

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**THE CLASS' MOTION TO COMPEL PRODUCTION OF ERNST & YOUNG LLP
DOCUMENTS AND FOR SANCTIONS FOR DEFENDANTS' CONTINUING
VIOLATIONS OF JUDGE GUZMAN'S FEBRUARY 1, 2007 ORDER AND THIS
COURT'S DECEMBER 6, 2006 ORDER**

I. INTRODUCTION

The Class respectfully moves the Court for an order further compelling defendants to comply with this Court's December 6, 2006 and Judge Guzman's February 1, 2007 orders regarding documents relating to Households' consultations with Ernst & Young LLP ("E&Y"). Notwithstanding these orders, defendants have failed to produce (i) E&Y's work papers, and (ii) at least 187 internal E&Y documents. *See* Ex. A (listing of some such documents).¹ As defendants well know, their refusal to comply with this Court's orders hinders the Class' ability to take upcoming depositions, including both of the E&Y employees (Mr. Keller's Rule 30(b)(6) deposition, set for March 1 and Mr. Bianucci's individual deposition, set for March 8), and to complete expert discovery. Having exhausted all other remedies, the Class now seeks another order compelling production and imposing the sanctions requested herein.

II. BACKGROUND

As the Court will recall, on October 16, 2006, the Class filed a motion to compel Household "to produce all of its documents relating to Household's consultations with Ernst & Young LLP." Dkt. No. 708 at 1. On December 6, 2006, this Court granted that motion. Dkt. No. 806. Defendants filed an objection with Judge Guzman, precipitating another round of motion practice. During the pendency of defendants' objection, the Court, as it did with respect to the Class' objection regarding defendants' interrogatories, ordered defendants to be prepared to produce the E&Y documents within seven days of Judge Guzman's ruling. Dkt. No. 831. On February 5, 2007, the parties received Judge Guzman's February 1, 2007 decision upholding the December 6, 2006 ruling. Dkt.

¹ All exhibits are attached to the Declaration of Jason C. Davis in Support of the Class' Motion to Compel Production of Ernst & Young LLP Documents and for Sanctions for Defendants' Continuing Violations of Judge Guzman's February 1, 2007 Order and this Court's December 6, 2006 Order, filed herewith.

No. 940. On February 13 and 14, 2007, defendants produced a small number of responsive documents without any indication that they were continuing to withhold other E&Y documents. However, after reviewing defendants' privilege log, the Class ascertained that defendants had failed to produce over 187 responsive documents. By letter of February 16, 2007, the Class informed defendants of this significant deficiency. *See* Ex. B. It has also come to the Class' attention that defendants have failed to produce E&Y's work papers. According to E&Y, in October of 2004 it sent the "July 2002 state regulatory engagement [documents] to Household (specifically to Household's outside storage vendor, Iron Mountain), as Household requested." *See* Ex. C. Defendants have not produced these documents.

The Class needs a complete E&Y production from defendants immediately to prepare for the remaining depositions and in order to prepare its expert reports in a timely fashion. These depositions, scheduled for late February and early March include the depositions of Mr. Schoenholz (February 28-March 1), Mr. Keller (March 1), Mr. Bianucci (March 8) and Ms. Allcock (March 7-8).²

The Class' efforts to cause defendants to comply with the Court's prior orders have met with no success. Defendants did not respond to the Class' February 16, 2007 letter until February 21, 2007, when they claimed they were withholding E&Y documents that do not "fall within the class period" or do not "relate to the privileged July 1, 2002 state regulatory compliance engagement" ("Compliance Engagement"). *See* Ex. D. Following receipt of this letter, on February 21, 2007, the Class contacted defendants via telephone. Defendants reiterated their position via telephone and e-

² E&Y has offered John Keller as its Rule 30(b)(6) witness. Mr. Keller created some of the documents at issue and will be deposed on March 1, 2007. The Class will also take Chris Bianucci's deposition on March 8, 2007. Mr. Bianucci also worked on the E&Y project. Mr. Schoenholz and Ms. Allcock were involved in communications with E&Y.

mail, *see* Ex. E, refusing to produce any more E&Y documents. Defendants' conduct in this regard is reminiscent of their refusal to produce many of the state agency documents after the Court had ordered production. In essence, defendants are again employing a "pocket veto" over the Court's orders by sitting on responsive documents, thereby necessitating another Class motion and relitigation of the same arguments defendants either made or could have raised previously. The federal rules provide for no such behavior, which should be sanctioned.

