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-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S DECEMBER 6, 2006 ORDER

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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' Partial Objection ("Pl. Obj.") to Magistrate Judge Nolan's December 6, 2006 Order (the "Order") denying Plaintiffs' motion to compel the production of underlying documents and additional deposition testimony relating to a confidential investigative report prepared for Household by its outside counsel Wilmer, Cutler & Pickering (the "Motion").

PRELIMINARY STATEMENT

In February 2003 Household and the Audit Committee of its Board of Directors engaged outside counsel at the highly regarded law firm of Wilmer, Cutler & Pickering (now "WilmerHale") to investigate and assess certain allegations that had been raised in a threatened lawsuit by a disgruntled employee of its Mortgage Services Division, Elaine Markell, advise the company as to litigation risk and, if appropriate, recommend corrective actions. Shortly before WilmerHale was engaged, the policies and practices that figured in Markell's allegations had become a central subject of a formal investigation being conducted by the SEC, and less than a month later the SEC confirmed its intention to commence legal proceedings against the company.[1] As had been requested, WilmerHale conducted an investigation, analyzed the results, and submitted to the Audit Committee a private and confidential report (the "Restructuring Report" or the "Report") presenting the firm's legal conclusions and recommendations.[2]

The Restructuring Report was produced to Plaintiffs in this litigation nearly two years ago, pursuant to a detailed written non-waiver agreement that expressly permits Plaintiffs to

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[1] The factual background relevant to the underlying motion to compel is set forth in more detail in Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel, which is attached as Exhibit 1 to the accompanying Declaration of Janet A. Beer, Esq. ("Beer Dec. II"). *See* Beer Dec. II Ex. 1 at 2–5. Exhibits referenced in Defendant's Memorandum below are included in the Declaration of Janet A. Beer dated November 3, 2006 ("Beer Dec. I"), at Beer Dec. II Ex. 2; in the Declaration of James R. Wrathall dated November 3, 2006, at Beer Dec. II Ex. 3; or, in the case of exhibits that were annexed to Plaintiffs' motion below, in Exhibit 2 to the Declaration of Jason C. Davis ("Davis Dec."), which was filed under seal on December 21, 2006 to accompany Plaintiffs' Partial Objection.

[2] Because the copy of the March 24, 2003 final Restructuring Report that appears at Exhibit 4 to the Davis Declaration appears to be missing pages 9–11, Defendants have attached a complete copy as Beer Dec. II Ex. 4. WilmerHale investigated two distinct sets of allegations and presented two final reports to the Audit Committee (the Restructuring Report and a separate Bankruptcy Report). Plaintiffs sought to compel underlying documents and additional deposition testimony relating only to the Restructuring Report, however, so the term "Report" as used in this Memorandum refers only to the Restructuring Report.

use the Report in this litigation and for purposes of this litigation. *See* Davis Dec. Ex. 5.[3] Even though the WilmerHale Report is generally favorable to Household, Defendants have consistently told Plaintiffs that they do not intend to introduce in their defense either the Report or any privileged material relating to the underlying investigation by WilmerHale or the preparation of its Report.[4] Defendants recognize — as Plaintiffs apparently do not — that the Report has no probative value in this litigation, not only because the Reports were produced nearly six months after the close of the Class Period but also because, even to the extent the findings might relate to any events that occurred during the Class Period, the findings in the Reports plainly constitute inadmissible hearsay.

More than eighteen months after they received the Restructuring Report, and only three months before the close of fact discovery, Plaintiffs filed their motion to compel. The Report itself was not at issue in Plaintiffs' Motion, which sought to compel production of underlying documents and additional deposition testimony relating to the Report. Plaintiffs have never specifically identified the particular documents or categories of documents whose production they hope to compel. Instead, the Motion swept broadly and sought the production of "*all* documents (including interview notes, statistical studies and draft reports) underlying the Restructuring Report . . . ." Pl. Obj. at 3 (emphasis added). Plaintiffs argued, variously, that the materials relating to the Restructuring Report were not privileged communications and not work product, that if the materials were work product Plaintiffs had shown substantial need and undue hardship, and that if the materials were privileged the privilege was waived when the Report was provided to Household's auditors

