UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

THE CLASS' REPLY IN SUPPORT OF 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

Defendants' Opposition is remarkable for what it does not include. Although defendants spend many pages trying to demonstrate an attorney-client relationship between Wilmer, Cutler & Pickering ("WCP") and Household International, Inc. ("Household"), they fail to cite even a single line of legal analysis or advice contained in the March 24, 2003 Restructuring Report ("Restructuring Report"). Similarly, defendants fail to set forth the portion of the Restructuring Report that supports their claim that it was prepared in anticipation of litigation. Indeed, the declaration of WCP attorney James R. Wathrall, submitted by defendants does not state that the Restructuring Report was prepared in anticipation of litigation. In other words, given the opportunity to establish work product protection through declaration, Mr. Wathrall could not do so. These failures are due to the simple fact that the Restructuring Report was not created as the result of an engagement for legal advice and it was not prepared in anticipation of litigation. Instead, the Restructuring Report was the result of a third-party's factual investigation which arose from Household and its auditor's statutory duties arising under the securities laws. Because WCP was engaged for its investigatory, rather than legal assistance, defendants have no valid privilege claim over the Restructuring Report or documents and communications related to WCP's investigation, including documents created and/or compiled at the request of WCP and recordings and notes from interviews of various Household employees.

What defendants' opposition does establish is that WCP was not, in fact, engaged by Household, but rather Household's Audit Committee. Indeed, at the start of the engagement, both Household and the Audit Committee recognized that WCP's representation of the Audit Committee may give rise conflicts of interest. This fact is evidenced by the signed engagement letter submitted by defendants which clearly defines Household and the Audit Committee as separate entities ***which may have conflicting interests with respect to the investigation***. *See* Wrathall Decl., Ex. A.[1] Because WCP's client was the Audit Committee, and not Household, communications between Household employees and WCP are not privileged. Furthermore, to the extent any privilege does exist. Household does not have standing to assert such privilege.

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[1] "Wrathall Decl." refers to the Declaration of James R. Wrathall, attached to the Household Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion Further Responses to the Class' Questions for Per Ekholdt Concerning Exhibit 13 and the Production of Documents Underlying Wilmer, Cutler & Pickering Reports ("Defs' Opp.").

Household's opposition also establishes conclusively that any privilege that may have protected the information sought by the Class has been waived. In an act that is brazen even by defendants' standards, Household produced for the first time in connection with its opposition a document that conclusively proves that ***"the [Restructuring Report], related letters and additional confidential and privileged materials" were voluntarily produced to the SEC more than three years ago.*** There is no question that this voluntary disclosure, made in an attempt to gain favor with the SEC, waived any applicable privilege protecting the information defendants seek to withhold from the Class. This Court should not countenance defendants' repeated efforts to hide behind the protection of privilege to prevent the Class from access to documents detrimental to them and their defenses. Privileges are to be used sparingly, and not in "derogation of the search for the truth." *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980).

Accordingly, the Court should order Household produce the documents at issue here.

II. ARGUMENT

A. Defendants Have Failed To Satisfy Their Burden To Prove The Documents At Issue Are Privileged

Defendants have the burden of proving the documents at issue merit protection under the attorney client privilege and work product doctrines. *See United States v. First State Bank*, 691 F.2d 332, 335 (7th Cir. 1982). They have failed to satisfy that burden.

1. Defendants' Submissions Show The Audit Committee Hired WCP For The Purpose of Conducting A Factual Investigation

In its opening papers, the Class demonstrated that WCP's work with respect to the Restructuring Report was to conduct a factual investigation, not render legal advice. Indeed, the documents submitted by defendants in opposition confirm this point. The Audit Committee stated it hired WCP "in order to comply with the requirements of 10A of the Securities [Exchange] Act of 1934."[2] *See* Brooks Decl., Ex. A.[3] The engagement letter dated February 13, 2003 (the "Engagement Letter") states that WCP was retained "for the purpose of conducting an inquiry into certain allegations that the Committee has discussed with its external auditors, KPMG." *See*

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[2] The import of KPMG LLP's ("KPMG") and the company's obligations under Section 10A are discussed herein.

[3] "Brooks Decl." refers to the Declaration of Luke O. Brooks in Support of the Class' Reply in Support of 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.

Wrathall Decl., Ex. A at 1. And the Restructuring Report spells out in plain terms that its purpose was [redacted] and [redacted] Class' Motion, Ex. 2.

