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-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR A FINDING OF CONTEMPT AND FOR APPROPRIATE SANCTIONS AND OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

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This reply memorandum of law 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 support of Defendants' motion for a finding of contempt and for appropriate sanctions, and in opposition to Plaintiffs' cross motion to strike.

INTRODUCTION

Plaintiffs' Opposition Brief ("Pl. Br.") confirms precisely what Defendants established in their opening brief: Plaintiffs have willfully and unapologetically violated this Court's explicit Orders. Plaintiffs' attempted smokescreens notwithstanding, the facts underlying Defendants' motion are simple:

- Under the authority of the Protective Order entered by this Court on November 5, 2004, Defendants demanded, by letter dated July 21, 2006, the return of an inadvertently produced document as to which Defendants asserted privilege (referred to herein, as in Defendants' opening brief, as "Document 1208");

- Plaintiffs disputed Defendants' privilege assertion as to Document 1208 and others created in the course of a privileged Ernst & Young retention in motions dated October 16, 2006 and February 22, 2007.

- The Court's December 6, 2006 Order recognized that the Ernst & Young engagement documents are privileged,[1] and by Order dated February 27, 2007, this Court resolved Plaintiffs' renewed challenge regarding Document 1208 and others in favor of Defendants. This Court's decision was affirmed by Judge Guzman's Order dated April 9, 2007 (Dkt. 1039).

- In defiance of their obligations under this Court's February 27, 2007 Order and the Protective Order, Plaintiffs have deliberately continued to use Document 1208. They admittedly have disclosed it to at least one of their proposed expert witnesses, Ms. Ghiglieri, who in turn cited it in her Report.

Plaintiffs' supposed excuse — that "there is no clear, unequivocal order from this Court that requires the return of this document" Pl. Br. at 7 — is an affront to this Court, given

[1] The Court's conclusion that certain documents created during the class period were nevertheless subject to production by reason of the *Garner* exception (discussed below) has no bearing on the instant motion because Document 1208 was created in 2003.

the implicit premise that when the Court held Document 1208 to be privileged, it dropped the ball by failing to specify that Plaintiffs must refrain from using the document in any fashion. The proposition that the Court is required to specifically order Plaintiffs to govern themselves in accordance with its express Orders is absurd, and serves only to highlight Plaintiffs' lack of any legitimate defense.

Even assuming, *arguendo*, that Plaintiffs were confused about the import of the Court's December 6, 2006 and February 27, 2007 Orders, there was nothing ambiguous about Defendants' express designation of Document 1208 as privileged, and Plaintiffs do not even pretend to interpret the Court's Orders as overruling that designation. Their decision to broadcast the document under those circumstances is all the more egregious in view of the clear and unequivocal dictates of the November 5, 2004 Protective Order. In no uncertain terms, that Order specifies the parties' obligations upon receipt of a demand for return of an inadvertently produced privileged document:

> "Upon such notice, all Receiving Parties that have received a copy of such document promptly shall return it to the Producing Party and shall destroy any other copies thereof unless there is a pending good faith dispute about the privileged nature of the document." Protective Order at ¶ 30.

Given this express prohibition, even if Plaintiffs could possibly have believed that the December 6 and February 27 Orders failed to resolve their objection to Defendants' designation of privilege for Document 1208, their only legitimate options after Judge Guzman affirmed the February 27 Order were (i) to return the document and destroy any copies thereof, or (ii) to refrain from using the document and disclosing it to their expert pending the disposition of the supposedly unresolved dispute. Unfortunately, this is not the first time that Plaintiffs have chosen a third, impermissible, option of taking it upon themselves to resolve the issue in their favor, no matter what this Court has ruled.

The only other possible explanation — that Plaintiffs simply made a mistake — seemed at least plausible until Plaintiffs met Defendants' request for compliance with facially insupportable arguments, and launched a vehement counter-attack to this motion to obscure their lack of any legitimate defense.

