**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

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| LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,<br><br>Plaintiff,<br><br>– against –<br><br>HOUSEHOLD INTERNATIONAL, INC., ET AL.,<br><br>Defendants. | Lead Case No. 02-C5893<br>(Consolidated)<br><br>CLASS ACTION<br><br>Judge Ronald A. Guzman<br>Magistrate Judge Nan R. Nolan |

# THE HOUSEHOLD DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' 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

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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, "Household" or "Defendants"), in opposition to Plaintiffs' Motion to Compel Further Responses to Class' Questions for Per Ekholdt Concerning Exhibit 13 and the Production of Documents Underlying Wilmer, Cutler & Pickering Reports ("Pl. Mot.").

**PRELIMINARY STATEMENT**

Early in 2003, facing an SEC investigation into allegations raised in a lawsuit threatened by an employee of its Mortgage Services Division, Household International, Inc. ("Household" or the "Company") sought advice from outside counsel. Household and the Audit Committee of its Board of Directors engaged the highly regarded law firm of Wilmer, Cutler & Pickering (now "WilmerHale") to investigate and assess the employee's allegations, to advise the company as to litigation risk and, if appropriate, to recommend corrective actions. As requested, WilmerHale conducted an investigation, analyzed the results and reported its legal conclusions and recommendations in two privileged and confidential reports submitted in March 2003 (the "Restructuring Report" and the "Bankruptcy Report," collectively, the "Reports"). [1]

Both Reports were produced to Plaintiffs nearly two years ago, pursuant to a detailed written non-waiver agreement — intended, ironically, "to avoid motion practice" — which permits their use in, and for purposes of, this litigation. *See* Pl. Mot., Ex. 6. Plaintiffs' motion seeks to compel disclosure of all the underlying documents that WilmerHale reviewed or created as it conducted its investigation and prepared the Restructuring Report, including documents that memorialize WilmerHale's interviews of Household employees, and to compel two witnesses to provide deposition testimony about WilmerHale's investigation, analysis and advice to Household and the Audit Committee.

Seizing upon the circumstance that Household's massive production of documents to the SEC in 2003 and its even more voluminous document production in this litigation contained a smattering of inadvertently produced privileged documents, Plaintiffs hope to lever the inadvertent production of a handful of investigation-related documents into a basis for wholesale

[1] Although the title of Plaintiffs' Motion refers to "Reports" (plural), the Motion seeks to compel production of testimony and documents relating only to the Restructuring Report (singular). Accordingly, the privilege issues addressed herein are discussed only insofar as they relate to the Restructuring Report.

production of all of the quintessentially privileged materials created as part of WilmerHale's confidential investigation, its legal analysis and conclusions and its report to its corporate client.

Plaintiffs base their untenable waiver argument in large part on Household's production of documents that transmit pre-existing factual information, as to which no claim of privilege has been asserted, and they attempt to shore up their waiver claim with the wholly disingenuous — and wholly false — accusation that Defendants plan to use some privileged materials to their own advantage while simultaneously withholding others. Defendants do not intend to introduce the Restructuring Report, or any other privileged information relating to WilmerHale's underlying investigation or the preparation of the Restructuring Report, and they have consistently informed Plaintiffs that they have no such intention.[2]

Plaintiffs' motion should be denied in its entirety.

## FACTUAL BACKGROUND

In late 2002 a disgruntled employee of Household Mortgage Services ("HMS"), Elaine Markell, threatened to sue Household on the basis of alleged mistreatment relating to her brief and unillustrious employment with the Company.[3] In a draft complaint provided to the company, Markell alleged, *inter alia*, that loan restructures had been used improperly in HMS to manipulate financial performance data. (Declaration of Janet A. Beer, Esq. ("Beer Dec.") Ex. A). In anticipation of the threatened litigation, Household's Internal Audit department immediately commenced an initial inquiry to assess the validity of Markell's allegations. (Pl. Mot. Ex. 5 at 1). A few weeks later, on December 5, 2002, the SEC, which was already conducting an informal, non-public inquiry into various matters concerning Household, sent the Company a letter request seeking documents on a number of subjects relating to the company's lending practices and account management policies and practices, including the loan restructuring policies that had figured in Markell's allegations. *See* Beer Dec. Ex. B.

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[2] Contrary to Plaintiffs' assertion (Pl. Mot. at 11 n.9), Defendants have not refused to disclose their intentions. We do, of necessity, reserve the right to respond as appropriate should Plaintiffs be permitted to make use of the Restructuring Report, whether in its case at trial or in motion practice.

[3] Markell was Director of Default Servicing in HMS from February 2002 until January 2003. Markell's employment dispute was settled in January 2003 without any admission of wrongdoing by the Company. Pl. Mot. Ex. 5 at 2.

