

**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.)	
_____)	

**MOTION TO COMPEL FURTHER RESPONSES TO THE CLASS' QUESTIONS FOR
PER EKHOLDT CONCERNING EXHIBIT 13 AND THE PRODUCTION OF
DOCUMENTS UNDERLYING WILMER, CUTLER & PICKERING REPORTS**

[REDACTED VERSION]

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I. INTRODUCTION

Wilmer, Cutler & Pickering (“WCP”) was retained by the Audit Committee of Household International, Inc.’s (“Household” or the “Company”) Board of Directors in 2002 to investigate allegations by Elaine Markell, former Director of Default Servicing for Household Mortgage Services (“HMS”),¹ concerning Household’s illegal loan restructuring manipulation and its violations of bankruptcy laws. The firm provided two final reports to the Audit Committee regarding its investigation around March 24, 2003. The first report (the “Bankruptcy Report”) concerns HMS’ bankruptcy practices. The second report (the “Restructuring Report”) concerns HMS’ loan restructuring practices and whether these practices were inconsistent either with Household’s public disclosures regarding these matters or with HMS’ internal policies. *See* Exhibits 1-2 (all exhibits are attached hereto, unless otherwise noted). By this motion, the Class respectfully moves this Court to compel (1) the production of all underlying documents for the Restructuring Report, (2) further responses to the Class’ written deposition questions for Per Ekholdt, Exhibit 13, which reflects statistics used in the restructuring report, and (3) further responses to the Class’ deposition questions of audit committee member Louis Levy.²

The Restructuring Report and related documents, interview notes, statistical studies and draft reports go to the heart of the Class’ claims, that the Household defendants manipulated the Company’s credit quality numbers by improperly restructuring delinquent accounts and made false and misleading statements about Household’s restructuring policies. ¶¶107-124.³ The Restructuring Report includes factual findings which support the Class’ claims. The report also contains certain conclusions with which the Class disagrees. The Class is entitled to test WCP’s conclusions through discovery. Defendants, however, have consistently refused to produce any underlying documents related to the reports – other than those *they* want in the record – or to answer questions concerning documents and the final report claiming privilege.

¹ HMS is a division of Household Finance Corporation, which is a subsidiary of Household.

² Mr. Ekholdt refused to answer questions 4-8, 11-12, 32 and 35-36, related to Exhibit 13. *See* Ex. 3. Audit Committee member Lou Levy also refused to respond to a number of questions concerning the WCP investigation and Restructuring Report at his deposition. *See* Ex. 4 at 182-188. The following entries on Household’s privilege logs appear to be related to the Restructuring Report: 2499, 2554, 2625-2627, 2633, 2635-2636, 2655, 2657-58, 2660, 2687, 3356-3358, 3834, 3836-3838, 3840-3841, 3845-3846, and 3913.

³ Paragraph (“¶”) reference is to the [Corrected] Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws.

The documents at issue are not privileged, but reflect a third party's factual investigation. Furthermore, WCP was retained by Household's Audit Committee, not by Household. Therefore, communications between Household employees and WCP, such as Mr. Ekholdt, are not protected by the attorney-client privilege. The work product doctrine, moreover, does not protect the related documents because the report was not prepared in anticipation of litigation or trial. WCP's role was to independently investigate HMS' reaging and restructuring practices and to identify any manipulations, not to prepare for litigation or trial.

The extent any privilege or protection ever did exist, it has been waived by defendants' voluntary production of related documents to the Class, the Securities and Exchange Commission ("SEC") and KPMG LLP ("KPMG"). These points are further discussed below.

II. FACTUAL BACKGROUND

The Restructuring Report was commissioned in 2002 at the insistence of Household's auditor, KPMG: [REDACTED]

[REDACTED]

[REDACTED] See Ex. 5 (emphasis added).

WCP was hired to conduct a factual investigation of Ms. Markell's allegations. As stated in the report, WCP's task was [REDACTED]

[REDACTED]

Ex. 2 at 4 (emphasis added). WCP conducted its investigation by reviewing thousands of documents and interviewing numerous Household employees. *Id.* at 2.

