UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

THE HOUSEHOLD DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE NOLAN'S DECEMBER 6, 2006 ORDER COMPELLING PRODUCTION OF CERTAIN ATTORNEY-CLIENT COMMUNICATIONS AND WORK PRODUCT

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Defendants Household International, Inc. ("Household"), Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (collectively the "Household Defendants" or "Defendants") respectfully submit these Objections to Magistrate Judge Nolan's December 6, 2006 Memorandum Opinion and Order insofar as it granted Plaintiffs' motion to compel the production of documents pertaining to Household's privileged consultations with Ernst & Young LLP ("December 6 Ruling").

PRELIMINARY STATEMENT

In July of 2002, less than four months before the end of the Class Period in this litigation, Household's General Counsel retained Ernst & Young ("E&Y") to assist the Household Legal Department in providing legal advice to Household concerning the company's compliance with certain state laws and regulations. Although it had been hoped that this Compliance Engagement could quickly be completed, the complexity of the issues raised, the scope of the project and the variances among state laws and regulations were such that most of the work was accomplished long after the fall of 2002 and was not completed until 2004. The Compliance Engagement was undertaken in response to litigation instituted by the State of California related to regulatory compliance issues, and in response to threats of similar litigation by other states. There is no question that E&Y was acting as an agent of Household's General Counsel in conducting this work, work that was beyond the capacity of Household's Law Department at the time.

In her December 6 Ruling, Magistrate Judge Nolan correctly held that communications created by or for E&Y in the course of the Compliance Engagement were protected by the attorney-client privilege because "[b]oth Household and E&Y understood that the engagement was to assist in-house counsel in providing legal advice regarding pending or anticipated litigation." *Id.* at 8. She also correctly held that such documents constitute work product "in that E&Y conducted its evaluation as an agent of Household's General Counsel's office." *Id.* at 17. Defendants concur with these well-supported conclusions, and with the Magistrate Judge's further rulings that Household had not waived these privileges, *id.* at 17-19.

These Objections relate solely to two aspects of the December 6 Ruling that had the effect of requiring Household to disclose the E&Y communications notwithstanding the Magistrate Judge's recognition that they were privileged and constitute work product.

First, the Ruling applied the so-called "fiduciary exception" to override Household's attorney client privilege. As shown below, this outcome was clearly erroneous because it relied on inapplicable and/or discredited precedent (*see* Part I (A)), and above all because the record was devoid of the essential factual showings that courts that recognize a fiduciary exception require as a condition of its application in a particular case. For example, Plaintiffs produced absolutely

no evidence that they and the class they represent held a majority of Household stock *at the time the privileged communications were made*, which for the most part was after the end of the Class Period and after this litigation had already been filed. Instead, in a footnote in their reply brief below, they asked the Magistrate Judge to accept an unsubstantiated assumption about the rate of stock turnover during the Class Period in order to conclude that class members were majority shareholders between July 1999 and October 2002. *See* the Class' Reply in Support of Motion to Compel Production of All Documents Pertaining to Household's Consultations with Ernst & Young LLP. Even if that superficial analysis were sufficient for the time period it purports to cover (and even if it had not been waived by Plaintiff's raising it for the first time on reply), it is not a valid predicate for applying a fiduciary exception because it does not and cannot show that Household owed a fiduciary duty to any or all class members during the post-Class Period, when most of this July 2002 Compliance Engagement was performed. Accordingly, the Magistrate Judge's finding that "the Class represents a substantial majority of Shareholders who owned stock at the time of the communications in questions" (December 6 Ruling at 14) had no evidentiary support. The failure of this threshold element defeats the invocation of a fiduciary exceptions. *See* Part I(B).

Another major omission in the December 6 Ruling is a well-based finding of good cause needed to override the attorney client privilege in contexts where a fiduciary exception is recognized and a fiduciary duty has been shown. This too is required by the courts that recognize a fiduciary exception, and as the Supreme Court has emphasized in analogous contexts, considerations of a plaintiff's convenience do not suffice. *See* Part I (C). In view of these critical errors and omissions, Defendants respectfully suggest that given (i) the strong policy considerations favoring protection of privileged communications, (ii) the short time remaining for fact discovery in this matter, (iii) Plaintiffs' failure of proof on the motion below; (iv) the exhaustive discovery Plaintiffs have obtained to date, (v) the many factors that the Magistrate Judge found to weigh against the abrogation of Household's privilege, and (vi) the shaky and controversial foundation of the fiduciary exception in the context of a securities fraud class action, the December 6 Ruling should be overruled insofar as it compels production of indisputably privileged communications with E&Y.