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[3] The Restructuring Report was produced to Plaintiffs by Household's outside auditors KPMG, along with certain other privileged portions of KPMG's audit work papers relating to Markell's allegations. *See* Davis Dec. Ex. 5. Several documents attached to Plaintiffs' Motion and to the Davis Declaration with no indication of their status are privileged documents that were produced pursuant to the February 23, 2005 non-waiver agreement, which permits their use in, and for purposes of, this litigation. *See* Davis Dec. Ex. 2.1, Ex. 2.2, Ex. 2.5 and Ex. 4. Production and use of these documents as authorized by the February 23, 2005 non-waiver agreement is not intended to, and shall not, constitute a waiver by Defendants of any applicable privilege. Plaintiffs have also included in the papers filed in support of their Objection certain documents that have been recalled by Defendants as inadvertently produced. *See* Davis Dec. Ex. 2.7, Ex. 7, Ex. 16 and Ex. 17. The filing and dissemination of documents subject to a claim of privilege, even if filed under seal, is contrary to the provisions of the Protective Order dated November 5, 2004 and Defendants object to Plaintiffs' cavalier disregard of their obligations under the Protective Order. Defendants do not waive or intend to waive, but on the contrary reserve and intend to preserve, all privileges applicable to these improperly filed documents.

[4] Defendants have, of necessity, reserved the right to respond appropriately should Plaintiffs nonetheless seek and be granted permission to make use of the Reports in their case at trial or in motion practice.

(notwithstanding an explicit non-waiver agreement) or when the Report was produced to the SEC (notwithstanding an express confidentiality agreement) or because a few non-privileged factual documents were intentionally produced to Plaintiffs in this litigation and a smattering of privileged documents were inadvertently produced.

Magistrate Judge Nolan determined that "all communications and documents relating to the WilmerHale investigation are privileged," Order at 23, and that "the report was prepared in anticipation of litigation" and thus within the scope of work product protection, Order at 24. Plaintiffs quarrel with both findings and with Magistrate Judge Nolan's further finding that no waiver of privilege occurred, but they have come nowhere near satisfying the stringent standard for setting aside the Magistrate Judge's ruling. Plaintiffs' objection as to the existence of privilege, as if this were a *de novo* review, does no more than reiterate the same flawed arguments that Magistrate Judge Nolan considered in detail and rejected. Plaintiffs devote the bulk of their objection to the contention that Magistrate Judge Nolan erred in applying the "selective waiver" theory in this case. Setting aside Plaintiffs' rhetorical jousting about creating new privileges, their argument boils down to this: If the theory of selective waiver were rejected, then providing the Restructuring Report to the SEC would have waived the privilege as to the Report. If the Restructuring Report is no longer privileged — and this is where Plaintiffs cannot connect the dots — Defendants must produce all the underlying privileged documents that were <u>not</u> provided to the SEC or to anyone else. In other words, Plaintiffs are attempting to use the Restructuring Report — a document they already have and that was not at issue on their Motion — as a proxy for all the underlying documents they actually seek.

JUDGE NOLAN'S DECEMBER 6 ORDER

Before issuing her December 6 Order, Magistrate Judge Nolan reviewed the Restructuring Report, the WilmerHale engagement letter and related documents, and evaluated the parties'respective legal and factual arguments, and based on her careful review and evaluation, determined that the underlying documents and the testimony sought by Plaintiffs fall within the scope of the attorney client privilege and work product protection. *See* Order at 20-25. Magistrate Judge Nolan also considered and rejected Plaintiffs' arguments that any applicable privileges had been waived. *See* Order at 25-34. Magistrate Judge Nolan then denied Plaintiffs' motion to compel.

First and most important, Magistrate Judge Nolan held that the documents Plaintiffs seek are protected by the attorney-client privilege. *See* Order at 23 ("The court concludes that all communications and documents relating to the WilmerHale investigation are privileged."). In arriving at this conclusion, Magistrate Judge Nolan evaluated and rejected Plaintiffs' assertion that WilmerHale provided Household with no legal advice or analysis, reviewed the Restructuring Report, and found that "WilmerHale considered both the quantitative and qualitative materiality of variances from disclosed restructuring policies, and provided legal advice as to whether Household should take corrective action." Order at 21. Magistrate Judge Nolan also considered and rejected Plaintiffs' contention that the subject documents and testimony cannot be privileged simply because WilmerHale's engagement had been suggested by Household's independent outside auditor, KPMG, in accordance with § 10A of the 1934 Act.[5] Order at 21-22 ("Nothing prohibited KPMG, however, from requesting legal assistance in meeting its obligations under § 78j-1(b)."). And Magistrate Judge Nolan considered and rejected Plaintiffs' implausible argument that WilmerHale represented only the Audit Committee of Household International, Inc. and not the corporation itself. Order at 23 ("WilmerHale's client was the entire corporation, and not just the Audit Committee.").