In 2004, the Restructuring Report and certain other related documents in KPMG's possession were produced to the Class with the agreement that production of these specific documents in this litigation would not waive any applicable privilege. See Ex. 6. In subsequent productions, Household has voluntarily produced other documents concerning this report that are not subject to the parties' agreement, including a different version of the Restructuring Report, dated March 17,

2002 (“March 17 Report”) and workpapers prepared by Household for WCP. *See* Exs. 3, 7, 11-12. The March 17 Report is slightly different than the March 24, 2003 version, is based on the same investigations and was not produced pursuant to the parties’ non-waiver agreement.

On March 28, 2006, the Class deposed Per Ekholdt, former Group Director of Credit Risk for HMS. During the deposition, counsel for Household defendants directed Mr. Ekholdt not to answer questions concerning Exhibit 13, a document that was provided to WCP by Mr. Ekholdt to assist in WCP’s investigation, on the grounds that it is protected by the attorney-client privilege and the attorney work product doctrine. *See* Ex. 8 at 182-183. Less than a week after the deposition, defendants withdrew their privilege claim: “[W]e have now had an opportunity to further evaluate our privilege claim and hereby withdraw it.” *See* Ex. 9 at 2. Defendants then agreed to answer written deposition questions the Class might have regarding this document.⁴ *See* Ex. 3.

On September 5, 2006, the Class propounded Questions for Per Ekholdt regarding Exhibit 13. On September 29, 2006, defendants served their responses and objections and again refused to answer questions, citing privilege. *See* Ex. 3. The Class now moves for responses to those questions and production of all withheld documents related to the Restructuring Report.

III. ARGUMENT

A. Communications Related to WCP’s Factual Investigation Are Not Privileged

In order for communications between Household and WCP to be privileged under the attorney-client privilege, they must reflect communications between a lawyer and a client for the purpose of obtaining or providing legal assistance to the client. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). WCP’s investigation of Household’s restructuring policies was a fact-finding mission and did not contemplate or involve the rendering of legal advice. Accordingly, the attorney-client privilege does not apply. *Osterneck v. E.T. Barwick Indus., Inc.*, 82 F.R.D. 81, 83-86 (N.D. Ga. 1979) (communications between an attorney retained to conduct an investigation and his client are not privileged unless the attorney is hired to render legal advice).

In *Osterneck*, the court rejected a nearly identical claim of attorney-client privilege where two attorneys were employed by the company as counsel to the special review committee set up

⁴ Because Mr. Eckholdt resides overseas, the Class agreed to submit questions in written form rather than recall the witness.

under an SEC consent decree. *Id.* at 82-83. The special review committee's task was to investigate and then to report to the board of directors on matters alleged in the SEC's complaint. *Id.* The court concluded that because the special counsel were retained to interview employees, compile documents and evaluate data, they were not hired for the value of their legal services. The court further found that their report did not contain legal advice, as it mainly reviewed the practices alleged in the SEC's complaint and made some recommendations on primarily accounting matters. *Id.* at 86. This case is no different.

The Restructuring Report squarely identifies the parameters of WCP's engagement: [REDACTED] Ex. 2 at 4 (emphasis added). WCP conducted its investigation by reviewing documents and interviewing Household employees. *Id.* at 2. WCP's final Restructuring Report, moreover, does not offer legal advice, but instead recites factual conclusions. A comparison of the two reports prepared by WCP, the Bankruptcy Report and the Restructuring Report, further shows that the Restructuring Report is nothing but a summary of factual findings. While the bankruptcy report contains sections titled [REDACTED] [REDACTED] the Restructuring Report does not include any legal analysis or recommendations. *See* Exs. 1-2.

Indeed, a careful reading of the Restructuring Report reveals that WCP played the role of an investigator rather than an attorney. The basis of WCP's Restructuring Report was the review of [REDACTED] and interview of [REDACTED] Ex. 2 at 2. This underlying factual information obtained by WCP during the investigation is discoverable. Hiring an attorney to be an investigator to compile factual information for the company does not shield the underlying investigation from discovery. *Osterneck*, 82 F.R.D. at 85-86. Thus, Household cannot meet its burden of establishing that the communications it refuses to disclose were made for the purpose of obtaining legal advice.⁵

B. Communications Between WCP and Household Employees Are Not Privileged

The attorney-client privilege only extends to communications between attorney and client, *i.e.*, the intended beneficiary of legal services. Here, Household's Audit Committee retained WCP to

⁵ Additionally, as discussed in the Class' Motion to Compel Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP, the attorney-client privilege is inapplicable under the *Garner* exception. The Class incorporates by reference the above-mentioned motion.

conduct an independent investigation. Therefore, to the extent that legal services were provided, the Audit Committee is WCP's client, not Mr. Ekholdt's and not other Household employees' who may have communicated with or provided information to WCP. WCP submitted drafts and the final reports to the Audit Committee, not Household or its employees. Indeed, WCP's own report states

[REDACTED]
[REDACTED] Ex. 2 at 2.