Second, Defendants object to the December 6 Ruling insofar as it erroneously concluded the E&Y communications constituted only "fact," as opposed to "opinion," work product, and that Plaintiffs had overcome the qualified protection applicable to "fact" work product. *See* December 6 Ruling at 17. Here too Plaintiffs' showing was based on considerations of their own preference and convenience rather than substantial need and lack of alternative sources, and therefore provided no basis for an order requiring disclosure. Nor was there any record support for Plaintiffs' assumption, adopted in the Ruling, that the writings memorializing E&Y's inter-

face with Household consisted only of fact work product. If the Court should reverse the fiduciary exception aspect of the December 6 Ruling, it will have no need to consider Defendants' objections regarding the compelled disclosure of work product. However, for the Court's information, an analysis of this issue and related precedent appears in Point II below.

THE DECEMBER 6 RULING

In relevant part, the December 6 Ruling addressed Plaintiffs' motion to compel disclosure of privileged communications and work product created in the course of a Compliance Engagement undertaken by E&Y to assist Household's attorneys in rendering legal advice. *See* December 6 ruling at 1-3, 7-19. The contested parts of the Ruling appear at pages 10-15, where Magistrate Judge Nolan held that *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), and related cases, support the abrogation of Household's attorney-client privilege as to the subject communications, and at page 17, where Judge Nolan concluded that Plaintiffs had shown "substantial need" for overcoming the work product protection that would otherwise immunize this material from disclosure.[1]

Over Plaintiffs' objection, Magistrate Judge Nolan correctly decided that "the E&Y documents in question are protected by the attorney-client privilege." *Id* at 10. As Judge Nolan noted, "at the time Household retained E&Y, it was preparing for a negotiation with the Multistate Working Group regarding threatened claims arising from the Company's consumer lending practices" (*id.* at 8), and that "[b]oth Household and E&Y understood that the engagement was to assist in-house counsel in providing legal advice regarding pending or anticipated litigation." Judge Nolan concluded that "[i]t is clear from the Compliance Engagement letter that E&Y was acting as an agent of Household's General Counsel's office." *Id.*

Judge Nolan also correctly ruled that the E&Y documents constitute privileged work product. *See* December 6 Ruling at 16. She based her conclusion on this Court's prior holding that "documents are protected by the work product privilege if they were prepared or obtained 'because of the prospect of litigation,'" *Lawrence E. Jaffe Pension Plan b. Household Int'l Inc.*, 237 F.R.D. 176, 181 (N.D. Ill. 2006) (internal citation omitted), and in light of her determination that "E&Y conducted the Compliance Engagement in response to the lawsuit filed by the State of California and in anticipation of other similar lawsuits from other states." *Id.* at 15. The December 6 Ruling also finds that Household had not waived any applicable privilege relative to

[1] The Ruling also addresses Plaintiffs' motion to compel production of communications with and work product created by an outside law firm retained by Household. *See id.* at 4-6, 19-34. That aspect of the Ruling is not at issue here.

the E&Y Compliance Engagement. *See id.* at 17-19.

Turning to (and granting) Plaintiffs' request for an order abrogating Household's attorney-client privilege as to these documents, Judge Nolan first summarized the rationale and holding in *Garner.* There the Fifth Circuit Court of Appeals held, in the context of a shareholder derivative action, that "where the corporation is in a suit against its shareholders on charges of acting inimically to stockholder interests, protection of those interests, as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance," *Garner,* 430 F.2d at 1103-04; *see* December 6 Ruling at 11.

