UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated,	)	
Plaintiffs,	)	
v.	)	**No. 02 C 5893**
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	**Judge Nan R. Nolan**
Defendants.	)	

ORDER

Plaintiffs have filed this securities fraud class action alleging that Defendants Household International, Inc., Household Finance Corporation, and certain individuals (collectively, "Household") engaged in predatory lending practices between July 30, 1999 and October 11, 2002 (the "Class Period"). During the course of this litigation, the parties have strenuously disputed the protected nature of documents relating to a compliance study performed by Ernst & Young LLP ("E&Y") at the request of Household's General Counsel. This opinion is intended to fully and finally resolve all outstanding issues related to the E&Y documents.

BACKGROUND

This opinion assumes the reader's familiarity with all of the court's prior decisions on this matter, including (1) *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02 C 5893, 2006 WL 3524016 (N.D. Ill. Dec. 6, 2006); (2) (Minute Order of 2/1/07, Doc. 940); (3) (Minute Order of 2/27/07, Doc. 999); (4) (Minute Order of 3/12/07, Doc. 1017); (5) (Minute Order of 4/9/07, Doc. 1039); (6) (Minute Order of 4/12/07, Doc. 1044); and (7) (Minute Order of 4/27/07, Doc. 1060.) The court repeats relevant background here to provide a single, comprehensive narrative of the E&Y dispute.

Household's General Counsel retained E&Y on July 1, 2002 to conduct a compliance study of its Consumer Lending operation (the "Compliance Engagement"). During the course of discovery, Household produced some E&Y documents that were responsive to Plaintiffs' general document requests, but it is undisputed that Plaintiffs never specifically requested E&Y documents. Instead, on May 19, 2006, Plaintiffs served a subpoena on E&Y seeking documents relating to the Compliance Engagement, and a witness to depose on that issue. E&Y objected to the subpoena by letter dated June 6, 2006. On July 13, 2006, Defendants sent Plaintiffs a letter stating that the E&Y materials requested in the subpoena were privileged and would not be produced.

A. The December 6, 2006 and February 1, 2007 Opinions

Plaintiffs responded with a motion to compel production of the E&Y documents. On December 6, 2006, the court found that documents relating to the Compliance Engagement were protected by the attorney-client privilege. *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *4-6. The court also held, however, that Plaintiffs had established good cause to invoke a limited fiduciary exception to the privilege as set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Under *Garner*, "where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." *Id*. at 1103-04. To the extent Plaintiffs presented evidence – undisputed by Defendants – that the Class represented a substantial majority of shareholders who owned stock at the time of the communications in question,[1] the court concluded that Defendants owed a majority of Plaintiffs a fiduciary duty sufficient to overcome the attorney-client privilege. *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *6-9. The court also found that the E&Y documents constitute attorney work

[1] As discussed below, the court understood "the time of the communications in question" to be during the Class Period.

product, but that Plaintiffs had demonstrated a substantial need for the E&Y information and an inability to obtain the substantial equivalent of the materials from another source. *Id*. at *10-11.

Defendants appealed this decision to Judge Guzman, and shortly thereafter on January 31, 2007, fact discovery closed. The next day, on February 1, 2007, the district court affirmed the December 6, 2006 decision in full. (Minute Order of 2/1/07, Doc. 940.)

B. The February 27, 2007 and April 9, 2007 Opinions

This, of course, did not end the matter. On February 22, 2007, Plaintiffs filed a Motion to Compel Production of Ernst & Young Documents and for Sanctions, arguing that Defendants had produced some documents in accordance with the court's rulings, but that Defendants were improperly withholding some 187 documents that were dated after the Class Period. Plaintiffs also objected to Defendants' new discovery of an additional 425 boxes of documents containing E&Y work papers located at an off-site storage facility. As a result of this motion, the court heard oral argument from the parties, and issued a Minute Order dated February 27, 2007, clarifying its earlier decision and addressing the new documents.

The court explained that the December 6, 2006 Opinion did not address whether Defendants were required to produce E&Y documents dated after the Class Period because (1) neither party ever raised the issue with the court; and (2) the court understood from the parties' briefs that the E&Y Compliance Engagement "was to be completed by September 30, 2002" and "had no reason to know that most of the documents at issue were dated outside the Class Period." The court also found that Judge Guzman did not consider this issue in ruling on the parties' objections, "as evidenced by the fact that his Minute Order says nothing about it." (Minute Order of 2/27/07, Doc. 999, at 1-2.) The court held that as of August 2002, Plaintiffs had filed this lawsuit against Household and were no longer in a fiduciary relationship with the Company. "Thus, any communications between E&Y and Household dated after that time are not subject to the *Garner* exception and remain privileged." (*Id*. at 2.) To the extent Defendants had already agreed to

provide Plaintiffs with documents through the end of the Class Period, however, the court found October 11, 2002 to be the appropriate cut-off date. (*Id*.)

With respect to the 425 newly-discovered boxes of "work papers," the court declined to find that Defendants had waived their privilege by failing to disclose the documents until after the close of fact discovery. In reaching this conclusion, the court considered the five-part balancing test set forth in cases such as *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2001 WL 1286727 (N.D. Ill. Oct. 24, 2001) and *Urban Outfitters, Inc. v. DPIC Cos.*, 203 F.R.D. 376 (N.D. Ill. 2001), assessing "the reasonableness of the precautions taken to prevent the disclosure, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, and the overriding issue of fairness." *Id*. at *6. *See also Urban Outfitters*, 203 F.R.D. at 380. The court noted that Defendants themselves did not know exactly what the boxes contained at that time, and that without a privilege log, the court could not determine whether the documents were privileged, much less subject to any exception. The court thus ordered Defendants to produce an appropriate privilege log. (*Id*. at 2-3.)