Because no attorney-client relationship exists between Household and WCP, communications between Household employees and WCP, such as interviews of Household employees conducted by WCP and documents prepared and provided to WCP by Household employees, are not privileged. *See Hickman v. Taylor*, 329 U.S. 495, 508 (1947) ("the protective cloak of [attorney-client] privilege does not extend to information which an attorney secures from a witness"). Therefore, any interview-related documents, such as summaries, memoranda, or notes, and any documents prepared at the request of WCP (such as Mr. Ekholdt's Exhibit 13 and similar documents), are discoverable and should be produced immediately.

C. The Requested Information Is Not Protected by the Work Product Doctrine

Under the Seventh Circuit law, the burden is on Household to establish that the Restructuring Report and related documents were "prepared in anticipation of litigation." *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 767-68 (7th Cir. 2006), *r' hrg en banc denied*, No. 04-4270, 2006 U.S. App. LEXIS 8147 (7th Cir. Mar. 31, 2006); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1983). Household cannot sustain this burden because the disputed documents here were not created in anticipation of litigation. WCP was retained by Household's Audit Committee to conduct an independent factual investigation of HMS' reaping policies. *See* Exs. 2, 5.

The purpose of WCP's investigation was to provide facts to the Audit Committee and KPMG regarding whether there were any accounting improprieties within HMS. *See id.* Nowhere in its report did WCP establish or even suggest that its services were done in anticipation of, or in connection with, any litigation – nor does the Restructuring Report include any discussion of legal strategy aimed at combating litigation. Indeed, defendants have not even specified the litigation for which the Restructuring Report supposedly was prepared.

Because WCP's work was undertaken independent of any litigation, the work product doctrine cannot shield the documents used to create the Restructuring Report from discovery.⁶ Furthermore, because the information underlying WCP's report is factual, rather than legal, in nature, it cannot be afforded work-product protection.

D. The Class Has a Substantial Need for the WCP Materials and Cannot Obtain the Substantial Equivalent Without Undue Hardship

Even if the WCP materials are protected by the qualified work product doctrine, they are still properly discoverable in this case. The Federal Rules provide that work product shall be produced where the requesting party has shown “[1] substantial need of the materials in the preparation of the party’s case and [2] that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3); *see also United States v. Nobles*, 422 U.S. 225, 239 (1975) (“The privilege derived from the work-product doctrine is not absolute.”). These two prongs are satisfied in this case and discussed in turn.

1. The Class Has a Substantial Need to Obtain the WCP Materials

The Restructuring Report and its underlying evidentiary bases go to the heart of this case and specific Class allegations regarding Household's reage policies and public statements. These factors satisfy the Fed. R. Civ. P. 26(b)(3) “substantial need” prong. *See Bairnco Corp. Sec. Litig. v. Keene Corp.*, 148 F.R.D. 91, 103 (D.N.Y. 1993) (“even if the documents were to fall under the rubric of privileged attorney work-product, plaintiffs manifest a compelling need to obtain discovery” because the evidence goes to “the crux of the case plaintiffs hope to present”). Specifically, the Restructuring Report and supporting evidence establish the falsity of Household's public disclosures respecting its restructure policies and statistics; scienter in that Household knew its public disclosures to be false; and materiality because Household's reage statistics were key indicators of the value of the Company's assets (its consumer loans) and were crucial to the Company's ability to

⁶ Even assuming WCP's Restructuring Report was created partially for use in litigation, a dual-purpose document is not protected by the work product doctrine in this Circuit. *United States v. Frederick*, 182 F.3d 496, 501-02 (7th Cir. 1999). Additionally, under the Seventh Circuit law, the work product doctrine protects only those documents prepared for use in litigation with the party seeking documents. *Mattenson*, 438 F.3d at 767-68; *see also Ferguson v. Lurie*, 139 F.R.D. 362, 368 (N.D. Ill. 1991) (“The work product doctrine does not apply here because . . . the two documents in question were not prepared in contemplation of the present litigation.”). Because the underlying documents of the Restructuring Report were not prepared in anticipation of this securities litigation, they cannot be protected by the work product doctrine.

sell large blocks of its loans (securitizations) to fund its business model. WCP found evidence on these points and made specific factual findings.

