UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, *- against -* Household International, Inc., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

HOUSEHOLD DEFENDANTS' MOTION FOR LEAVE TO FILE *INSTANTER* MEMORANDUM OF LAW IN EXCESS OF TEN PAGES

Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (the "Household Defendants" or "Defendants"), by and through their attorneys, hereby move this Court for leave to file their Memorandum of Law in Support of the Privileged Nature of the Ernst & Young Compliance Engagement Work Papers, which is submitted herewith, in excess of ten pages. In support thereof, the Household Defendants state as follows:

Comprehensively addressing the factual and legal issues relating to the privileged nature of the work papers generated by Ernst & Young pursuant to the July 1, 2002 Compliance Engagement requires more than ten pages. While Defendants have attempted to fairly and completely address all of Plaintiffs' contentions that no privilege should attach to these work

papers with as much brevity as possible, Defendants believe any further reduction would impact the quality and clarity of the presentation made to the Court.

WHEREFORE, for the reasons stated above, Defendants respectfully request that they be granted leave to file a Memorandum of Law of 17 pages.

Dated: May 4, 2007
Chicago, Illinois

Respectfully submitted,

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MEMORANDUM OF LAW OF THE HOUSEHOLD DEFENDANTS IN SUPPORT OF THE PRIVILEGED NATURE OF THE ERNST & YOUNG COMPLIANCE ENGAGEMENT WORK PAPERS

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Defendants Household International, Inc. ("Household"), Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilman and J.A. Vozar (collectively, the "The Household Defendants" or "Defendants") submit this Memorandum of Law pursuant to the Court's April 12, 2007 Order requiring Defendants to provide certain information regarding privileged material in the approximately 400 boxes of work papers generated by E&Y during the July 1, 2002 Compliance Engagement, and to respond to Plaintiffs' arguments that none of the E&Y documents is privileged.

PRELIMINARY STATEMENT

The starting point for any discussion of E&Y's work papers must be the prior rulings issued by this Court and the District Court on the privileged nature of the Compliance Engagement. Plaintiffs' April 25, 2007 Status Report, which Defendants have been directed to address in this Memorandum, fails to discuss or even mention any of these prior rulings, as if the underlying predicates for a privilege ruling were being considered by the Court for the first time.

In its December 6, 2006 Memorandum Opinion and Order ("Dec. 6 Order"), the Court held:

- "It is clear from the Compliance Engagement ["a compliance study of Household's Consumer Lending operations"] letter that E&Y was acting as an agent of Household's General Counsel's office." (Dec. 6 Order at 8)
- "Both Household and E&Y understood that the engagement was to assist in-house counsel in providing legal advice regarding pending or threatened litigation." (*Id.*)

- "Defendants have demonstrated the necessity of E&Y's services in this case. Household retained E&Y to conduct complex quantitative analyses and extensive information gathering that was beyond Household counsel's resources and abilities, but was uniquely within E&Y's qualifications." (*Id.* at 9)

- The Compliance Engagement letter confirms that Mr. Robin and Ms. Curtin intended to use E&Y's work product to provide legal advice to Household 'in [their] capacity as General Counsel.'" (*Id.*; brackets in original)

Based on these findings, and before considering the so-called *Garner* exception, the Court held that the "E&Y documents in question are protected by the attorney-client privilege." (*Id.* at 10). (The Court later clarified that the "documents in question" were those from the Compliance Engagement that appeared on Defendants' privilege log at the time of the ruling.)

The District Court adopted the December 6, 2006 Order in full in a February 1, 2007 Minute Order. In the course of taking appropriate steps to comply with the Court's ruling, Household's counsel learned from E&Y's counsel that the work papers E&Y had created during its two years of work on the Compliance Engagement had been collected and stored in approximately 400 indexed boxes. Household's counsel also learned then, for the first time, that these boxes had not been retained by E&Y, but had been transferred to an Iron Mountain document storage facility utilized by Household at an off-site location. (*See generally* Declaration of Landis C. Best dated February 26, 2007.)

In a February 23, 2007 e-mail, Plaintiffs demanded the production of the E&Y work papers, even though (i) this material was *never* the subject of any previous document request to Household, (ii) Plaintiffs had *never* challenged E&Y's objections to their subpoena for documents relating to the Compliance Engagement, (iii) the fact discovery cut-off had passed (we now are three months beyond the cut-off), and (iv) the work papers were created largely after the start of this lawsuit. This demand ultimately led to the creation of privilege logs and other meas-

ures outlined in the Court's February 27, 2007 Minute Order, through which the Court said it hoped to gain a better feel for the origin and nature of the newly-demanded work papers.