On March 12, 2007, the court denied Plaintiffs' motion for reconsideration of the February 27, 2007 Order. (Minute Order of 3/12/07, Doc. 1017.) The district court affirmed the Order in full on April 9, 2007, confirming that "neither Magistrate Judge Nolan nor this Court had an occasion to address" whether the fiduciary exception applied to privileged material dated after the Class Period. (Minute Order of 4/9/07, Doc. 1039, at 2.) The court also cautioned that "there is a fine line between vigorously representing the interests of one's client and officiously affronting the capabilities of the judiciary." (*Id*.) The court further affirmed that Defendants should produce an appropriate privilege log regarding the 425 boxes of work papers. (*Id*.)

C. The April 27, 2007 Opinion

Not satisfied with the requirement that they produce E&Y documents dated through the end of the Class Period, Defendants raised yet another objection, arguing that their agreement to produce documents through October 11, 2002 did not include the 425 boxes of documents that were belatedly disclosed to the court and to Plaintiffs. On April 27, 2007, the court rejected this position, explaining:

> The court accepted Defendants' assertion that they were unaware of the 425 boxes of documents until recently, and declined to find a blanket waiver of their privilege. At the same time, the court recognizes that Defendants, as the undeniable custodians of the documents in question, are responsible for the new issues that have now arisen after the close of fact discovery. . . . . As noted, Defendants agreed to produce E&Y documents within the Class Period. Defendants did not discover the additional 425 boxes of documents until after they made this agreement, but they must now live with the consequences.

(Minute Order of 4/27/07, Doc. 1060.)[2]

D. The 425 Boxes of E&Y Documents

In accordance with the February 27 and April 9, 2007 Opinions, Defendants began the process of reviewing the E&Y documents in the boxes located at the off-site storage facility. Defendants reported that there were actually a total of 393 boxes, and that 115 of those contained substantive work from E&Y, while 278 contained computer records.[3] The court ordered Defendants to produce a complete privilege log for all documents in the 115 "substantive boxes." The court also conducted an *in camera* review of an Index to the 393 boxes of documents that was prepared by E&Y when the documents were placed in storage. The court determined that the Index was not

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[2] Despite this court's separate treatment of "substantive" and "non-substantive" E&Y documents, as detailed below and in several Minute Orders, Plaintiffs construed this ruling as suddenly entitling them to all Class Period documents from all E&Y boxes. The court clarified at a May 31, 2007 status hearing, however, that the ruling was far more limited. Specifically, it covered the 115 boxes of substantive documents the court had already determined were subject to the *Garner* exception, but would only apply to the remaining 278 boxes of computer records if the court similarly determined that *Garner* applied to those documents as well.

[3] In subsequent briefs, Defendants have stated that there are 110 substantive boxes, and 280 non-substantive boxes. For purposes of continuity, the court will use the initial figures of 115 and 278 throughout this opinion.

privileged and ordered Defendants to produce it to Plaintiffs. (Minute Order of 4/12/07, Doc. 1044.) As for the 278 boxes of computer records, the court instructed the parties to meet and confer to determine a protocol for producing a privilege log and/or a sampling of the documents. (Minute Order of 3/12/07, Doc. 1017.)

By April 6, 2007, Defendants had completed their privilege log of the 115 substantive boxes. Several of the entries contained dates that began within the Class Period and extended beyond that period. At the court's request, Plaintiffs identified some 21 such entries on the log for the court's *in camera* review. (Email of 4/13/07.) Given that several of the selections were in excess of 2,000 pages, the court asked Defendants to produce a subset of those documents for preliminary review. The court also requested an affidavit from someone at E&Y providing further explanation regarding the nature of the documents in the 393 boxes.

As requested, Defendants submitted two boxes of documents for the court's *in camera* review on April 17, 2007. On April 24, 2007, Defendants submitted an affidavit from John M. Keller, a partner with E&Y familiar with the Compliance Engagement.[4] The affidavit explains in detail (1) Household's retention of E&Y to perform the study; (2) the objectives of the Compliance Engagement and investigation of seven loan attributes, including loan origination fees, prepayment penalties, refinance restrictions, late fees, unemployment and disability credit insurance, recording fees, and disclosures; (3) the initial phases of the project, including E&Y's methods of data validation (i.e., reviewing extracts from Household's loan accounting systems to determine whether data had been captured correctly), data integrity (i.e., determining whether the selective loan data contained within Household's loan systems and captured with the data extracts represented the

[4] Defendants originally argued that the affidavit was privileged, and the court ordered them to produce a version to Plaintiffs in redacted form. Defendants have since agreed to produce an unredacted version with the understanding that it is without prejudice to their assertion of privilege as to the conduct and results of the Compliance Engagement. (Minute Order of 5/8/07, Doc. 1069.)

corresponding loan attributes of the underlying loan agreements under review), and sampling (i.e., checking to make sure that the "queries" or "algorithms" that E&Y had written to replicate Household's calculation of various loan fees and charges were working properly); (4) preparation of exception reports identifying instances where Household loans were not processed and treated according to Household policies; and (5) E&Y's January 2004 Draft Report summarizing the exceptions found by E&Y with respect to the attributes it ultimately examined in all of the states where Household did business pursuant to the Compliance Engagement.

