

**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
COMPLIANCE ENGAGEMENT DOCUMENTS NOT LISTED ON DEFENDANTS'
PRIVILEGE LOG OR IN THE ALTERNATIVE, PREPARATION OF A PRIVILEGE
LOG AS TO SUCH DOCUMENTS**

I. INTRODUCTION

On April 9, 2007, defendants provided this Court with a copy of a draft final report from Ernst & Young LLP (“E&Y”) as to the July 1, 2002 state regulatory compliance engagement (“Compliance Engagement”). This document had not been previously identified on defendants’ privilege log. During the April 12, 2007 status conference, counsel for defendants indicated that other E&Y-related documents were not identified on defendants’ privilege log. Defendants had an obligation to identify these documents on their privilege log pursuant to Fed. R. Civ. P. 26(b)(5)(A). This obligation received reinforcement on October 19, 2006 when this Court directed defendants to identify on a privilege log the documents relating to Household International, Inc.’s (“Household” or the “Company”) retention of E&Y, including the Compliance Engagement. Defendants’ refusal to list all such documents on their privilege log previously warrants a finding of waiver. The Class could seek all documents relating to any E&Y engagement based on defendants’ waiver. However, the Class is focusing this motion on only those documents pertaining to the Compliance Engagement, which the Court has already found to be directly relevant to the Class’ claims in this litigation.

II. FACTUAL BACKGROUND

On October 16, 2006, the Class filed its motion to compel Household to produce all documents relating to its communications with E&Y. In its moving papers, the Class noted that Household had not identified all E&Y documents on its privilege log despite repeated requests by the Class that it do so and Household’s own express commitment to do so. Class’ Motion at 9-10¹ (citing correspondence between parties).

¹ “Class’ Motion” refers to the Class’ Motion to Compel Production of Documents Pertaining to Household’s Consultations with Ernst & Young LLP (Dkt. No. 708).

On October 19, 2006 at the presentment hearing for the Class' Motion, Class counsel referenced the lack of a comprehensive privilege log by defendants. *See* Exhibit A at 98-99, attached hereto. In response, Ms. Best represented, "we have provided privilege logs for some of the documents. As to the others, we are in the process of completing the privilege log but they have the documents" *Id.* at 99. The Court responded to Ms. Best's comments: "Well, I couldn't tell whether they have everything. I mean we don't know if they have everything. So I mean that's one of the functions of a log" *Id.* The Court then stated what it wanted from defendants, including "I need the log." *Id.* at 102. In response to this comment and others from this Court, Ms. Best responded: "We'd be happy to address all these issues." *Id.*

Subsequently, on October 25, 2006, defendants supplemented their privilege log by including further documents relating to Household's engagement of E&Y. Defendants attached this 13th installment of their log as Exhibit 13 to the Declaration of Susan Buckley in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household Consultations with Ernst & Young LLP (Dkt. No. 749-3). That log includes documents dated after the Class Period as well as documents relating to engagements other than the Compliance Engagement.

Following the Court's ruling on December 6, 2006 and the District Court's affirmance of that ruling on February 1, 2007, the Court utilized defendants' privilege log to determine those documents that needed to be produced to the Class. *See* February 27, 2007 Order at 2.

On April 9, 2007, the Court requested defendants to provide a copy of any final report prepared by E&Y as a result of the Compliance Engagement. No such document had been identified on the privilege log. Nonetheless, within 24 hours, Household provided a draft final report to the Court for *in camera* review.

At the April 12, 2007 status conference, the Class raised the issue of the draft final report not being part of any log. During the ensuing discussion, counsel for defendants indicated that

Household had not logged all of the E&Y documents. Further, defense counsel asserted that the Court had never directed defendants to produce a privilege log as to such documents and did not commit to providing a privilege log as to the unlogged documents.

By order dated April 12, 2007, the Court directed Household to add the draft final report and an index of E&Y work papers to their privilege log.

The Class now brings this motion to compel defendants to produce all unlogged documents relating to the E&Y Compliance Engagement or alternatively, for defendants to put all such documents on a privilege log.

III. LEGAL ARGUMENT

A. A Defendants' Refusal to List All Documents Relating to This Compliance Engagement Warrants a Finding of Waiver

A party withholding documents on the basis of privilege must timely log such documents. Failure to timely identify withheld documents results in waiver. Defendants failed to identify all E&Y documents on their log prior to the Class' Motion on October 16, 2006. As a result, this Court directed defendants to provide a log for the E&Y documents on October 19, 2006. Defendants now concede that they did not log all such documents. Moreover, defendants knew that their privilege log was incomplete and did not include E&Y's final report and other documents. Accordingly, defendants have waived any applicable privilege as to these unlogged documents.

Under Fed. R. Civ. P. 26(b)(5)(A), a party withholding documents from production on the basis of privilege must identify those documents on a log so that the opposing party (and the Court) may know what documents are being withheld on a privilege basis and whether the assertion of privilege is appropriate. Failure to comply with this obligation in a timely fashion constitutes grounds for waiver. *See* Fed. R. Civ. P. 26 advisory committee notes (1993 amendments); *see also* Class' Motion at 9 (citing *Burlington N. & Santa Fe Ry. v. U.S. Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005) and *Universal City Dev. Partners Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688,

696 (M.D. Fla. 2005)). Similarly, failure to comply with the Court's directive on October 19, 2006 to provide a log constitutes grounds for waiver.

