

This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, “Defendants”) pursuant to Federal Rule of Civil Procedure 37(b) and 28 U.S.C. §1927.

INTRODUCTION

Plaintiffs have violated the protocols of the Protective Order entered by this Court on November 5, 2004 by refusing to return or destroy a document that this Court has explicitly held is privileged and therefore protected from disclosure in this litigation. Because Plaintiffs refuse to return or destroy this privileged document and—indeed, brazenly proclaim their intention to continue using it — Defendants are constrained to ask the Court to intercede. Plaintiffs’ flagrant contempt of the Protective Order and this Court’s other Orders cannot go unchecked.

ARGUMENT

I. Factual Background

The document bearing Bates number HHS-E 0001208 (“Document 1208”) which is subject to attorney client privilege and work product protection¹ was inadvertently produced to Plaintiffs. Document 1208 is described on Defendants October 25, 2006 Thirteenth Privilege Log as a “[r]efund forecast performed by E&Y at the request of Household counsel in order to assist Household counsel in providing legal advice regarding the AG settlement.” On July 21, 2006, Defendants recalled Document 1208 in accordance with ¶ 28 of the November 5, 2004

¹

Although the Defendants asserted the attorney work product doctrine and the attorney-client privilege as to Document 1208, to avoid undue complexity Defendants will herein refer only to attorney-client privilege.

Protective Order,² which provides:

“In the event that a Producing party inadvertently produced a document that the Producing Party considers to be subject to any privilege or protection from disclosure, the Producing Party shall give written notice to Receiving Parties no later than ten (10) days after discovery by the Producing Party of the inadvertent production of such a document *Upon such notice, all Receiving Parties that have received a copy of such document promptly shall return it to the Producing Party and shall destroy any other copies thereof unless there is a pending good faith dispute about the privileged nature of the document.*”³

As the Court will recall, Plaintiffs disputed Defendants’ assertions of privilege as to documents relating to the Ernst & Young Compliance Engagement (hereinafter “E&Y Compliance Engagement”), including Document 1208.⁴ On October 16, 2006, Plaintiffs moved this Court to overrule Defendants’ assertion of privilege as to all documents related to the E&Y Compliance Engagement that had been withheld from production or recalled by Defendants. On December 6, 2006, after extensive briefing, this Court held that documents related to the E&Y Compliance Engagement were subject to the attorney-client privilege, but required Defendants to produce certain documents dated during the Class Period under an exception to the privilege rules.⁵ Document 1208 is dated after the end of the Class Period, and therefore was not subject to the exception. Judge Guzman upheld this Court’s December 6, 2006 Order on February 1, 2007.

² See July 21, 2006 letter of Kim A. Smith, Esq. to Azra Mehdi, Esq. Declaration of Janet A. Beer, dated March 10, 2008 (“Beer Decl.”) Ex. 1.

³ November 5, 2004 Protective Order, Beer Decl. Ex. 2.

⁴ July 25, 2006 letter of Azra Mehdi, Esq. to Kim A. Smith, Esq., Beer Decl. Ex. 3.

⁵ See December 6, 2006 Order, applying the *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), exception to the attorney-client privilege.

On February 22, 2007, Plaintiffs again moved this Court to compel production of additional withheld and recalled documents relating to the E&Y engagements. Document 1208 was included on a list of 187 documents that Plaintiffs appended to their brief.⁶ In an Order dated February 27, 2007, this Court held “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.”⁷ Document 1208 is dated February 18, 2003, after the end of the Class Period, and Defendants had asserted attorney-client privilege as to that document on their privilege log.⁸ Thus, the indisputable import of the Court’s February 27, 2007 Order is that Document 1208 is exempt from production. Plaintiffs appealed this Court’s Order to Judge Guzman, who upheld this Court’s decision in full, and warned Plaintiffs that their arguments as to this Court’s decision were inappropriate. April 9, 2007 Order⁹ (“The Court cautions that there is a fine line between vigorously representing the interests of one’s client and officiously affronting the capabilities of the judiciary. The class’s argument that Nan R. Nolan does not understand her role as a magistrate judge is risible. Failure to avoid such arguments in the future shall result in sanctions.”).

Judge Guzman’s April 9, 2007 Order constituted a final adjudication that Document 1208 is protected from disclosure by the attorney-client privilege, putting to rest any contention that there existed a “pending good faith dispute” as to the protected nature of Document

⁶ See Plaintiffs’ February 22, 2007 Motion to Compel at Ex. B, Beer Decl. Ex. 4.

⁷ February 27, 2007 Order, Beer Decl. Ex. 5.

⁸ There can be no question that the privileged status of Document 1208 was at issue in Plaintiff’s February 2007 motion because *Plaintiffs themselves included Document 1208 in the list of documents appended to their brief.*

⁹ April 9, 2007 Order, Decl. Ex. 6.

1208. Accordingly, Plaintiffs were obliged to abide by the Protective Order and return or destroy all copies of Document 1208, which had in no uncertain terms been held to be privileged by this Court and by Judge Guzman.