At an April 27, 2007 status hearing, the court notified the parties that it was satisfied, based on its preliminary *in camera* review, that the documents produced on April 17, 2007 are in fact what they purport to be as stated on the privilege log. The court requested, however, that Defendants provide a supplemental affidavit clarifying the purpose and nature of the reviewed documents. The court also offered Plaintiffs an opportunity to identify additional documents from the privilege log that they wanted the court to review *in camera*.

On May 4, 2007, Defendants submitted a supplemental affidavit of John M. Keller, describing the documents the court reviewed *in camera*; confirming that the documents were largely generated by E&Y, and identifying those generated by Household; and clarifying the relevant date of each document. Also on May 4, 2007, Plaintiffs identified additional documents for the court's review, and Defendants produced the documents to the court on May 10, 2007. With two exceptions, the court is satisfied that the documents are what they purport to be.[5]

On May 11, 2007, the parties reached an agreement on a protocol for the court's review of a subset of the 278 boxes of E&Y work papers consisting of computer records. The parties divided the boxes of documents into five subcategories (data validation; single state, single attribute;

[5] The exceptions are (1) HHS 03677839 and HHS 03677841, which is a two-page computer printout of a coupon available on the easyspirit website; and (2) HHS 03677843, which is a letter thanking Geofrey Godfrey for choosing the DISH Network.

multistate; data integrity; and other) and proposed that for each subcategory, the court review one entire box and approximately ten percent of the volume of the contents of an agreed-upon number of additional boxes (if any). (Letter of 5/11/07.) The court received these documents on May 22, 2007, and subsequently requested a corresponding privilege log, which Defendants produced on May 29, 2007. The court has reviewed the documents pursuant to the protocol set forth by the parties, and is satisfied that they are what they purport to be.

E. Additional E&Y Documents

While the court worked to resolve these matters relating to the 393 boxes of E&Y documents, Plaintiffs raised yet another issue. Specifically, Plaintiffs expressed concern that Defendants were in possession of additional E&Y documents that did not yet appear on any privilege log, and asked that Defendants be ordered to account for any such documents. The court initially agreed to this request, ordering Defendants to (1) produce any additional E&Y documents in their possession related to the Compliance Engagement and dated within the Class Period; and (2) identify any other such documents dated after the Class Period on an appropriate privilege log. Defendants have now asked the court to reconsider this decision.

F. Additional Disputes

Despite the numerous rulings and orders set forth by the court, Plaintiffs also continue to assert that none of the E&Y documents is privileged at all. Plaintiffs claim that (1) Defendants have waived any privilege due to their inadequate and/or incomplete privilege logs; (2) the documents do not constitute "communications" between an attorney and client; (3) Defendants have not taken adequate precautions to protect the privilege; (4) Defendants are improperly manipulating document dates to fall outside the Class Period; and (5) none of the documents is protected by the work product privilege. These arguments relate to all of the documents on the privilege log and in the boxes of computer reports that have not yet been logged.

DISCUSSION

As set forth above, there are two primary matters that must be resolved with respect to the E&Y documents: (1) Plaintiffs' claim that none of the E&Y documents is privileged at all; and (2) Defendants' motion to reconsider the court's April 27, 2007 Order to produce and/or log additional E&Y documents in their possession. The court addresses each in turn.

I. Privilege

As noted, Plaintiffs argue that the E&Y documents are not privileged under either the attorney-client or work product doctrines. They object to the form of Defendants' privilege log and urge the court not to consider Mr. Keller's supplemental affidavit; argue that the documents do not reflect communications for legal advice; insist that Defendants have failed to adopt adequate precautions to protect the privilege; dispute the dates of the documents; and claim that the court has already found that Plaintiffs have overcome the work product privilege with respect to the 393 boxes of newly-discovered documents.

A. Attorney-Client Privilege

The attorney-client privilege provides that (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). The purpose of the privilege is to "encourage full disclosure and to facilitate open communication between attorneys and their clients." *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003). The privilege extends to statements made by the lawyer to the client where those communications rest on confidential information obtained from the client, or where those communications would reveal the substance of a confidential communication by the client. *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000). A party that refuses to disclose information based on a claim of privilege bears the burden

of establishing that the privilege applies. *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000).

1. Privilege Log

Plaintiffs argue that Defendants cannot assert any claim of privilege over the E&Y documents because their privilege log as to the 115 substantive boxes is inadequate, and they have not provided a timely or complete privilege log as to the remaining 278 boxes of computer records.

A privilege log must be detailed enough to enable other parties to assess the applicability of the privilege asserted and should include: (1) the name and capacity of each individual from whom or to whom a document and any attachments were sent (including which persons are lawyers); (2) the date of the document and any attachments; (3) the type of document; (4) the Bates numbers of the documents; (5) the nature of the privilege asserted; and (6) a description of the subject matter in sufficient detail to determine if legal advice was sought or revealed, or if the document constitutes attorney work product. *See Mold-Masters Ltd. v. Husky Injection Molding Sys. Ltd.*, No. 01 C 1576, 2001 WL 1558303, at *2 (N.D. Ill. Dec. 6, 2001); *Allendale Mutual Ins. Co. v. Bull Data Systems Inc.,* 145 F.R.D. 84, 88 (N.D. Ill. 1992). "If the description falls below this standard and fails to provide sufficient information for the court and the party seeking disclosure to assess the applicability of the attorney-client privilege or work-product doctrine, then disclosure of the document is an appropriate sanction." *Id*. (citing *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 534 (N.D. Ill. 2000)).