ARGUMENT

I. This Court Has Explicitly Held That Document 1208 Is Privileged

As discussed in Defendant's opening brief, Document 1208 has previously been the subject of motion practice before this Court. On October 16, 2006, Plaintiffs filed their Motion to Compel Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP. It is clear that Document 1208, as well as other disputed Ernst & Young documents, was the subject of Plaintiffs' motion.[2] At the October 19, 2006 status conference, Defendants expressed their concern to the Court that Plaintiffs had used this very document while the dispute over the document was still pending.[3] On December 6, 2006, this Court issued an Order addressing Plaintiffs' October 16 motion, holding that documents relating to the Ernst & Young engagement, including documents that had been inadvertently produced to Plaintiffs by Defendants, are subject to attorney-client privilege.[4] Dec. 6, 2006 Order at 10 ("Thus, the E&Y documents in question are protected by the attorney-client privilege."). The Court also declined to "find waiver based on Household's inadvertent production of certain E&Y documents to Plaintiffs during discovery." *Id.* at 18. The Court noted that "Defendants have produced some four million pages of documents in this case. . . . It was not unexpected that Defendants and their agents would inadvertently produce some privileged materials and, indeed, the parties' agreed protective order outlines a procedure for returning such materials." *Id.* The December 6,

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2 Plaintiffs' October 16, 2006 motion papers stated: "During the project, E&Y authored a number of documents, including Excel spreadsheets. Household withheld some of these documents from its production on March 20, 2006 based on an assertion of privilege. . . . [*S*]*ee also* Baker Decl. Ex. N (spreadsheet including E&Y refund analysis)." Declaration of Landis C. Best, dated April 1, 2008 ("Best Decl.") Exs. 1 and 2. Plaintiffs note in the footnote that corresponds with this text that "Baker Decl. Ex. N is one of the disputed documents." Best Decl. Ex. 2 at 2 n. 3. Clearly, Plaintiffs intended for the Court to determine whether Document 1208, Exhibit N to the Baker Declaration that accompanied the October 16, 2006 motion, was subject to attorney-client-privilege as Defendants had asserted that it was.

3 Defendants strenuously objected to Plaintiffs' use of Document 1208 in connection with their motion, and the Court sealed the record regarding the discussion of this issue. Transcript of Proceedings, October 19, 2006 at 93 (beginning of sealed portion).

4 The Court held that certain documents subject to attorney-client privilege were required to be produced under the *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), exception (the "*Garner* exception").

2006 Order made clear that documents relating to the Ernst & Young engagement were subject to attorney-client privilege, limited only by the *Garner* exception the Court applied to class-period documents.

Plaintiffs took a different view, and argued in motion papers submitted on February 22, 2007 that Defendants should be compelled to produce post-class period attorney-client privileged documents. As to the category of documents that include Document 1208, *i.e.*, Ernst & Young documents dated after the class period as which Defendants assert attorney-client privilege, Plaintiffs' challenge to Defendants' privilege assertion was overruled. In its February 27, 2007 Order, this Court unequivocally held "that Defendants need not produce any of the 187 documents which are covered by the attorney-client privilege (either alone or in addition to work product protection) and dated after the Class Period." The Court expressly based its ruling on findings that the 187 documents are privileged and that such privilege had not been waived. Document 1208 was one of the 187 documents specifically presented to the Court in Plaintiffs' motion.[5] The indisputable import of the Court's February 27, 2007 Order is that Document 1208 is not available for Plaintiffs' use in this case or otherwise. By Order dated April 9, 2007, Judge Guzman affirmed this Court's Order.

Despite the fact Document 1208 was one of the documents they explicitly identified in their motion papers, Plaintiffs argue now that Document 1208 was not within the scope of the Court's February 27, 2007 Order because Plaintiffs' motion giving rise to that Order was styled as a motion to compel production, rather than to allow the retention of inadvertently produced privileged documents. Pl. Br. at 2 ("Plaintiffs' motions did not address previously produced documents, such as this one, but requested the Court to compel defendants to produce additional documents.") (emphasis removed). Although Plaintiffs do not, and cannot, dispute that

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[5] Plaintiffs claim that "Defendants' only basis for asserting that the February 27, 2007 Order addressed this document is the inadvertent inclusion of HHS-E 0001208 on the list of 'withheld' documents submitted by plaintiffs to support their motion." Plaintiffs' argument that they inadvertently included Document 1208 on their list accompanying their February 2007 motion papers might have some force if it were the only inadvertently produced document on the list. However, Plaintiffs' argument strains credulity given than Document 1208 is one of 28 previously produced (i.e., not previously "withheld") documents included on Plaintiffs' list of 187 documents. Moreover, even if Document 1208 had not been included on Plaintiffs' list, the document would still be covered by the principles set forth in this Court's December 6, 2006 and February 27, 2007 Orders.