The Court's February 27, 2007 Minute Order also contained the following findings and rulings:

- "[N]either party raised the post-Class Period issue [post-October 11, 2002] issue with this court, nor was the court aware that most of the documents were dated after the Class period. Indeed the court understood the study 'was to be completed by September 30, 2002'." (February 27, 2007 Order at 1)
- "[I]nherent 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 11, 2002 engagement letter" (the "Compliance Engagement") (*Id.*)
- "[I]t appears that during the time the parties were arguing this motion, no one was aware that Defendants had an additional 425 boxes of documents containing E&Y work papers at an offsite storage facility." (*Id.* at 1-2)
- "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." (*Id.* at 2)
- "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." (*Id.*)
- "[T]he Court now holds that Defendants need not produce any of the 187 documents [on Defendants' privilege log] which are . . . dated after the Class period." (*Id.*)
- "In addition, Defendants need not produce any of the 187 documents that do not relate to the Compliance Engagement." (*Id.*)
- "[I]t is also not clear that Plaintiffs tendered a document request [to Household] specifically asking for the E&Y documents [the work papers]." (*Id.* at 3)

- "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." (*Id.*)

In an April 9, 2007 Minute Order, the District Court adopted this Court's February 27, 2007 rulings in full, noting that "the recent disclosure" of the boxes of E&Y's work papers for the Compliance Engagement "is not so egregious in light of the fact that the class never previously requested Household to produce E&Y documents or challenged E&Y's objections to the May 2006 subpoena for production of documents relating to the Compliance Engagement. Further, it was perfectly reasonable for the magistrate judge to rely on, and accept as true, Landis Best's declaration that Household was, until recently, unaware of the 425 boxes stored offsite at Iron Mountain." (April 9, 2007 Minute Order at 2)

The core findings and conclusions contained in the rulings of this Court and affirmed by the District Court provide the essential framework for the Court's consideration of Plaintiffs' current arguments and demands. As set forth below, the work papers created in the course of the Compliance Engagement, which collectively constitute and reveal the substance of E&Y's work as agent for Household's General Counsel, are no less privileged than the documents that were the subject of the December 6, 2006 Order.

ARGUMENT

Plaintiffs' arguments range from the irrelevant (such as their meaningless observation that the work papers are generally not "communications" bearing "to" and "from" designations) to the absurd (such as their theory that communications between a lawyer and his agent cannot be privileged). As noted, however, the chief hallmark of their position is a complete disregard of the detailed, well-supported findings this Court has already made (and the District

Court has affirmed) regarding the nature and purpose of the Compliance Engagement for which the work papers were created.

I. E&Y's Work Papers Are Protected in Their Entirety by the Attorney-Client Privilege

Plaintiffs' insistence that the E&Y documents must be evaluated for privilege on a document-by-document basis is based on a logical fallacy. Because attorney client protection is often extended to communications in which a client requests or an attorney renders legal advice, Plaintiffs assume that no other type of document is entitled to protection. (*See* Pl. Status Rep. at 3-6.) They offer no legal support for this simplistic analysis, which ignores this Court's prior rejection of this very argument in its December 6 Order. As summarized by the Court, Plaintiffs had insisted "that the E&Y documents are not covered by the attorney client privilege because they do not reflect communications between a lawyer and a client for the purpose of providing legal assistance." (Dec. 6 Order at 7) After reviewing this and a number of Plaintiffs' related arguments, the Court succinctly stated, "The Court disagrees." (*Id.*)

This conclusion should apply with equal force to the work papers that constitute and collectively reveal the substance of analyses undertaken for and under the supervision of Household's General Counsel. It would be anomalous indeed to protect E&Y's draft final report from disclosure (as the Court stated it would do during the April 12 Status Conference) while requiring Defendants to produce the individual analyses summarized in that draft report. As discussed below, the factual and legal bases for rejecting that result are compelling.