In blatant and willful defiance of this Court's orders, however, not only did Plaintiffs fail to return or destroy Document 1208, but they provided it to at least one of their retained experts, Catherine Ghiglieri, who discussed the document at length in her Rule 26 Report and thus disclosed the substance of the privileged communication. During Ms. Ghiglieri's deposition on February 13, 2008, Defendants objected to Ms. Ghiglieri's use of Document 1208.¹⁰ In subsequent correspondence, Plaintiffs' counsel have taken the astonishing position that they are free to retain and continue to use this privileged document because "defendants did not request that the Court order a recall of this document nor did the court order a recall of this document."¹¹ Plaintiffs contend that the Court's February 27, 2007 Order denied Plaintiffs' motion to compel "additional post-Class period E&Y documents" but "did not direct the return of previously produced E&Y documents, even if dated post-Class Period."¹²

In sum, having been caught for using a privileged document, Plaintiffs do **not** dispute that the document is privileged, they do **not** deny that Defendants recalled the document pursuant to the provisions of the Protective Order, they do **not** deny that Defendants' assertion of privilege was upheld by this Court and by Judge Guzman, and they do not even assay an excuse

¹⁰ Ghiglieri Dep. Tr. 316:11-318:8, Beer Decl. Ex. 7. Ms Ghiglieri testified that she was not informed that the document was privileged, and that she had she been so informed, she would not have used it. *Id.*

¹¹ February 14, 2008 letter of D. Cameron Baker, Esq. to Jason M. Hall, Esq., Beer Decl. Ex. 8.

¹² February 28, 2008 letter of D. Cameron Baker, Esq. to Jason M. Hall, Esq., Beer Decl. Ex. 9.

that the document was retained and disseminated to their expert by mistake. Rather, they take the position that the Court's determination that Document 1208 is protected by privilege was not sufficient to require them to adhere to the clearly applicable provisions of the Protective Order and return or destroy the document. Plaintiffs assert that they are permitted to continue to use the document, despite its adjudicated status as a privileged document, unless and until they are specifically instructed by a further Court Order to return or destroy it. The Protective Order is abundantly clear that no such convoluted process is required. Plaintiffs know that, and their refusal to return or destroy Document 1208, like the broadcast of its contents in their expert's report, reeks of bad faith and continued disdain for the Court's authority.

II. Plaintiffs' Violations of the Protective Order Warrant a Determination of Contempt and the Imposition of Sanctions

Faced with Plaintiffs' persistent refusal to abide by this Court's Orders, Defendants are left with no choice but to ask the Court to enforce its Orders and punish Plaintiffs' counsel for their continued acts of contempt.¹³ This Court has the authority to enter orders to punish Plaintiffs' violations. *See* Fed. R. Civ. P. 37(b)(2)(D) (“[T]he court in which the action is pending may make such orders in regard to the failure as are just . . . [including] an order treating as a contempt of court the failure to obey any orders. . . .”); *Claiborne v. Wisdom*, 414 F.3d 715, 721 (7th Cir. 2005) (recognizing the district court authority to impose sanctions under 28 U.S.C. §1927 where an attorney “multiplies the proceedings in any case unreasonably and vexatiously”); *Schmude v. Sheahan*, 420 F.3d 645, 649-650 (7th Cir. 2005) (recognizing the inherent powers of the court to impose sanctions).

¹³ The parties attempted unsuccessfully to meet and confer under Local Rule 37.2 on this issue. Beer Decl. Ex. 10.

Sanctions are appropriate where, as here, “the noncomplying party acted *either* with willfulness, bad faith or fault.” *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992) (emphasis in original) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976)). Plaintiffs’ counsel willfully violated, and continue to violate, the Protective Order and the February 27, 2007 Order, thus warranting a determination of contempt and the imposition of sanctions. *See Ladien v. Astrachan*, 128 F.3d 1051, 1056-1057 (7th Cir. 1997) (affirming sanctions under Rule 37(b) for misconduct including violation of protective order by using undisclosed documents as exhibits in a deposition); *American National Bank and Trust Co. of Chicago v. AXA Client Solutions, LLC*, No. 00 C 6786, 2002 U.S. Dist. LEXIS 14774, at *9-11, 17-18 (N.D. Ill. August 12, 2002) (upholding Magistrate Judge’s order of sanctions under Rule 37 for violation of protective order including improperly disseminating confidential information gained through the litigation); *Kapco Manufacturing Co. v. C&O Enterprises, Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989) (finding under §1927 “[i]f a lawyer pursues a path that a reasonable careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious”) (quoting *In re TCI*, 769 F.2d 441, 445 (7th Cir. 1985)). Finally, the Court has the inherent power to sanction Plaintiffs’ counsel for their willful disobedience of the court’s orders. *See Whitehead v. Gateway Chevrolet*, No. 03 C 5684, 2004 U.S. Dist. LEXIS 11979, at *16 (N.D. Ill. June 28, 2004) (noting the flagrant violation of the protective order could also be sanctioned under the court’s inherent authority); *see also Schmude*, 420 F.3d at 649-650 (under inherent power court can sanction counsel for “‘willful disobedience of a court order’ or ‘bad faith’ conduct”).

