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FILED
NOVEMBER 7, 2006
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,	Lead Case No. 02-C-5893 (Consolidated)
Plaintiff,	CLASS ACTION
- against -	Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan
HOUSEHOLD INTERNATIONAL, INC., ET AL.,	
Defendants.	

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 LLP

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household"), Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Defendants") in opposition to Plaintiffs' motion to compel the production of documents pertaining to Household's consultations with Ernst & Young LLP ("E&Y").

INTRODUCTION

Plaintiffs have moved to compel the production of documents concerning Household's engagement of E&Y, an accounting and consulting firm that was hired by the General Counsel of Household to assist him in providing legal advice in connection with existing and anticipated litigation. As shown below, the documents relating to the engagement are protected by both the attorney-client privilege and the work product doctrine, and those protections have not been waived or otherwise overcome.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs seek documents relating to E&Y's review of various state regulatory compliance aspects of Household's Consumer Lending operation (the "Compliance Engagement"). *See* Declaration of Kenneth H. Robin, Esq., dated November 3, 2006 ("Robin Decl.") Ex. 1.[1] The Compliance Engagement was triggered by a lawsuit brought by the State of California which had alleged, *inter alia,* that Household had overcharged or charged excessive fees to California customers. *Id.* ¶ 3. Household was concerned that other states and/or class action plaintiffs lawyers might bring similar claims, and had also received formal inquiries from the Attorneys General of the states of Arizona and Washington. *Id.* At the time it retained E&Y, Household was preparing for its first negotiation session with a Multistate Working Group of state Attorneys General ("the Working Group") regarding threatened claims arising from its consumer lending practices. *Id.* The Compliance Engagement

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[1] In addition to the redacted copy of the engagement letter attached to the Robin Declaration, an unredacted copy has been submitted *in camera* for the Court's convenience. Defendants are prepared to submit any additional documents *in camera* that the Court believes will assist it in deciding the present motion.

entailed the review of possible overcharges associated with such loan features as administrative fees, late fees, and prepayment penalties. *Id.* ¶ 2.

The review was commissioned and conducted in order to assist Household's General Counsel in providing legal advice to Household regarding existing and threatened litigation relating to the compliance issues under review. This purpose is expressly confirmed by E&Y on the first page of the engagement letter, which states:

> We understand that you will be utilizing the Work Product in order to provide legal advice to your client, Household, in your capacity as General Counsel. As such, all Work Product shall be deemed covered by the attorney-client privilege. Furthermore, it is our understanding that Household companies are currently involved in various types of litigation for which the Work Product may be used and anticipate such litigation in the future. As such, all Work Product shall be treated by E&Y as privileged under the attorney work product privilege.

Id. Ex. 1.

E&Y was retained because the Office of the General Counsel lacked some of the resources needed to conduct this review on its own. *Id.* ¶ 4. The Compliance Engagement required (i) sophisticated quantitative analyses, (ii) expertise in identifying and addressing compliance issues, and (iii) a substantial commitment of personnel. *Id.* The General Counsel's Office required the services of a firm such as E&Y with significant expertise and resources in order to provide legal advice to Household regarding existing and threatened litigation. *Id.* Due to their other commitments and overall workload, as well as the level of expertise and manpower required, it would not have been possible for Household personnel to have performed all of the tasks that E&Y performed. *Id.* At all times while performing services pursuant to the Compliance Engagement, E&Y acted as an agent of Household's General Counsel, subject to the latter's control and direction. *Id.* ¶ 5.

On September 24, 2002, Household's General Counsel wrote to the Working Group regarding possible means of resolving that Group's articulated concerns and threat of litigation. *See* Declaration of D. Cameron Baker, dated October 16, 2006 ("Baker Decl."), at Ex. F. The proposal set forth in that letter was meant to serve as a basis for further settlement negotiations. Robin Decl. ¶ 6. As part of its proposal, Household indicated that it was amenable to sharing the results of a *future* audit of ongoing compliance with the terms of any settlement agreement that may be reached, to be

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conducted either by E&Y or another firm. Baker Decl. Ex. F; Robin Decl. ¶ 6. Household also indicated that it was amenable to sharing the results of a prospective secret shopper program as part of a settlement, provided "strictest confidentiality could be maintained." Baker Decl. Ex. F; Robin Decl. ¶ 6. These suggestions were just that — suggestions — made in the course of settlement negotiations, and the suggestion regarding the secret shopper program was never pursued. Robin Decl. ¶ 6. The September 24, 2002 letter mentions the Compliance Engagement, but does *not* state that Household would be amenable to sharing the results of that engagement with the Working Group. Baker Decl. Ex. F; Robin Decl. ¶ 6.