On this issue, Judge Nolan observed that the Court of Appeals for this Circuit has not determined whether a fiduciary exception applies where shareholders are suing a corporation in a non-derivative action, such as here, and identified cases in this district and elsewhere where a fiduciary exception has been recognized in various contexts.[2] Judge Nolan correctly noted that courts that recognize a fiduciary exception have not adopted a uniform method of applying it, and that some had questioned whether it should be applied routinely in securities fraud lawsuits, where plaintiffs are seeking personal benefit rather than a benefit to the company. *See id.* at 13. Judge Nolan indicated that she shared that reservation, "and also that she viewed the non-derivative nature of the claim as a strong factor to consider in determining whether to prevent invocation of the attorney client privilege." *Id.* She also found it notable that "Plaintiffs have not raised any breach of fiduciary duty claims in this lawsuit," *id.* at 14, citing two cases from this district that followed *Garner* in the context of breach of fiduciary duty claims.

A key factor cited in this portion of the Ruling is the requirement that in a securities fraud class action the plaintiffs must consist of "present shareholders", or "shareholders at the time of the privileged communication". *Id.* at 14. Although this should have been a dispositive factor in Defendants' favor, Plaintiffs had apparently led Judge Nolan to believe that the E&Y Compliance engagement was completed solely within the Class Period (the only time period for which they made any showing as to their purported majority status). As a result, the Ruling turned on the supposedly unopposed finding that class members owned a majority interest when the privileged communications were created. *Id.* The Ruling states as follows:

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[2] As discussed in Part I (A) below, numerous other cases in this district and elsewhere have declined to recognize a "fiduciary exception" in the context of a securities fraud action, and even the cases listed in the December 6 Ruling contain limitations that would affect the outcome here.

> "[U]nlike the plaintiffs in *In re Omicron Group*, Plaintiffs have presented evidence – and Defendants do not dispute – that the Class represents a substantial majority of shareholders who owned stock at the time of the communications in question. (P. Reply at 7 n.7)" December 6 Ruling at 14.

This finding is based on an unproven and mistaken factual assumption. It is evident from the Court's citation to a footnote in Plaintiffs' *Reply* brief that Plaintiffs' "evidence" was undisputed because it was not presented in a manner that gave Defendants the opportunity to dispute it. Moreover, this passage necessarily but incorrectly assumes that "the communications in question" were all made during the Class Period when class members may (or may not have) been in the majority, rather than months later, when Plaintiffs' interests were overtly antagonistic to those of Household and its then-current shareholders. As discussed in Part I (C) below, these pivotal factual mistakes require reversal of this Ruling.

Having concluded mistakenly and/or without an evidentiary basis that Household owed a fiduciary duty to the Class "at the time of [all] the communications in question", the Court next concluded that Plaintiffs had shown good cause to override Household's privilege, primarily because their claim had withstood a motion to dismiss, and "the requested information concerns past actions that are the subject of this action." December 6 Ruling at 14. In this regard, the Ruling contains the remarkable statement that "it does not appear that [Plaintiffs] could obtain from another source the underlying data E&Y utilized in conducting its investigation. *(But see* this Court's Memorandum Opinion and Order dated November 22, 2006, at 2, 9-10, noting the substantial volume of data Plaintiffs have obtained through discovery, including on subjects that were the focus of E&Y's analyses.)

Because the *Garner* exception does not abrogate work product, the Court next turned to this issue. The Court held that the E&Y output was only entitled to "fact" work product, and that Plaintiff had met their burden to overcome such protection on the ground that the documents "may assist" Plaintiffs in prosecuting their claim. *Id*. at 17.

STANDARD OF REVIEW

Rule 72(a) provides that in reviewing a discovery-related order issued by a magistrate judge, the district judge "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see also Weeks* v. *Samsung Heavy Indus. Co.*, 126 F.3d 926, 943 (7th Cir. 1997); *For Your Ease Only, Inc*. v. *Calgon Carbon Corp.*, No. 02 C 7345, 2003 WL 21475905, at *4 (N.D. Ill. June 20, 2003);[3] 12 Charles

[3] All unreported cases cited herein are contained in the appendix to this memorandum.