Document 1208 is within the category of documents explicitly held to be privileged (and not within the *Garner* exception) in this Court's February 27, 2007 Order, they disingenuously contend that the Court's decision that Document 1208 may be withheld from production did not require the return of a copy of the document in their possession because that document had been inadvertently produced rather than withheld. Even if that spurious distinction made any sense, the argument that Plaintiffs may rely on the Court's turn of phrase to *retain* Document 1208 does not begin to justify their decision to *use* the document and broadcast its indisputably privileged substance.

To the contrary, once Defendants had asserted a claim of privilege over the inadvertently produced Document 1208, as they did by letter in July 2006, the Protective Order explicitly prohibited Plaintiffs from using or disclosing the document, regardless of Plaintiffs' disagreement with the privilege assertion, unless and until the dispute were resolved in Plaintiffs' favor. Protective Order at ¶ 30. *A fortiori* that prohibition applies to documents, including Document 1208, as to which the Court has expressly sustained Defendants' assertion of privilege. Plaintiffs' flimsy opposing arguments betray their persistent disdain for the rights of the Defendants and the authority of this Court.

II. Plaintiffs' Waiver Argument is Meritless and a Blatant Attempt to Deflect the Court's Attention from Plaintiffs' Violation of the Court's Orders

Plaintiffs do not, and cannot, deny the facts that demonstrate their violation of the Court's Orders. Indeed, they specifically admit that "Plaintiffs used this document as a Court exhibit and as a deposition exhibit at Mr. Robin's deposition and Ms. Allcock's deposition. Plaintiffs provided these depositions and the related exhibits to their expert Ms. Ghiglieri." Pl. Br. at 7. Rather than denying their violations, Plaintiffs all but boast of them and then attempt to excuse their misbehavior by resorting to the time-worn fallacious argument that two wrongs (or, in this instance, at least three wrongs) make a right.[6]

In violation of this Court's explicit Orders and the Protective Order, Plaintiffs in-

[6] Plaintiffs also assert, with no factual basis, that "defendants' own expert, Robert E. Litan, relies upon the March 8, 2007 deposition of Ms. Allcock and presumably the exhibits to that deposition although that reference is not explicitly stated." Pl. Br. at 4. Plaintiffs' presumption is wrong. Defendants never provided Document 1208 to Dr. Litan.

tentionally used a document they knew was the subject of dispute throughout the period of dispute, including by marking it as an exhibit at two depositions without complete identification. Document 1208 is a fifty-page spreadsheet with no creation date shown. Plaintiffs did not receive it in this form, however. The document was inadvertently produced as part of Defendants' electronic production, in native file format, as an attachment to an email that included, inter alia, the date—*well after the end of the class period*—and the names of the recipients—*including an in-house attorney*. At both depositions, Plaintiffs attempted to obscure the identity of the spreadsheet by separating it from the cover email to which it was attached in Defendants' production. When Defendants requested the identifying information they were entitled to under the parties' native format agreement, Plaintiffs refused to comply. Having thus tried to obscure the privileged nature of this document, Plaintiffs smugly argue, in effect, that their stealth in marking it as a deposition exhibit without being caught constitutes a waiver of privilege on Defendants' part. Plaintiffs' "gotcha" litigation tactics and lack of candor with this Court, as described in greater detail below, should not be rewarded.

The day after the Court held that "the E&Y documents . . . are protected by the attorney-client privilege," (Dec. 6, 2006 Order at 10), Plaintiffs' attorney, Cameron Baker, marked Document 1208 as an exhibit at the December 7, 2006 deposition of Kenneth Robin, Esq., without its identifying cover email. The context dispels any possible inference of waiver. When the topic of the Ernst & Young engagement was first raised, counsel for Defendants, Peter Sloane, stopped the questioning on the ground of privilege. He said "I'm going to need to consult with . . . Mr. Robin with respect to privilege issues with respect to this."[7] Following a break, Mr. Sloane reiterated that he had not "had a chance to review the Court's opinion which I just got," and he expressly preserved Defendants' privilege objection, stating that he would allow Plaintiffs to ask questions about the Ernst & Young retention only "to learn what knowledge [Mr. Robin] has or doesn't have, ***without intending to or waiving any privileges we might have*** or might assert in appeal if we were to take one from the Magistrate Judge's opinion." *Id.* at 164:11-20 (emphasis added). When Mr. Baker showed the witness Document 1208, Mr. Sloane insisted that Mr.