In late January 2003, on the recommendation of its new outside auditor, KPMG, the Audit Committee of Household International, Inc.'s Board of Directors entered discussions with WilmerHale regarding the possibility of engaging the law firm to conduct an internal investigation to assess the legal implications of Markell's allegations. *See* Pl. Mot. Ex. 5 at 2. The informal, non-public SEC inquiry had matured into a formal investigation and a subpoena had been served on the Company on January 13, 2003; on March 7, 2003 the SEC wrote to Household's outside counsel confirming its intention to commence legal proceedings against the company. *See* Beer Dec. Exs. C, D; Pl. Mot. Ex. 5 at 1, 5. On February 13, 2003, the Audit Committee retained WilmerHale to conduct an inquiry into Markell's allegations. (Declaration of James R. Wrathall ("Wrathall Dec.") ¶¶ 3, 6, Ex. A). In light of the on-going SEC investigation and the inevitable threat that private class action litigation would follow, the Audit Committee instructed WilmerHale to investigate the accuracy of Markell's allegations and provide advice regarding the legal implications of any potential misconduct and also to assess the extent to which HMS's restructuring practices were inconsistent with publicly disclosed policies or with internal policies. *See* Pl. Mot. Ex. 2 at 2.

In the course of WilmerHale's investigation, Household provided factual information to WilmerHale, with the understanding that the information would be maintained as confidential. (Wrathall Dec. ¶ 12). WilmerHale attorneys reviewed thousands of documents and interviewed a number of Household employees. (Pl. Mot. Ex. 2 at 2). On March 17, 2003 WilmerHale provided to the Audit Committee a draft of the Restructuring Report. (Pl. Mot. Ex. 7).[4] On March 24, 2003 WilmerHale provided its final Restructuring Report to the Audit Committee. (Wrathall Dec. ¶ 8; Pl. Mot. Ex. 2). The Restructuring Report contains certain findings of fact, and it also provides an extensive analysis of the legal implications of the facts found by WilmerHale. *See, e.g.*, Pl. Mot. Ex. 2 at 7–11.

[4] Plaintiffs' assertion that Defendants selectively disclosed the March 17 draft of the Restructuring Report is false. *See* Pl. Mot. at 9, Pl. Mot. Ex. 7. That Defendants' production of the March 17 draft report was inadvertent is evidenced by the fact that two copies of the same document are plainly identified on Defendants' privilege log. *See* Beer Dec. Ex. E, Nos. 2626, 3913. Defendants first became aware of the inadvertent production when they received Plaintiffs' Motion and, in accordance with the Protective Order, they promptly recalled the document. *See* Beer Dec. ¶ 7 and Ex. F. Plaintiffs, moreover, were well aware when they filed their Motion that Defendants had asserted privilege as to the March 17 draft report, because both of the privilege log entries noted above are cited in Plaintiffs' motion as "entries . . . related to the Restructuring Report." (Pl. Mot. at 1 n.2) Plaintiffs' assertion that Defendants have selectively disclosed the draft report to gain an unfair tactical advantage cannot have been made in good faith.

The SEC subpoena called for the production of information on many of the same subjects that WilmerHale had been asked to investigate. *See* Beer Dec. Ex. C at 12–14. Accordingly, many of the same factual documents and data that Household had provided to WilmerHale were also produced to the SEC. *See, e.g.*, Pl. Mot. Exs. 11–12. Documents that contained privileged information were withheld from the SEC production and identified on privilege logs that were supplied to the SEC. *See, e.g.*, Beer Dec. ¶ 8, Ex. G. The Restructuring Report was identified as privileged and it was supplied to the SEC only pursuant to a written confidentiality agreement that expressly provides that "neither the Committee nor Household intend to waive the protections of the attorney work product doctrine, attorney-client privilege, or any other privilege applicable as to third parties." *See* Beer Dec. Ex. H. Household produced over 1,850,000 pages of documents to the SEC. (Beer Dec. Ex. I). As is often the case in large-scale document productions that are completed on an accelerated schedule, some minimal amount of privileged material was inadvertently produced.

In order to render its 2002 audit opinion and to fulfill its obligations under the securities laws, KPMG required access to WilmerHale's Reports. To make clear that the Company did not intend to waive any applicable privileges, the Reports were provided the Reports to KPMG only pursuant to an explicit non-waiver agreement. *See* Beer Dec. Ex. J; Wrathall Dec. ¶ 14. In connection with its audit of Household's 2002 financial statements, KPMG verified the material accuracy of data used in the Restructuring Report. *See* Pl. Mot. Ex. 5 at 8. KPMG obtained from Household the factual data it needed to assess the accuracy of the information in the Restructuring Report. *See* Pl. Mot. Ex. 5 at 7. Factual data used by KPMG was produced to the Plaintiffs nearly two years ago, in response to Plaintiff's third-party subpoena of KPMG. At approximately the same time, the privileged portions of KPMG's audit work papers relating to Markell's allegations, including copies of the Reports, were produced to Plaintiffs pursuant to a non-waiver agreement. *See* Pl. Mot. Ex. 6.