III. ARGUMENT

There is no question that defendants have willfully violated this Court's and Judge Guzman's orders respecting production of the E&Y documents. After extensive briefing of the privilege issues in connection with the E&Y documents, both this Court and Judge Guzman rejected defendants' assertions of privilege and held the E&Y documents are highly relevant and probative of a number of the Class' allegations. Indeed, Judge Guzman held that "[t]he documents shed great light on a number of issues in this case, *e.g.*, the falsity of Household's statements regarding predatory lending practices, as well as scienter and materiality." Dkt. No. 940 at 3. Thus, any questions as to whether the documents are relevant, privileged or otherwise protected from discovery have all been resolved in favor of the Class. Further, this Court ordered defendants to produce the documents no more than seven days following Judge Guzman's order. Dkt. No. 831.

Notwithstanding these clear orders from the Court, defendants have withheld the E&Y work papers and at least 187 other documents. During the February 21, 2007 meet and confer, defendants attempted to justify their conduct on the grounds that the documents at issue are "post-Class Period" materials and are somehow not covered by the two orders mandating production of the E&Y documents. Neither argument passes muster.

Defendants did not raise (and thus waived) the so-called "post-Class Period" argument with this Court prior to its December 6, 2006 Order. Further, defendants raised and lost that issue before

Judge Guzman on their objection. Dkt. No. 841. Indeed, they specifically argued that “most of the [E&Y] work was accomplished long after the fall of 2002 and was not completed until 2004.” *Id.* at 1. The “post-Class Period” argument, thus, provides no justification for withholding E&Y documents. However, that is exactly what defendants are doing, as evidenced by the facts that not one “privileged”³ E&Y document that was produced is dated after October 11, 2002, and that 163 of the 187 withheld documents are dated after October 11, 2002. *See* Ex. A. The Class asked defendants to represent that they have produced *all* documents related to the Compliance Engagement as required by this Court’s December 6, 2006 Order and Judge Guzman’s February 1, 2007 Order. *See* Ex. F. To the contrary, defendants confirmed that they are in fact withholding all post-Class Period documents. *Id.*

Defendants’ other argument that they are currently withholding E&Y documents that relate to “other” engagements and not to the Compliance Engagement also fails. *See* Ex. D. First, as a factual matter, defendants have asserted that these other two engagements are unrelated to this litigation and concern (i) “price practices/HMDA issues” and (ii) a “secret shopper” program. *See* Ex. E. This argument cannot apply to the E&Y work papers because those papers concern only the Compliance Engagement. *See* Ex. C. Further, the relevant entries from the privilege log for the withheld documents demonstrate that these documents, likewise, do not pertain to such “other” engagements. In fact, 73 of the entries describe the documents at issue as relating to the “AG Settlement,” an event with clear ties to this litigation and within the scope of the Compliance Engagement. Indeed, this Court based its finding of attorney work product on the link between the

³ The Class’ review of the subset of E&Y documents defendants have produced demonstrates that many documents did not merit protection from disclosure under the most expansive definitions of work product or attorney-client privilege. Examples will be provided to the Court under separate cover for review *in camera* as defendants still claim the documents at issue are privileged.

Compliance Engagement and the AG negotiations. Dkt. No. 806 at 15-16. Another 38 entries are of “CA Exam/Settlement” documents, are similarly connected to this case and clearly within the Compliance Engagement as defendants have stated the California examination and settlement provided the genesis for retention of E&Y. Dkt. No. 764 at 1. Further, as a legal matter, the Class’ motion specifically sought “all of [Household’s] documents relating to Household’s consultations with Ernst & Young LLP.” Dkt. No. 708 at 1. In their opposition to the Class’ motion, defendants made only passing reference to any “other” engagements and specifically acknowledged that the grounds for withholding documents pertaining to these other engagements are “privileged for the same reasons set forth in this [Opposition] Memorandum.” Dkt. No. 764 n.3. This Court rejected defendants’ arguments and was affirmed by Judge Guzman. Thus, production should be compelled.