None of the materials generated in connection with the Restructuring Report were created for the purpose of obtaining legal advice. Defendants' contrary arguments are fatally flawed because they ignore the contents of the report. Nowhere in their 17-page opposition do defendants cite to even a single line of legal analysis from the Restructuring Report. It simply isn't there. In fact, the entire report reads like an accounting or business analysis rather than a legal analysis. Typical of this analysis is WCP's report THAT one [redacted] Class' Motion, Ex. 2. This conclusion is the product of accounting, rather than legal, analysis.

Indeed, this engagement with WCP was formed pursuant to KPMG's advice to the Audit Committee that it should hire outside counsel [redacted] *See* Brooks Decl., Ex. A; *see* 15 U.S.C.S. §78j-1. Section 10A imposes an affirmative obligation on auditors to determine whether the company has committed an illegal act. 15 U.S.C.S. § 78j-1(b)(1) ("If, in the course of conducting an audit . . . [auditors become] aware of information indicating that an illegal act . . . may have occurred, the firm shall . . . determine whether it is likely that an illegal act has occurred").[4] Congress did not intend to allow issuers to cloak such an investigation under the work product shroud by simply outsourcing the investigation to a lawyer. *See, e.g., SEC v. Solucorp Indus. Ltd.*, 197 F. Supp. 2d 4, 11 (S.D.N.Y. 2002) ("This provision, while ultimately aimed at preventing the abuses directly proscribed in §10(b) . . . requires independent public accountants to conduct audits in accordance with Generally Accepted Auditing Standards . . . and to comply with certain enumerated reporting requirements should they uncover suspicious activity during an audit."). In fact, depending on the outcome of WCP's investigation, the Company or its auditor may have been under an affirmative duty to

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[4] The Engagement Letter states [redacted] *See* DCRPC §1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . .").

disclose the results. *See* 15 U.S.C.S. §78j-1(b)(1). The details of such an investigation, with no expectation of confidentiality, are not privileged.

In addition to their glaring failure to point to any piece of legal advice in the Restructuring Report, defendants have utterly failed to address the Class' arguments that there is no privilege where a law firm is hired to perform factual investigation. For example, defendants simply ignore the *Osternick* case, cited by the Class, where the Court rejected a privilege assertion under circumstances nearly identical to this one. In that case, special counsel was retained to interview employees, evaluate data and generate a report that mainly reviewed allegedly improper accounting practices while making recommendations on such matters. *See* Class' Motion at 2-3, (citing *Osterneck v. E. T. Barwick Industries, Inc.*, 82 F.R.D. 81, 90 (D. Ga. 1979). The facts of this case also compare favorably to those in *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999), where an attorney sought to assert privilege over documents prepared in connection with a tax return. There, Judge Posner stated "[t]hrowing the cloak of privilege over this type of audit-related work of the taxpayer's representative would create an accountant's privilege usable only by lawyers."[5] The Court should not extend attorney client privilege in this case to protect documents prepared by a *de facto* accountant's investigator. *See* Class' Motion, Ex. 2 at 8 [redacted]

The same holds true in this case, particularly in light of (i) the utter lack of any legal advice in the restructuring report, (ii) KPMG's Section 10A statutory obligations (iii) WCP's factual analyses based [redacted] and (iv) the accounting policies discussed in the Restructuring Report. *See* Class' Motion, Ex. 2.

Instead, the purpose of the report at issue here was to assist KPMG in satisfying its Section 10A obligations and to achieve the other business objectives discussed below. *See infra* at 6-7. This factual investigation is not privileged.

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[5] Defendants rely on two factually inapposite cases, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), and *Hughes v. Paine, Webber, Jackson & Curtis, Inc.*, 565 F. Supp. 663, 670 (N.D. Ill. 1983), to support the pedestrian observation that legal advice is often based on facts. *See* Defs' Opp. at 7. The question before the Court in this case, however, is not what standard applies to the documents at issue but whether defendants have satisfied their burden to meet that standard. They have not.

2. Defendants Have Failed To Satisfy Their Burden of Proving The Documents At Issue Constitute Attorney Work Product

Defendants have failed to satisfy their burden of proving 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); *see also Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983).