A. The Work Papers Contain All the Indicia of Privilege

E&Y was given a general mandate to examine Household's compliance with its internal policies and state laws and regulations in order to assist the General Counsel in rendering

legal advice to Household. (December 6 Order at 8; Affidavit of Household General Counsel Kenneth Robin, dated November 3, 2006 (annexed at Tab A); Affidavit of John Keller of E&Y, dated April 24, 2007 (the redacted version of which is annexed at Tab B); Supplemental Affidavit of John Keller, dated May 4, 2007 (annexed at Tab C)). E&Y was expected to analyze Household's consumer lending operations in all of the 47 states where Household did business, focusing by state on the specific loan attributes set forth in the Engagement letter (prepayment penalties, origination fees, etc.). The objective was to determine the level of compliance with Household's policies (as informed by local laws or regulations) and to determine the magnitude of and reasons for any exceptions. (Keller Afft. ¶¶ 6-7) E&Y's selective collection, validation and analysis of data regarding individual Household loans by loan attribute and by state are embodied in the work papers contained in the approximately 400 boxes of E&Y material now at issue. (Keller Afft. ¶¶ 8-16) This work was closely monitored by Household's General Counsel and his staff, who met with the E&Y team at least once a month on average for updates and discussions of E&Y's observations.[1] (Keller Supp. Afft ¶18) Defendants have provided to the Court, for *in camera* inspection, samples of the detailed agenda and interim report for one such regular review, which were listed at entry 158 (Third Installment) of Defendants' relevant Privilege Log and summarized in paragraph 17 of Mr. Keller's Supplemental Affidavit.

As described in the two Keller Affidavits, in order to perform its work for the General Counsel, E&Y requested specific individual customer loan information from Household, usually designated by account number and loan attribute. It did so initially to test and refine En-

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[1] Defendants do not believe that any response is necessary to Plaintiffs' rather novel contention that "communications between E&Y and the office of Household's general counsel do not constitute attorney-client communications as they are nothing more than communications between an attorney and his agent." (Plaintiffs' Status Report at 4n.1) Such a ruling would mean that any discussions between Mr. Robin and one of the attorneys in his office would not be covered by the attorney-client privilege. Merely stating Plaintiffs' contention serves to refute it.

gagement-specific systems and then to perform the detailed analyses that were discussed with in-house counsel and summarized in the January 2004 draft final report. As the Court's *in camera* review of the work papers will confirm, from the outset --- even during the preliminary data validation phase --- the material was organized and tested according to specific formulae applied within discrete substantive categories, thus making the empirical data in the files inseparable from the substantive analyses, evaluations, and conclusions.

B. Applicable Legal Authority Supports Attorney-Client Protection For the Work Papers in Their Entirety

As Defendants have previously demonstrated, because E&Y indisputably prepared the Compliance Engagement work papers at the direction of Household's General Counsel and for the purpose of assisting the General Counsel in rendering legal advice, this material must be deemed privileged without reference to each specific document taken out of the context of the Engagement.[2] Accountants' memoranda and work papers are protected by attorney-client privilege where, as here, they are "prepared by an accountant at an attorney's request to assist the attorney in giving legal advice to the client." *In re OM Group Securities Litigation*, 225 F.R.D. 579, 588-589 (N.D. Oh. 2005); *see Asian Vegetable Research & Development Center* v. *Institute of International Education*, 1995 U.S. Dist. LEXIS 11776, *13 (S.D.N.Y. Aug. 16, 1995) (accountant work papers and reports found to be privileged); *Florentia Contracting Corp.* v. *Resolution Trust Corp.*, 1993 U.S. Dist. LEXIS 5275, *17 (S.D.N.Y. Apr. 22, 1993) ("The attorney-client privilege . . . extends to work papers and reports of an accountant retained by the attorney or by the client at the attorney's direction, in connection with anticipated litigation.") (quoting 2. J. Weinstein & M. Berger, Weinstein's Evidence, ¶503(a)(3)[01], at 34 (1992)). Moreover, if the

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[2] A summary of the legal authority set forth in this section was provided to the Court in a March 28, 2007 letter.

accountant was asked to create a report at the request of counsel "where the purpose of the report was to put in usable form information obtained from the client" privilege will also attach. *In re Vazquez*, 1998 Bankr. LEXIS 475, *7 (N.D.Ill. Apr. 21, 1998). Here, because E&Y prepared work papers, memos and other documents under the Compliance Engagement at the direction of and as agent of Household's General Counsel, its output should be deemed privileged in its entirety without requiring a unique demonstration of privilege for each component page.

