

**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' STATUS REPORT FOR THE MARCH 20, 2007
TELEPHONIC STATUS CONFERENCE

On March 12, 2007 the Court requested that the parties review two cases regarding selective *in camera* review of privileged documents and provide this Court with guidance on how to proceed with respect to the approximately 278 boxes of Ernst & Young LLP (“E&Y”) work papers that apparently contain computer-generated data. By letter dated March 15, 2007 Household amended the description of the contents of these boxes given at the March 12 status conference to indicate that they now believe that these boxes contain documents pertaining to “data validation” (currently estimated to be approximately 28 boxes) and “data sampling” (estimated to represent approximately 220 boxes). There are approximately 30 boxes within this group of 278 boxes for which Household has not been able to identify their contents with this level of general description.

I. THE CLASS’ PROPOSAL FOR PROCEEDING

1. By March 30, 2007 defendants shall complete their review of these boxes and provide a privilege log as to their contents. This process will put defendants in a position to separate the privileged documents from the non-privileged documents and, pursuant to the February 27, 2007 Order, separate the documents asserted to be privileged under the attorney-client privilege from those protected by the attorney work product. (The February 27, 2007 Order reaffirmed this Court’s conclusion that the Class had shown good cause to overcome any work product doctrine privilege shielding production of the E&Y compliance engagement documents. February 27, 2007 Order at 2.) Completion of this privilege log and separation of the documents is a necessary first step for the Court (and the Class) to develop a protocol for *in camera* review of a representative sample of the remaining documents.

Separation of the documents into the attorney-client category and the other categories and the related preparation of a privilege log are mandated under the case law cited to the parties by the Court. First, defendants have the burden of establishing that the attorney-client privilege applies. They cannot do so without reviewing the documents and coming to a good faith determination that

this privilege applies to each and every document or to a portion of such document. “To carry that burden, [defendants] must ‘describe in detail’ the documents or information sought to be protected and provide ‘precise reasons’ for the objection to discovery. In addition, [defendants] must provide sufficient information to enable the court to determine whether *each element* of the asserted objection is satisfied.” *Heavin v. Owens-Corning Fiberglass*, No. 02-2572-KHV-DJW, 2004 WL 316072, at *2 (D. Kan. Feb. 3, 2004) (emphasis in original).

The Court should not and does not need to review documents (or portions thereof) for which defendants have no good faith basis for assertion of the attorney-client privilege nor those documents (or portions thereof) as to which defendants have not prepared an adequate privilege log. The Class is hopeful that upon a comprehensive review by defendants and the preparation of privilege log, the number of documents at issue will be diminished substantially. Indeed, the Class notes that documents of this nature, computer runs, are generally not treated as privileged as being unlikely to reveal any legal advice. *See, e.g., Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981) (“Only where the document is primarily concerned with legal assistance does it come within these privileges; technical information is otherwise discoverable.”).

Further, this Court must have the opportunity to conduct any *in camera* review in context of defendants’ privilege assertions, i.e., “the opportunity to review documents against the log.” *In re Vioxx Prod. Liab. Litig.*, No. 06-30378, 2006 WL 1726675, at *2 (5th Cir. May 26, 2006). Finally, the preparation of this log is necessary for the parties and the Court to determine how best to develop a protocol sufficient to ensure a “statistically sound protocol for sampling documents.” *Id.* at n.5.

2. Defendants should provide the index of the boxes either to the Class or to the Court for *in camera* review. If the Court determines that the index is not privileged, the Class should have access to this document. This index, together with the privilege log, will assist the Court and the parties to develop a sound protocol for conducting the *in camera* review.

3. The Court should request a representative of E&Y to appear before it to provide an overview of the documents at issue as well as respond to questions posed by the Court and the parties. The Class envisions that this hearing would take approximately one hour. These documents are E&Y's work papers and absent some explanation from an E&Y representative, this Court (and the Class) will have difficulty ascertaining the nature of the documents, their contents and how best to select a representative sample. During the meet and confer process, Household counsel indicated that they have had discussions of this type with E&Y. The Court should do likewise.

4. Using the privilege log, the E&Y witness testimony and the index, the Court should select a representative sample of documents to review. At present the Class lacks sufficient information to determine the appropriate protocol. Household has not finished its process of segregation nor provided any information regarding the individual documents or boxes themselves. For example, there are still thirty boxes whose contents have not been categorized at the highest level of generalization. Accordingly, neither the Court nor the Class knows the universe of documents at issue. Whether there are 200 boxes in a category or three categories of boxes makes a difference in developing this protocol. Similarly, if some documents are large or all are large makes a difference. One box containing three large documents will not be representative of a group of boxes each of which has hundreds of short documents. This type of information will be available only through the privilege log. Thus, while the Class is anxious for this process to proceed rapidly, it, like the Court, must balance the need for speed with the need to do it right in the first instance. *See Vioxx*, 2006 WL 1726675, at *2 (recognizing the importance of prompt rulings, but remanding for a new *in camera* review under the appropriate protocol).

Once the Court (and the Class) has the information resulting from the steps outlined above, the design of a protocol can commence. The Class has considered various approaches and believes that the Court can proceed in one of two ways: 1) *in camera* review of whole boxes; or 2) *in camera*

review of documents within selected boxes. The Class believes the latter approach to be preferable in that it will allow the Court to obtain a better sampling of the universe of documents. The specific protocol for randomly selecting documents and/or boxes must await provision of the information outlined above. As a general approach, the Class suggests that a random sample of boxes be selected. This number would be larger than that to be reviewed by the Court. Once this number has been selected, each of the parties would be entitled to selected a subset of the boxes with the Court selecting its own subset. In that way, the actual boxes reviewed by the Court would be determined equally by the Court, defendants and the Class.

II. CONCLUSION

The Class looks forward to discussing these points in greater detail on the March 20, 2007 telephonic conference.

DATED: March 19, 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/ D. Cameron Baker

D. CAMERON BAKER

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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DECLARATION OF SERVICE BY EMAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on March 19, 2007, declarant served by electronic mail and by U.S. Mail to the parties: **THE CLASS' STATUS REPORT FOR THE MARCH 20, 2007 TELEPHONIC STATUS CONFERENCE**. The parties' email addresses are as follows:

TKavaler@cahill.com PSloane@cahill.com PFarren@cahill.com LBest@cahill.com DOwen@cahill.com	NEimer@EimerStahl.com ADeutsch@EimerStahl.com MMiller@MillerLawLLC.com LFanning@MillerLawLLC.com
--	--

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

David R. Scott, Esq.
Scott & Scott LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of March, 2007, at San Francisco, California.

s/ Monina O. Gamboa

MONINA O. GAMBOA