[7] Robin Tr. at 162:24-163:3, Best Decl. Ex. 3.

Baker provide the missing cover email.[8] Mr. Baker did not comply, and because the witness could not identify the spreadsheet, there were no substantive questions about the exhibit.

At the deposition of Robin Allcock in March 2007, Mr. Baker again had the reporter mark Document 1208 without providing a copy of its cover email. Defense counsel Landis Best called Plaintiffs on their failure to provide the information required by the native format protocol,[9] and there were no substantive questions or answers about the exhibit. Plaintiffs' argument that their own tactics at the Allcock deposition make this privileged document fair game is absurd — particularly as for the second time Plaintiffs tried to obscure the provenance of the exhibit by withholding the cover email showing that it was transmitted to in-house counsel and was dated well after the period to which the *Garner* exception was applied. To credit Plaintiffs' waiver argument would disadvantage Defendants simply because they failed to recognize soon enough that Plaintiffs were not conducting themselves in good faith and in accordance with the Court's clear orders.

Plaintiffs' shameless waiver argument aside, one might suppose from reading their brief that the Protective Order's clear proscription against using a recalled privileged document is of no force and effect — or is only as strong as Defendants' ability to detect Plaintiffs' stealth violations. Plaintiffs' resort to "self-help" in the face of the unambiguous Orders of this Court warrant strong sanctions.

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8 Robin Tr. at 173:12-23, Best Decl. Ex. 3. Plaintiffs' failure violated the parties' Native Format protocol, which provides in pertinent part: 4. Exhibits: ...For each document shown to a witness or relied upon at trial, plaintiffs . . . at a minimum shall identify the CD number on which the document was produced, as well as the path and filename, if they exist. If no path or filename exists, plaintiffs shall identify the document using the CD number, the name of the person whose file the document came from, and other information sufficient to identify the document being used as an exhibit — ***such as the date of an email and the subject line or subject matter***." (Emphasis added).

9 Allcock Tr. at 399:16-400:6, Best Decl. Ex. 4. ("MR. BAKER: Let's mark this as Exhibit 141. Just so the record is clear, this document was originally an Excel spreadsheet that had been printed out. MS. BEST: This is a document that was produced by the Household defendants in Native format? MR. BAKER: Uh-huh. MS. BEST: Can you represent what disk it came from? MR. BAKER: Not right now. It's previously been used as an exhibit in Mr. Robin's deposition. But I reprinted it, just because it didn't copy good [sic]."). Moreover, by stating that the document had been "used" earlier as an exhibit at Mr. Robin's deposition, without noting Mr. Sloane's express reservation of privilege, Mr. Baker falsely implied to defending counsel that one of her colleagues had previously allowed the alleged use.

III. Plaintiffs' Violations of the Court's Explicit Orders Warrant a Finding of Contempt

This Court may make a finding of contempt where, as here, a party violates its Orders. *See*, *e.g.*, Fed. R. Civ. P. 37(b)(2)(D) ("[T]he court in which the action is pending may make such orders in regard to the failure as are just . . . [including] an order treating as a contempt of court the failure to obey any orders . . . ."). As discussed in Defendants' opening brief, Plaintiffs' misconduct warrants the imposition of sanctions. *See Ladien* v. *Astrachan*, 128 F.3d 1051, 1056-1057 (7th Cir. 1997) (affirming sanctions under Rule 37(b) for misconduct including violation of protective order by using undisclosed documents as exhibits in a deposition); *American National Bank and Trust Co. of Chicago* v. *AXA Client Solutions, LLC*, No. 00 C 6786, 2002 U.S. Dist. LEXIS 14774, at *9-11, 17-18 (N.D. Ill. August 12, 2002) (upholding Magistrate Judge's order of sanctions under Rule 37 for violation of protective order including improperly disseminating confidential information gained through the litigation); *Kapco Manufacturing Co.* v. *C&O Enterprises, Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989) (finding under §1927 "[i]f a lawyer pursues a path that a reasonable careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious") (quoting *In re TCI*, 769 F.2d 441, 445 (7th Cir. 1985)).

