

**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' SUR-REPLY BRIEF IN SUPPORT OF PRODUCTION OF ERNST &
YOUNG LLP WORK PAPERS AND DRAFT REPORT**

The Class submits this sur-reply memorandum in support of production of the Ernst & Young LLP (“E&Y”) work papers and draft report. As stated in the Class’ May 11, 2007 Memorandum,¹ defendants cannot establish a basis on which to withhold these documents from the Class. With respect to the attorney-client privilege, defendants are attempting to fit a square peg in a round hole. These documents, which are described not coincidentally as “Work Product” in the engagement letter, do not meet the requirements of the attorney-client privilege as set out by this Court. Further, although these documents are classic work product, this Court has previously found that the Class has shown good cause to overcome the qualified work product privilege attaching to the E&Y Compliance Engagement. We discuss these points further below.

A. Defendants Assertion of the Attorney-Client Privilege

In their Reply Brief,² defendants finally come to grips with the very serious defects regarding their assertion of the attorney-client privilege. However, defendants do not and cannot overcome these defects. The case law requires identification of a protected client communication in order for the privilege to attach. Defendants do not identify any such communications at issue or address the fact that Class Period communications between Household and E&Y are not privileged with respect to the Class. Further, even if the attorney-client privilege were expanded to cover inter-attorney communications involving legal advice, defendants do not meet this standard as the E&Y authors are not attorneys and the work papers and draft report do not reflect legal advice. Defendants fail to establish the foundational elements of the attorney-client privilege as to the documents at issue.³

¹ “Class’ Memorandum” refers to the Class’ Memorandum of Law in Support of Production of the Work Papers Created by Ernst & Young and Draft Report (Dkt. No. 1078).

² “Reply Brief” refers to the Reply Memorandum of Law of the Household Defendants in Support of the Privileged Nature of the Ernst & Young Compliance Engagement Work Papers (Dkt. No. 1092).

³ In its May 11, 2007 brief, the Class showed the procedural defects in defendants’ evidentiary showing, including the hearsay and personal knowledge issues present by Mr. Keller’s supplemental affidavit.

Defendants continue to argue that they need no more than this Court's prior findings that E&Y was the agent of counsel and was engaged for the purpose of assisting counsel. Reply Brief at 1. Under this view, every report or memorandum authored by an investigator hired by an attorney would be privileged under the attorney-client privilege. This is not the law. Only reports or memoranda reflecting underlying communications with the client are privileged under the attorney-client privilege (as opposed to the work product doctrine). *See, e.g., Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01 C 4366, 2003 U.S. Dist. LEXIS 13816, at *8 & n.2 (N.D. Ill. Aug. 7, 2003); *Stafford Trading, Inc. v. Lovely*, No. 05 C 4868, 2007 U.S. Dist. LEXIS 13062, at *23-24 (N.D. Ill. Feb. 22, 2007); *see also United States v. South Chicago Bank*, No. 97 CR 849-1, 2, 1998 U.S. Dist. LEXIS 17445, at *6 (N.D. Ill. Oct. 30, 1998) (work papers prepared by accounting firm KPMG to assist law firm in investigation are not privileged). Moreover, in the context of this Court's *Garner* rulings, defendants must establish not only a confidential client communication reflected on the face of these documents, but a post-Class Period communication.

Defendants cannot meet this standard as to the work papers and the draft report. Indeed, although this point was discussed at length in the Class' Memorandum, defendants do not even try to meet this standard. A review of the E&Y documents produced to date to the Class confirms that these documents do not reflect any underlying client communication nor any intent that they be shared with others.

To get around this problem, defendants attempt to analogize the E&Y work papers and reports to the communication between attorneys addressed in *Stafford*. Reply Brief at 2. There are two problems with this argument. First, the documents at issue are not communications. Second, the relevant E&Y personnel are not lawyers and their work papers and report do not reflect legal advice. It was the protection of legal advice that was the basis for the *Stafford* Court's decision. *See Stafford*, 2007 U.S. Dist. LEXIS 13062, at *23. Defendants do not deny these points, which

preclude reliance upon *Stafford*. See, e.g., Reply Brief at 4 n.1 (discussing Class' assertion that the E&Y documents do not reflect legal advice).