On October 11, 2002, Household and the Multistate Working Group reached and announced a settlement of the Group's predatory lending allegations against Household. Robin Decl. ¶ 7, Ex. 2. The settlement agreement provided that Household would retain, subject to the approval of the settling states, an "independent monitor" who would "ensure compliance with the terms of the agreement" (the "Settlement Audit"). *Id.* While the settlement agreement provided that the reports of this future "independent monitor" in connection with the Settlement Audit would be provided to the Attorneys General, it did not provide access to any of the materials relating to the pre-existing Compliance Engagement that is the subject of this motion. *Id.* Household never shared the results of the Compliance Engagement at issue here with the Attorneys General at any point in time. *Id.* ¶ 8. Nor did Household ever share the results of the Compliance Engagement with the S.E.C., the O.T.S., or any other government agency, authority, or entity. *Id.* At all times, the Office of the General Counsel has taken care to hold the results of the Compliance Engagement and related privileged material in strictest confidence. *Id.*

In late May 2006, Plaintiffs served a subpoena on E&Y that demanded that E&Y produce a witness to be deposed regarding, *inter alia*, the Compliance Engagement and produce documents relating to that engagement. Declaration of Susan Buckley, dated November 3, 2006 ("Buckley Decl."), Ex. 1. E&Y served written objections to the subpoena by letter dated June 6, 2006.[2] *See*

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[2] Plaintiffs have not moved to compel E&Y to comply with this subpoena, despite the fact that E&Y objected on numerous grounds independent of any claim of attorney-client privilege or work product

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Baker Decl. Ex. I. On June 14, 2006, counsel for Plaintiffs wrote to E&Y (without copying counsel for Defendants) asking "whether [E&Y] has been instructed by Household to withhold all documents based on" the attorney-client privilege and the work product doctrine. *Id.* E&Y forwarded a copy of this letter to Defendants' counsel, who responded on June 29, 2006, informing Plaintiffs that Defendants were in the process of gathering information relating to work performed by E&Y for Household during the Class Period in order to determine whether this work was of a privileged nature. Buckley Decl. Ex. 2. In a follow-up letter on July 13, 2006, Defendants' counsel informed Plaintiffs that the inquiries concerning the work performed by E&Y during the Class Period were largely complete and that Defendants had established that materials relating to that work were protected by the attorney-client privilege and the work product doctrine. *Id.* Ex. 3. Defendants' counsel enclosed a redacted copy of the engagement letter for the Compliance Engagement, which, as discussed above, clearly demonstrates that the engagement was of a privileged nature.[3] *Id.* Despite the obvious centrality of this engagement letter to the issues presented by this motion, Plaintiffs failed to provide it to the Court or even mention it in their papers.

On July 21, 2006, pursuant to Paragraph 28 of the Protective Order, Defendants recalled several privileged documents relating to the Compliance Engagement that had been inadvertently produced during the course of Defendants' document production. *Id.* Ex. 4. On July 25, 2006, Plaintiffs refused to return the documents, arguing that Defendants had waived their right to assert any privilege over the documents because Plaintiffs believed that Defendants had not recalled the documents within ten days of discovering their inadvertent production, and that in any event, the documents did not "on their face reflect any privilege". *Id.* Ex. 5. Plaintiffs also threatened to "con-

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protection.

[3] Defendants' counsel also enclosed redacted copies of two other engagement letters regarding E&Y engagements entered into during the Class Period. One was also dated July 1, 2002, and the other was dated September 25, 2002. *Id.* These engagements addressed different issues from those addressed in the Compliance Engagement, and thus are not germane to Plaintiffs' motion. In any event, documents relating to these separate engagements are not relevant to Plaintiffs' claims in this case, and would be privileged for the same reasons set forth in this Memorandum.

tinue to use the documents in compliance with the Protective Order." *Id.* Defendants responded to Plaintiffs' baseless assertions by letter dated July 27, 2006.[4] *Id.* Ex. 6. Defendants pointed out to Plaintiffs that the July 21 recall of the inadvertently-produced documents relating to the Compliance Engagement was well within the ten-day period from July 13, 2006, when they had determined that such documents were privileged. *Id.* Defendants also noted that the documents had been inadvertently produced in the first instance precisely because "on their face" they did not indicate that they were privileged, and it was only after an inquiry into the Compliance Engagement that it was possible to determine the privileged nature of these documents. *Id.* Furthermore, Defendants pointed out that Plaintiffs could not "continue to use" the disputed documents consistent with Paragraph 30 of the Protective Order. *Id.* Plaintiffs responded on August 2, 2006, again refusing to return the documents. *Id.* Ex. 7.