Confidential data that E&Y requested from Household for use in specific Compliance Engagement projects are uniformly privileged as well. *See In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000):

> "[M]aterial transmitted to accountants may fall under the attorney-client privilege if the accountant is acting as an agent of an attorney for the purpose of assisting with the provision of legal advice. 'What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer.* If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.'" (*citing United States* v. *Brown*, 478 F.2d 1038, 1040 (7th Cir. 1973), *quoting United States* v. *Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)) (emphasis added).

See also, *Ferko*, 218 F.R.D. at 139 (Where the accountant is hired for a "specific purpose that related significantly to the disputed communications or documents at issue, *any documents* disclosed to such a professional and any communications regarding those documents are privileged.") (emphasis added); *In re OM Group Securities Litigation*, 225 F.R.D. at 589 n.18 (where forensic accountant was engaged to assist outside counsel in providing legal advice to an audit

committee, the court extended the privilege to "documents underlying the advice [the accountant] provided to [counsel].").[3]

Here, Household disclosed customer data and other information to E&Y in order to satisfy specific targeted requests, in the latter's capacity as "an agent of Household's General Counsel's office." Household's General Counsel was entitled to rely on the assistance of E&Y in analyzing complex and massive amounts of customer loan data for the purposes of providing legal advice to the Company. Courts faced with similar situations have compared the role of accountant to that of translator or interpreter in deeming material provided by a client to the accountant privileged. In *United States* v. *Kovel*, 296 F.2d 918 (1961), an early case addressing this issue, Judge Friendly explained:

> "This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand. Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege . . . the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege . . . What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." *Id.* at 922.

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[3] *United States* v. *South Chicago Bank*, 1998 U.S. Dist. LEXIS 17445 (N.D. Ill. Oct. 16, 1998), a case relied on by Plaintiffs at page 5 of their Status Report, is not inconsistent with this line of authority. There, the court found that the proponent of the privilege had made only a conclusory assertion of privilege as to accountant work papers and had not carried its burden. *Id.* at *6. This of course is far from the case here, where the Court has already found the Compliance Engagement to be privileged and Defendants have made a substantial showing, including detailed affidavits and memoranda of law, demonstrating that the privilege ruling in the December 6 Order should be extended to the related work papers.

See also Ferko v. *NASCAR*, 218 F.R.D. 125, 140 (E.D. Tex. 2003) (holding that all communications and documents given to E&Y by in-house counsel were privileged where E&Y was hired by in house counsel to "serve as listening posts, and interpret documents related to [new Statement of Financial Accounting Standards]. Ernst &Young's accountants also helped translate financial information for [in house counsel.]"). Accordingly, as with the privileged work papers prepared by E&Y, the selected confidential data on which E&Y's analyses were based must likewise be deemed privileged.

As a corollary to this point, it is important to note that the Court will not necessarily be able to determine the privileged nature of the E&Y work papers merely by examining particular excerpts in isolation. In such a circumstance, the Court of Appeals for this Circuit has instructed that when privilege cannot be determined from the face of a document, but circumstances suggest the document may be privileged, the court must "consider the totality of those circumstances in making its determination as to whether the privilege must be recognized." *In re Grand Jury Proceedings*, 220 F.3d at 572. For assistance in making that inquiry, a court can look to "the submission of an affidavit or declaration with specific facts and/or the submission of the documents in camera." *Sphere Drake Insurance Ltd.* v. *All American Insurance Co.*, 221 F. Supp. 2d 874, 885 (N.D. Ill. 2002);); *In re Grand Jury Proceedings*, 220 F.3d at 572 (a court may find it necessary to "rely on the testimony of those involved in the production and handling of a document to determine the purpose for which it was produced.").

Here, in keeping with the Court of Appeals' guidance, this Court has been provided with the Affidavit of Household's General Counsel and two affidavits from John Keller of E&Y, and is proceeding to review broad samples of the work papers listed on Defendants' privilege log, as well as files created during the preliminary testing phases of the project. The totality of the circumstances here provides ample support for the conclusion that the work papers that constitute and reflect E&Y's performance of its privileged retention should be deemed privileged in

their entirety without reference to each of the myriad individual pages that collectively reflect E&Y's analysis.[4] *See Fischel v. Equitable Life Assurance*, 191 FRD 606, 609 (N.D. Cal. 2000) (having looked at thirteen sample documents in camera comprising communications between the defendant and its inside and outside counsel, the court ruled on privilege by category, including one privileged category for "all documents that comprise legal advice from outside or inside counsel to management regarding legal implications and potential liability for [defendant] and its Board in amending and designing the ERISA plan [at dispute]."). *Cf. SEC* v. *Thrasher,* 1996 U.S. Dist. LEXIS 3327 (SDNY Mar. 19, 1996) (finding a privilege log sufficient when it lists documents by category rather than on an individual basis); *SEC* v. *Nacchio,* 2007 U.S. Dist. LEXIS 5435 (D. Cal. Jan. 24, 2007); *In re Imperial Corp.,* 174 FRD 475 (S.D. Cal. 1997).