For example, WCP found a variance between actual restructure policies and statistics versus disclosed policies and statistics. *See* Ex. 2 at 3, 6-7. Regarding scienter, WCP's findings and evidence reviewed by WCP indicated Household maintained inadequate reporting systems, as illustrated by the fact that the individuals responsible for reporting restructure information did not have personal knowledge of that information. *Id.* at 2, 10. Regarding materiality, findings and evidence showed Household drove down account delinquencies by motivating employees (by way of incentive compensation) to restructure accounts. *Id.* at 8. Because the materials at issue go to the crux of this case, are factual in nature, and are necessary to cross-examine Household's reliance on any of these materials at trial, the Class has satisfied the "substantial need" element of Fed. R. Civ. P. 26(b)(3).⁷

2. The Class Cannot Obtain Substantially Equivalent Evidence Without Undue Hardship

The Class cannot obtain the substantial equivalent of the Restructuring Report and supporting evidence without undue hardship. The Restructuring Report summarizes WCP's investigation based on a cache of facts to which the Class has no access and cannot recreate without undue hardship, if at all. Specifically, WCP interviewed dozens of Household employees and reviewed numerous documents that are beyond the Class' reach. These interviews and documentary evidence are discussed in turn.

The Court should permit discovery concerning the preparation of the Restructuring Report, including any documents memorializing WCP's interviews of "over forty" Household employees. *Id.* at 2. The Class cannot depose all of these individuals, as it has only 55 depositions for the entire case. Improper reaging constitutes only one component of Household's multi-pronged fraud scheme. The Restructuring Report, moreover, addresses only HMS, one of Household's five business units. It is therefore impossible to depose these 40 witnesses and depose fact witnesses on the other factual predicates while remaining within the deposition limit. Even if the Court did permit

⁷ As noted herein the materials at issue are factual in nature and not opinion work product. As a consequence, the Class' burden to show substantial need is diminished. *See Condon v. Petacque*, 90 F.R.D. 53, 54-55 (N.D. Ill. 1981) (the burden of showing substantial need is lessened the farther the material is from the attorney's mental processes or impressions).

the Class additional depositions, it is highly probable that the witnesses interviewed by WCP have forgotten crucial facts. Over three and a half years have passed since their interviews with WCP's investigative team. Furthermore, WCP based its investigation on over 2,000 documents provided by Household, including employee emails. *Id.* Household has represented that it "inadvertently" deleted hundreds of thousands of emails. *See Ex. 10* Whether by accident or design, emails available to WCP were deleted from Household's computers and are no longer available to the Class. Other courts have found substantial need under similar circumstances. *See FEC v. Christian Coalition*, 178 F.R.D. 456, 466 (E.D. Va. 1998) (affirming the holding that movant "could not obtain the same information elsewhere due primarily to the limit on depositions"); *see Harper & Row Publishers v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) (finding "material discrepancies and failures to recall significant facts" are grounds for producing documents otherwise considered work product), *aff'd*, 400 U.S. 348 (1971); *see also Ehrlich v. Howe*, 848 F. Supp. 482, 492-93 (S.D.N.Y. 1994) (memory lapses of witnesses interviewed provide basis for finding substantial need/no substantial equivalent); *see In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 15 (D.D.C. 2002) (ordering production of documents over a work product assertion because defendants had destroyed certain documents).

In these circumstances, the Class has substantial need for the Restructuring Report and supporting evidence and cannot obtain the substantial equivalent of the materials in question without undue hardship if at all. Thus, the Court should find that the Class has adequately rebutted the qualified privilege that Household asserts attaches to the WCP Restructuring Report and its supporting testimonial and documentary evidence.