The documents that had been produced to the SEC were also produced to Plaintiffs in this case over two years ago. (Beer Dec. Ex. I). Plaintiffs thus have had access for more than two years to factual documents and data, such as data reported by HMS employee Per Ekholdt and his staff, which were produced to the SEC and which, in some instances, had also been provided to WilmerHale. To the extent that Defendants have discovered any privileged documents among those that were produced to the SEC and then to Plaintiffs, we have recalled them, as provided in

the Protective Order. *See, e.g.*, Beer Dec. Ex. F. In addition to the SEC production, Defendants have also produced well over two million pages of additional documents and have provided, to date, thirteen privilege logs. Included in that production as well are numerous documents containing or transmitting nonprivileged factual information that were provided to WilmerHale, including the document that Plaintiffs marked as Exhibit 13 at the deposition of Per Ekholdt. *See* Pl. Mot. Ex. 3.

## ARGUMENT

At the outset, it is essential to focus on what this motion is not about. It is not about the Restructuring Report, because Plaintiffs already have that document and, pursuant to the non-waiver agreement under which it was produced, Defendants will not object on grounds of privilege to Plaintiffs' use of the Report in, or for the purposes of, this litigation. It is not about obtaining the underlying data needed to test the accuracy of information in the Report, because Plaintiffs already have the data that Household's outside auditor KPMG used — and found sufficient — for precisely that purpose. And the motion cannot really be about preventing selective production for strategic purposes because — as they have consistently told Plaintiffs — Defendants do not intend to introduce in their defense either the Restructuring Report or any privileged information underlying the Report.

Although Plaintiffs have not specifically identified the documents or categories of documents that they contend must be produced,[5] the content of the motion makes clear that Plaintiffs seek the production of all communications between or among WilmerHale and any Household employees and testimony about those communications, all of the documents reviewed by WilmerHale, and all materials related to WilmerHale's interviews of Household personnel. *See* Pl. Motion at 3–5. Plaintiffs thus seek to compel the production of documents and testimony that are plainly within the scope of the attorney-client and work product privileges, and to which Plaintiffs simply are not entitled.

[5] The only particular documents Plaintiffs have identified are those reflected in the privilege log entries listed in Plaintiffs' footnote 2. (Pl. Mot. at 1 n.2).

### A. Plaintiffs Seek to Compel the Production of Documents and Testimony That Are Protected by Privilege

#### 1. The Information Sought Is Protected by the Attorney-Client Privilege

Plaintiffs contend that communications between Household employees and outside counsel at WilmerHale are not protected by attorney-client privilege, first, because WilmerHale's client was not Household but rather its Audit Committee and, second, because the law firm's investigation and report constituted only a factual inquiry. Neither argument has any merit.

The Audit Committee of Household's Board of Directors retained the law firm of WilmerHale to conduct an investigation and to provide the committee and the company with legal advice regarding the subjects of Markell's allegations. (Wrathall Dec. ¶ 6, 8–10, Ex. A). Throughout the engagement WilmerHale understood its role to be that of Household's counsel. (Wrathall Dec. ¶ 11) Plaintiffs' assertion — with no supporting legal authority — that the Company had no attorney-client relationship with WilmerHale because the law firm was retained by the company's Audit Committee, Pls. Mot. at 4–5, is a word game that ignores the fundamental realities of corporate organization. Numerous courts have held, in situations directly parallel to that presented here, that attorney-client privilege runs between the corporation and the law firm as well as between the audit committee and the law firm. *See, e.g., SEC* v. *Brady*, No. 3:05-CV-1416-M, 2006 U.S. Dist. LEXIS 74979, at **22–23 (N.D. Tex. Oct. 16, 2006) (finding, where a law firm was retained by an audit committee to conduct an internal investigation, that communications between officers and directors and the law firm are privileged communications between "corporate client and its counsel"); *Washington Bancorp.* v. *Said*, No. 88-3111, 1989 U.S. Dist. LEXIS 5135, at *6 (D.D.C. May 10, 1989) (finding that the Special Committee and the Board of Directors of a corporation are "the same corporate client" for purposes of assessing the attorney-client relationship).[6]

Plaintiffs' other argument fares no better. The Restructuring Report and the related documents as to which Defendants assert privilege relate to WilmerHale's legal conclusions and