Alan Wright, Arthur R. Miller and Richard L. Marcus, Federal Practice and Procedure 2d § 3069 (2006). Under the clear error review standard, a judge may overturn a magistrate judge's ruling if "the district court is left with the definite and firm conviction that a mistake has been made." *Weeks*, 126 F.3d at 943; *see also Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985); *Ocean Atl. Woodland Corp.* v. *DRH Cambridge Homes, Inc.*, No. 02 C 2523, 2004 WL 609326, at *3 (N.D. Ill. Mar. 23, 2004). A magistrate judge's legal conclusions are subject to de novo review. *McFarlane* v. *Life Ins. Co.*, 999 F.2d 266, 267 (7th Cir. 1993); *Todd* v. *Corporate Life Ins. Co.*, 945 F.2d 204, 207 (7th Cir. 1991).

ARGUMENT

I. The Application of *Garner* Was Clearly Erroneous.

As shown in Part A below, numerous courts have questioned the continued vitality of *Garner v. Wolfinbarger* in view of later Supreme Court opinions that criticize *ex post*, judgmental tests for maintaining or overriding privileges. However, this Court does not have to reach that ultimate question to conclude that it was clearly erroneous to override Household's attorney-client privilege in the absence of any showing that Household stood in a fiduciary relationship with the Class at the time most of the subject communications were created *See* Part B, and on the basis of an alleged showing of good cause that was no more than a conclusory assertion of relevance. S*ee* Part C.

A. To The Extent *Garner* Remains Good Law, It Should Not Be Applied Outside Of The Derivative Liability Context

Garner involved a securities fraud and derivative action brought by shareholders against a corporation and its officers. 430 F.2d at 1095. In ruling that a corporation's attorney-client privilege is not absolute in such a setting, the Court of Appeals for the Fifth Circuit outlined a multi-factor balancing test whereby shareholder plaintiffs could establish "good cause" to override the assertion of privilege by a corporation "in suit against its stockholders on charges of acting inimically to stockholder interests[.]"[4] *Id.* at 1103-04. The starting point for the Fifth Circuit's analysis was a narrow and negative "perspective" of privilege that was repeated in some other district court cases (including in this district), before being soundly rejected by the Supreme Court. That now discredited premise was that the attorney-client privilege was a "speculative" and unwelcome "obstacle to the investigation of the truth", which therefore should be

[4] It should be noted that the *Garner* exception to the attorney-client privilege does not apply to the work-product doctrine. *See* December 6 Ruling at 15 and cases cited therein.

"narrowly confined within the narrowest possible limits". *Id.* at 1100-01. In the *Garner* court's view, keeping this "obstruction" in check required a "balancing of interests between injury resulting from disclosure and the benefits gained in the correct disposal of litigation." *Id.* at 1101. To implement such balancing in the context of a derivative action, the court articulated a complicated set of nine vague criteria, buttressed by the need to pay "due regard" to "the interests of nonparty stockholders, which may be affected by impinging on the privilege, sometimes injuriously . . . ." *Id.* at 1101 n.17.

Later Supreme Court cases eschewed *Garner*'s hostile approach to privilege. See, for example, *Upjohn Co.* v. *United States*, 449 U.S. 383, 392-93 (1981), in which the Supreme Court rejected the "control group" test for applying the attorney-client privilege to corporate clients in part due to the unpredictability inherent in such a test. The Court first elaborated on the importance of attorney-client privilege – not as an obstacle to the search for truth – but as the oldest of common law privileges, whose

> "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Id.* at 389.

Elsewhere, the Court pointed out that too-narrow an application of the attorney-client privilege:

> "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most lawyers, constantly go to lawyers to find out how to obey the law." *Id.* at 390.

In keeping with this philosophy, the *Upjohn* Court rejected the idea of applying a subjective test to determine after the fact whether an employee's communications with corporate counsel should be deemed privileged:

> "[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.[5]

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[5] Citing this passage from *Upjohn*, the Supreme Court later 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

Footnote continued on next page.

The Supreme Court again rejected the concept of an *ad hoc* balancing test in *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998), the case in which it confirmed that the attorney-client privilege survives the death of the client in both civil and criminal cases. The Court explained 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." These cases make plain that, under the federal common law of privilege, maintaining the confidentiality of attorney-client communications serves important public policy objectives that would be jeopardized by the indiscriminate use of balancing tests that create uncertainty and could chill open communication with company counsel.