On August 7, 2006, Plaintiffs indicated that they would agree to meet and confer regarding the disputed documents only if Defendants satisfied certain unilateral "precondition[s]": that Defendants provide a privilege log for the disputed documents that were already in Plaintiffs' possession; that Defendants identify the date(s) on which Defendants discovered the inadvertent production of each of the disputed documents; and that Defendants represent that the list of disputed documents in the July 21 letter was a comprehensive list of the documents at issue with respect to E&Y. *Id.* Ex. 8. By letter dated August 9, 2006, Defendants offered to meet and confer on the issue the following day, indicating that a privilege log for the disputed documents would be forthcoming in the ordinary course; that a review of prior correspondence established when Defendants became aware that the disputed documents had been inadvertently produced; and that Defendants had made a diligent and good faith search for all privileged documents relating to the Compliance Engagement and any other privileged E&Y engagements during the Class Period, but that they reserved their rights under the Protective Order with respect to any other such documents later discovered to have been inadvertently produced. *Id.* Ex. 9. In a round of letters over the next few days, Plaintiffs again imposed con-

[4] Mr. Baker conveniently neglected to include this letter in his Declaration submitted in support of the present motion.

ditions upon a meet and confer, and Defendants repeated their willingness to talk. *Id.* Exs. 10-12. From the time of Defendants' last letter to this effect on August 14, 2006, Plaintiffs remained silent on this subject until they filed the instant motion in the waning weeks of fact discovery. No "meet and confer" was ever had despite Defendants' several offers to participate in one.[5]

ARGUMENT

I. CONFIDENTIAL COMMUNICATIONS BETWEEN HOUSEHOLD AND ERNST & YOUNG IN CONNECTION WITH THE COMPLIANCE ENGAGEMENT ARE PROTECTED FROM DISCLOSURE UNDER THE ATTORNEY-CLIENT PRIVILEGE

A. The Attorney-Client Privilege Applies

It is black-letter law that documents and other communications provided to a third party are fully protected by the attorney-client privilege if the third party is: (i) acting as agent for the attorney (ii) for the purpose of assisting with the provision of legal advice. *See*, *e.g.*, *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000); *Brown* v. *Trigg*, 791 F.2d 598, 601 (7th Cir. 1986) ("Brown's counsel hired Thornberg to administer a polygraph and testify at the juvenile court waiver hearing. Thornberg was an agent of Brown's attorney, and as such was protected by the attorney-client privilege."); *United States* v. *McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979) (statements made to investigator acting as agent for attorney were privileged; "it is as if the communication was to the attorney himself").

The leading case establishing this rule, *United States* v. *Kovel*, 296 F.2d 918, 922 (2d Cir. 1961), held that confidential communications made to an accountant hired by the client's attorney to assist the attorney in rendering tax advice to the client were protected by the attorney-client privilege. In so ruling, the Court of Appeals recognized that "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others," and concluded that "'the privilege must include all the persons who act as the attorney's agents'" when the assistance of the agent is "indispensable" to the attorney's work. *Id.* at 921 (citation omitted).

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[5] Plaintiffs' failure to meet and confer before filing their motion, as required by the Protective Order, is just the latest example of Plaintiffs' failure to abide by that Order. Protective Order ¶ 30. It is an additional reason for this Court to deny Plaintiffs' motion.

In the Seventh Circuit and the Northern District of Illinois, the attorney-client privilege has been held to extend to communications with and the records of various types of attorney's agents, including accountants, *see In re Grand Jury Proceedings*, 220 F.3d at 571; investigators, *see McPartlin*, 595 F.2d at 1337; polygraph examiners, *see Brown*, 791 F.2d at 601; child interviewers, *see Sharonda B.* v. *Herrick*, No. 97 C 1225, 1998 WL 341801, at *5 (N.D. Ill. June 11, 1998)[6]; collection agents, *see Vasquez* v. *Sears, Roebuck & Co.*, Nos. 84 B 00224, 97 A 00407, 1998 WL 191271, at *6 (Bankr. N.D. Ill. Apr. 21, 1998); and foreign patent agents, *see Baxter Travenol Laboratories, Inc.* v. *Abbott Laboratories*, No. 84 C 5103, 1987 WL 12919, at *8 (N.D. Ill. June 19, 1987); *Mitts & Merrill, Inc.* v. *Shred Pax Corp.*, 112 F.R.D. 349, 352 (N.D. Ill. 1986); *Mendenhall* v. *Barber-Greene Co.*, 531 F. Supp. 951, 954 (N.D. Ill. 1982).