[6] In response to Plaintiffs' incorporated argument that the attorney-client privilege is inapplicable under the so-called *Garner* exception (Pl. Mot. at 4 n.5), Defendants incorporate by reference the response included in Section I.B of The Household Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household's Consultations with Ernst & Young.

the legal advice WilmerHale provided to its client. The unsurprising fact that WilmerHale's engagement required it to gather facts does not indicate that WilmerHale did not provide legal advice. Indeed, fact-gathering is an essential element in an attorney's formation of legal conclusions. *See Upjohn Co.* v. *United States*, 449 U.S. 383, 390–91 (1981) ("The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."); *Hughes* v. *Paine, Webber, Jackson & Curtis, Inc.*, 565 F. Supp. 663, 667 (N.D. Ill. 1983) ("A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."). WilmerHale's engagement as counsel included information gathering, consultation, and legal analyses. (Wrathall Dec. ¶ 8; see also Restructuring Report, Pl. Mot. Ex. 2 at 3, ll. 3 – 4. WilmerHale conducted legal analyses and provided legal advice to Household, at Household's request, on various issues related to the investigation and Markell's allegations. (*Wrathall Dec.* at ¶ 9) Plaintiffs acknowledge as much when they state in their brief that "[the] report also contains certain conclusions . . . ." Pls. Mot. at 1.

The Restructuring Report and related documents, including drafts of the report and communications between WilmerHale and Household, are protected from discovery by the attorney-client privilege.

**2. The Information Sought Is Protected Attorney Work-Product**

As Plaintiffs properly acknowledge, work-product protection attaches to the Restructuring Report and related documents to the extent that they were "prepared in anticipation of litigation." *See* Pls. Mot. at 5 (quoting *Mattenson* v. *Baxter Healthcare Corp.*, 438 F.3d 763, 767–68 (7th Cir. 2006)). As discussed above, Markell's threatened lawsuit precipitated the decision to seek WilmerHale's counsel; the law firm was retained to investigate Markell's allegations shortly after the SEC had commenced a formal investigation that encompassed Markell's allegations; and, less than a month after WilmerHale was engaged, Household was informed by the SEC that it intended to commence administrative cease-and-desist proceedings or civil action against the company. Plaintiffs' assertion that the Restructuring Report was not "prepared in anticipation of litigation" defies common sense.

Any material prepared *because of* the prospect of litigation constitutes protected work-product. *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, 237 F.R.D. 176,

181 (N.D. Ill. July 6, 2006) (Nolan, J.) ("[D]ocuments are protected by the work product privilege if they were prepared or obtained 'because of the prospect of litigation.' In the court's view, the position . . . that the primary motivating purpose for creating the document must be to 'aid in litigation' is overly narrow and contrary to the principles underlying the work product doctrine.") (internal citations omitted); *National Jockey Club* v. *Ganassi,* No. 04 C 3743, 2006 WL 733549, at *1 (N.D. Ill. Mar. 22, 2006) (Nolan, J.) ("The test for determining whether the work product doctrine protects materials from disclosure is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.") (emphasis added) (citation and internal quotation marks omitted).

Plaintiffs' broad, generalized descriptions of the disclosures they hope to compel by this motion — answers to deposition questions concerning WilmerHale's investigation and report (Pl. Mot. at 1 n.2), "communications between Household employees and WCP" (*id.* at 5), "any interview-related documents" (*id.* at 5), "all information related to the WCP investigation" (*id.* at 10) — make apparent that Plaintiffs seek to compel principally documents that include the attorneys' mental impressions, conclusions or legal theories, in short, classic opinion work product. An attorney's selection and consideration of the facts regarding a pending or threatened litigation, and legal opinions formed on the basis of those facts, constitute work product. *See, e.g.*, *Hollinger International, Inc.* v. *Hollinger Inc.*, 230 F.R.D. 508, 512 (N.D. Ill. 2005) (Nolan, M.J.) ("[L]egal memoranda prepared by attorneys which analyze the facts under the applicable legal standards . . . .constitute classic opinion work product. . . ."). Unlike the "cold underlying data behind [a] report," an attorney's "[n]otes and memoranda . . . generated from an attorney's interview with a client, are the very essence of what is protected by the work product doctrine." *Chamberlain Manufacturing Corp.* v. *Maremont Corp.*, No. 90 C 7127, 1993 U.S. Dist. LEXIS 371, at **5, 8 (N.D. Ill. Jan. 15, 1993); *see also SEC* v. *Brady*, No. 3:05-CV-1416-M, 2006 U.S. Dist. LEXIS 74979, at *35 (N.D. Tex. Oct. 16, 2006) (finding that investigatory reports that contain summaries of witness interviews are opinion work product because they are "suffused with the investigator's mental impressions and conclusions").