Defendants' claims that WCP was hired to represent the company in anticipation of potential litigation with the Securities and Exchange Commission ("SEC") and Elaine Markell, ignore reality. The Audit Committee's records, the Engagement Letter and the Restructuring Report flatly contradict that proposition since each shows WCP was hired to conduct an audit-related factual investigation. A report that does not specifically reference litigation and was created "to investigate, review and analyze the facts and circumstances of any possible wrongdoing" of a company is not protected by the work product doctrine. *Id.; see also Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 181 (N.D. Ill. 2006) ("Plaintiffs are correct that documents created in the ordinary course of business do not qualify for [work product] protection."); *In re Bank One Sec. Litig.*, 209 F.R.D. 418, 425 (N.D. Ill. 2002) (same); *South Chicago Bank*, 1998 U.S. Dist. LEXIS 17445, at *17 (same).

Further, as evidenced by defendants' submissions, the law firms of Wachtell, Lipton, Rosen & Katz ("Wachtell") and Katten Muchin Zavis Rosenman ("KMZR") represented Household vis-à-vis the SEC. *See* Beer Decl. Exs. C, D, G and H.[6] In addition, Wachtell and/or KMZR – not WCP – attended Household employee depositions or interviews before the SEC. *See* Brooks Decl., Ex. B. Separately, Littler Mendelson represented Household against Markell. *See, e.g.*, Brooks Decl. Ex. O. Perhaps most telling is the fact that Mr. Wrathall's declaration does not state that WCP performed its investigation "in anticipation of litigation." The fact that Mr. Wrathall is a lawyer who understands the difference between being aware of allegations and performing work in anticipation of litigation, and does not attest to the latter is significant and belies Household's contention that it has met its burden in establishing work product protection.

Despite these facts to the contrary, defendants maintain that the disputed materials were prepared "in anticipation of" litigation with Markell and the SEC. As shown above, both of these

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[6] "Beer Decl." refers to the Declaration of Janet A. Beer, attached to Defs' Opp.

factual assertions are unfounded.[7] Moreover, pursuant to KPMG's free standing obligations under Section 10A, and the Audit Committee's corresponding duties, KPMG and Household were required to investigate the reage allegations made by Markell as a matter of course. It is well settled that "[i]f in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is produceable in civil pre-trial discovery." *Binks Mfg. Co.*, 709 F.2d at 1119; *United States v. South Chicago Bank*, No. 97 CR 849-1, 1998 U.S. Dist. LEXIS 17445, at *20 (N.D. Ill. Oct. 16, 1998).

Here, as in *South Chicago Bank*, the WCP report investigated facts concerning [redacted] Class' Motion, Ex. 2 at 2. The report further reviewed any inconsistencies [redacted] *Id.* at 4. Based on WCP's factual findings, Household implemented various business measures to correct its accounting improprieties within HMS. *See* Brooks Decl., Ex. C ([redacted]); Brooks Decl., Ex. D.

Furthermore, the Restructuring Report and related documents were integral to Household's ability to close its merger with HSBC Holdings plc ("HSBC") on March 28, 2003, a vital business goal. As noted above, KPMG could not have fulfilled its audit duties without properly investigating the facts pertaining to Ms. Markell's allegations regarding improper reaging practices. KPMG required the investigation in order to issue a clean audit opinion. *See* Class' Motion at 12. HSBC required KPMG to issue such an opinion and insisted on contacting WCP and KPMG directly to discuss various issues, including the improper reaging practices. *See* Brooks Decl., Ex. E. Without conducting appropriate due diligence with WCP and KPMG, HSBC may not have obtained the regulatory approvals necessary to consummate the merger, and its board would have risked failing to

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[7] Even if they could somehow be classified as prepared to aid in possible future litigation – which they obviously were not – in this circuit, it is well-established that dual-purpose documents are not protected as work product. *See Frederick*, 182 F.3d at 501-02 (finding that the documents at issue were not privileged as work product, stating simply "[m]ost are ***dual-purpose documents, about which no more may be said***"); *see also Harper v. Automobile-Owners Ins. Co.*, 138 F.R.D. 655, 661 (S.D. Ind. 1991) ("Documents prepared for concurrent purposes, therefore, should not be classified as work product."); *Pacamor Bearings v. Minebea Co.*, 918 F. Supp. 491, 513 (D.N.H. 1996) (exclusion from work product protection of materials assembled "pursuant to public requirements unrelated to litigation" applies "even if the party is aware that the document may also be useful in the event of litigation").