Here, E&Y was retained by the General Counsel of Household, Kenneth H. Robin, Esq., specifically as an agent of his legal department. Robin Decl. ¶ 5. Indeed, the engagement letter specifies that E&Y was serving as an agent of the General Counsel's office. *See*, *e.g.*, *id.* Ex. 1, Appendix B ("the Attorneys have retained Ernst & Young to assist the Attorneys rendering legal advice to Household Finance Corporation and certain of its affiliates"). The compliance review conducted by E&Y was expressly for the purpose of assisting Household's legal department in providing legal advice to Household regarding pending or anticipated litigation. *Id.* ¶ 3, Ex. 1. It is also clear that both the Household legal department and E&Y understood the engagement to be for this purpose, because the engagement letter laid out in painstaking detail the procedures that E&Y was to follow in order to preserve the privileges that attached to the documents and other materials provided to or generated by E&Y during the course of the review. *See id.* E&Y was hired to conduct a compliance review involving complex quantitative analyses and extensive information-gathering that the General Counsel's office could not conduct on its own, but for which firms such as E&Y are especially qualified.[7] *Id.* ¶ 4. Because E&Y, in conducting the review at issue, was serving as an agent of House-

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[6] An Appendix of Unreported Cases has been submitted herewith for the Court's convenience.

[7] Plaintiffs argue that "E&Y was not necessary for in-house lawyers to understand Household's business practices or to calculate refunds" because "Household had its own internal departments that could and did provide these same tasks." Pl. Br. at 5. In support of this argument, Plaintiffs point to a

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hold attorneys to assist in their provision of legal advice to Household, any confidential communications between Household and E&Y regarding the review are protected by the attorney-client privilege.

Plaintiffs implausibly argue that "Household's in-house counsel were not signing [the engagement letter] as counsel, but on behalf of the corporate entities[,]" Pl. Br. at 4 n.4, citing a single-page memorandum dated June 20, 2002 in which Mr. Robin states that "Kay [Curtin, General Counsel of Household Finance Corporation] can sign in my absence on behalf of HFC and I will also sign upon my return on behalf of [Household International, Inc.]." Baker Decl. Ex. K. This argument is completely disingenuous, considering that Plaintiffs have in their possession (but failed to provide to the Court) the actual engagement letter, which makes absolutely clear that E&Y understood that Mr. Robin and Ms. Curtin would "be utilizing [E&Y's] Work Product in order to provide legal advice to your client, Household [previously defined in the engagement letters as Household International, Inc. and Household Finance Corporation, collectively] in your capacity as General Counsel." Robin Decl. Ex. 1.

Plaintiffs also argue that "all communications between in-house counsel on the one hand and E&Y on the other are communications not involving any client." Pl. Br. at 4 n.4. Since E&Y was acting as the General Counsel's agent, that is akin to arguing that a discussion between two in-house lawyers at Household in connection with rendering legal advice to Household is not privileged. This absurd argument does not even hold up factually, because all of the documents listed in Exhibit E to the Baker Declaration, as well as all of the documents recalled in the July 21 letter, were in fact communicated by or to non-legal Household personnel. *See* Buckley Decl. Exs. 12-13. Furthermore, to the extent that the documents or communications reveal confidential information previ-

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spreadsheet indicating that Household personnel were also involved in calculating refunds. Baker Decl. Ex. N. However, a closer review of this document demonstrates that the work being performed by Household personnel and that performed by E&Y for the most part did not overlap. It would not have been possible for Household personnel to have performed all of this work on their own, due to the resources and expertise required. Robin Decl. ¶ 4.

ously communicated by Household either directly to its in-house attorneys or to E&Y as agent for those attorneys, the documents are privileged regardless of whether the documents themselves were communicated to or from a non-lawyer. *See*, *e.g.*, *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 495 (7th Cir. 1984) ("billing sheets or time tickets which indicate the nature of documents prepared, issues researched, or matters discussed could reveal the substance of confidential discussions between attorney and client"); *SmithKline Beecham Corp.* v. *Pentech Pharmaceuticals, Inc.*, No. 00 C 2855, 2001 WL 1397876, at *1 (N.D. Ill. Nov. 6, 2001) (Nolan, M.J.) ("In determining whether a document is subject to the attorney-client privilege, the primary question is whether 'the document in question reveal[s], directly or indirectly, the substance of a confidential attorney-client communication.'") (citation omitted).