The authority cited in Plaintiffs' brief supports the proposition that sanctions are warranted. "To hold a party or witness in civil contempt, the district court must be able to point to a decree from the court which sets forth in specific detail an unequivocal command which the party . . . in contempt violated." *Jones* v. *Lincoln Electric Co.*, 188 F.3d 709, 738 (7th Cir. 1999) (citations and internal quotations marks omitted) (cited in Pl. Br. at 6). The Protective Order sets forth in specific detail the unequivocal command that, once Defendants asserted a claim of privilege as to Document 1208, Plaintiffs were obligated to return or destroy the document or, at least, to refrain from using the document pending a resolution in their favor of a dispute as to its privilege status. Protective Order at ¶¶ 28, 30. This Court held in its February 27, 2007 Order that Document 1208 is privileged and therefore exempt from production, thus requiring that Plaintiffs fulfill their obligation under the Protective Order to return or destroy the document. Plaintiffs violated the Protective Order's unequivocal command, as they admit, by using Document 1208 and by providing it to their proposed expert, Ms. Ghiglieri. This conduct is in con-

tempt of this Court's Orders and warrants sanctions.

IV. Plaintiffs' Motion to Strike Should Be Denied

Plaintiffs' motion to strike is based upon overly formalistic and erroneous arguments and should be denied. Plaintiffs are mistaken that this motion is premature for failure to meet and confer. The parties exchanged correspondence on this issue and held a telephonic meet and confer session. During the parties' February 22, 2008 telephonic meet and confer, Plaintiffs' counsel Cameron Baker explicitly stated as to this issue: "Okay, well, then, look, we're at an impasse. I told you we were at an impasse from the first . . . ***Go ahead. Make your motion***." Meet and Confer Transcript at 26 (Dkt. 1200-2 at 66) (emphasis added). Plaintiffs' Counsel's subsequent letter reflected no progress toward resolution, so Defendants were constrained to move the Court for assistance in resolving the dispute. Likewise, Plaintiffs mistakenly invoke Local Rule 37.1 for the proposition that Defendants were required to proceed by affidavit in raising their motion rather than by fully briefing the issue. *See* Memorandum of Law in Support of Plaintiffs' Motion to Strike Defendants' Motion For Failure to Comply With Local Rules 37.1 and 37.2 ("Motion to Strike"). Defendants' opening brief explained the factual basis for their motion, and was signed by an officer of the Court. Plaintiffs insistence on "an affidavit...set[ting]out with particularity the misconduct complained of" unnecessarily seeks to elevate form over substance. Motion to Strike at 1 n.2.

Plaintiffs also request an evidentiary hearing, *e.g.*, Motion to Strike at 9-10. However, Plaintiffs fail to identify any factual question that is in controversy. Plaintiffs' do not dispute the salient facts giving rise to Defendants' motion; an evidentiary hearing is unnecessary.

CONCLUSION

For the foregoing reasons Defendants respectfully request the entry of an Order granting the relief requested in Defendants' opening brief, namely: (i) holding Plaintiffs' counsel in contempt for willfully defying this Court's Orders, (ii) requiring Plaintiffs and their counsel to cure their standing violations of the Protective Order by returning or destroying all copies of Document 1208, and all documents containing any information derived therefrom, (iii) ordering certification by Plaintiffs that they have not otherwise used or shown their experts or anyone else any other privileged documents or if they are unable to so certify, to identify every docu-

ment they have misused in this way so Defendants and the Court can determine what corrective action is required, (iv) prohibiting Plaintiffs and their counsel from carrying out their threatened further violations of the Protective Order, (v) ordering all portions of Ghiglieri's report relying on Document 1208 be stricken and (vi) imposing appropriate sanctions on Plaintiffs and their counsel, including payment of the costs and fees Defendants were required to incur in seeking the requested relief.

Dated: April 1, 2008
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on April 1, 2008, he caused to be served copies of **Reply Memorandum of Law in Support of Defendants' Motion for a Finding of Contempt and for Appropriate Sanctions and Opposition to Plaintiffs' Motion to Strike** to the parties listed below via the manner stated.

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