discharge its fiduciary duties. *See* Brooks Decl., Ex. F; *accord Periman*, 665 F. 2d 1214 (attorney-client privilege waived by disclosure of documents to SEC to facilitate approval of registration statement). After WCP submitted its first report of March 17, 2003 to the Audit Committee at its meeting on March 17, 2003, HSBC agreed to consent to offer to settle the reage and restructure improprieties investigation with the SEC, which smoothed the way to closing the merger. *See* Brooks Decl., Exs. G-H. Because the Restructuring Report and related documents were crucial to Household's achieving this substantial business objective, such documents do not merit protection under the work product doctrine.

3. WCP's Declaration Demonstrates the Audit Committee Was WCP's Client, Not Household

Defendants' submissions to the Court illustrate that the Audit Committee, not Household, was WCP's client. Thus, only communications between WCP and the Audit Committee can be protected. Accordingly, the communications between Household employees and WCP were not between attorney and client and cannot be privileged.

WCP's Engagement Letter clearly states [redacted] *See* Wrathall Decl., Ex. A at 1.[8] The Engagement Letter continues, [redacted] *Id.* Nowhere does the letter suggest that Household was the client in connection with the Restructuring Report. In his declaration, Mr. Wrathall states WCP had represented Household in ***other*** matters. *See* Wrathall Decl. at ¶2. This fact does not support the conclusion that WCP had an attorney-client relationship with Household with respect to the Restructuring Report matter.

To the contrary, the Engagement Letter specifically identifies Household and the Audit Committee as separate parties with potentially conflicting interests. Indeed, as required under Rule 1.7(c) of the DCRPC,[9] WCP obtained consent from its existing client, Household, to the representation of its new client, the Audit Committee, in a context where the clients' interests did or could conflict. *See* DCRPC 1.7(c). The Engagement Letter contains an entire "conflicts" section informing both entities that [redacted]

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[8] All emphasis added unless otherwise noted.

[9] The Engagement Letters states [redacted]. *See* Wrathall Decl., Ex. A at 1.

[redacted] Wrathall Decl., Ex. A at 2. Household acknowledged the Audit Committee was a separate entity and signed the conflicts waiver. *Id.* The Restructuring Report was addressed to the Audit Committee, and WCP repeated its admonishment that the firm [redacted] *See* Class' Motion, Ex. 2 at 2. These documents squarely contradict Mr. Wrathall's alleged "understanding" three years later that Household was WCP's client. *See* Wrathall Decl. at ¶11.

It is unclear, moreover, how Mr. Wrathall reached his counterfactual conclusion that WCP [redacted] *Id.* Mr. Wrathall did not sign the Engagement Letter. Mr. Wrathall did not participate in the Audit Committee meetings where WCP presented its findings. *See* Brooks Decl. at Exs. G, I-J. WCP partner Mr. Russell J. Bruemmer did attend these meetings; did sign the Engagement Letter; did correspond directly with the audit committee. *See* Brooks Decl., Ex. K.; and currently has a biography on WCP's website stating he served as "lead outside counsel" to "HSBC Finance" (*i.e.*, Household) in connection with $7.1 billion in corporation transactions and "also represented HSBC Finance's ***audit committee*** in specific assignments." *See* Brooks Decl., Exs. L-M (emphasis added). Mr. Breummer, however, did not submit a declaration.

Household's legal arguments on this point are as vacuous as its factual assertions. The two cases defendants cite *SEC v. Brady*, Civil Action No. 3:05-CV-1416-M, 2006 U.S. Dist. LEXIS 74979 (N.D. Tex. Oct. 16, 2006), and *Washington Bancorporation v. Said*, Civil Action No. 88-3111 (RCL), 1989 U.S. Dist. LEXIS 5135 (D.D.C. May 10, 1989) did not address the legal question of whether the Audit Committee is separate from the company for attorney-client purposes in a context, present in this case, where all affected parties so clearly delineated the fact that the Audit Committee, not Household, was the client.

In the end, Household's *post hoc* attempt to create an attorney-client relationship between itself and WCP, does not withstand scrutiny. Because no attorney-client relationship existed between Household and WCP with respect to the engagement, the communications between Household employees and WCP are properly discoverable. *See* Class' Motion at 4-5.