The Restructuring Report, drafts of the report, underlying interview notes and other related documents prepared or selected in anticipation of litigation are "suffused" with

WilmerHale's mental impressions and conclusions. Therefore, the Reports and other documents sought by Plaintiffs are attorney work-product that merit the highest level of protection.

**B. No Waiver of the Privileges Occurred**

As discussed below, Household and WilmerHale have taken great care to preserve the confidential privileged nature of the documents Plaintiffs seek, and privilege has not been waived as to any of the documents or testimony Plaintiffs seek.

**1. Defendants Have Not Voluntarily Produced Privileged Documents**

As it relates to Defendants' production to Plaintiffs in this litigation, Plaintiffs' waiver argument is premised on the assertion that Defendants have voluntarily produced four documents and permitted testimony during one deposition that reveal privileged information.

The notion that Defendants waived privilege by allowing Mr. Louis E. Levy, the former chair of Household's Audit Committee, to provide substantive deposition testimony relating to the WilmerHale investigation can be easily dispensed with because Plaintiffs' assertion that Mr. Levy testified "as to the substance of discussions he had with WCP" (Pl. Motion at 9) is pure fiction. The only testimony Plaintiffs cite to support that statement plainly refers to the "SEC investigation" and not to any investigation conducted by WilmerHale or any discussions with WilmerHale:

> Q: Was there any discussion within the audit committee or board of directors *regarding the SEC investigation*?
>
> A: Yes.
>
> Q: What was the substance of that discussion?
>
> A: I can't recall because there were many audit committee meetings during the period when they were investigating, but . . . I can recall that they were reviewing the circumstances surrounding the restatement . . . ." Pl. Mot. at 9, Pl. Mot. Ex. 4 at 188:3–17 (emphasis added)).

Not even the most creative reading of Mr. Levy's testimony could give it the meaning Plaintiffs ascribe to it, nor is there any other testimony that discloses communications with WilmerHale, which is no doubt why Plaintiffs have not quoted any supporting testimony in their motion. .

Three of the documents Plaintiffs point to as having effected a waiver of privilege contain no privileged information. Each of the documents was indeed produced to the Plaintiffs, and each document (or a copy) had previously been produced to the SEC, but not one of the

documents Plaintiffs rely on supports a waiver of privilege. First is the document Plaintiffs refer to as Ekholdt Exhibit 13.[7] Plaintiffs reason incorrectly that Defendants "affirmatively waived any claim of privilege" when they withdrew the claim of privilege claim that had been asserted as to this document during Per Ekholdt's deposition, because they miss the point: No privilege is asserted as to this document, which consists of an empty internal email (the functional equivalent of a fax cover sheet) transmitting a tabular arrangement of nonprivileged factual data that had been requested by WilmerCutler. *See Upjohn Co.* v. *United States*, 449 U.S. 383, 395–96 (1981) (attorney-client privilege "does not protect disclosure of the underlying facts by those who communicated with the attorney").[8] Similarly, Plaintiffs' Exhibit 11 is an internal email forwarding an email addressed to an attorney, which in turn merely identifies and attaches a tabular array of nonprivileged pre-existing factual information. No privilege is asserted. *See Sneider* v. *Kimberly-Clark Corp., 91 F.R.D. 1, 4* (N.D. Ill. 1980) ("Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney. To permit this result would abrogate the well-established rule that only the communications, not underlying facts, are privileged."). The third document, Plaintiffs' Exhibit 12, appears to be an internal Household presentation. The document includes one reference to "estimates" having been prepared at the request of Wilmer, Cutler & Pickering, but it does not include or describe such estimates (the document is presumably a draft, as it includes several incomplete pages). Again, no privilege applies and none is asserted. As to each of these documents, Plaintiffs have failed to explain how a waiver of privilege can be effected by the production of nonprivileged information.

The fourth document is Plaintiffs' Exhibit 7. As explained above, Defendants produced this document inadvertently, and they promptly recalled the document upon learning of its production when Plaintiffs' motion was served. The fact that two other copies of the same

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[7] Although it was not appended to Defendants' Responses and Objections to Plaintiffs' Questions for Per Ekholdt, the document can be found behind Pl. Mot. Ex. 3.

[8] At Plaintiffs' insistence, as a continuation of his oral deposition, Mr. Ekholdt provided answers to more than 90 of Plaintiffs' 102 written questions, answering all of the questions that inquired about the contents of this purely factual document. Mr. Ekholdt declined to answer questions, however, that would have required him to disclose the substance of communications with counsel at WilmerHale or to disclose the attorneys' work product. *See* Pl. Mot. Ex. 3 and compare, *e.g.,* answers to Questions 83–88 with answers to Questions 4–8.

document are included in Defendants' privilege logs (Beer Dec. Ex. E, Nos. 2626, 3913) attests to the fact that Defendants did not intend to waive any applicable privilege and that production of one copy of the document was inadvertent. The fact that Plaintiffs also knew (or should have known) that Defendants intended no waiver is apparent from the fact that Plaintiffs included both of Defendants' privilege log entries in the list of "related" documents referenced in their motion. (Pl. Motion at 1 n.2).