Next, Magistrate Judge Nolan evaluated and rejected Plaintiffs' contention that the WilmerHale documents are not protected work product. Order at 23 ("The WilmerHale documents and communications are also protected by the work product privilege."). Magistrate Judge Nolan found that WilmerHale had been retained because of the prospect of litigation and explicitly rejected Plaintiffs' contention that WilmerHale could not have been counsel for Household because Household had also retained other counsel in connection with Markell's threatened lawsuit and the SEC's formal investigation. Order at 23-24. Furthermore, even if Plaintiffs had requested only fact work product and not opinion work product — which is plainly not the case — Magistrate Judge Nolan determined that Plaintiffs had failed to demonstrate "substantial need" for the subject documents and testimony sufficient to overcome work product protection, Order at 24 ("To the extent Defendants do not intend to introduce the Restructuring Report at trial, however, Plaintiffs have no substantial need for the information for cross-examination purposes."), and that Plaintiffs failed to

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[5] Section 10A requires that: "If, in the course of conducting an audit . . . the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the accountant shall . . . determine whether it is likely that an illegal act has occurred." 15 U.S.C § 78j-1(b)(1).

demonstrate that they could not obtain equivalent information without "undue hardship," Order at 25.

Finally, Magistrate Judge Nolan evaluated and rejected Plaintiffs' arguments that Defendants had waived privilege with regard to the documents Plaintiffs seek to compel. Magistrate Judge Nolan found no waiver in Defendants' production of non-privileged factual documents connected with the investigation or in the unintentional production to Plaintiffs of a small number of privileged documents. *See* Order at 25–26. She also found no waiver in the disclosure of the Restructuring Report to Household's outside auditors, noting that she had previously rejected Plaintiffs' arguments regarding disclosure to an auditor and would not revisit her earlier ruling. Order at 27.[6] Magistrate Judge Nolan's discussion of "selective waiver" focused primarily on the Restructuring Report itself and, as discussed below, her application of the selective waiver theory in this case is neither contrary to law nor clearly erroneous. In any event, since the draft reports, statistical studies, interview notes and other underlying documents at issue on Plaintiffs' motion were never produced to the SEC or anyone else, Plaintiffs' waiver argument is simply inapplicable to those underlying documents. Even if Plaintiffs were able to demonstrate that Household waived its privilege as to the Restructuring Report by producing the Report to the SEC, the underlying documents would still be privileged and still protected from disclosure. In short, the result Magistrate Judge Nolan reached — denying Plaintiffs' motion to compel as to documents underlying the Restructuring Report — does not depend on her finding that the doctrine of "selective waiver" applies to preserve the privilege as to the Restructuring Report.

ARGUMENT

A. A Magistrate Judge's Disposition of a Discovery Dispute is Entitled to Substantial Deference

Fed. R. Civ. P. Rule 72(a) sets forth the exacting standard that governs a district judge's review of a magistrate judge's decision on a nondispositive motion such as this discovery dispute. *Ocean Atlantic Woodland Corp.* v. *DRH Cambridge Homes, Inc.*, No. 02 C 2523, 2004 WL 609326, at *3 (N.D. Ill. Mar. 23, 2004) (Guzman, J.) ("Routine discovery motions are considered to be 'nondispositive' within the meaning of Rule 72(a)."). Rule 72(a) provides that the dis-

[6] Plaintiffs have also objected to Magistrate Judge Nolan's prior ruling, *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006).

trict judge "'shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be *clearly erroneous or contrary to law.*'" (emphasis added) *See also For Your Ease Only, Inc.* v. *Calgon Carbon Corp.*, No. 02 C 7345, 2003 WL 21475905, at *3 (N.D. Ill. June 20, 2003); 12 Charles Alan Wright, *et al.*, *Federal Practice and Procedure 2d* § 3069 (1997). With respect to factual determinations, the "clearly erroneous" standard "means that the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks* v. *Samsung Heavy Industries Co.*, 126 F.3d 926, 943 (7th Cir. 1997). The application of a legal standard to a particular set of facts is also reviewed under the "clearly erroneous" standard. *McFarlane* v. *Life Insurance Co. of North America*, 999 F.2d 266, 267 (7th Cir. 1993).