Further, a number of the documents Household has produced have been produced in redacted form. Given the Court’s prior rulings, there is no basis for these redactions. Six documents appear to be E&Y documents that defendants have been ordered to produce.⁴ Nonetheless, defendants have redacted certain text. Defendants claim they will send another privilege log reflecting the redactions at some point this week. The Court should order defendants to produce these documents in unredacted form for a review *in camera* and a determination as to whether they are properly immune from discovery.

To prevent further prejudice to the Class, defendants should be ordered again to produce all of the E&Y documents in PDF format via e-mail delivery as early as possible and no later than 5:00 p.m. (EST) on February 27, 2007.

⁴ See HHS 02945165; HHS-ED 001109-15; HHS 03449422; HHS 03449189; HHS 03438329C-30C; and HHS 03437887A-09A, attached as Exhibits 1-6, respectively, to the Class’ *in camera* submission, included with the Court’s courtesy copies of the documents filed in connection with this motion.

IV. THE LIMITED SANCTIONS SOUGHT BY THE CLASS ARE WARRANTED

Defendants should be sanctioned for their refusal to comply with this Court's prior orders commanding production of all E&Y documents. The Class seeks two categories of sanctions.

First, to the extent the Class must recall any of the upcoming deponents for further questioning on any of the currently withheld E&Y documents, defendants should be required to pay for all fees and expenses.⁵ The Class also seeks reimbursement for fees and expenses associated with the filing of this motion. Fed. R. Civ. P. 37(b) provides for the imposition of sanctions in the form of attorney's fees and costs incurred by the other party because of the failure to adhere to a court's order. That remedy is particularly appropriate where, as here, there is willfulness, bad faith, or fault on the part of the disobeying party. *See, e.g., Ladien v. Astrachan*, 128 F.3d 1051, 1056 n.5 (7th Cir. 1997).

Second, this Court should recommend to the trial court (i) that defendants be precluded from denying materiality and scienter with respect to the Class' allegations for the purpose of summary judgment; and (ii) a finding that defendants had knowledge of their defective compliance systems at the commencement of the Class Period. These remedies are consistent with evidentiary sanctions awarded in other cases in this jurisdiction under similar circumstances. *See, e.g., Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1381 (7th Cir. 1993) (upholding district court's ruling precluding party from relying on documents party refused to produce pursuant to court order and precluding it from making certain substantive arguments, which the sanctioned party argued "amounted to default judgment"). Given the importance of the E&Y documents to this case, a fact that Judge Guzman clearly articulated in upholding this Court's December 6, 2006 Order, the Class would be justified in

⁵ Given the timing, it is likely that Mr. Schoenholz may need to be recalled to the extent withheld documents were addressed to or from him.

seeking more severe sanctions. Moreover, because it is unlikely that defendants will affirmatively seek to use the E&Y documents to support their positions, simple preclusion from use will not penalize defendants for their conduct.

V. CONCLUSION

For the reasons set forth above, the Class respectfully urges the Court to order defendants to comply with this Court's December 6, 2006 Order and Judge Guzman's February 1, 2007 Order, and produce all E&Y documents in PDF format via e-mail delivery, no later than 5:00 p.m. (EST) on February 27, 2007. In light of defendants' continuing violations of the foregoing court orders, the Class urges the Court to require defendants to pay all fees and expenses associated with calling back any deposition witness to ask questions about any withheld E&Y documents and all fees and expenses associated with the filing of this motion. In addition, for defendants' willful misconduct, the Class requests the Court recommend that defendants be precluded from denying materiality and scienter at summary judgment and recommend a finding by the trial court that defendants had knowledge of defective compliance systems at the commencement of the Class Period.

DATED: February 22, 2007

Respectfully submitted,

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154452)
MONIQUE C. WINKLER (90786006)
LUKE O. BROOKS (90785469)
JASON C. DAVIS (4165197)

s/ Jason C. Davis

JASON C. DAVIS

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
101 North Wacker Drive, Suite 2010
Chicago, IL 60606
Telephone: 312/525-8320
312/525-8231 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.
SOICHER
LAWRENCE G. SOICHER
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

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