Finally, Plaintiffs claim that, as part of settlement discussions, Household offered to share the results of the Compliance Engagement with the Working Group, and thereby demonstrated that it never intended to maintain the confidentiality of the documents relating to that engagement. Pl. Br. at 2, 5. Plaintiffs' claim is false. Plaintiffs make this disingenuous argument by selectively quoting from the document at issue. *Id.* at 2. However, as the document cited by Plaintiffs clearly states, *see* Baker Decl. Ex. F, Household only suggested that, as a potential part of an eventual settlement with the Working Group, it would consider sharing the audit results of a future "secret shopper" program and a future audit of ongoing compliance with any settlement agreement. Robin Decl. ¶ 6. Household *never* indicated any willingness to share the audit results of the Compliance Engagement. *Id.* When a settlement with the Working Group was eventually reached, it did not provide the Working Group with access to any of the materials relating to the Compliance Engagement. *Id.* ¶ 7. Household never shared the audit results of the Compliance Engagement with the Attorneys General, with the S.E.C., or with any other government agency, authority, or entity, and has maintained the results of that engagement in strictest confidence. *Id.* ¶ 8.

B. The *Garner* Exception is Inapplicable

Plaintiffs argue that the exception to the attorney-client privilege articulated in *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) applies in this case. However, the *Garner* exception,

to the extent that it remains viable, applies only in derivative actions or similar actions in which the party seeking discovery actually stands in the shoes of the holder of the privilege. To the extent that *Garner* could be interpreted to apply in a private securities fraud action for individual damages, it is no longer good law following subsequent decisions of the United States Supreme Court, and thus has no application in this case.

Garner involved a derivative action brought by shareholders against a corporation and its officers. *Id.* at 1095. In articulating a complicated multi-factor balancing test to determine whether the shareholders purporting to stand in the corporation's shoes could establish "good cause" to preclude assertion of the corporation's attorney-client privilege, the *Garner* court noted that "[d]ue regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege, sometimes injuriously. . . . The corporation is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders, even others constituting a majority." *Id.* at 1101 n.17. The court also observed that impinging on the privilege may be inappropriate in "situations in which the corporate entity or its management, or both, have interests adverse to those of some or all stockholders." *Id.* at 1101.

Indeed, in the decades since *Garner* was decided by the Fifth Circuit Court of Appeals, other courts have questioned the extent to which the exception it articulated has application outside the context of derivative actions, and, in particular, whether it can be extended to private securities fraud actions in which shareholders seek recovery for their own damages, rather than on behalf of the corporation. For example, in *Weil* v. *Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981), the Ninth Circuit held that *Garner* was "inapposite" because the case was a securities class action "to recover damages from the corporation for [plaintiff] and the members of her proposed class" rather than a derivative suit on behalf of the corporation. Similarly, in *In re LTV Securities Litigation*, 89 F.R.D. 595, 608 (N.D. Tex. 1981) — a case arising within the Fifth Circuit — the court refused to follow *Garner* in a securities fraud class action, noting that "[t]he Plaintiff class is frozen when corporate wrongdoing ends. From that time on, the class interests are adverse to the corporation which has allegedly defrauded it, and possibly adverse to nonparty shareholders as well." The Fifth Circuit itself has called into doubt the wisdom of applying the *Garner*

exception in non-derivative securities fraud cases. *See Ward* v. *Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988) (declining to vitiate privilege in a non-derivative action that "necessarily ar[ose] from some adverse interests").

Plaintiffs attempt to analogize this case to *In re General Instrument Corp. Securities Litigation*, 190 F.R.D. 527 (N.D. Ill. 2000). However, *General Instrument* involved two *derivative* suits, wherein the shareholders were suing on behalf of the corporation rather than for personal damages. *Id.* at 528. Where securities fraud claims for private, individual damages are part of the case, the interests of the parties, not to mention those of the non-party shareholders, are at such loggerheads that application of the *Garner* exception is inappropriate. In *Ohio-Sealy Mattress Manufacturing Co.* v. *Kaplan*, 90 F.R.D. 21, 31-32 (N.D. Ill. 1980), for example, the court refused to apply the *Garner* exception even though part of the case *was* based on derivative claims, observing that "[t]he information that plaintiffs would obtain by virtue of their representation of Sealy in the derivative action could be used to the corporation's detriment in the individual litigation between plaintiffs and Sealy." Because this case is a securities fraud class action, in which Plaintiffs seek to recover damages for themselves at the expense of the corporation and the corporation's current shareholders, rather than a derivative suit brought on behalf of the corporation, the *Garner* exception simply has no application here.