Determinations of a magistrate judge in the discovery context are entitled to substantial deference because "[t]he Federal Rules of Civil Procedure grant magistrate judges broad discretion in resolving discovery disputes," *Ocean Atlantic Woodland Corp.*, 2004 WL 609326, at *3, and "[t]he magistrate judge has a much higher familiarity with the parties and the conduct of discovery . . . ." *Whittaker* v. *NIU Board of Trustees*, No. 00C 50447, 2004 WL 524949, at *1 (N.D. Ill. Mar. 12, 2004). Magistrate Judge Nolan's December 6 Order reflects a careful and reasoned application of relevant law to the documents and testimony at issue on Plaintiffs' motion to compel production of documents and further testimony related to WilmerHale's investigation. As demonstrated herein, Plaintiffs offer no valid and sufficient basis to disturb the Order.

B. Magistrate Judge Nolan Correctly Found That the Subject Documents Are Privileged

After reviewing the Restructuring Report, the Engagement Letter and several related documents, Magistrate Judge Nolan found that all communications and documents relating to the WilmerHale investigation are protected by the attorney client privilege and the work product doctrine. Order at 23. Plaintiffs object to this Court that "[t]he documents at issue are not even privileged," advancing a jumbled argument that makes no distinction between the attorney client privilege and the work product doctrine. *See* Pl. Obj. at 11-13. Plaintiffs' arguments fail as to both the attorney client privilege and the work product doctrine.

1. The Documents at Issue Are Protected by the Attorney Client Privilege

Magistrate Judge Nolan correctly determined that the documents at issue are protected by the attorney client privilege. Order at 23. Plaintiffs offer three unavailing arguments in support of their contention that the documents at issue are not protected by the attorney client privilege: (1) that WilmerHale was not hired to provide legal advice but only to conduct a factual investigation, in part because Household's outside auditors needed to comply with the obligations imposed on them by § 10A of the 1934 Act and also because Household needed to address factual questions essential to the consummation of Household's merger with HSBC; (2) that WilmerHale represented the Audit Committee of Household's Board of Directors and not the corporation itself; and (3) that WilmerHale could not have represented Household vis-à-vis the SEC or Elaine Markell because other firms represented Household in those matters. Each of these arguments was duly considered and properly rejected by Magistrate Judge Nolan.

The fact that the Audit Committee of Household's Board of Directors may have engaged WilmerHale does not, as Plaintiffs contend, indicate that the corporation was not WilmerHale's client. *See, e.g., SEC* v. *Brady*, No. 3:05-CV-1416-M, 2006 U.S. Dist. LEXIS 74979, at **22–23 (N.D. Tex. Oct. 16, 2006) (finding, where a law firm was retained by an audit committee to conduct an internal investigation, that communications between officers and directors and the law firm are privileged communications between "corporate client and its counsel"); *Washington Bancorp.* v. *Said*, No. 88-3111, 1989 U.S. Dist. LEXIS 5135, at *6 (D.D.C. May 10, 1989) (finding that the Special Committee and the Board of Directors of a corporation are "the same corporate client" for purposes of assessing the attorney-client relationship). Moreover, the mere fact that other counsel also represented Household in the context of the SEC investigation and in connection with Markell's threatened lawsuit does not support Plaintiffs' conclusion that WilmerHale did not represent Household, and it defies logic even to suggest that if a client simultaneously employs more than one law firm on a given matter privilege attaches to the communications and work product of only one of them.

Likewise, notwithstanding Plaintiffs' unsupported assertions to the contrary, the fact that WilmerHale was engaged after Household's independent auditor requested an investigation by outside counsel to ensure compliance with the requirements of § 10A of the 1934 Act does not in any way demonstrate that WilmerHale conducted only a factual investigation. Section 10A re-

quired KPMG to ascertain whether Household had engaged in any illegal acts that would directly and materially affect its financial statements. The Magistrate Judge reviewed the Restructuring Report, the WilmerHale engagement letter and related documents and concluded that the work performed by WilmerHale had involved legal analysis and that legal advice had been provided. Whether KPMG, or anyone else, first made the suggestion that Household retain outside counsel is simply irrelevant to the privilege inquiry.