a. Log of 115 Substantive Boxes

Plaintiffs first urge the court not to consider Mr. Keller's May 4, 2007 supplemental affidavit in support of the privilege log because it is "based on [Mr. Keller's] review and that of several of my colleagues at E&Y." (Supp. Aff. ¶ 2.) Having reviewed Mr. Keller's affidavit, however, the court is

satisfied that it is made on competent personal knowledge. *See Maher v. International Brotherhood of Electric Workers*, No. 90 C 6502, 1993 WL 57553, at *2 (N.D. Ill. Mar. 4, 1993) (declining to strike affidavit that was based on personal observations and discussions with knowledgeable individuals). Plaintiffs next insist that the affidavit "demonstrates the numerous errors and unreliability of defendants' privilege log." (Pl. Resp., at 5.) According to Plaintiffs, Mr. Keller (1) indicates that some documents within log entries include material authored by Household, but the privilege log identifies only E&Y as the author; (2) asserts that versions of certain entries were provided to unidentified Household representatives, but the privilege log lists no recipients; and (3) changes some of the document dates from those reflected on the privilege log. (*Id*. at 6.)

As explained throughout the remainder of this opinion, the court does not deem any of these issues sufficient to find that Defendants have waived their privilege with respect to the documents identified on the log. Defendants did not discover the existence of the 393 boxes of E&Y documents until after the close of fact discovery, and they have been working diligently to log those materials in a timely and efficient manner. Given the volume of documents and the time concerns, it is not surprising that some errors have been made. Defendants have worked to correct these errors, and the court declines to impose the sanction of waiver under such circumstances.

Plaintiffs next argue that Defendants' log of the 115 substantive boxes improperly lumps groups of documents together. The court agrees that it generally must analyze Defendants' assertion of privilege "on a document-by-document basis." *Mold-Masters Ltd.*, 2001 WL 1558303, at *3. Having reviewed the privilege log and the documents produced *in camera*, the court agrees that Defendants have on occasion grouped several related documents together within a single entry. The court finds this approach reasonable, as it appears that Defendants "logged by discrete folders of related, integrated material that were organized as such in the boxes in question," and given the large volume of documents at issue. (Def. Reply, at 7). *See also S.E.C. v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at *1 (S.D.N.Y. Mar. 20, 1996) ("[I]n appropriate

circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category or otherwise to limit the extent of his disclosure," for example where "the files in question are extremely voluminous" and "a document-by-document listing would be a long and fairly expensive project for counsel to undertake.") Mr. Keller's supplemental affidavit, however, indicates that some of the documents within a particular grouping were actually generated by Household, not E&Y. (*See, e.g.*, Keller Supp. Aff. of 5/4/07, ¶¶ 7, 8, 12-15.) Defendants must provide separate log entries for documents created by Household, including the date of creation, the purpose of the document, and the recipient(s).

b. Log of 278 Boxes of Computer Records

Plaintiffs argue that Defendants have waived any assertion of privilege over the 278 boxes of computer records by failing to produce a timely privilege log relating to those documents. (Pl. Resp., at 5 n.3.) The court disagrees. Defendants have at all times asserted their claim of privilege over all documents located at the off-site storage facility, including the 278 boxes of computer records. When Defendants discovered these boxes, fact discovery had closed and the parties and this court were suddenly faced with privilege issues relating to a veritable mountain of documents that no one had ever seen. The court worked diligently with the parties to devise a protocol for reviewing these documents in a manner that was both fair to the parties and efficient for the court. In that regard, the court instructed Defendants to produce a privilege log of all documents in the 115 substantive boxes, but asked the parties to work together on a protocol for reviewing the 278 boxes of computer records. The court understood that most of these records consisted of repetitive computer printouts reflecting numbers and other data relating to individual consumer loans.

Once the parties agreed on a protocol for the court's *in camera* review of the computer records, Defendants produced a privilege log as to those documents per the court's request. Given the time constraints and volume of documents at issue, the court declines to find that Defendants waived their right to assert a privilege as to the remaining 278 boxes merely because they have not

yet produced a complete log relating to those documents. This is entirely consistent with the court's instructions, which were necessitated by the unusual situation presented here. *See R.J. Reynolds Tobacco Co.*, 2001 WL 1286727, at *6; *Urban Outfitters*, 203 F.R.D. at 380.

2. Confidential Communications

Plaintiffs next object that the E&Y work papers "are in essence memos to file not revealing any confidential client communication and should be produced." (Pl. Resp., at 7.) They argue that Household's need for legal advice ended in January 2002 when it settled a November 2001 lawsuit filed by the California Department of Corporations; that assuming the continued need for legal advice, a lawyer's agent's notes are not privileged; and that the documents in question were never sent to or reviewed by anyone.

As noted, the court has already determined that Household's attorneys retained E&Y to assist in providing legal advice regarding pending or anticipated litigation, and that E&Y's assistance was necessary. *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *5 (citing *Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002) ("[T]he complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others, [and] the attorney-client privilege must include all the persons who act as the attorney's agents."), and *In re Grand Jury Proceedings*, 220 F.3d at 571 ("[M]aterial transmitted to accountants may fall under the attorney-client privilege if the accountant is acting as an agent of an attorney for the purpose of assisting with the provision of legal advice.")) (*See also* Minute Order of 2/1/07, Doc. 940.) Contrary to Plaintiffs' assertion, the relevant litigation was not only the California lawsuit, but also the threatened claims from multiple State Attorneys General arising from the Company's consumer lending practices. The mere fact that Household entered into a Settlement Agreement with those State Attorneys General on October 11, 2002 does not establish that Household's continued retention of E&Y to complete its project was not for the purpose of obtaining legal advice. Indeed, the parties to the Settlement Agreement included a mechanism for monitoring Household's

compliance with that agreement and, presumably, for pursuing appropriate legal relief if the Company did not fulfill its obligations.