The Seventh Circuit has upheld sanctions where a party fails to adhere to its obligations under a protective order. *See Marrocco*, 966 F.2d at 221, 224 (finding “willful and unexcused violations of the protective order here certainly qualify as contumacious conduct”);

American National Bank and Trust Co. of Chicago v. AXA Client Solutions, LLC, No. 00 C 6786, 2002 U.S. Dist. LEXIS 9511, at *9 (N.D. Ill. May 24, 2002) (noting “the parties must comply with the terms of the protective order or subject themselves to possible sanctions”).

In a similar case, *American National Bank and Trust Co. of Chicago v. AXA Client Solutions, LLC*, 2002 U.S. Dist. LEXIS 9511, the parties entered into a protective order to restrict the dissemination of confidential documents. *Id.* at *3. Under the protective order in that case, as here, “[u]ntil an objection to the designation of a document had been resolved by agreement of counsel or by the court, the document remained designated as confidential or highly confidential . . . and subject to the protective order.” *Id.* One party was found to have violated the protective order by disseminating highly confidential information. *Id.* at *10. Although that disseminating party argued that the confidentiality designation was inappropriate, the Court rejected this excuse and held that the clear terms of the protective order should have been obeyed. *Id.* at *19-20. The court ordered the disseminating party to pay the attorney’s fees and expenses generated by this document dispute and required the party to abide by the terms of the protective order. *Id.* at *22. Here, where Defendants’ assertion of privilege has already been upheld by this Court and affirmed by Judge Guzman, *a fortiori* sanctions are in order.

Plaintiffs’ counsel admits having provided the document to their proffered expert witness, Catherine Ghiglieri, who discussed the document at length in her Rule 26 report, thus broadcasting information previously held by this Court to be privileged. The explicit refusal of Plaintiffs’ counsel to follow the course of action specified in the Protective Order constitutes nothing less than willful disregard of this Court’s Orders. Their reckless and wanton behavior should be sanctioned.

Defendants respectfully submit that Plaintiffs’ counsel should be held in con-

tempt. Furthermore, Plaintiffs' counsel should be required pay the fees and expenses incurred by Defendants in bringing this issue to the Court for resolution and whatever other sanctions this Court deems appropriate and fitting given Plaintiffs' counsel's brazen disregard of this Court's Orders. *See Whitehead*, 2004 U.S. Dist. LEXIS 11979, at *5 (awarding attorneys' fees); *American National Bank and Trust Co. of Chicago*, 2002 U.S. Dist. LEXIS 9511, at *15 (awarding attorneys' fees and expenses).

CONCLUSION

For the foregoing reasons Defendants respectfully request the entry of an Order (i) holding Plaintiffs' counsel in contempt for willfully defying the Protective Order and the February 27, 2007 Order, (ii) requiring Plaintiffs and their counsel to cure their standing violations of the Protective Order by returning or destroying all copies of Document 1208, and all documents containing any information derived therefrom, (iii) ordering certification by Plaintiffs that they have not otherwise used or shown their experts or anyone else any other privileged documents or if they are unable to so certify, to identify every document they have misused in this way so Defendants and the Court can determine what corrective action is required, (iv) prohibiting Plaintiffs and their counsel from carrying out their threatened further violations of the Protective Order, (v) ordering all portions of Ghiglieri's report relying on Document 1208 be stricken and (vi) imposing appropriate sanctions on Plaintiffs and their counsel, including payment of the costs and fees Defendants were required to incur in seeking this essential relief.

Dated: March 10, 2008

Chicago, Illinois

Respectfully submitted,

EIMER STAHL KLEVORN & SOLBERG LLP

By: /s/ Adam B. Deutsch

Nathan P. Eimer (#00735353)
Adam B. Deutsch (#6236959)
224 South Michigan Avenue, Suite 1100
Chicago, Illinois 60604

-and-

CAHILL GORDON & REINDEL LLP

Thomas J. Kavalier
Howard G. Sloane
Landis C. Best
Patricia Farren
David R. Owen
80 Pine Street
New York, NY 10005
(212) 701-3000
Attorneys for Defendants Household International,
Inc., Household Finance Corporation, William F.
Aldinger, David A. Schoenholz, Gary Gilmer and
J.A. Vozar

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on March 10, 2008, he caused to be served copies of **Defendants' Motion For a Finding of Contempt and For Appropriate Sanctions** to the parties listed below via the manner stated.

/s/ Adam B. Deutsch

Adam B. Deutsch

Via Email

Azra Z. Mehdi
D. Cameron Baker
Spence Burkholz
COUGHLIN STOIA GELLER RUDMAN
& ROBBINS LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111
(415) 288-4545

Via Email

Marvin A. Miller
Lori A. Fanning
MILLER LAW LLC
115 South LaSalle Street
Suite 2910
Chicago, IL 60606
(312) 332-3400
(312) 676-2676 (fax)