Indeed, in cases decided well after *Garner*, the United States Supreme Court has repeatedly declined to treat privilege as a flexible, fact-dependent concept susceptible to a balancing of the conflicting interests of litigants. For example, in *Upjohn Co.* v. *United States*, 449 U.S. 383, 392-93 (1981), in explaining why it had rejected the "control group" test for application of the attorney-client privilege to corporate clients, the Court emphasized the need for predictability and certainty in the application of the privilege:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Id. at 393. Citing this passage from *Upjohn*, the Supreme Court, in *Jaffee* v. *Redmond*, 518 U.S. 1, 17-18 (1996), rejected a balancing component in the application of the federal psychotherapist-patient privilege, concluding that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." Finally, citing both *Upjohn* and *Redmond*, the Supreme Court held in *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998) (emphasis added), that the attorney-client privilege survives the death of the client in both civil and criminal cases, explaining that "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, ***we have rejected use of a balancing test in defining the contours of the privilege***." In short, the Supreme Court has made perfectly clear that, under the federal common law of privilege, balancing tests employed to determine whether the attorney-client privilege should be honored are forbidden, because such tests create impermissible uncertainty and frustrate the very purpose of the privilege. These cases require the Court to reject Plaintiffs' invitation to engage in an impermissible balancing test based on the complicated formula they derive from an old case in another jurisdiction whose reasoning is properly confined to derivative actions or other actions in which the interests of the party seeking disclosure and those of the privilege holder are ostensibly aligned. If *Garner* could possibly be interpreted to establish a complicated balancing test to determine the application of the attorney-client privilege in the context of a private securities fraud action, in view of subsequent Supreme Court developments it can no longer be considered good law.

II. DOCUMENTS RELATING TO THE COMPLIANCE ENGAGEMENT ARE PROTECTED FROM DISCLOSURE UNDER THE WORK PRODUCT DOCTRINE

The work product doctrine provides an additional independent basis for the protection of the documents relating to the Compliance Engagement. The work product doctrine shields from disclosure all "documents prepared in anticipation of litigation by a party's representative or agent." *Hollinger International Inc*. v. *Hollinger, Inc*. 230 F.R.D. 508, 511 (N.D. Ill. 2005) (Nolan, M.J.); *see also* Fed. R. Civ. P. 26(b)(3) (protecting from disclosure materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative"). As dis-

cussed in detail above, E&Y was plainly functioning as an agent of Household's attorneys. It is equally clear that documents prepared by E&Y in connection with the Compliance Engagement were prepared "in anticipation of litigation."

When interpreting the meaning of "in anticipation of litigation," courts look to "'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.'" *Hollinger*, 230 F.R.D. at 512 (citation omitted); *see also Lawrence E. Jaffe Pension Plan* v. *Household International, Inc.*, 237 F.R.D. 176, 181 (N.D. Ill. 2006) (Nolan, M.J.) ("documents are protected by the work product privilege if they were prepared or obtained 'because of' the prospect of litigation'"). Here, the Compliance Engagement was conducted in response to the lawsuit brought by the State of California and in anticipation of other states potentially bringing similar lawsuits, and in preparation for discussions with the Working Group regarding perceived abuses of various consumer lending practices. Robin Decl. ¶ 3. No "readily separable business purpose" existed for the creation of any of the documents that were created in connection with the Compliance Engagement. *See Hollinger*, 230 F.R.D. at 514 ("the [Special Committee] Report was created because litigation was reasonably anticipated. There was no readily separable business purpose...").

Plaintiffs argue that at least some of the documents relating to the Compliance Engagement are discoverable because they were prepared by non-lawyers and thus constitute "fact" rather than "opinion" work product, and that Plaintiffs have overcome the qualified work production protection for such documents by showing a substantial need for the documents and undue hardship in obtaining the substantial equivalent of the documents by other means. Pl. Br. at 7-8. However, as the engagement letter itself makes clear, *see* Robin Decl. Ex. 1, the Compliance Engagement was being conducted at the direction and under the supervision of Household attorneys. An analysis of documents created in connection the Compliance Engagement, even if those documents were not themselves prepared by an attorney, would undoubtedly reveal to Plaintiffs the nature and focus of the work being conducted by E&Y at the request of Household's attorneys, thereby invading the inviolable area of opinion work product. Documents reflecting opinion work product receive, "for all

intents and purposes, . . . absolute protection." *Portis* v. *City of Chicago*, No. 02 C 3139, 2004 WL 1535854, at *2 (N.D. Ill. July 7, 2004) (Nolan, M.J.).