Despite these rulings, Plaintiffs continue to object that E&Y's work papers and Draft Report are not privileged because they reflect personal notes that were not created with the intent to share them with anyone. (Pl. Resp., at 10.) Plaintiffs argue that Defendants' privilege log itself establishes that there are no recipients for any of the documents in question, and that "a memorandum . . . prepared for an attorney's own use . . . is not a communication." *Stafford Trading, Inc. v. Lovely*, No. 05 C 4868, 2007 WL 1238915, at *2 (N.D. Ill. Apr. 26, 2007) (Coar, J.), *aff'g Stafford Trading, Inc. v. Lovely*, No. 05 C 4868, 2007 WL 611252 (N.D. Ill. Feb. 22, 2007) (Keys, M.J.) The court agrees with the general proposition that an individual attorney's personal notes are not privileged "communications" if they are not shared with anyone else. The *Stafford Trading* court, for example, declined to extend the attorney-client privilege to a document prepared for an attorney's own use, where it was not communicated to other attorneys or to the client, and it did not memorialize any such communications. 2007 WL 611252, at *7.

Documents that are shared among multiple attorneys representing a client, however, are privileged. As Plaintiffs acknowledge, Magistrate Judge Keys' underlying opinion in *Stafford Trading* adopted the position set forth in *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242 (N.D. Ill. 2000), that "although communications between in-house counsel are not communications directly to or from the client, it appears implicit in present day litigation with multiple attorneys required for proper representation that attorneys must be allowed to confer with each other regarding the representation of a client on a privileged basis in the same way that clients must be able to discuss the advice of counsel amongst themselves on a privileged basis." *Stafford Trading*, 2007 WL 611252, at *7 (quoting *McCook Metals*, 192 F.R.D. at 255).

Plaintiffs find it significant that E&Y personnel are not themselves attorneys. Again, however, E&Y was an agent of Household's General Counsel, and "the attorney-client privilege

must include all the persons who act as the attorney's agents." *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *5. In addition, the court finds the situation presented here akin to the one addressed in *In re OM Sec. Litig.*, 226 F.R.D. 579 (N.D. Ohio 2005), in which a company audit committee's counsel retained forensic accountants to investigate the corporation's inventory problems. The lawyers instructed the accountants to make a list describing the documents they created relating to the investigation, and then the attorneys reviewed the list without ever looking at the underlying documents. *Id*. at 584, 589 n.18.

The court held that "[d]ocuments created by an accountant at the attorney's request to assist the attorney in providing legal advice to the client are protected by the attorney-client privilege," and confirmed that the forensic accountants' "documents underlying the advice it provided to [the lawyers] have to be protected." *Id*. at 589 and n.18. As the court explained, "[w]hether [the lawyers] reviewed such documents firsthand is inconsequential because [they] reviewed [the accountants'] list." *Id*. *See also Kimberly-Clark Corp. v. Tyco Healthcare Retail Group*, No. 05 C 985, 2007 WL 1246411, at *1 (E.D. Wis. Apr. 27, 2007) (citing *In re OM Sec. Litig.* for the proposition that the breadth of the attorney-client privilege "extends to tests or materials produced in order to facilitate the attorney's giving of legal advice."); *In re Vazquez*, Nos. 84 B 224, 97 A 407, 1998 WL 191271, at *3 (Bankr. N.D. Ill. Apr. 21, 1998) ("The privilege can attach to reports of third parties made at the request of the attorney or client where the purpose of the report was to put in usable form information obtained from the client.")

Contrary to Plaintiffs' assertion, the E&Y documents were not created merely for the business purpose of determining the amount of refunds owed to customers who had been overcharged on their loans. (Pl. Resp., at 14.) Rather, E&Y's documents relating to data validation, data integrity, sampling tests, and analysis of specific loan attributes were produced to facilitate E&Y's overall analysis of Household's consumer lending practices, which in turn assisted Household's General Counsel in providing legal advice. (Keller Aff. of 4/24/07 ¶¶ 2, 3.) *See also*

Kimberly-Clark Corp., 2007 WL 1246411, at *1 (the attorney-client privilege "extends to tests or materials produced in order to facilitate the attorney's giving of legal advice."); *In re Vazquez*, 1998 WL 191271, at *3. Mr. Keller and his colleagues "regularly met with Household's General Counsel, Kenneth Robin to inform him of the status of the project, answer his questions and discuss our observations to date." (Keller Supp. Aff. of 5/4/07, ¶ 18.) In addition, the Draft Report reflects that E&Y provided Household with a detailed description of its testing methodology and database programs. *See In re OM Sec. Litig.*, 226 F.R.D. at 589 n.18 (documents underlying advice provided by accountants to lawyers were privileged communications where lawyers had a description of the documents that were created); (Keller Aff. of 4/24/07, ¶ 21.) E&Y used all of the work papers, moreover, to provide the analysis set forth in the Draft Report, which was communicated to Mr. Robin, among others. Thus, the E&Y documents, including the Draft Report, are privileged communications.

The court notes that in reaching this conclusion, it has reviewed the approximately 293 pages and 1,903 entries of Defendants' privilege logs; and conducted an *in camera* review of documents Plaintiffs designated for such review, and of E&Y's January 2004 Draft Report. The court has made its determination based on a consideration of the totality of the circumstances, and has requested and reviewed two extensive and detailed affidavits from Mr. Keller, an individual involved in the production and handling of the documents, in determining the purpose for which those documents were produced. *In re Grand Jury Proceedings*, 220 F.3d at 572. *See also Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 221 F. Supp. 2d 874, 885 (N.D. Ill. 2002) (determining privilege "will often necessitate the submission of an affidavit or declaration with specific facts" about the documents).