E. The Household Defendants Have Waived Any Privilege or Protection as They Have Produced the Requested Information, or Portions Thereof, to the Class, the SEC and KPMG

1. Defendants' Production of the March 17, 2003 Restructure Report and Selected Documents Underlying the Report to the Class Waives Any Claimed Privilege

Disclosure of attorney work product to an adversary waives both the attorney-client privilege and the work product protection. *In re Bank One Sec. Litig.*, 209 F.R.D. 418, 423 (N.D. Ill. 2002); *Hobley v. Burge*, Case No. 03 C 3678, 2004 U.S. Dist. LEXIS 6858, at **22-24 (N.D. Ill. Apr. 21, 2004); *Neal v. Honeywell, Inc.*, No. 93 C 1143, 1995 U.S. Dist. LEXIS 14488 (N.D. Ill. Oct. 4, 1995). Household has waived any and all applicable privileges by producing documents and providing testimony related to the Restructuring Report.

Indeed, Household affirmatively waived any claim of privilege with respect to Mr. Ekholdt's Ex. 13: "[W]e have now had an opportunity to further evaluate our privilege claim and hereby withdraw it." Ex. 9 at 2. In addition, on March 20, 2006, two years after the parties entered into the non-waiver agreement, Household produced to the Class the March 17 Report which is based on the same investigation as the Restructuring Report. This document appears to be an earlier version of the Restructuring Report and, based on its title, was presented to Household's Audit Committee.⁸ Furthermore, although Mr. Levy refused to respond to deposition questions related to WCP's investigation, citing privilege concerns, he did testify as to the substance of discussions he had with WCP. *See* Ex. 4 at 188. This testimony provides yet another basis for waiver. Thus, Household has selectively disclosed two versions of the Restructuring Report and the portions of the WCP investigation and analysis, including communications between the Audit Committee and WCP, that Household wishes to use, but denied the Class full access to the underlying evidence.

Courts in the Seventh Circuit have unequivocally held that "production of some privileged documents waives the privilege as to all documents of the same subject matter." *Chinnici v. Cent. DuPage Hosp. Ass'n*, 136 F.R.D. 464, 465 (N.D. Ill. 1991); *Burden-Meeks v. Welch*, 319 F.3d 897, 901 (7th Cir. 2003). "The subject matter waiver doctrine embodies two principles: (1) only confidential matters should be protected by the attorney-client privilege, and (2) a party should not be permitted to 'exploit selective disclosures for tactical advantage.'" *Vardon Golf Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 532 (N.D. Ill. 2003) (citation omitted). Judge Zagel from this district further stated: "The rationale underlying partial waiver is that a party should not be able to gain a tactical advantage by disclosing favorable portions of privileged documents and withholding unfavorable portions." *United States v. South Chicago Bank*, No. 97 CR 849-1, 2, 1998 U.S. Dist. LEXIS 17445, at *9 (N.D. Ill. Oct. 16, 1998).

In *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, No. F 74-137, 1977 U.S. Dist. LEXIS 16078 (N.D. Ind. May 2, 1977), defendant sought documents that were related to plaintiffs' product patentability and the prosecution of the patent from plaintiffs' patent counsel. *Id.* at *2. After plaintiffs' counsel produced relevant documents pertaining to communications between counsel and plaintiffs, defendant sought to compel additional notes and memoranda. *Id.* at *5. The

⁸ The March 17 Report is not included in or protected by the parties' non-waiver agreement. In addition to not being listed, the non-waiver agreement covers only documents produced by KPMG. The March 17 Report was voluntarily produced by Household.

court held that by producing *some* documents related to the prosecution of the patent, plaintiff waived its privilege with respect to *all* documents related to prosecution of the patent, despite the fact that they constituted work product *Id.* at **5-6.

Here, defendants' voluntary disclosures act as a subject-matter waiver as to all information related to the WCP investigation. Exhibit 13 was prepared at the request of "Household's outside counsel at Wilmer, Cutler & Pickering" in the course of its preparation of the Restructuring Report. *See* Ex. 3. The restructure data included in Exhibit 13 provides the foundation for WCP's conclusions included in its report. Just as in *Bowmar*, the production of documents related to WCP's investigation waives any applicable privilege with respect to all documents and communications related to the investigation. Household cannot produce a document, agree to respond to questions regarding that document and then claim that "the information that [the witness was] requested to provide," the "parameters or limitations . . . as to the data used," and the "purpose of preparing Exhibit 13" are privileged.