C. Plaintiffs' Other Grounds for Opposing Privilege Are Without Merit

Plaintiffs also argue unpersuasively that since some of the pending or threatened litigations that prompted Household's General Counsel to undertake the Compliance Engagement were resolved by the end of the Class Period, any post-Class Period work done by E&Y cannot be privileged. (*See* Pl. Status Rep. at 7-8.) While the idea for the Compliance Engagement emerged from concerns about certain existing and potential litigation, the essence of the Compliance Engagement was to assist the General Counsel in rendering legal advice on compliance exceptions — a mission that continued, as expected, after the settlement of the threat of legal proceedings by a task force of State Attorneys General. Plaintiffs' premise that work undertaken

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[4] This fact obviates the need for the Court to review *each* of the thousands of pages of confidential loan files provided to E&Y and distinguishes this case from *In re Grand Jury Proceedings,* 220 F.3d at 572, a tax fraud prosecution where the court remanded for a document-by-document privilege determination in view of the exception to the privilege rule where material is transmitted to a tax preparer solely "for the purpose of using that information on a tax return. . . ." *Id.* at 571.

by or for a company's attorney cannot be deemed privileged unless there is a pending lawsuit is simply wrong, and in any event, the settlement with the Attorneys General did not insulate Household from exposure to subsequent civil and regulatory proceedings throughout the country.

Plaintiffs also argue that Household has not demonstrated the steps taken to preserve the confidential nature of the E&Y work papers. (*See* Pl. Status Rep. at 8.) This assertion, raised for the first time in Plaintiffs' April 25, 2007 Status Report, is unfounded. The Compliance Engagement retention letter expressly obliges E&Y to hold the subject information in strictest confidence in keeping with its privileged nature. (Robin Afft. ¶ 8) As set forth in the February 26, 2007 Best Declaration, which is cited with approval in Judge Guzman's February 1, 2007 Minute Order, when E&Y concluded its work on the Compliance Engagement in late 2004, the work papers remained segregated and were never conveyed to Household for integration within its general files. Rather, E&Y boxed all relevant work papers and sent them to an Iron Mountain document storage facility. The work papers were clearly and prominently marked with a legend indicating that they were privileged and confidential. They were not left unattended or subject to review by individuals who lacked appropriate clearance. That defense counsel were not immediately aware of the off-site storage arrangements has no bearing whatsoever on the level of security afforded to this material.

II. Plaintiffs Have Not Overcome the Work Product Protection for E&Y's Compliance Engagement Work Papers

In view of the attorney client privilege that attaches to E&Y's work papers, this Court has no need to consider Plaintiffs' demand to invade Household's work product protection with respect to this material. For the record, however, this Memorandum will highlight Plaintiffs' failure to make a compelling (or any) showing on this issue, given their unfounded reliance

on the Court's December 6 findings with respect to a relatively small and different set of documents created during the Class Period.

In its December 6, 2006 ruling, the Court held that "Defendants have met their burden of showing that the E&Y documents constitute protected work product." (Dec. 6 Order at 16) Nevertheless, based on Plaintiffs' generalized assertions, the Court found that the material in question was primarily fact work product as to which Plaintiffs had demonstrated a substantial need "in that it may assist Plaintiffs in establishing falsity, scienter, and materiality." (*Id.*) Plaintiffs made this argument, and the Court accepted it, based upon the mistaken belief that the Compliance Engagement was completed fully within the Class Period (July 30, 1999 through October 11, 2002). But the Compliance Engagement was only in its preliminary stages at the end of the Class period, and most substantive analysis did not begin until approximately November and December 2002 — after the end of the Class period and during the pendency of this action. Keller Aff't ¶19. Moreover, E&Y did not complete its work until 2004 — years after the relevant time period here. Keller Aff't ¶20.