3. Precautions to Protect the Privilege

Plaintiffs next claim that Defendants have not taken adequate steps to protect the privilege with respect to the E&Y documents located at the off-site storage facility, and that this alone

requires a finding that any privilege has been waived. (Pl. Resp., at 14.) Plaintiffs note that the documents were sitting in the storage warehouse for more than two years, apparently unbeknownst to Household, and that Defendants have not offered any evidence that the boxes were stored securely. (*Id*. at 14-15.) Defendants respond, however, that the documents were clearly and prominently marked with a legend indicating that they were privileged and confidential, and there is no evidence that anyone besides Household had access to the materials. (Def. Mem., at 12.) The court declines to find any waiver based on Defendants' document protection procedures.

4. Dates on the Privilege Log

Plaintiffs also object that Defendants are "amending their privilege log so that documents previously identified as created during the Class Period are now logged as post-Class Period documents." (Pl. Resp., at 15.) To avoid further confusion, the court clarifies its position on dates as follows. First, the court finds nothing improper in Defendants' amendment of the privilege log to clarify the dates of certain documents. The documents in question were largely created by E&Y, and not Household, and the court required Defendants to log these voluminous records in a very short period of time. The court accepts Defendants' representations that they changed certain document dates solely based on subsequent notification from Mr. Keller and other E&Y personnel that those dates were inaccurate and/or based on further review of the documents themselves.

In addition, the court continues to reject Plaintiffs' suggestion that all documents subject to the *Garner* exception must be produced as long as they address events occurring during the Class Period. As the court has explained numerous times, the relevant time period for purposes of the *Garner* exception is the period during which Household had a fiduciary relationship with Plaintiffs. Thus, documents need only be produced if they were actually *created* during the Class Period.

This "creation date" rule, however, is not adequate to deal with documents that have been modified over time; i.e., documents first created during the Class Period but then modified at some point beyond the Class Period. Nor is it particularly useful now that it has become clear that most

of the E&Y study occurred after the Class Period ended. The court's determination that *Garner* applied to the E&Y Compliance Engagement was based in large measure on the court's understanding that most of the documents in question were created during a very limited time within the Class Period (July 1 through September 30, 2002), and when Household had a fiduciary relationship with Plaintiffs. *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *9 (applying *Garner* exception "[o]n the limited facts of this case," and "stress[ing] that this holding should be narrowly construed.") We now know that E&Y's study extended into 2004 and involved several phases of data collection and analysis throughout that period. Indeed, most of E&Y's substantive work occurred after the Class Period ended.

In his supplemental affidavit, Mr. Keller suggests that the appropriate date to consider is the one corresponding with the "manual sign off" by an E&Y or Household representative. (*See, e.g.*, Keller Supp. Aff. of 5/4/07, ¶¶ 4-6.) Defendants explain that "[t]his was the date on which documents that are included in a logged folder, some of which may have been gathered or printed out on some earlier date, were reviewed by E&Y for accuracy and, if necessary, modified or revised." (Def. Work Paper Mem., at 9.) Plaintiffs insist that the date of creation is the only one that matters.

To address this issue, the court conducted an *in camera* review of documents with dates that crossover the Class Period, as selected by Plaintiffs, and considered the totality of the circumstances presented, including a review of the two Keller affidavits. *In re Grand Jury Proceedings*, 220 F.3d at 572. *See also Sphere Drake Ins. Ltd.*, 221 F. Supp. 2d at 885 (determining privilege "will often necessitate the submission of an affidavit or declaration with specific facts" about the documents). The court also conducted an *in camera* review of the E&Y computer records as agreed upon by the parties, and requested supplemental briefing from the parties. Notably, neither party provided any case law addressing the application of *Garner* where documents have dates that crossover the relevant fiduciary period, nor is the court aware of any

Seventh Circuit decision in that regard. In addition, the court reiterates that *Garner* is a limited exception that must be narrowly construed.

The court concludes that, with respect to any substantive documents that were created during the Class Period but then modified, updated, or reviewed for accuracy after the Class Period, the appropriate date for *Garner* purposes is either the last date the document was altered, or the date of the manual sign-off, whichever is later. The Compliance Engagement was an on-going project, with E&Y conducting data validation, data integrity, and sampling tests to get Household's customer data into proper form for analysis. E&Y revised and recalculated those tests to ensure accuracy, and then used the resulting data to create exception reports. E&Y personnel checked those reports internally before engaging in a back-and-forth exchange with Household, resulting in numerous draft reports. To the extent E&Y ultimately made substantive findings and recommendations, it was based on an assessment and analysis of the data in its final, reviewed form. Thus, the relevant date of these documents is the last date E&Y modified or updated them, or reviewed them for accuracy. Substantive documents created during the Class Period without subsequent modification or manual sign-off, however, must be produced.[6]

With respect to the 278 boxes of computer records, the court finds that none of the documents is subject to the *Garner* exception. As explained in Mr. Keller's affidavits, E&Y requested specific individual customer loan information from Household to test and refine the systems E&Y created and utilized to analyze the data and determine Household's compliance with consumer lending policies and laws. Having reviewed the documents *in camera*, the court agrees that these preliminary analyses, which contain sensitive personal information about individual customers, and which E&Y constructed solely to ensure the accuracy of its later substantive testing, are not the types of information Plaintiffs would be entitled to as shareholders. The court has

[6] The court understands that Defendants have already produced such documents.

repeatedly stressed that the *Garner* exception at issue here is extremely narrow, and the court will not extend it to personal consumer data that has no discrete relevance to this case. The court notes that Plaintiffs already have considerable information relating to the loan attributes addressed by E&Y, including monthly refund reports; reports from state regulatory agencies mandating specific customer refunds; State Examination Audit Tracking Expense Summary charts; and Class Period data compiled for the multi-state group of Attorneys General.[7]

B. Work Product Doctrine

Plaintiffs argue that even if some E&Y documents are protected by the attorney-client privilege, they have overcome any showing that the documents are protected by the work product doctrine. A document may be protected by the work-product privilege if it is created by an attorney "in anticipation of litigation." FED. R. CIV. P. 26(b)(3); *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996). An assertion of work-product privilege may be overcome upon a showing of "substantial need" and "undue hardship." *Logan*, 96 F.3d at 976.