In the wake of *Upjohn*, several district courts have questioned whether *Garner* is still good law. In *Shirvani* v. *Capital Investing Corp., Inc.*, 112 F.R.D. 389, 390 (D. Conn. 1986), for example, the court rejected *Garner*, observing that its "rather vague 'good cause' exception . . . was ill-defined in origin and has been troublesome in application." The court went on to analyze *Garner*'s deficiencies in detail:

> "Although corporate management is expected to act ultimately for the shareholder's benefit, a hasty resort to *Garner* concepts will confuse who corporate counsel's clients realistically are, and ignore the genuine need of management in the ordinary course for confidential communication and advice. When the policy basis for attorney-client privilege is carefully considered, then although '[f]iduciary relationships may create special duties that require ... unusual or special care', it is still the case that '[t]hat is more, not less, reason to give fiduciaries full opportunity to consult openly with counsel'. Saltzburg, 'Corporate Attorney-Client Privilege in Shareholder and Similar Cases: *Garner* Revisited', 12 Hofstra L.Rev. 817, 847 (1984). Indeed, a curtailment or confusion of traditional privilege concepts eventually may not lead to more endpoint disclosure at all, but result instead in less open and candid attorney-client communication in the first place. An uncertain and unpredictable rule, moreover, '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 391 (citing *Upjohn*). *Accord Lefkowitz* v. *Duqesne Light Co.*, Nos. 86-1046, 86-2085, 1988 WL 169273 (W.D. Pa. June 14, 1988) ("[W]e fully agree with the reasoning employed by the court in *Shirvani*" in rejecting *Garner*).

Footnote continued from previous page.

> the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee* v. *Redmond*, 518 U.S. 1, 17-18 (1996).

Similarly, in *Milroy* v. *Hanson*, 875 F. Supp. 646 (D. Neb. 1995), the court questioned *Garner*'s continued viability in light of subsequent Supreme Court decisions, stating:

> "*Garner*'s continued vitality is suspect ... even in federal courts." [citation omitted]. Many commentators believe "*Garner* was wrong and ... the attorney-client privilege in shareholder cases should apply just at it does in other litigation." [citations omitted].
>
> In my opinion, *Garner*, adopted as it was prior to the Supreme Court's opinions in *Upjohn* and [*Commodity Futures Trading Comm.* v.] *Weintraub*, [471 U.S. 343 (1985),] is problematic because (a) it is in effect a lower-court-created exception to the general rule announced by the Supreme Court in *Upjohn* and *Weintraub* that a corporation has the right to assert an attorney-client privilege, and (b) the *Garner* opinion does not focus on the critical issue of "management," as the Supreme Court did in *Weintraub*, and the relevant substantive law of corporations for purposes of determining who may assert, waive, or otherwise frustrate the attorney-client privilege for a solvent corporation. As a result, I am not inclined to adopt *Garner* without clear direction from the court of appeals.

Id. at 651; *see also Opus Corp.* v. *International Business Machines Corp.*, 956 F. Supp. 1503, 1509 n.9 (D. Minn. 1996) ("there is some suggestion within this Circuit that the rule espoused by *Garner* may no longer reflect viable authority in view of more recent holdings by the United States Supreme Court, which implicate the attorney-client privilege", citing *Milroy*).

Even if the Supreme Court's criticism of *ex post* balancing tests has left room for application of fiduciary exception criteria in appropriate settings, at a minimum the Supreme Court's protective approach to attorney-client privilege should inform this Court's review of the December 6 Ruling, which deprived Household of its recognized and unwaived attorney-client privilege on a finding of good cause essentially limited to a determination that the material was relevant and "may assist" Plaintiffs in prosecuting their "colorable" claims. *See* December 6 Order at 14, 17. As a matter of sound public policy that Ruling should not be sustained.