The attorney-client privilege applicable to Plaintiffs' Exhibit 7 survives inadvertent production, particularly because Defendants promptly recalled the document, as explicitly permitted under the Protective Order, upon learning of the inadvertent production. *See In re Sulfuric Acid Antitrust Litigation*, 235 F.R.D. 407, 417 (N.D. Ill. 2006) (holding that production of one unredacted version of a report along with four redacted versions, in a production of 800,000 documents, was an inadvertent production and insufficient to constitute a waiver of privilege; *In re Brand Name Prescription Drugs Antitrust Litigation*, No. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 17110, at *6 (N.D. Ill. Nov. 14, 1995) ("the mere inadvertent production of documents does not waive the privilege").

Unable to muster an argument on the basis of the actual facts, Plaintiffs set up a straw man by asserting that "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." Pls. Mot. at 10. As discussed above, and as Defendants have advised Plaintiffs previously, Defendants have no intention of making affirmative use of the Restructuring Report or of the underlying documents as to which Defendants have asserted privilege. Absent an intention by Defendants to use the Report, and there is none, the authorities cited by Plaintiffs stand solidly for the proposition that work-product protection should *not* be waived. *E.g., Tribune Co.* v. *Purcigliotti*, No. 93 Civ. 7222, 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") (emphasis added).

**2. Producing Documents to the SEC Did Not Effect a Waiver**

Defendants did not, as Plaintiffs erroneously contend, produce to the SEC "documents summarizing the Restructuring Report." Pl. Mot. at 11. Household *did* produce in

response to the SEC subpoena a number of documents such as Plaintiffs' Exhibit 11 (discussed above), which transmit pre-existing factual material that did not become privileged merely by virtue of having been provided to WilmerHale. Plaintiffs' Exhibit 11, far from "summarizing the Restructuring Report" or disclosing the privileged information contained therein, provides only raw factual data.[9] The fact that Household produced to the SEC, in response to the SEC subpoena, some of the same documents transmitting factual data about restructuring statistics that had been provided to WilmerHale need not effect a waiver of privilege.

Many documents related to WilmerHale's engagement were withheld from the SEC on the basis of privilege and a privilege log was provided to the SEC (Beer Dec. Ex. G), which in itself is a clear indication that Household did not intentionally and voluntarily waive privilege when it produced factual data such as Plaintiffs' Exhibit 11 to the SEC. Further evidence that Household did not intend for its responses to the SEC subpoena and the earlier letter requests to waive any applicable privilege is found in the fact that the company acceded to the SEC's request for access to the final Restructuring Report only on condition that the SEC enter into a written confidentiality agreement, which specifically states that "neither the Committee nor Household intend to waive the protections of the attorney work product doctrine, attorney-client privilege, or any other privilege applicable as to third parties." (Beer Dec. Ex. H). The Court should not find a waiver of privilege in Household's responses to the SEC investigation.

### 3. Providing the Restructuring Report to KPMG Did Not Effect a Waiver

Household's outside auditor, KPMG, was provided with a copy of the Restructuring Report, pursuant to an express written non-waiver agreement, in order for the auditor to render its 2002 audit opinion and to fulfill its obligations under the securities laws. Household provided the report to KPMG only pursuant to an explicit non-waiver agreement and commitment from KPMG that it would maintain the documents in confidence, which rules out any question that Household intended thereby to waive any applicable privileges. (Beer Dec. Ex. J; Wrathall Dec. ¶ 14). Disclosure of work product to a third party waives work product protection only if "the protected communications are disclosed in a manner which substantially increases the

[9] Plaintiffs' Exhibit 12 bears no discussion as that document disclosed no confidential information about WilmerHale's engagement, investigation, or conclusions.

opportunity for *potential adversaries* to obtain the information." *Smithkline Beecham Corp.* v. *Pentech Pharmaceuticals, Inc.*, No. 00 C 2855, 2001 WL 1397876, at *8 (N.D. Ill. Nov. 6, 2001) (Nolan, J.) (emphasis added) (citations and internal quotation marks omitted).