In any event, Plaintiffs have not shown and could not possibly show substantial need and undue hardship. As this Court well knows, Defendants have made an exhaustive document production in this litigation, and Plaintiffs are in the process of taking 55 depositions of fact witnesses. Household has even been ordered to create special computer programs to compile and format Class Period account information in categories requested by Plaintiffs. Household has also provided responses to multiples sets of interrogatories and requests for admissions. In light of the tremendous volume of factual information made available to Plaintiffs, Plaintiffs' claim that they cannot obtain sufficient information regarding Household's lending practices without these privileged documents strains credulity. Plaintiffs' argument of less than one page, unsupported by any evidentiary submission such as an affidavit or declaration explaining exactly why Plaintiffs need these specific documents and what measures they have taken to obtain the substantial equivalent of the factual information contained therein, and why the millions of pages they have in hand will not suffice, comes nowhere close to meeting Plaintiffs' burden to overcome 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).

III. HOUSEHOLD HAS NOT WAIVED THE ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT PROTECTION WITH RESPECT TO DOCUMENTS RELATING TO THE COMPLIANCE ENGAGEMENT

Finally, Plaintiffs argue unpersuasively that Household has waived any applicable privilege or protection for documents relating to the Compliance Engagement. Plaintiffs claim that Household waived protection by revealing the subject matter (but not the details) of the Compliance Engagement to the Attorneys General, the S.E.C., and the O.T.S.; by failing to prevent the inadvertent production of some of the documents at issue and failing to recall those documents in a timely

manner; and by failing to provide a privilege log for the documents that have been withheld or re-called. Pl. Br. at 8-10. None of these arguments can withstand even the most cursory scrutiny.

The fact that Household revealed the general subject matter of the Compliance Engagement to third parties is of no consequence. "[A] client does not waive his attorney-client privilege 'merely by disclosing a subject which he has discussed with his attorney.' In order to waive the privilege, the client must disclose the communication with the attorney itself." *United States* v. *O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) (citation omitted). The general subject matter of attorney-client communications is not itself privileged, so disclosure of that general subject matter to a third party cannot constitute a waiver as to the substance of all attorney-client communications on that subject matter. *See In re Brand Name Prescription Drugs Antitrust Litigation*, No. 94 C 897, MDL 997, 1995 WL 531805, at *2 (N.D. Ill. Aug. 18, 1995) (finding no subject matter waiver where witness had "reveal[ed] nothing substantive about attorney-client communications" and whose references to legal advice were only "conclusory"); *Goldman, Sachs & Co.* v. *Blondis*, 412 F. Supp. 286, 289 (N.D. Ill. 1976) (finding no waiver as to the substance of certain attorney-client communications despite the fact that client had revealed that communications with his attorney on a particular subject matter had occurred; "[t]he general rule is that it is the substance of conversations which is protected, not the fact that they occurred"). Indeed, it would be impossible for a party to draft a meaningful privilege log entry for a privileged document if the party could not reveal the general subject matter of the attorney-client communication. The same logic applies to the alleged waiver of work product protection. Household did not disclose "work product" to the Attorneys General or the SEC simply by disclosing the fact that E&Y had been engaged to perform certain tasks.[8]

[8] Even when more information is provided than just the subject matter of the engagement (which is all that Household revealed), courts have found that such disclosures do not necessarily result in a broad subject-matter waiver. *See*, *e.g.*, *Hartford Fire Insurance Co.* v. *Pure Air on the Lake Ltd. Partnership*, 154 F.R.D. 202, 211 (N.D. Ind. 1993) (publication of one-page summary of conclusions of engineering firm retained to perform a study in anticipation of litigation did not waive work product protection for all documents relating to the study; summary "did not begin to recite all of [the engineering firm's] studies, factual findings or conclusions").