B. The Finding that Plaintiffs Represented a Substantial Majority of Shareholders Who Owned Stock at the Time the Privileged Communications Were Created is Unsupported and Factually Wrong

Courts that recognize a fiduciary exception to the attorney client privilege in any context necessarily insist on a threshold showing that the corporation that owns the privilege actually had a fiduciary relationship with the party or parties seeking to invade the privilege. *See, e.g., In Re Kidder Peabody Securities Litigation*, 169 F.R.D. 459, 475 (S.D.N.Y. 1996) ("[T]he logic of the *Garner* approach may limit its application to parties who were shareholders at the time of the assertedly privileged communications, or at least at the time when discovery is sought.") (citations omitted); *Moscovitz v. Lopp*, 128 F.R.D. 624, 637 (E.D. Pa. 1989) ("Under this interpreta-

tion, there must be some fiduciary relationship and a mutuality of intrest at the time the privileged communications were made for the *Garner* rationale to apply."); *Quintel v. Citibank, N.A.*, 567 F. Supp. 1357, 1363 (N.D.N.Y. 1983) ("With respect to communications made after the fiduciary relationship . . , the privilege attaches. The parties' interests were no longer mutual after this point and in fact, diverged following an August 15, 1979 meeting described in the Borbett memorandum. Hence, Garner has no application."); *In re LTV Securities Litigation*, 89 F.R.D. 595, 607 (N.D. Tex. 1981) ("A review of the cases applying the 'good cause' exception supports defendant's temporal distinction. None of the decisions subjects post-event attorney-client communications to disclosure under the Garner rule.") (citations omitted).

This essential element raises fewer concerns in the context of a shareholder derivative action, although even in *Garner*, the court took pains to highlight the need to pay due regard to "the interest of non-party shareholders, which may be affected by impinging on the privilege, sometimes injuriously . . ." 430 F.2d at 1101 n.17. Indeed, it is for this reason that some courts will not entertain *Garner* in a setting other than a shareholder's derivative action. *See, e.g.*, *Weil* v. *Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981) (holding 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, such that "*Garner*'s holding and policy rationale simply do not apply here."); *see also Milroy*, 875 F. Supp. at 651 ("whatever the utility of the *Garner* rationale, it has no applicability where the plaintiff stockholder asserts claims primarily to benefit himself, particularly where such claims will undoubtedly harm *all* other stockholders if successful") (emphasis in original).

Here, in making the pivotal and supposedly undisputed finding that Household and the Jaffe class had a mutuality of interest throughout the period the privileged communications were created *(see* December 6 Ruling at 14), the Magistrate Judge made two clear errors. *First*, contrary to the record on the motion, the Ruling implicitly assumed that all of the privileged communications at issue were created during the Class Period, which ran from July 31, 1999 to October 11, 2002. (That is the only time period for which Plaintiffs even attempted to make a showing.) As set forth in the letter of July 13, 2006 annexed to the Best Decl. as Exhibit A, Plaintiffs were informed some time ago that the E&Y Compliance Engagement did not even begin until July 2002, near the end of the Class Period, and "most of their work was completed after the class period." *See also* redacted retention agreement annexed to the July 13, 2006 letter, forecasting that performance would entail at least 300 person weeks.[6] Plaintiffs made no show-

[6] These materials were provided to the Magistrate Judge as exhibits to the Declaration of Susan

Footnote continued on next page.

ing that they and their putative class represented a majority of Household shareholders at any time after October 11, 2002, and the fact that they filed this lawsuit in August, 2002 put them in an openly adversarial position to Household thereafter.

Second, even as to the Class Period, Plaintiffs made no showing that would justify a conclusive finding of mutuality of interest between the class and Household through October 2002. In support of her finding to the contrary, the Magistrate Judge relied only on a footnote in Plaintiffs' *Reply* brief, which in turn alluded to a chart that purported to show trading volume at various points during the Class Period. December 6 Ruling at 14, citing Plaintiffs' Reply Br. at 7n.7. The chart, which Plaintiffs annexed to their Reply Brief as Exhibit 5, says nothing about who owned the traded shares, whether they were class members or not, or whether the volume represented a steady turnover of shareholders or a steady pattern of activity by existing shareholders, or some other inference from these anonymous figures. In recognition of these deficiencies, Plaintiffs' footnote asked Judge Nolan to assume that 50% of trades were repeat sales, while providing no information to allow the Court to discern if that figure is even in the right ballpark. Apart from being unintelligible and therefore unreliable (especially for so important a task as deciding whether to override a party's privilege), Plaintiffs' footnote and table should not have been considered at all on the motion because the Seventh Circuit Court of Appeals has definitively held that arguments not made in an opening brief are deemed waived, *see, e.g., Estate of Phillips* v. *City of Milwaukee,* 123 F.3d 586, 597 (7th Cir. 1997), and that a "necessary corollary to the principle is that '[a]rguments raised for the first time in the reply brief are waived.'" *Id.*