Furthermore, Household cannot produce a prior version of the Restructuring Report and expect the factual information underlying that report (as well as the subsequent "final" version) will be shielded from discovery. Defendants are not permitted to use favorable portions of the WCP materials as a sword while simultaneously withholding unfavorable portions under the work product shield. The Supreme Court has held that this tactic is fundamentally unfair. *See Nobles*, 422 U.S. at 239; *see also Tribune Co. v. Purcigliotti*, 93 Civ. 7222 (LAP)(THK), 1997 U.S. Dist. LEXIS 228, at *24 (S.D.N.Y. Jan. 10, 1997) ("where there is partial disclosure in the context of the litigation for the benefit of the privilege holder, there may be a complete subject matter waiver as to all communications on the subject"). In *Nobles*, the Supreme Court held that if defense counsel sought to introduce favorable testimony of an investigator at trial then it was precluded from asserting the work product privilege to withhold related documents and other internal materials. 422 U.S. at 239-40 ("[defendant] can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination"). The Class should not be forced to rely on the conclusions of Household's expert, WCP, without a chance to explore the underlying basis for the conclusions reached in the Restructuring Report. Household does not get to pick and choose which documents it

will disclose and which it will not. All documents underlying the Restructuring Report must be produced.⁹

2. Household's Production of Summary Information from the Restructuring Report to the SEC Waived Any Applicable Privilege

In addition to waiving any privilege through its production to the Class, Household also produced documents summarizing the Restructuring Report to another adversary, the SEC. This production is further cause for finding waiver. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (voluntary disclosure of privileged materials to the SEC for the purpose of gaining a benefit affirmatively waives the work-product privilege). Here, Household has produced numerous documents created for WCP's use in the Restructuring Report to the SEC.

At least one of the documents produced to the SEC was, just like Exhibit 13, authored by Mr. Ekholdt at the instruction of WCP and, just like Exhibit 13, contains restructure statistics provided for the Restructuring Report. Ex. 11. Another document provided to the SEC includes a summary of estimates prepared "at the request of attorneys with the firm of Wilmer, Cutler & Pickering." Ex. 12.

Because the Household defendants have produced documents underlying and describing the Restructuring Report to the SEC, Household's adversary during the SEC investigation, they must also produce related documents to the Class and answer questions regarding these documents.

3. Any Purported Privilege or Protection Is Waived Because Household Produced the Requested Information to Its Independent Auditor

Household produced the Restructuring Report and other related documents to KPMG, thus waiving any privilege. When auditors are conducting an audit of a public company, the auditor's interests are aligned with the company's shareholders and creditors, rather than with the company. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). In *Arthur Young*, the Supreme Court described the auditor's role as follows:

⁹ To the extent Household intends to rely upon any of the WCP materials in presenting its defense, it should be similarly compelled to produce all underlying materials and reports or precluded from using the WCP materials altogether. To date, defendants have refused to indicate whether they intend to use the Restructuring Report at trial. Defendants should be ordered to make this determination now. Otherwise, the Class will not be able to use these materials to depose its limited number of witnesses until it is too late, thereby severely handicapping the Class' ability to conduct an effective cross-examination.

By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. ***The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public.*** This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

Id. (first emphasis in original, second emphasis added); *see also* Roberta S. Karmel, *A New Watchdog for Public Accountants*, 228 N.Y. Law J. No. 31 at 3 (Aug. 15, 2002) ("Good auditing requires adversarial tension between the auditor and the client.").

In *South Chicago Bank*, the court held that because defendant voluntarily disclosed the disputed documents to its outside auditor, it relinquished the right to assert the attorney-client privilege. 1998 U.S. Dist. LEXIS 17445, at *8. Specifically, the court reasoned that "auditors are not generally part of the circle of persons, . . . with whom confidential information may be shared without destroying the." *Id.* at *7.

In *First F.S.B. of Hegewisch v. United States*, 55 Fed. Cl. 263 (2003), plaintiff company hired an outside law firm to conduct an internal investigation. *Id.* at 265. The law firm then hired an accounting firm to assist the investigation. *Id.* Plaintiff disclosed its board meeting minutes to the accounting firm both for the investigation and for the annual audit purposes. *Id.* The court held that disclosure of the minutes to the accounting firm for the purpose of assisting defendant's counsel to render legal advice did not constitute a waiver, however, disclosure of the same minutes for the business purposes of performing annual services constituted a waiver of the attorney-client privilege. *Id.* at 268-69. The court pointed out that "a dual purpose document is not privileged." *Id.* at 269 (citing *Frederick*, 182 F.3d at 501).

