendants acknowledge this in a footnote to their brief and indicate that some future revision to the log will be forthcoming. Household Mem. at 1 n.2. However, the Class alerted defendants to this issue in early May and on May 9, Ms. Best wrote the Class that they intended to "provide dates for these entries shortly." Ex. D (May 9, 2007 letter from Ms. Best to Mr. Brooks). However, as with the original E&Y privilege log, defendants have sat on this issue and failed to provide this information. Defendants must produce these documents since they have failed to establish that these documents are post-Class Period documents.

DATED: June 8, 2007

Respectfully submitted,

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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 June 8, 2007 declarant served by electronic mail and by U.S. Mail to the parties: **THE CLASS' MEMORANDUM REGARDING (1) THE ERNST & YOUNG LLP DATA VALIDATION AND SAMPLING WORK PAPERS AND (2) THE MANUAL SIGN-OFF DATE (redacted version)**. 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 8th day of June, 2007, at San Francisco, California.

s/ Juvily P. Catig
JUVILY P. CATIG