United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	Nan R. Nolan
CASE NUMBER	02 C 5893	**DATE**	2/27/2007
CASE TITLE	Lawrence E Jaffe vs. Household International Inc, et al		

DOCKET ENTRY TEXT

Motion hearing held. For the reasons set forth below, Plaintiffs' Motion to Compel Production of Ernst & Young Documents [Doc. 974] is granted in part, denied in part, and entered and continued in part.

■[For further details see text below.]

Notices mailed by Judicial staff.

02:01

STATEMENT

On February 1, 2007, the district court affirmed this court's decision that certain documents relating to a Compliance Engagement conducted by Ernst & Young LLP ("E&Y") were privileged, but that (1) the court "properly found that plaintiffs had established good cause to invoke the *Garner* [*v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970)] exception to the attorney-client privilege; and (2) Plaintiffs had overcome the work product privilege based on a showing of substantial need and undue hardship. (Minute Order of 2/1/07, Doc. 940.) *See also Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02 C 5893, 2006 WL 3524016 (N.D. Ill. Dec. 6, 2006). In its underlying opinion, this court had expressly noted that "Plaintiffs have presented evidence - and Defendants do not dispute - that the Class represents a substantial majority of shareholders who owned stock *at the time of the communications in question*." *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *9 (emphasis added).

Inherent in this ruling is a requirement that Plaintiffs have a fiduciary relationship with Household at the time of each particular communication between E&Y and Household in order for *Garner* to apply. Notably, neither party raised the post-Class Period issue with this court, nor was the court aware that most of the documents were dated after the Class Period. Indeed, the court understood that the study "was to be completed by September 30, 2002." (Class' Motion to Compel Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP, Doc. 708, at 2.) Also inherent in the court's December 6, 2006 ruling is a requirement that the documents relate to the compliance study of Household's Consumer Lending operation, conducted pursuant to the July 1, 2002 engagement letter. *Id*. at *1. Judge Guzman "adopt[ed] in full" these premises.

Defendants produced E&Y documents in accordance with the court's rulings, but withheld some 187 documents that were dated after the Class Period and/or related to two other E&Y engagements not at issue here. In addition, it appears that at the time the parties were arguing this motion, no one was aware that Defendants

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had an additional 425 boxes of documents containing E&Y work papers at an off-site storage facility. Plaintiffs argue that Defendants should produce all of these documents immediately.

This court never specifically addressed whether the E&Y production should include post-Class Period documents; this issue was not presented by the parties, and the court had no reason to know that most of the documents at issue were dated outside the Class Period. Judge Guzman, similarly, did not consider this issue in ruling on the parties' objections to the December 6, 2006 opinion, as evidenced by the fact that his Minute Order says nothing about it. *See United States v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000) ("[A]rguments not made before a magistrate judge are normally waived . . . . [T]here are good reasons for the rule that district courts should not consider arguments not raised initially before the magistrate judge . . . . Failure to raise arguments will often mean that facts relevant to their resolution will not have been developed."); *American Family Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2006 WL 2192004, at *9 (N.D. Ill. July 27, 2006) (Guzman, J.) ("Efficiency in judicial administration requires that all arguments be presented to the magistrate judge in the first instance. The review procedure thus does not afford the opportunity to present new arguments not raised before the magistrate judge.") (internal quotations omitted).

Having heard oral argument on the issue, the court now holds that Defendants need not produce any of the 187 documents which are covered by the attorney-client privilege (either alone or in addition to the work product privilege) and dated after the Class Period. *See Fairley v. Andrews*, 423 F. Supp. 2d 800, 806 (N.D. Ill. 2006) ("Discovery rulings are a matter of the Court's discretion, and the Court need not allow briefing on discovery motions.") 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. This is true even if the communications related to the Compliance Engagement. The court's decision to extend the production through the Class Period is based on the fact that Defendants have already agreed to produce such documents.

In addition, Defendants need not produce any of the 187 documents that do not relate to the Compliance Engagement. Defendants noted early on that Household retained E&Y to conduct two additional studies, but it is clear that Plaintiffs sought only documents relating to the Compliance Engagement. (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Consultations with Ernst & Young LLP, Doc. 764, at 4 n.3; Class' Motion to Compel, Doc. 708, at 1 ("At issue are documents relating to Household's retention of E&Y to study Household's compliance with state predatory lending laws during the Class Period").) Any other E&Y documents are not germane to Plaintiffs' motion and need not be produced.

As for any of the 187 documents covered only by the work product privilege, the court affirms that "Plaintiffs have demonstrated a substantial need for the E&Y information in that it may assist Plaintiffs in establishing falsity, scienter, and materiality." *Lawrence E. Jaffe Pension Plan*, 2006 WL 3524016, at *11. (*See also* Minute Order of 2/1/07, Doc. 940.) Thus, these materials must be produced.

More problematic is what to do about the 425 boxes of "work papers." Plaintiffs argue that the documents should be produced outright because fact discovery has closed and the Class will suffer and has suffered extreme prejudice from this late disclosure. Defendants argue that they just learned about the documents and that there is no basis for treating them differently than the documents addressed in the court's December 6, 2006 opinion. The court is disturbed that Defendants did not discover the existence of these documents in a timely manner. Plaintiffs had served a subpoena on E&Y in late May 2006, and Defendants were in touch with E&Y the following month. In addition, Defendants engaged in "the process of gathering information relating to work performed by E&Y for Household during the Class Period in order to determine whether this work was

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of a privileged nature." (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel, Doc. 764, at 3-4.) It is not clear how Defendants failed to discover the existence of the 425 boxes of documents at that time.

At the same time, it is also 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, which did expressly request E&Y's work papers from January 1, 1999 through December 31, 2002. The court has no reason to doubt Defendants' representation that they just learned about the 425 boxes, and declines to find that they waived their privilege. Defendants are not, however, relieved of their obligation to rectify this matter.

At this point, Defendants themselves do not even know exactly what the boxes contain. Absent a privilege log, the court cannot determine whether the documents are privileged, much less subject to any exception. (*Compare* Minute Order of 1/24/07, Doc. 931) (court conducted an *in camera* review of the additional documents to determine whether they were in fact privileged).)

Defendants are ordered to produce a privilege log by March 30, 2007.[1] The court is aware of the enormity of this task, but expects the log to be sufficiently detailed to allow a reasoned determination as to any claim of privilege. *See United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003) ("The mere assertion of a privilege is not enough; instead, a party that seeks to invoke the attorney-client privilege has the burden of establishing all of its essential elements."); *Ocean Atlantic Dev. Corp. v. Willow Tree Farm, L.L.C.*, No. 01 C 5014, 2002 WL 1968581, at *2 (N.D. Ill. Aug. 23, 2002) ("The party seeking to invoke either the attorney-client privilege or the work product doctrine bears the burden of demonstrating that the privilege should apply.")

The privilege log 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; (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 Allendale Mutual Ins. Co. v. Bull Data Systems Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992).

Plaintiffs' expert reports and disclosures are now due May 1, 2007. Defendants' rebuttal expert reports and disclosures are due July 1, 2007, and all expert depositions and discovery to be completed by August 1, 2007. Status hearing remains set for March 12, 2007 at 8:45 a.m. CST.

1. It goes without saying that any relevant documents that are not privileged must be turned over to Plaintiffs.