Defendants did not comply with their obligation to log the E&Y Compliance Engagement documents under Fed. R. Civ. P. 26(b)(5)(A) prior to the Class' Motion. Further, when this Court directed defendants to provide a log in no uncertain terms, *see* Ex. A at 102 ("I need the log."), defendants produced a log that they acknowledge does not include all withheld E&Y documents. Defendants have waived any privilege with respect to such unlogged documents, which should be produced immediately.

During the meet and confer process, defendants took the position that no privilege log was required because the Class did not request the E&Y documents. This position has no merit – the Class propounded numerous requests that cover the Compliance Engagement documents, including the following:

Request No. 1 of the First Request: "All documents and communications concerning or relating to Household's lending practices and policies related to loans secured by real property (as described in the Complaint), including, but not limited to, correspondence, analyses, statistics, presentations, training materials, public statements, memoranda and notes."

Request No. 7 of the First Request: "All documents and communications concerning or relating to investigations by any state or federal governmental, administrative or regulatory agency, presentations or other body into Household's lending policies and practices."

Request No. 8 of the Second Request: "All documents and communications concerning, relating to or reflecting Household's use of discount points in its real estate loans during the Relevant Time Period."

Request No. 34 of the Third Request: "Documents that track, analyze or describe related to state regulatory examinations and investigations, including but not limited to, refunds for, prepayment penalties, origination fees, single premium credit life insurance, discount points, EZ Pay, finance charge, recording fees, and administration fees."

See plaintiffs' first, second, and third request for production of documents. The Class could cite numerous other document requests seeking these documents.

The Compliance Engagement documents are responsive to these requests. First, the documents represent E&Y's analysis of defendants' loan practices, including as to prepayment penalties, origination fees, and discount points and administrative fees; and so are responsive to Plaintiffs' First Request for Production of Documents to Household Defendants. Similarly, the documents constitute E&Y's evaluation of refunds owed to consumers and so are responsive to Plaintiffs' Third Request for Production of Documents to Household Defendants, including Request No. 34. Third, this engagement was triggered by issues raised during state agency examinations, *see* Declaration of Kenneth Robin in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household Consultations with Ernst & Young LLP (Dkt. No. 749-2), ¶3, and thus are responsive to those requests seeking documents relating to such examinations. *See, e.g.*, Plaintiffs' First Request for Production of Documents to Household Defendants, Request No. 7.

Defendants should not be allowed to contend otherwise. Defendants have produced various documents relating to the E&Y Compliance Engagement, which production is an admission that the documents are responsive to the Class' document requests, including requests from Plaintiffs' First Request for Production of Documents to Household Defendants. Indeed, defendants' first cover letters relating to productions inclusive of E&Y documents start with the phrase "In response to Plaintiffs' First Request for Production of Documents to Household Defendants, enclosed please find documents" *See* Ex. B attached hereto.² Later cover letters also include the Class' Second Request for Production of Documents to Household Defendants. *See, e.g., id.*

Equally importantly, defendants did not oppose the Class' initial motion on the E&Y engagement based upon the assertion that the Class did not propound any document requests seeking

² Exhibit B consists of seven cover letters to defendants' production of documents. Some of those documents produced were submitted in connection with the Class' Motion.

these documents. If, as defendants now assert, the Compliance Engagement documents were not responsive to any pending request, that would have been defendants' first argument from a procedural standpoint. Defendants did not make this argument and thus, impliedly conceded that the Class' document requests sought the E&Y Compliance Engagement documents.

Finally, in addition to the foregoing, this Court expressly directed defendants to provide the Court with a privilege log in response to the Class' Motion, which sought all documents relating to communications with E&Y. Defendants stated that they would comply with that directive and in fact, did provide a supplemental log on October 25, 2006. At no time prior to April 12, 2007 did defendants indicate to either the Class or the Court that this supplemental log was not complete or that additional E&Y Compliance Engagement documents had not been logged.

B. The Class Has Been Prejudiced By Defendants' Conduct

Defendants' failure to list all the Compliance Engagement documents on their privilege log has resulted in prejudice to the Class. Defendants' conduct has resulted in a series of motions and hearings that have addressed the issues in piecemeal fashion. Further, in February, this Court relied upon defendants' incomplete log to determine what documents should be produced pursuant to the Court's rulings on the E&Y Compliance Engagement. *See* February 27, 2007 Order at 2. Documents not listed on the log within the scope of the Court's prior orders should have been produced in February 2007 in time for the March 7 and 8 deposition of Robin Allcock, head of the Consumer Lending Compliance Department. Such documents also could have been used in the deposition of Mr. Robin, which took place on December 7, 2006. Finally, the Class would like to get these documents to its experts as soon as possible for their consideration and review.

IV. CONCLUSION

For the reasons set forth above, the Court should grant the Class' motion to compel production of E&Y Compliance Engagement documents not listed in defendants' privilege log, or in the alternative, the Court should require defendants to prepare a privilege log as to such documents.

DATED: April 24, 2007

Respectfully submitted,

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