Additionally, the inadvertent production of some of the documents relating to the Compliance Engagement does not support a finding of waiver. The Protective Order in this case specifically contemplates that some privileged documents will be inadvertently produced and sets forth procedures for the recall of those documents — procedures that Defendants followed in this instance. *See* Protective Order, ¶ 28. As this Court has recently noted, "Defendants have produced some four million pages of documents in this case. . . . It was not unexpected that Defendants and their agents would inadvertently produce some privileged materials and indeed, the parties' agreed protective order outlines a procedure for returning such materials." *Lawrence E. Jaffe Pension Plan*, 237 F.R.D. at 183. Plaintiffs' argument that "many [of the recalled documents] on their face include legends indicating a potential privilege" (Pl. Br. at 9) is highly misleading. In fact, very few of the recalled documents have such a legend. With respect to the vast majority of recalled documents, it was not possible to tell from the face of the documents that they contained privileged information until counsel had developed an understanding of the nature and scope of the privileged Compliance Engagement. *See* Buckley Decl. Ex. 6. Furthermore, the fact that some of the documents relating to the Compliance Engagement were withheld in March does not indicate a global awareness of the potentially privileged nature of all other documents relating to that engagement. It was not until Defendants learned of the subpoena issued to E&Y that Defendants' counsel had occasion to inquire into the potentially privileged nature of the Compliance Engagement and to review its production for potentially privileged documents relating to that engagement, and it was not until mid-July that Defendants' counsel determined that the documents relating to that engagement were, in fact, subject to the attorney-client privilege and work product protection. *See id.* ¶ 4, Exs. 2-3. After making this determination, Defendants promptly recalled the inadvertently produced documents, as contemplated by the Protective Order.[9] Buckley Decl. Ex. 4.

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[9] Plaintiffs' argument that Defendants' failure to move to recover the inadvertently produced documents supports a finding of waiver is absurd. *See* Pl. Br. at 9. As Plaintiffs well know, the parties are required to meet and confer regarding disputes over recalled documents prior to making a motion to compel. Protective Order, ¶ 30. Defendants offered to meet and confer on this issue months ago — an offer that Plaintiffs declined. *See* Buckley Decl. Exs. 9-11. Because Plaintiffs are prohibited from using the documents until the dispute is resolved, *see* Protective Order, ¶ 30, Defendants had no need to

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Finally, Plaintiffs' argument that Defendants' failure to provide a privilege log for the disputed documents supports a finding of waiver is without merit. First, Plaintiffs' assertion that Defendants have failed to provide a privilege log for the documents withheld in March is patently incorrect. Defendants provided a privilege log for these documents on September 8, 2006, weeks before Plaintiffs filed their motion. *See* Buckley Decl. Ex. 12. With respect to the recalled documents, Defendants continue to be mystified why Plaintiffs insist on needing a privilege log in order to evaluate Defendants' privilege claims, *since Plaintiffs still have the actual documents and have refused to return them*. The privilege log will tell them virtually nothing that cannot be gleaned from a review of the documents themselves, every one of which has been identified to Plaintiffs by Bates numbers. In any event, Defendants have since provided Plaintiffs with a privilege log for these documents. Buckley Decl. Ex. 13. In support of their argument that the delay in providing these privilege logs supports a finding of waiver, Plaintiffs rely on *Burlington Northern & Santa Fe Ry.* v. *United States District Court*, 408 F.3d 1142 (9th Cir. 2005). However, that case explicitly rejected a *per se* rule that failure to provide a privilege log in a timely manner triggers a waiver of privileges, *id.* at 1147, and held that a court should take into account "the magnitude of the document production" in determining whether a waiver had occurred, *id.* at 1149. The court also noted that "particularly in discovery-intensive litigation, compiling a privilege log within 30 days may be exceedingly difficult, even for counsel who are sophisticated, experienced, well-funded, and acting in good faith." *Id.* at n.3. Plaintiffs also rely on *Universal City Development Partners, Ltd.* v. *Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 696 (M.D. Fla. 2005), which found waiver after a delay of three and a half months in providing a privilege log. However, that case involved only the "review and production of 13,000 pages of documents," *id.* at 695, while in this case Defendants have produced over *four million* pages of documents, have reviewed many, many more, and provided Plaintiffs with a privilege log of E&Y documents beginning less than two months after the privilege determinations were made. Furthermore, Defendants have already provided Plaintiffs with privilege log entries for nearly 6,200 separate

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documents. *See* Buckley Decl. Ex. 13. As this Court has already recognized, with a document production of this magnitude, a delay of a few months in resolving privilege issues is not unreasonable. *See Lawrence E. Jaffe Pension Fund*, 237 F.R.D. at 183 ("Given the volume of documents at issue in this case, the court does not view this delay [of between four and eighteen months from inadvertent production to recall of certain documents] as unreasonable.").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' motion to compel be denied.

Dated: November 3, 2006
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