B. Even if Any Requested Documents Were Protected from Discovery, Under the Qualified Attorney Client and Work Product Privileges Defendants Have Forfeited Such Protection by Producing Such Documents to the SEC, KPMG and the Class

1. Household Forfeited Any Privilege by Voluntarily Disclosing the Restructuring Reports, Related Letters, and Additional Related Memoranda to the SEC

In a stunning abuse of discovery, defendants' July 16, 2003 letter to the SEC enclosing the "the [Restructuring Report], related letters and additional confidential and privileged materials" ***appears for the first time in this litigation*** as Exhibit H to the Beer Declaration. *See* Beer Decl. Ex. H.[10] That letter bears no Bates identification number because it was never produced to the Class. *Id.* No doubt defendants will repeat their rote incantation that this "oversight" was the result of Household's large production. It should be noted however, defendants had no trouble finding this document when they perceived an advantage from disclosure in opposition to the Class' motion.

Defendants' behavior with the SEC wasn't much different. Defendants first informed the SEC that their production of documents relating to the Restructuring Report was "inadvertent." *See* Brooks Decl., Ex. N. The SEC gave the documents back. *Id.* Two weeks later, seeking to gain a tactical advantage, defendants reversed course and voluntarily produced those documents. *See* Beer Decl. Ex. H. By doing so, defendants waived any privilege related to the investigation underlying the Restructuring Report.

Defendants cannot withhold the materials they so vehemently argue are privileged in this case after having voluntarily produced such materials to the SEC. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2003 U.S. Dist. LEXIS 23102, at **1-3 (S.D.N.Y. Dec. 24, 2003) (documents containing defense counsel's legal arguments are discoverable in civil litigation where the documents were produced to the SEC in connection with a prior investigation). Defendants contention that "the company acceded to the SEC's request for access to the final Restructuring Report" only on the condition that the SEC preserve its confidentiality is both irrelevant and unsupported by the record. *See* Beer Decl., Ex. H. The July 14 letter to the SEC merely states [redacted]

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[10] Despite the Court's explicit instructions, defendants have not identified any of the additional underlying materials that were produced to the SEC.

■ It is evident that defendants knowingly and voluntarily gave the SEC materials they deemed privileged to prevent adverse enforcement action by the SEC.

Defendants cite no legal authority supporting the notion that a party can knowingly volunteer privileged documents to an adversary without forfeiting any privilege. Nor do they take issue with the authorities the Class cites finding forfeiture or waiver. *See, e.g.*, *In re Bank One*, 209 F.R.D. at 423 (disclosure of attorney work product to the SEC waives both the attorney-client privilege and the work product protection); *Hobley v. Burge*, Case No. 03 C 3678, 2004 U.S. Dist. LEXIS 6858, at **22-24 (N.D. Ill. Apr. 21, 2004) (same); *Neal v. Honeywell, Inc.*, No. 93 C 1143, 1995 U.S. Dist. LEXIS 14488 (N.D. Ill. Oct. 3, 1995) (same).

Numerous other courts have recognized the commonsense proposition that an enforcement target which discloses otherwise privileged information to a governmental agency ***for its own benefit*** waives the attorney-client privilege in other proceedings. For example, the Second Circuit noted that "a party's claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes." *In re John Doe Corp.*, 675 F.2d 42, 489 (2d Cir. 1982). Similarly, the Third Circuit explained that "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Westinghouse Elec. Corp. v. Republic of Philipines*, 951 F.2d 1414, 1425 (3d Cir. 1991).

Defendants' assertion that they did not waive any applicable privilege or protection by producing privileged documents to the SEC because Household entered into a written confidentiality agreement with the SEC also fails. In *Bank One*, 209 F.R.D. at 424, the court rejected this very argument, ruling that the confidentiality agreement between defendant bank and the government agency did not salvage the protection of the work product doctrine. *Id.*

In a securities fraud case against Qwest, the company produced documents to the SEC pursuant to an agreement that specified that SEC staff would maintain the documents' confidentiality, "except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities." *In re Qwest Communications*, 450 F.3d 1179, 1181 (10th Cir. 2006) *cert denied*, No. 06343, 2006 U.S. LEXIS 71267 (Nov. 13, 2006). ***This is the exact same language as is contained in the "non-waiver" agreement defendants rely on here.*** *See* Beer Decl., Ex. H. The Tenth Circuit found that

"such language affords the [SEC] broad discretion to use the Waiver Documents as they saw fit," and held that the company's production of documents to the SEC waived any privilege. *Qwest*, 430 F.3d at 1194. On November 13, 2006, the Supreme Court denied Qwest's petition for certiorari, thus declining to reverse the Tenth Circuit's well reasoned decision. *See also In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002) ("any form of selective waiver, ***even that which stems from a confidentiality Agreement***, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage'") (citation omitted).