Because proof of a mutuality of interest between a corporation and the parties seeking to override its attorney-client privilege is an essential element under cases that recognize a fiduciary exception to the privilege, and because Plaintiffs submitted no timely, reliable, admissible evidence on this issue for the period July 2002 through October 11, 2002, and no evidence at all for the period thereafter, the ruling that such mutuality of interest existed at the time the privileged E&Y material was created is clearly erroneous and must be reversed.

C. The December 6 Ruling Erroneously Concluded that Plaintiffs Had Shown Good Cause to Overturn Household's Privilege.

The December 6 Ruling erroneously concluded that Plaintiffs had established "good

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Footnote continued from previous page.

Buckley dated November 3, 2006 in connection with the Household Defendants' response to Plaintiffs' motion to compel production of the E&Y communications.

cause" to preclude application of the attorney-client privilege to the E&Y documents. *See* December 6 Ruling at 17. In support of this finding, Magistrate Judge Nolan pointed to no more than an assertion by Plaintiffs that they consider the contested material relevant and not otherwise available to them. (*See* December Ruling at 14.) However, as this Court pointed out in its Memorandum Opinion and Order dated November 22, 2006, a showing of relevance is not by itself sufficient to support Plaintiffs' onerous demands even for regular fact discovery at this late stage of the case (*see id.* at 7), and in view of the substantial material they already have at hand, Plaintiffs' blanket assertions of need are not in the least persuasive. *See id.* at 8. Although it may be technically correct to say that E&Y documents are the only source of *E&Y's* compilation of facts, that assertion is meaningless, as Plaintiffs have received and continue to receive data in the same general categories from multiple sources within and outside of Household. Most recently, this included interrogatory answers showing quarterly revenues from lending practices that Plaintiffs apparently regard as predatory, a project for which the Magistrate Judge required Household to design and implement special computer programs. And as this Court observed in its November 22 ruling, the millions of documents already produced include Household's entire production to the SEC and extensive material regarding settlements with various state Attorneys General. Plaintiffs obviously would welcome the opportunity to "troll already chartered waters" with the help of Household's work product and other privileged information, but as the Supreme Court has said, "considerations of convenience do not overcome the policies served by the attorney client privilege, *Upjohn*, 449 U.S. at 396. *See also Hickman v. Taylor,* 329 U.S. 495, 516 (1947) ("Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from an adversary".)

The Magistrate Judge's attempted analogy between this case and *In re General Instrument Corp. Securities Litigation,* 190 F.R.D. 527 (N.D. Ill. 2000), does not overcome the lack of substance in Plaintiffs' purported showing of good cause. *See* December 6 Ruling at 14. *General Instrument* involved two *derivative* suits, in which the shareholders were pursuing claims on behalf of the corporation rather than for personal damages. *Id.* at 528. Given the more direct link between derivative shareholder plaintiffs and the corporation whose interests they seek to vindicate, courts have recognized that the good cause standard may be more easily satisfied in derivative actions. For example, in *Ward* v. *Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988) (holding that shareholder plaintiffs in a non-derivative action had not established "good cause" to preclude application of the privilege), the Fifth Circuit explained this distinction in the following terms:

> "Where plaintiffs bring a derivative claim against management for actions in which there are no adverse interests, then the strength of plaintiffs' 'bona fides' may allow for a finding of good cause even though other factors are marginally demonstrated. A non-derivative suit by shareholders against management actions

> that necessarily arise from some adverse interests (*e.g.* disclosures related to a tender offer) presents more problems for finding good cause. . . ."
>
> "Where shareholders bring a successful derivative action on behalf of the corporation, they benefit *all* shareholders. Where, however, shareholders seek to recover damages from the corporation for themselves, they do not even seek a gain for all others. In the latter circumstance, the motivations behind the suit are more suspect, and this more subject to careful scrutiny, in determining if good cause for suspending the privilege exists."