In this case, KPMG was Household's independent auditor and was not involved in any internal or external investigation of Household. Instead it insisted that the Audit Committee hire WCP to perform an independent investigation before it would agree to issue a clean audit opinion. *See* Ex. 5. Thus, under *First F.S.B.*, any underlying information for WCP's Restructuring Report produced to KPMG by the Household defendants is not protected by the attorney-client privilege because KPMG used them to assist rendering the auditing opinions for Household.

IV. CONCLUSION

For the reasons set forth, the Class respectfully requests an order compelling (1) further responses to the Class' questions for Per Ekholdt concerning Exhibit 13 (2) further responses to

deposition questions posed to Louis Levy, and (3) production of all underlying documents related to WCP's Restructuring Report.

DATED: October 16, 2006

Respectfully submitted,

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Exhibit 1

**Document Filed
Under Seal**

Exhibit 2

**Document Filed
Under Seal**

Exhibit 3

**Document Filed
Under Seal**

Exhibit 4

**Document Filed
Under Seal**

Exhibit 5

**Document Filed
Under Seal**

Exhibit 6

NON-WAIVER AGREEMENT

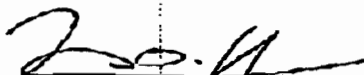
Household Defendants maintain that each of the documents set forth below is protected from disclosure by the work-product doctrine and/or the attorney-client privilege. Class Representatives dispute this. The documents at issue are in the possession of KPMG LLP which was served with a third-party subpoena by Class Representatives dated August 27, 2004. To avoid motion practice, it is hereby agreed that production of the documents at issue will not be deemed to constitute a waiver by Household Defendants of any privilege which Household has with respect to these documents or any other documents produced in this case, including but not limited to the attorney-client privilege and/or work-product privilege. This agreement is made without prejudice to the rights of Class Representatives to assert that any privilege invoked by the Household Defendants was previously waived by conduct other than the production of the documents at issue in accordance with this agreement. Notwithstanding the foregoing agreement that the act of producing the documents at issue shall not be deemed a waiver of any privilege which Household has with respect to these documents or any others, the parties further agree that they may use the documents at issue in this litigation (and for purposes of this litigation), subject to the terms of the November 5, 2004 Protective Order previously entered in this litigation, and that neither party may object to such use on privilege grounds including, but not limited to, attorney work-product and/or attorney-client privilege. The documents at issue are:

- Document No. 1: March 2003 memo from William Long, KPMG
- Document No. 3: March 2003 memo from William Long, KPMG
- Document No. 4: Report by Wilmer, Cutler & Pickering to the Board of Directors of Household International, Inc., dated 3/24/03
- Document No. 5: Report by Wilmer, Cutler & Pickering to the Audit Committee of the Board of Directors of Household International, Inc., dated 3/23/03
- Document No. 6: Letter from Russell J. Bruemmer, Esq., Wilmer, Cutler & Pickering, to Audit Committee of the Board of Directors, dated 3/23/03
- Document No. 7: Letter from Russell J. Bruemmer, Esq., Wilmer, Cutler & Pickering to KPMG, dated 3/23/03
- Document No. 8: March 2003 memo from Alan Kuska, KPMG
- Document No. 9: Undated outline of changes to internal controls and procedures by Wilmer Cutler & Pickering
- Document No. 11: March 2003 Memo from Brian Gordon, KPMG
- Document No. 14: Letter from Warren Stern, Wachtell, Lipton, Rosen & Katz to Kenneth Robin, Executive VP & General Counsel, Household International, dated 3/17/03
- Document No. 15: Letter from Russell J. Bruemmer, Esq., Wilmer, Cutler & Pickering to the Audit Committee of the Board of Directors of Household International, Inc., dated 3/18/03
- Document No. 16: Letter from Russell J. Bruemmer, Esq., Wilmer, Cutler & Pickering to the Audit Committee of the Board of Directors of Household International, Inc., dated 3/17/03

Feb-28-05 10:40am From:18 Cahill Gordon & Reindel LLP 212-269-5420--19 T-066 P.003/003 F-388
Feb-24-05 02:31pm From-