There can be no dispute that the work papers are essentially memos to file prepared for E&Y's own use. The same holds true with the draft report. As the Court in *Sneider* emphasized, to be privileged under the attorney-client privilege the documents must be prepared with the intention of being shared. *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 6 (N.D. Ill. 1980) ("memos to file prepared by counsel do not reflect an intention to confidentially communicate with a client"). Mr. Keller's affidavits do not contain a statement to the effect that the work papers or the draft report were prepared with the intention of being shared with others, including Household's counsel. Nor do defendants argue that these documents were prepared with this intention. Indeed, with respect to the draft report, as the *Sneider* Court noted, draft documents are by their nature not intended to be communicated to anyone else. *Id.* at 6 (draft affidavit "is not by its very nature a communication which was intended to be confidential"). As the Class has noted, the subsequent provision of a non-confidential document to counsel does not thereby render the document confidential under the attorney-client privilege.

Finally, defendants cannot assert an attorney-client privilege under *Stafford* because these documents do not involve any legal advice from E&Y. The *Stafford* Court protected an inter-attorney communication because it contained legal advice. *Stafford*, 2007 U.S. Dist. LEXIS 13063, at *23. No such legal advice is at issue here and the relevant E&Y personnel are not attorneys. Thus, even if the Court were inclined to accept the *Stafford* holding of privilege with respect to communications not involving a client, that holding does not protect the documents at issue here.

Defendants also suggest that this Court has already ruled at the April 12, 2007 status conference that the draft report would not be produced. To the contrary, the language cited by defendants starts with "if." See April 12, 2007 Hearing Tr. at 33. Moreover, the Court's comments

at that hearing were directed to Household, stating in effect that if Household wished to withhold the document from production, it need to log the document. The question of production of the draft report remains open before this Court.

In sum, defendants cannot establish an attorney-client privilege as to these documents against the Class.

B. Defendants Cannot Reply Upon the Work Product Doctrine

Defendants make a short and futile argument to support the assertion of the work product doctrine. However, this argument relies upon a mischaracterization of this Court's prior February 27, 2007 ruling. Defendants argue that the February 27, 2007 Order's affirmation of good cause applies only to "187 *Class Period* Documents." Reply Brief at 8 (emphasis added). However, that is untrue – the disputed 187 documents include post-Class Period documents. That fact is reflected in the February 27 Order: defendants "withheld some 187 documents that were dated after the Class Period and/or related to two other E&Y engagements not at issue here." February 27, 2007 Order at 1. This Court's February 27 finding that the Class had shown good cause to overcome the work product privilege, thus, was addressing post Class Period documents relating to the Compliance Engagement. Other than continuing to complain about the correctness of the Court's finding, defendants present no reason why this Court's prior finding is not applicable to the work papers. Reply Brief at 8. Indeed, the Class has the same need for E&Y's internal documents generated during the Compliance Engagement on the issues of "falsity, scienter, and materiality" as Household's documents relating to the same engagement. *See* February 27, 2007 Order at 2.

II. CONCLUSION

For the reasons stated above, defendants have failed to establish the elements of the attorney-client privilege as to the documents at issue. Further, although these documents are subject to a

claim of work product doctrine, the Class has shown good cause to overcome the qualified privilege as to these documents.

DATED: May 29, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL 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 May 29, 2007 declarant served by electronic mail and by U.S. Mail to the parties: **THE CLASS' SUR-REPLY BRIEF IN SUPPORT OF PRODUCTION OF ERNST & YOUNG LLP WORK PAPERS AND DRAFT REPORT**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of May, 2007, at San Francisco, California.

s/ Juvily P. Catig

JUVILY P. CATIG