Plaintiffs claim that this court has already determined that they have overcome any work product privilege with respect to the 393 boxes of E&Y documents located at the off-site storage facility. (Pl. Resp., at 16-17.) This is not correct. In the December 6, 2006 Opinion, the court did find that the E&Y documents constitute attorney work product, but that Plaintiffs had demonstrated a substantial need for the E&Y information and an inability to obtain the substantial equivalent of the materials from another source. *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *10-11.

[7] Plaintiffs also object that Defendants have not provided any dates for certain entries on the privilege log. Defendants state that they have now provided dates for all but seven such entries, and note that "[b]ased on the time line of the E&Y Compliance Engagement set forth in the Keller Affidavits, it is more likely than not that these documents . . . were created after October 11, 2002. (Def. Work Paper Reply, at 9.) It is Defendants' burden to establish that the documents fall outside the Class Period, and the court agrees with Plaintiffs that Defendants should produce any documents with unknown dates by June 22, 2007. *In re Grand Jury Proceedings*, 220 F.3d at 571.

At the time, however, the court was unaware of the additional 393 boxes of documents and, thus, neither did nor could have included them within the scope of that opinion.

In the February 27, 2007 Order, the court affirmed that, with respect to any documents addressed in the December 6, 2006 Opinion and covered only by the work product privilege, Plaintiffs had "demonstrated a substantial need for the E&Y information in that it may assist Plaintiffs in establishing falsity, scienter, and materiality." (Minute Order of 2/27/07, Doc. 999, at 2.) The court made no such finding with respect to the 393 boxes of documents. Indeed, at that time, no one had any idea exactly what was in them. (*Id*. at 2-3.)

The court's determination that Plaintiffs had overcome the work product privilege was based in large measure on the court's understanding that most of the documents in question were created during a very limited time within the Class Period (July 1 through September 30, 2002), and when Household had a fiduciary relationship with Plaintiffs. Though the *Garner* exception does not apply to the work product privilege, the court did consider the time period and the nature of the parties' relationship in finding that Plaintiffs had demonstrated a substantial need for the E&Y information and likely could not obtain the substantial equivalent of the materials from another source such as witness depositions.

It is now clear that most of E&Y's analysis took place after the Class Period ended. Any substantive E&Y documents that were either created, modified, or reviewed for accuracy after the Class Period do not shed light on Household's scienter, or the falsity or materiality of statements made during the Class Period. *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.") Thus, Defendants need only produce substantive documents (i.e., documents from the 115 substantive boxes) that are protected solely by the work product privilege if they were "created" during the Class Period, as that term has been defined in detail above. Any non-substantive documents protected by the work product doctrine

remain privileged in their entirety. As noted, these documents consist of preliminary analyses and contain sensitive personal information about individual customers. They do not speak to Household's scienter, or to the falsity or materiality of Class Period statements and, thus, Plaintiffs have not demonstrated a substantial need for these documents sufficient to overcome the work product privilege.

In light of these findings, Defendants need not produce a privilege log as to the remaining 278 boxes of non-substantive documents. To the extent all of these documents are privileged, the court finds that such an exercise at this late date would entail excessive burden for at most marginal gain. *See Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 523 (N.D. Ill. 2005) (court may limit discovery if the burden or expense of the proposed discovery outweighs its likely benefits). Plaintiffs' request for access to the non-substantive computer records is denied.

II. Motion to Reconsider

The court next considers Defendants' motion for partial reconsideration of its April 27, 2007 Order. A motion for reconsideration under Rule 59(e) "serves the limited function of correcting manifest errors of law or fact or presenting newly discovered evidence." *Thomas v. Johnston*, 215 F.3d 1330 (Table), 2000 WL 518100, at *3 (7th Cir. 2000) (citing *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996)). Reconsideration is appropriate when "the Court has patently misunderstood a party or has made a decision outside the adversarial issues presented to the Court by the parties or has made a an error not of reasoning but of apprehension." *Spearman Indus., Inc. v. St. Paul Fire and Marine Ins. Co.*, 139 F. Supp. 2d 943, 945 (N.D. Ill. 2001). Rule 59(e) does not, however, "provide a vehicle for a party to undo its own procedural failures [or] to introduce new evidence or advance arguments that should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). *See also Marquez v. New Century Mortgage Corp.*, No. 03 C 7136, 2004 WL 1688556, at *1 (N.D. Ill. July 27, 2004).

Defendants argue that they should not be required to produce or log all E&Y documents in their files as required by the April 27, 2007 Order. They also ask the court to clarify that it did not intend to overrule its prior directives with respect to the duration of the John Keller and Chris Bianucci depositions.