Finally, that WilmerHale's engagement required it to gather facts does not, as Plaintiffs contend, indicate that WilmerHale did not provide legal advice. Far from treating these as mutually exclusive activities, Magistrate Judge Nolan correctly observed that fact-gathering is a prerequisite to the formation of legal conclusions. Order at 21 (citing *Upjohn Co.* v. *United States*, 449 U.S. 383, 390-91 (1981) ("The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.")). Furthermore, WilmerHale's engagement plainly went beyond an investigation of facts; the Restructuring Report itself contains a detailed analysis of quantitative and qualitative materiality in the context of the securities laws. *See* Order at 21; Beer Dec. Ex. 4 at 7–8. The report also assessed the company's compliance with § 13 of the Securities Exchange Act and provided advice as to the legal obligation to take certain corrective actions. Beer Dec. Ex. 4 at 10–11.

2. The Documents at Issue Are Protected Under the Work Product Doctrine

Magistrate Judge Nolan correctly determined that the documents at issue are protected work product. Order at 23. Plaintiffs seek "all documents (including interview notes, statistical studies and draft reports) underlying the Restructuring Report." Pl. Obj. at 3. Documents fall within the work product doctrine if they were created in anticipation of litigation. *See Weeks* v. *Samsung Heavy Industries Co.*, No. 93 C 4899, 1996 U.S. Dist. LEXIS 8554, at *8 (N.D. Ill. June 19, 1996) (Guzman, J.) ("Under the work product doctrine, a qualified immunity attaches to any document prepared in anticipation of litigation by or for a party."). Magistrate Judge Nolan correctly inquired as to whether the Restructuring Report was created in anticipation of litigation and found that the Report was created by WilmerHale in the context of an ongoing formal investigation of Household by the SEC and subsequent to the threatened filing of an action by disgruntled former Household employee Elaine Markell. Order at 23–24. Therefore Magistrate Judge Nolan's conclusion that the Restructuring Report was created "because of the prospect of litigation," Order at 23,

was plainly correct. Plaintiffs have failed to carry their burden to demonstrate clear error in Magistrate Judge Nolan's determination that the documents they seek are protected work product.

Plaintiffs seek to compel the production of drafts, documents reflecting interviews and other underlying documents prepared by attorneys at WilmerHale in the course of the firm's investigation and in connection with the attorneys' preparation of the Restructuring Report. Such documents, which reflect the thought processes and analyses of attorneys, are precisely the sort of documents routinely protected as opinion work product. *See, e.g.*, *Chamberlain Manufacturing Corp.* v. *Maremont Corp.*, No. 90 C 7127, 1993 U.S. Dist. LEXIS 371, *5 (N.D. Ill. Jan. 15, 1993) (finding, where a corporate entity engaged outside counsel to conduct an investigation but never disclosed to any third party interview notes, summaries and other documents underlying the investigation report, that such documents were "the very essence of what is protected by the work product doctrine" as they "undoubtedly reflect[ed] [attorneys'] thoughts and mental impressions of what was important in the interviews"). *See also Hollinger International Inc.* v. *Hollinger Inc.*, 230 F.R.D. 508, 512 (N.D. Ill. 2005) ("[L]egal memoranda prepared by attorneys which analyze the facts under the applicable legal standards . . . constitute classic opinion work product . . . because they contain the attorneys' mental impressions, conclusions, opinions and legal theories.").[7]

Because the documents at issue reflect attorneys' though processes and mental impressions, and because they were prepared in anticipation of litigation, Plaintiffs' contention that Magistrate Judge Nolan committed clear error in finding these documents protected by the work product doctrine is unavailing.

3. No Waiver of Privilege Occurred as to the Underlying Material

There is no clear error in Magistrate Judge Nolan's determination that Defendants adequately protected their privilege as to the documents that Plaintiffs seek to compel. Plaintiffs

[7] Plaintiffs have no basis to contend that Magistrate Judge Nolan erred by not separately addressing their attempt to compel Household employee Per Ekholdt to respond yet again to the voluminous written questions Plaintiffs propounded as a follow up to Mr. Ekholdt's deposition testimony as to a single document (an email transmitting a tabular array of factual data that had been requested by WilmerHale). *See* Davis Dec. Ex. 6. Several months after Mr. Ekholdt's deposition, Plaintiffs served 102 written questions, and Mr. Ekholdt promptly answered every question that asked about the content and interpretation of the document. He declined to answer questions that sought the disclosure of privileged communications with WilmerHale attorneys or their protected work product. *See, e.g.*, Davis Dec. Ex. 6 at 2-3, Questions 4–8 and 11–12. Magistrate Judge Nolan's ruling denying Plaintiffs' motion to compel responds adequately and correctly to Plaintiffs' demand for further testimony from Per Ekholdt.