Recognizing their uphill battle with respect to waiver, defendants seek to limit the scope of their work product waiver to the Restructuring Report itself. Defs' Opp. at 13-14. This tactic fails for several reasons. First, Household voluntarily produced not only the Restructuring Report, but numerous documents underlying the Restructuring Report – including "related letters and additional related memoranda" – to the SEC (and KPMG). *See* Beer Decl., Ex. H. Thus, it is well established, moreover, that 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). Thus, as defendants themselves concede subject matter waiver of work product protection is appropriate in "instances where a selective disclosure is intended to gain a tactical advantage in the context of litigation." Defs. Opp. at 14 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, Case No. 94 C 897, MDL 997, U.S. Dist. LEXIS 17110, at *6 (N.D. Ill. Nov. 14, 1995). There is no question that as the target of an SEC investigation, Household made a tactical decision – for its own benefit – to disclose certain documents to the government that may have originally qualified for protection under the attorney-client privilege and/or work-product doctrine. In rejecting selective waiver, Judge Posner discussed "a fear that selective disclosure will be used to obtain a strategic advantage, and puzzlement why if the information is really confidential it was disclosed except for some nefarious strategic purpose." *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997); *see also Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."). Having selectively waived any privilege, if applicable at all, Household cannot be allowed to invoke those protections against plaintiffs.

2. Household Forfeited Any Privilege by Voluntarily Disclosing the Restructuring Report and Related Materials to Its Independent Auditor KPMG

Household forfeited any privilege over documents provided to KPMG for two reasons. First, as discussed above, the entire process leading to WCP's Restructuring Report was initiated by KPMG to discharge its obligations under Section 10A of the Securities Exchange Act. *See* Brooks Decl. Ex. A. Section 10A imposes affirmative obligations on public auditors to investigate and disclose any potentially illegal acts to the SEC. *See* 15 U.S.C.S. §78j-1. Household acknowledged the gravity of this risk by requiring KPMG to obtain its formal written consent to even listen to a telephone call with the SEC. *See* Brooks Decl. Ex. P. Such circumstances differ markedly from those present in other cases defendants cite where auditors have not initiated any investigation into company practices. *See, e.g., Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 184 (N.D. Ill. 2006). In this case KPMG was not acting in any capacity analogous to a confidential advisor but rather serving as an independent outside auditor. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984) ("[Auditor's] public responsibility transcend[s] 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."); *see also, First F.S.B. of Hegewisch v. United States*, 55 Fed. Cl. 263, 268 (2003) ("the overwhelming weight of authority on the subject matter indicates that he privilege is waived when privileged documents are disclosed to an agent for a purpose unrelated to the rendition of legal advice"). Household provided purportedly privileged documents to KPMG not in order to obtain legal advice but because KPMG required the documents to provide Household clean audit opinion. As noted above, the clean audit opinion enabled Household to file its Form 10-K and consummate the HSBC merger. As a consequence, Household achieved its business objective, but waived any privilege argument as to the materials provided to KPMG.

3. Household Forfeited Any Privilege by Voluntarily Disclosing Documents Relating to the Restructuring Report to the Class

As explained in the Class' opening papers, the third way defendants waived any existing privilege was by producing documents to the Class relating to the restructuring reports. These documents include summary studies and statistics compiled at the request of WCP, as well as a draft

of the Restructure Report. The Class addresses defendants' contentions with respect to these documents in turn. Thus, the evidence at issue here are discoverable by the Class.