A. Production/Logging of All E&Y Documents

In section (5) of its April 27, 2007 Order, the court ordered Defendants to produce "any additional E&Y documents in their possession that are related to the Compliance Engagement and dated within the Class Period," and to log any such documents dated after the Class Period. (Minute Order of 4/27/07, Doc. 1060.) Defendants urge the court to reconsider, arguing that Plaintiffs never sought E&Y documents in any discovery requests propounded during the discovery period, and that requiring such an exercise at this late date will result in undue burden, cost, and delay without meaningfully advancing the case. The court agrees in part.

It is undisputed that Plaintiffs' only explicit request for E&Y documents came in the form of a subpoena issued to E&Y on May 19, 2006. E&Y promptly objected to the subpoena by letter dated June 6, 2006, and on July 13, 2006, Defendants sent Plaintiffs a letter stating that the E&Y materials requested in the subpoena were privileged and would not be produced. Rather than moving to compel E&Y to honor the subpoena, Plaintiffs waited until October 16, 2006 to file a motion to compel *Defendants* to produce the E&Y documents.

The court has expressed on several occasions its skepticism that Plaintiffs' general document requests sufficed to place Defendants on notice that they specifically sought documents relating to the E&Y Compliance Engagement. In its February 27, 2007 Order, the court stated: "[I]t is . . . not clear that Plaintiffs tendered a document request specifically asking for E&Y documents. Nor does it appear that Plaintiffs ever moved to enforce the May 2006 subpoena they served on E&Y." (Minute Order of 2/27/07, Doc. 999, at 2.) Judge Guzman agreed with this sentiment, noting in his April 9, 2007 Order that "[T]he class 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." (Minute Order of 4/9/07, Doc. 1039, at 2.) In the April 27, 2007 Order, moreover, the court expressly disagreed that Plaintiffs' "generic request for 'All documents and communications concerning or relating to Household's lending practices and policies related to loans secured by real property . . .' and for 'Documents that track, analyze or describe communications related to state regulatory examinations and investigations . . .' suffice to place Defendants on notice that Plaintiffs wanted documents from E&Y . . . in particular." (Minute Order of 4/27/07, Doc. 1060, at 3.)

At the same time, the court acknowledged that, by filing the motion to compel in October 2006, Plaintiffs put Defendants on notice that they wanted documents relating to E&Y. (*Id*.) Defendants argue that they "fairly read Plaintiffs' motion to encompass only the E&Y Compliance Engagement documents that were otherwise responsive to Plaintiffs' general document demands and listed or to be listed on Defendants' privilege log." (Motion to Reconsider, at 5.) The problem with this position is that Defendants discovered, after the close of fact discovery, some 393 boxes of E&Y documents that were within its possession and control, but which Defendants apparently knew nothing about. This raised concerns as to the completeness of Defendants' disclosures irrespective of any dispute as to scope.

On reconsideration, the court affirms its order that Defendants produce and/or log additional E&Y documents in their possession, with the following amendment. Defendants explain in their motion that "[s]earching for all documents in Household's files relating to [the Compliance] Engagement would require Defendants to almost re-do their entire document collection process, an extremely burdensome and disruptive task especially at this late date." (Motion to Reconsider, at 8.) In light of the fact that Plaintiffs never expressly requested E&Y documents pursuant to Rule 34, the court agrees that a full "re-do" of Household's document collection would be unduly burdensome and unreasonable at this late stage of the litigation. The court therefore accepts

Defendants' compromise position, in part, and orders them to produce and/or log documents contained in the files of nine "core" individuals involved with the study.

B. Keller and Bianucci Depositions

On February 12, 2007, the court issued an Order stating that the deposition of John Keller would take place over one day and count as one deposition, and that the Chris Bianucci deposition would take place on one day. (Minute Order of 2/12/07, Doc. 954.) In section (2) of its April 27, 2007 Order, however, the court appeared to reverse itself, stating that "[a]bsent leave of the court, each deposition will not exceed two, consecutive seven-hour days." (Minute Order of 4/27/07, Doc. 1060, at 2.) As both parties know, the court has devoted an inordinate amount of time and resources to this case, and has written countless opinions and orders addressing a wide variety of topics. On many occasions, including this one, the court has had to enter several orders on a single topic.

The court has made every effort to keep track of each dispute, ruling, and motion on the docket. This case, however, has been a stunning example of what happens when parties' discovery tactics become so adversarial that they cannot agree on a single issue, no matter how routine. All efforts to streamline discovery have failed, forcing the court to become a reluctant participant in the minutiae of that process. Indeed, the court had to appoint "deposition coordinators" because the parties could not even schedule depositions without constant court intervention. Sadly, even this and other such heavy-handed measures have not stemmed the tide of petty motions and disputes.

There are now more than 1,100 entries on the docket in this case, and this is only one of some 140 cases pending before the court. After years of micro-managing the most mundane aspects of discovery due to the complete lack of cooperation by the attorneys, it is not surprising that some details have been inadvertently misstated or remembered incorrectly. The court did not intend to grant Plaintiffs additional time for the Keller and Bianucci depositions absent some

showing of need as indicated in the February 12, 2007 Order. Defendants' motion to reconsider section (2) of the court's April 27, 2007 Order is granted.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Compel Production of Ernst & Young LLP Documents and for Sanctions [Doc. 974] is granted in part and denied in part. Defendants are to submit outstanding documents and a revised privilege log, as necessary, consistent with this opinion by June 22, 2007. Defendants' Motion for Partial Reconsideration and Clarification of the Court's April 27, 2007 Order [Doc. 1071] is granted in part and denied in part.

ENTER:

Nan R. Nolan

Dated: June 13, 2007

NAN R. NOLAN
United States Magistrate Judge