It follows that the Court's December 6 conclusion does not apply automatically to the work papers created and considered after the start of this action. For one thing, there is no logical connection between allegedly false statements and omissions made by Household management before October 11, 2002 and a body of analysis that was not even created for months or years after the Company allegedly committed knowing fraud. Plaintiffs' failure and inability to show how a 2003 or 2004 exception report could possibly have informed an executive's scienter two or more years earlier should doom their demand for an extraordinary exception to the work product doctrine — even if one were to assume, contrary to fact, that the work papers were de-

void of the decisions, mental impressions and insights of Household's counsel. See Supp. Keller Afft. ¶¶ 3-15) Whatever the Household Defendants ultimately learned from the E&Y Compliance Engagement, it cannot have informed their knowledge or state of mind from 1999 through October 11, 2002. Nor can the work papers help Plaintiffs prove any other part of their claim that statements made to investors during the July 1999-October 2002 time period were knowingly and materially false. See *Pommer* v. *Medtest Corp.*, 961 F.2d 620, 625 (7th Cir. 1992) ("The truth (or falsity) of defendants' statements and their materiality, must be assessed *at the time the statements are made*, and not in the light of hindsight") (emphasis added).

Plaintiffs' generalized statement of "need" deserves no credit in any event in view of its utter lack of substantiation and Plaintiffs' exhaustive discovery regarding Household's lending practices, policies, procedures, training, complaint and compliance processes during the Class Period. Household has produced millions of pages of documents that concern loan origination fees, prepayment penalties, refinance restrictions, late fees, unemployment and disability credit insurance, recording fees and disclosures — topics that also were studied in the post-Class period Compliance Engagement. This production included a large volume of Class Period data that had been shared with the multi-state group of Attorneys General in advance of the October 11, 2002 settlement agreement. Plaintiffs have also taken dozens of depositions regarding their claim that Household knowingly engaged in and concealed from investors a predatory lending scheme between July 1999 through October 11, 2002.

Plaintiffs have not even tried to demonstrate a need for the E&Y work papers, much less "substantial" need to overcome work product protection afforded to fact work product that is free of attorney opinion (unlike the materials at issue). At best, Plaintiffs' conclusory statements

indicate that they *want* these documents (just as they have insisted on full-bore discovery of every other aspect of Household's operations), but that is not the standard for overcoming work product protection for factual material, a burden that "is difficult to meet and is satisfied only in 'rare situations, such as those involving witness unavailability.'" *Eagle Compressors, Inc.* v. *HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D. Ill. 2002) (citation omitted); *see also, e.g., Trustmark Insurance Co.* v. *General & Cologne Life Re of America*, No. 00 C 1926, 2000 WL 1898518, at *3 (N.D. Ill. Dec. 20, 2000) (same); *Scurto* v. *Commonwealth Edison Co.*, No. 97 C 7508, 1999 WL 35311, at *2 (N.D. Ill. Jan. 11, 1999) (same). And because empirical material in these work papers is inseparable from the mental impressions of the attorneys and their agents who designed and implemented the Compliance review, this material would be entitled to protection as attorney work product even if the attorney client privilege did not protect it from disclosure.

III. The Redactions of the Keller Affidavit Provided to Plaintiffs Are Appropriate

On April 24, 2007, Defendants submitted to the Court *in camera* the Affidavit of John M. Keller of E&Y, sworn to on that date. Pursuant to the Court's instruction, Defendants provided Plaintiffs with a redacted copy of that Affidavit. In its April 27, 2007 Order, the Court instructed Defendants to include "an explanation as to why the redacted portions of the affidavit from John Keller of April 24, 2007 are privileged." The redacted portions are privileged and confidential, and are not subject to the *Garner* exception, because they elaborate on substantive activity of Household counsel or their agents well after the close of the Class period. Defendants redacted this material on excess of caution, given the extreme positions Plaintiffs have taken in

this litigation on the subject of waiver. If the Court would prefer, in the interest of avoiding further impediments to the completion of fact discovery, Defendants would be willing to disclose an unredacted version of Mr. Keller's April 24, 2007 Affidavit if such production were deemed to be without prejudice to Defendants' assertion of privilege as to the conduct and results of the Compliance Engagement.

CONCLUSION

Plaintiffs' demands for production of additional documents created in the course of E&Y's privileged Compliance Engagement should be denied in full.

Dated: May 4, 2007
Chicago, Illinois

Respectfully submitted,

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