See also In re LTV Securities Litigation, 89 F.R.D. at 608 (declining to apply the *Garner* exception in a securities fraud class action, and 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").]

Ohio-Sealy Mattress Manufacturing Co. v. *Kaplan*, 90 F.R.D. 21, 31-32 (N.D. Ill. 1980), is especially instructive here. The court found that plaintiffs had failed to establish "good cause" even where 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." Indeed, as discussed above, the *Garner* court itself noted that the exception may not apply when the interests of all stockholders were not aligned, or when the interests of the corporation and the plaintiff shareholders were actually adverse. 430 F.2d at 1101 & n.17.

Although Magistrate Judge Nolan recognized that "the non-derivative nature of the claim" was a "strong factor" weighing against Plaintiffs in the *Garner* balance, her December 6 Ruling articulated no countervailing factors sufficient to overcome the important policies underlying attorney-client privilege -- or for that matter, sufficient to subject Defendants to another oppressive, one-sided round of discovery on any subject this close to the long-awaited end of fact discovery on January 31. Plaintiffs' preference to avoid a day of reckoning while further opposing Defendants and fishing for more prejudicial-sounding anecdotes should not be encouraged further. In the interest of basic fairness, Defendants urge the Court to protect Household's attorney-client privilege, and to protect them from further burden, expense and delay.

II. The December 6 Ruling Erroneously Held That Plaintiffs Had Overcome The Work Product Protection Attaching to The E&Y Documents.

The *Garner* exception does not apply to attorney work product. Thus, Magistrate Judge Nolan turned to the question of whether the E&Y documents were protected by the work product

doctrine.[7] While she correctly concluded that the E&Y documents were subject to the attorney work product doctrine, Magistrate Judge Nolan found that Defendants had not established that the E&Y documents constitute "opinion" rather than "fact" work product, and that Plaintiffs have overcome the qualified work production protection for "fact" work product by showing a substantial need for the documents and undue hardship in obtaining the substantial equivalent of the documents by other means. December 6 Ruling at 17. These conclusions are clearly erroneous. As the engagement letter itself makes clear, *see* Best Decl. Ex. A, the Compliance Engagement was conducted at the direction and under the supervision of Household attorneys. An analysis of documents created in connection with that 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 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).

Even if the E&Y documents did constitute only "fact" rather than "opinion" work product, Magistrate Judge Nolan clearly erred in finding that Plaintiffs had shown a substantial need for the E&Y documents and undue hardship in obtaining their substantial equivalent through other means. The finding that the E&Y documents "*may assist* Plaintiffs in establishing falsity, scienter, and materiality" (December 6 Ruling at 17 (emphasis added)), whether correct or not, hardly rises to the level of substantial need, especially given the massive discovery Plaintiffs have already received from Defendants and non-party witnesses. *See generally* Memorandum Opinion and Order, dated November 22, 2006, at 7-9) (rejecting Plaintiffs' similar arguments as a basis to expand discovery of non-privileged material past the Class Period). Mere speculation that the cumulative material sought might be useful to Plaintiffs' case is plainly insufficient to show substantial need to overcome Household's work product protection – especially since the vast majority of it was created *after* Plaintiffs had elected to sue Household. *See Bramlette* v. *Hyundai Motor Co.*, No. 91 C 3635, 1993 WL 338980, at *3 (N.D. Ill. Sept. 1, 1993) ("This kind of speculation has been rejected as a basis for overcoming work product protection.").

Magistrate Judge Nolan also found that "Plaintiffs do not have the underlying data E&Y utilized in preparing its report," and that therefore Plaintiffs could not obtain the substantial equivalent of the E&Y documents. December 6 Ruling at 17. However, Defendants have made

[7] If the Court finds *Garner* to be inapplicable and upholds Household's attorney-client privilege, these will be no need for the Court to consider the work product ruling.

an exhaustive document production in this litigation, and Plaintiffs are in the process of completing depositions of 55 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, has also provided responses to multiples sets of interrogatories and requests for admissions. In light of the tremendous volume of factual information produced in this case, 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).

CONCLUSION

For the foregoing reasons, Defendants' Objections to Magistrate Judge Nolan's December 6 Ruling should be sustained.

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