Defendants do not dispute that they voluntarily produced to the Class documents summarizing studies done at the request of WCP (Ex. 11), data compiled at the request of WCP and transmitted to WCP (Ekholdt Ex. 13), and presentations summarizing studies performed at the request of WCP (Ex. 12). Defendants claim, however, that production of these documents does not constitute waiver because "no privilege applies and none is asserted."[11] Defs' Opp. at 10. As discussed above, the Class agrees that no privilege applies to these or any other documents related to the Restructure Report. However, defendants' claim that no privilege is asserted with respect to these documents is not accurate. With respect to at least one of these documents, Ekholdt Ex. 13, counsel for defendants has instructed witnesses not to answer deposition questions regarding "the information that [Mr. Ekholdt] was requested to provide," the "parameters or limitations . . . as to the data used," and the "purpose for preparing" the document. The Class reasonably anticipates that defendants will object to similar questions regarding Exs. 11 and 12. Defendants cannot be permitted to produce documents and then refuse to allow discovery regarding their meaning and how they were created.[12] At bottom, whether or not these documents are privileged, and once produced, defendants opened the door to discovery regarding the subject matter to which they relate: the WCP investigation. *Vardon Golf Co. v. Karsten Mfg. Corp.*, 312 F.R.D. 528, 532 (N.D. Ill. 2003) ("[A] party should not be permitted to 'exploit selective disclosures for tactical advantage.") (citation omitted); *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, No. 97 CR 849-1, 1998 U.S. Dist. LEXIS 17445, at *5-6 (N.D. Ill. Oct. 16, 1998) (Disclosure of some documents related to subject matter waives privilege as to all documents related to same subject).

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[11] Defendants have gone so far as to now characterize Ekholdt Ex. 13 as "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." Defs' Opp. at 10. This begs the question: if Exholdt Ex. 13 is in defendants' estimation so obviously non-privileged, why did they recall the document in the first place? Like many other arguments defendants have made in this action, their assessment of the facts depends on which way the wind is blowing. Defendants' constant reversals of position should be viewed with heavy skepticism.

[12] It should be noted that while defendants have now represented that they do not intend to use any document at summary judgment or trial over which they have asserted privilege, they have made no such representation as to these and other similar documents which they apparently intend to use while at the same time restricting the Class' discovery with respect to their creation.

Importantly, defendants have not explained why the "nonprivileged factual data" reflected in Exs. 11-12 and Ekholdt Ex. 13 is any different from factual information conveyed to WCP by Household employees and reflected in interview notes and other memoranda. All such information should be produced not just the information defendants wish to have in the record.

Defendants' production of the March 17, 2003 draft Restructuring Report similarly waives any privilege with respect to the documents at issue. Defendants do not dispute that this report was based on the same factual investigation as the final report. Instead, defendants now claim that the document was "inadvertently" produced. This claim was made only after the Class attached the damaging draft report to its motion. Defendants' claim that they "promptly recalled the document upon learning of its production when Plaintiffs' motion was served," moreover, is not entirely accurate. Defs' Opp. at 10. In fact, the parties discussed this report extensively at the October 19, 2006 hearing and defendants did not once mention that the document's production had been "inadvertent." In any event, defendants have not satisfied their burden of establishing ***via declaration*** that (1) they could not have prevented the production despite reasonable efforts and (2) they made reasonable efforts to timely recover the documents. *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417 (N.D. Ill. 2006); *Mattenson v. Baxter Healthcare Corp.*, Case No. 02 C 3283, 2003 U.S. Dist. LEXIS 21373, at *6 (N.D. Ill. Nov. 25, 2003).

With respect to the first point, defendants do not even offer an argument or explanation, let alone a declaration. This is because any such argument would be absurd. Prior to producing the March 17 Report, defendants had once already "inadvertently" produced documents relating to the Restructuring Report to the SEC, and thus were on notice of ***all*** of the supposedly privileged documents relating to this subject matter. Given that knowledge, defendants have no excuse for the "inadvertent" production of the March 17 Report to the Class. Furthermore, defendants entered into an agreement with the Class to produce the final Restructuring Report, further heightening their awareness of the supposed privileges they now assert. If defendants intended to withhold the documents underlying the final report, they could and should have done a search for all such documents and segregated them from the production. There is no evidence defendants took such steps.