In any event, a public company's disclosure of information to its independent auditor does not increase the likelihood that an adversary will obtain the disclosed information. *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006) (Nolan, J.) ("[T]he fact that an independent auditor must remain independent from the company it audits does not establish that the auditor also has an adversarial relationship with the client as contemplated by the work product doctrine. Disclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information."); *see also Gutter* v. *E.I. Dupont de Nemours and Co.,* No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) ("Transmittal of documents to a company's outside auditors does not waive the work product privilege because such a disclosure cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs.") (citations and internal quotation marks omitted); *In re Pfizer Inc. Securities Litigation*, No. 90 Civ. 1260, 1993 WL 561125, at *6 (S.D.N.Y Dec. 23, 1993) (lawyers and independent auditors "obviously shared common interests in the information, and [the independent auditor] is not reasonably viewed as a conduit to a potential adversary"). Work product protection was not waived by providing the Restructuring Report to KPMG.

### C. If Waiver Could Be Found, Its Scope Would Be Very Narrow

Even if the Court were to find that a waiver of privilege occurred as to the Restructuring Report, no further waiver may be found as to underlying documents relating to the same subject matter. *Canel* v. *Lincoln National Bank*, 179 F.R.D. 224, 226 (N.D. Ill. 1998) ("there exists no subject matter waiver for the kind of work product expressly defined in Fed. R. Civ. P. 26(b)(3) as the 'mental impressions, conclusions, opinions, or legal theories of an attorney'"); *Bramlette* v. *Hyundai Motor Co.*, No. 91 C 3635, 1993 U.S. Dist. LEXIS 12112, at *11 (N.D. Ill. Aug. 31, 1993) ("Nor does disclosure of some documents destroy work product protection for other documents of the same character."). "Subject matter waiver based on disclosure is a form of implied waiver which is designed to ensure fairness to litigants." *Hollinger*, 230 F.R.D. at 516. In fact, subject matter waiver of work product protection is

"generally reserved for instances where a selective disclosure is intended to gain a tactical advantage in the context of litigation." *In re Brand Name Prescription Drugs Antitrust Litigation*, No. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 17110, at *6 (N.D. Ill. Nov. 14, 1995) ("the mere inadvertent production of documents does not waive the privilege") (internal citations omitted). As discussed above, Defendants have repeatedly explained to Plaintiffs that we have no intention of affirmatively using the Restructuring Report in this litigation. Thus here, as in *Hollinger*, Defendants are not attempting to inject the Restructuring Report into this litigation, and no prejudice will result from the absence of disclosure. *Hollinger*, 230 F.R.D. at 519.

In the context of an investigatory report, the fact that the report itself has been shared does not result in subject-matter waiver as to interview notes, memoranda, and drafts underlying the report. *See Neal* v. *Honeywell, Inc.*, No. 93 C 1143, 1995 U.S. Dist. LEXIS 14488, at **20–22 (N.D. Ill. Oct 3, 1995) (holding that disclosure of an investigatory report to the adversary did not result in a subject matter waiver as to opinion work product that had not been produced); *Chamberlain Manufacturing Corp.* v. *Maremont Corp.*, No. 90 C 7127, 1993 U.S. Dist. LEXIS 371, at **7–8 (N.D. Ill. Jan. 15, 1993) (finding that documents underlying an investigatory report would not necessarily be included in a subject matter waiver of privilege). Thus, even if the Court were to find a waiver of privilege as to the Restructuring Report itself, notwithstanding that the report has not been disclosed except where pursuant to express written non-waiver agreements, no waiver should be imputed to other documents, such as interview notes, memoranda, drafts of the report and other underlying documents, that have not been shared with any third party.[10]

### D. Plaintiffs Have Not Satisfied the Stringent Standard for Disclosure of Information Protected by the Work Product Doctrine

Plaintiffs contend that the Restructuring Report and "its underlying evidentiary bases" must be produced notwithstanding the protection of the work product doctrine because

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[10] Many of the documents sought by the Plaintiffs are attorney work product that has not been shared with the client. (Wrathall Dec. ¶ 9). Even if the Court were to find for any reason that Household's work product privilege was waived as to any of the materials Plaintiffs seek, the *attorneys'* work product privilege has not been waived as to attorney work product that was not shared with the client. *See Vardon Golf Co.* v. *Karsten Manufacturing Corp.*, 213 F.R.D. 528, 534 (N.D. Ill. 2003) ("[T]o the extent [the attorneys'] work product has not been shared with its client, it has not been waived.").