- Document No. 17: Memo from Wachtell, Lipton, Rosen & Katz to the Audit Committee of the Board of Directors of Household International, Inc., dated 3/19/03
- Document No. 19: February 2003 memo from William Long, KPMG
- Document No. 20: Draft document to Kenneth Robin, Executive VP & General Counsel, Household International, dated 1/20/02
- Document No. 21: January 2003 Executive Summary of KPMG Procedures
- Document No. 28: March 2003 memo from Brian Gordon & William Long, KPMG (section reflecting discussion of internal investigation and SEC consent order was initially redacted)
- Document No. 29: August 2002 memo from Wendy Holder & Brian Gordon, KPMG (section reflecting advice from Wachtell, Lipton was initially redacted)

Dated: February 23, 2005



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Received Feb-24-05 06:37pm From-

To:03 Cahill Gordon & R Page 003

Exhibit 7

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Exhibit 8

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Exhibit 9

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*ADMITTED IN
DC, TX, VA ONLY

April 3, 2006

Re: Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al., Case No. 02-CV-5893 (N.D. Ill.)

Dear Cam:

I write in response to your letter of March 31st. I was dismayed to see that you have attempted to obscure the issue at hand by focusing on the bona fides of Defendants' good faith assertion of privilege over the document bearing production numbers HHS-E 0013179.0001 through HHS-E 0013180.0011 rather than the wrongful and unprofessional conduct of your chosen consultant and agent Mr. Duffy. The facts at issue here are simple. During the course of Mr. Ekholdt's deposition, Defendants asserted a privilege over the document in question. Pursuant to the terms of the Protective Order, I requested its return and you acquiesced. At that point, there was no dispute that a privilege had been asserted and that the document was being returned. This is the factual scenario within which Mr. Duffy acted and within which his actions must be evaluated. Knowing that — and only that — Mr. Duffy attempted to copy the document's contents and improperly retain a copy of it after a good faith privilege claim had been asserted and you had agreed to return the document. This was a clear violation of the terms of the Protective Order. What, if anything, would later transpire regarding the privilege claim has no bearing on that fact.

As your letter acknowledges ("I have had the opportunity to review Mr. Duffy's notes relating to this document..."), Mr. Duffy made notes from the document after a privilege claim was asserted — whether these notes consist of 2 lines or 2 pages is irrelevant and does not mitigate Mr. Duffy's willful violation of the terms of the Protective Order. Given that you have admitted that Mr. Duffy took notes from the document and given that he attempted to retain a copy of the document even after he watched you return the copies in your own possession at the deposition, I find it difficult to understand your continued efforts to deny that Mr. Duffy has acted wrongfully, unprofessionally and in willful violation of the terms of the Protective Order. Moreover, given that Mr. Duffy has clearly demonstrated that he will not abide by the terms of the Protective Order, we

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-2-

must reiterate our demand that he, and his firm, no longer be granted access to Confidential Information provided to you under the condition that it is subject to the protections of the Protective Order. We hope that — having acknowledged Mr. Duffy's conduct — you will provide us with written confirmation that Mr. Duffy and his firm will have no further access to Household's Confidential Information. However, if (notwithstanding the requirements of Federal Rule of Civil Procedure 23(a)(4)) you choose to continue to dispute the facts and/or fail to ensure that Household's Confidential Information is no longer in possession of an individual who has willfully violated the terms of the Protective Order, we will be forced to make an appropriate motion to the Court and would be happy to engage in a fact-finding hearing and present numerous witnesses who observed Mr. Duffy's conduct — including calling you as a hostile witness. Moreover, we reserve our right to refuse to allow any deposition to proceed while Mr. Duffy, any member of his firm, or any other person who has not demonstrated that they have executed Exhibit A to the Protective Order, is present.

With regard to the document itself, we have now had an opportunity to further evaluate our privilege claim and hereby withdraw it. With regard to your inquiry regarding the Wilmer Cutler Report, I'm sure you are aware that the parties have entered into a non-waiver agreement which, by its terms, provides that any party may make use of the Report in this action. Beyond that fact, what use, if any, we may elect to make of the Wilmer Report in the course of our defense is, by definition, none of your business.

Yours truly,


Janet A. Beer

D. Cameron Baker, Esq.
Lerach Coughlin Stoia Geller
Rudman & Robbins LLP
100 Pine Street, 26th Floor
San Francisco, CA 94111

VIA FACSIMILE

cc: Adam Deutsch, Esq. (via facsimile)
Marvin Miller, Esq. (via facsimile)

Exhibit 10

**Document Filed
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Exhibit 11

**Document Filed
Under Seal**

Exhibit 12

**Document Filed
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