As to the second point, defendants offer only the conclusory statement that immediate steps were taken to recall the document. Defs' Opp. at 10. As discussed, this statement is not entirely accurate. Perhaps that is why defendants provided no declaration on this point. Furthermore, defendants offer no explanation at all as to why they let years go by before seeking to recall the

March 17 Report. In any event, defendants' unsupported recitation is not enough to establish that reasonable efforts were made to timely recover the documents.[13]

4. Defendants Have Failed to Overcome the Class' Showing of Substantial Need and Undue Hardship

Defendants' struggle to overcome the Class' showing of substantial need and undue hardship has failed. As to substantial need, defendants' argument focuses on documents the Class has not "specifically identified." Defs' Opp. at 15. Defendants cannot seriously propose the Court adopt a new standard requiring the Class and every other party seeking documents ***withheld*** by an adversary to identify each of those documents. Defendants ignore the guiding principle articulated in *Bairnco Corp. Sec. Litig.* that the Class is entitled to the documents at issue because they go to the "the crux of the case plaintiffs hope to present." *See Bairnco Corp. Sec. Litig. v. Keene Corp.*, 148 F.R.D. 91, 103 (S.D.N.Y. 1993). Defendants ignore the two paragraphs of detailed analysis where the Class illustrates the evidence at issue is crucial to specific elements of the Class' claims. *See* Class' Motion at 6-7. Instead, defendants bootstrap a vacuous legal argument to documents ***they*** have not identified by way of any declaration or example. *See* Defs' Opp. at 15. Importantly, the only declaration defendants have submitted is that of Mr. Wrathall, who (i) as shown herein, obviously lacks any personal knowledge of the matters at hand and (ii) failed to attach any examples of his vaguely described "information gathering" or "communications" or "memoranda or notes" that could possibly support Household's assertion that WCP's materials constitute "classic work product" or "fact work product." *See id.* 16.

As to undue hardship, defendants make two arguments. Both have glaring errors. First, the Class does not "speculate" that Household deleted hundreds of thousands of emails covering the period in which WCP conducted its inquiry: it is a *fait accompli* freely admitted by Household. Defendants have flatly refused to produce ***any*** documents in response to the Class' recent document requests, much less any documents related to the matters at hand. Next, defendants' rote clatter about 4 million documents should be silenced in light of the 1.3 million pages of useless spreadsheets they produced, the thousands of state and federal agency documents they purportedly

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[13] With respect to the other key factors regarding waiver, the Class refers the Court to its the Class' Reply in Support of Motion to Compel Production of All Documents Pertaining to Household's Consultations with Ernst & Young LLP brief, as the factors weighing in favor of waiver with respect to the E&Y documents apply equally here.

inadvertently produced, the hundreds of purportedly privileged documents they expect the Class to sort out for them, and the fact that Household admittedly purged truckloads of highly relevant documents. The Class trusts no further argument is necessary to prove the fact that it must obtain evidence from WCP to discover the facts Household has destroyed either by will or by inadvertence.

Second, defendants make the surprising[14] claim that the Class can get the information it seeks via deposition testimony. Defendants cite *In re International Sys. & Control Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982) and *Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D. Ill. 2002) for the proposition that the Class faces no "undue hardship" because the Class can obtain the information it seeks by deposing WCP interviewees since those witnesses are still available. Again, defendants provide no facts supporting this claim. As to the nine unidentified witnesses defendants ***claim*** have such information, the Class obviously cannot obtain information surrounding the Restructuring Report from them since defendants cloak all of that information under the privilege claims and repeatedly instruct their deponents not to answer any questions relating to any "privileged" subject. Defendants say nothing, moreover, about former Household employees' endemic memory problems. Finally, defendants address none of the cases the Class cites supporting the conclusion that all of these reasons lead to the conclusion that the requested evidence must be produced. *FEC v. Christian Coalition*, 178 F.R.D. 456, 466 (E.D. Va. 1998) (limited depositions support production); *see Harper & Row Publishers v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) (memory lapses support production), *aff'd*, 400 U.S. 348 (1971); *see also Ehrlich v. Howe*, 848 F. Supp. 482, 492-93 (S.D.N.Y. 1994) (same).

III. CONCLUSION

For the foregoing reasons and those presented in the Class' opening papers, the Class' Motion to Compel should be granted.

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[14] As the Court knows too well, Defendants have vehemently protested the Class' taking any depositions over a 10-deposition limit, or the now 55-deposition limit imposed by the Court.

DATED: November 17, 2006

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DECLARATION OF SERVICE BY EMAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on November 17, 2006, declarant served by electronic mail and by U.S. Mail to the parties **THE CLASS' REPLY IN SUPPORT OF 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]**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of November, 2006, at San Francisco, California.

s/ Marcy Medeiros
MARCY MEDEIROS

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