Plaintiffs claim to have demonstrated that they have a substantial need for the materials and that they cannot obtain the substantial equivalent without undue hardship. Although Plaintiffs have not specifically identified what documents they claim to need, their generalized demand for "discovery concerning the preparation of the Restructuring Report, including any documents memorializing WCP's interviews of 'over forty' Household employees" (Pl. Mot. at 7) makes clear that their goal is to compel the disclosure of WilmerHale's opinion work product. *See Hollinger*, 230 F.R.D. at 512 (finding that undisclosed drafts, interview notes, memoranda of witnesses' oral statements, and internal legal memoranda prepared by attorneys which analyze the facts under the applicable legal standards "constitute classic opinion work product . . . because they contain the attorneys' mental impressions, conclusions, opinions and legal theories). When a party seeks to discover such information, "a showing of substantial need and undue burden is not sufficient. Rather, the moving party must make 'a far stronger showing of necessity and unavailability.'" Id. Plaintiffs cannot satisfy this exacting test.

Plaintiffs' "substantial need" argument is a chain that is missing several crucial links. Plaintiffs claim that they have demonstrated "substantial need" because the Restructuring Report and underlying documents "are necessary to cross-examine Household's reliance on any of these materials at trial." Pl. Mot. at 7. But not only is there no demonstration that Plaintiffs need such documents to conduct a cross-examination, there is no need even for the cross-examination Plaintiffs hypothesize — because Defendants have consistently informed Plaintiffs that we do not intend to introduce the Restructuring Report at trial.[11] Passing that Plaintiffs have already obtained the Restructuring Report pursuant to a non-waiver agreement, Plaintiffs have no need — much less a substantial need or necessity — to obtain privileged documents for use in a cross-examination they will not need to conduct.[12]

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[11] Defendants do not intend to introduce the Restructuring Report, or any other privileged materials relating to the underlying investigation by WilmerHale or the preparation of its Reports — despite the fact that the Reports are generally favorable to Household — because Defendants recognize, as Plaintiffs apparently do not, that the Reports have no probative value in this litigation. The Reports were produced nearly six months after the close of the Class Period and, even to the extent that the findings detailed in the Reports might relate to events that occurred during the Class Period, the findings in the Reports plainly constitute inadmissible hearsay.

[12] Plaintiffs also miss the mark when they attempt to import the disclosure standards for testifying experts, by arguing that they "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."

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Plaintiffs' "undue hardship" argument is equally vacant. First, they contend that they must be provided with documents that memorialize the interviews WilmerHale conducted in the course of its investigation — which are classic opinion work product — because Plaintiffs are permitted to take "only 55 depositions" in this litigation (Pl. Mot. at 7) and thus cannot depose all of the employees who were interviewed by WilmerHale. Plaintiffs have not even attempted to explain or justify why it would be necessary to depose everyone WilmerHale interviewed in order to "test WCP's conclusions" (Pl. Mot. at 1), even passing the fact that Household does not intend to make "WCP's conclusions" part of its defense. Even more to the point, as Plaintiffs have already deposed or scheduled the deposition of nine employees or former employees of HMS, they already have had more than ample opportunity to explore the factual bases for Ms. Markell's allegations and for the conclusions in the Restructuring Report, had they chosen to do so. Even if Plaintiffs were seeking only fact work product, which they clearly are not, their showing would be insufficient. For example, "[D]iscovery of work product will be denied if a party can obtain the information he seeks by deposition." *In re International Systems & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240 (5th Cir. 1982); *see also Eagle Compressors, Inc.* v. *HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D. Ill. 2002) (explaining that the party seeking fact work product must meet "difficult burden" satisfied only in "'rare situations, such as those involving witness unavailability'") (quoting *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)).

Second, Plaintiffs contend that they must obtain copies of all of the underlying documents that WCP reviewed in the course of its investigation, without specification or distinction, because Plaintiffs speculate that "emails that were available to WCP" may have been inadvertently deleted from Household's computers. Pl. Mot. at 8. This all-too-familiar shibboleth does not suffice to show undue hardship. Assuming that Plaintiffs' goal is, as stated at in their Motion, to "test WCP's conclusions" (Pl. Mot. at 1), they have already obtained, without any

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Pls. Mot. at 10 (emphasis added). The disclosure standards of Fed. R. Civ. P. 26(b)(4) are not applicable to this dispute and,, moreover, it is Plaintiffs who have chosen to focus on the Restructuring Report even though it was produced months after the end of the Class Period and is entirely without probative value and despite Defendants' assurance that they do not intend to use the documents Plaintiffs seek to discover.

hardship at all, the documentary information that KPMG used to validate the accuracy of the information. Plaintiffs have received to date more than four million pages of documents from Defendants, they continue to serve additional document demands on Defendants and subpoenas on third parties, and they have taken or will take the depositions of 55 witnesses. Plaintiffs have failed to demonstrate that they have need of anything further.

Plaintiffs have not made a showing of substantial need and undue burden sufficient to justify setting aside the protection of work product doctrine.

**CONCLUSION**

For the reasons set forth above, Plaintiffs' 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 should be denied.

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Chicago, Illinois

Respectfully submitted,

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