seek documents underlying the Restructuring Report — not, as explained above, the Restructuring Report itself, which Plaintiffs already have — including interview notes and draft reports. These documents, which constitute attorney opinion work product, have never been intentionally produced to the SEC or to Plaintiffs.[8] Plaintiffs' waiver argument and their objection to Magistrate Judge Nolan's findings regarding "selective waiver" thus sweep too broadly.

Defendants produced the Restructuring Report to the SEC and to Plaintiffs only pursuant to express written non-waiver agreements. Defendants have also produced to the SEC and to Plaintiffs certain documents containing non-privileged factual material that was also provided to WilmerHale in connection with its investigation. Defendants have never intentionally produced the privileged documents Plaintiffs now seek — underlying analytical materials, including interview memoranda and draft reports, that are plainly protected by the attorney client privilege and work product protection.

Production of an investigation report does not constitute a waiver of privilege as to underlying work product. *Chamberlain*, 1993 U.S. Dist. LEXIS 371, at *7 ("Though *Upjohn* did not explicitly state that voluntary disclosure to the government of a report of violations does not waive privilege as to underlying notes of interviews of employees made by attorneys, it has been so interpreted by the Seventh Circuit.") (citing *In re Feldberg*, 862 F.2d 622, 629 (7th Cir. 1988). *See also Neal* v. *Honeywell, Inc.*, No. 93 C 1143, 1995 U.S. Dist. LEXIS 14488, at *20-22 (N.D. Ill. Oct. 3, 1995) (holding that disclosure of an investigatory report to the adversary did not result in waiver as to underlying opinion work product that had not been produced).

4. Even as to Documents that Household Provided to the SEC, Magistrate Judge Nolan Did Not Commit Clear Error in Applying the Selective Waiver Doctrine

Magistrate Judge Nolan's decision may be disturbed only if it is "clearly erroneous." This Court is well aware that "[t]he Seventh Circuit has interpreted the clear error standard to mean that 'the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made.'" *Ocean Atlantic Woodland Corp*,

[8] To the extent Defendants have become aware of any inadvertent production of privileged materials in their document production of nearly five million pages, Defendants have immediately and proactively recalled such documents from production in accordance with the terms of the Protective Order. *See, e.g.*, Beer Dec. II Ex. 3(F).

2004 WL 609326, at *3 (quoting *Weeks* v. *Samsung Heavy Industries Co.*, 126 F.3d 926, 943 (7th Cir. 1997)). In an area where the law in this circuit remains unsettled, as it does as to the issue of "selective waiver," the Magistrate Judge does not commit clear error by choosing a reasonable position backed by precedent. *See, e.g.*, *In re Rivastigmine Patent Litigation*, No. 05 MD 1661 (HB), 2006 U.S. Dist. LEXIS 84737 at *20 n.11 (S.D.N.Y. Nov. 22, 2006) ("Indeed, the very fact that the governing law at issue is unsettled makes it more difficult to overturn [the Magistrate Judge's] reasoning as 'clearly erroneous' or 'contrary to law.'"); *Manufacturing Administration and Management Systems* v. *ICT Group, Inc.*, 212 F.R.D. 110, 119 (E.D.N.Y. 2002) ("A Magistrate Judge's order simply cannot be contrary to law when the law itself is unsettled.").

As noted by Magistrate Judge Nolan, "the circuit courts are split as to the viability and application of [the selective waiver] theory," Order at 28, and "the Seventh Circuit has not yet determined its position on selective waiver," Order at 31. The governing law as to selective waiver is unsettled in this circuit.[9] *Neal*, 1995 U.S. Dist. LEXIS 14488, at *8 n.2 ("There is a split in the circuit courts of appeals on this issue, although several circuits, including the Seventh Circuit, have not addressed it."); *Chamberlain*, 1993 U.S. Dist. LEXIS 371, at *5 ("There is a significant debate in the courts as to what effect voluntarily disclosing a document to a government agency has on the privilege status of that document as to other parties."). Far from being settled law, as Plaintiffs assert, the issue of "selective waiver" remains unsettled in several circuits.[10]

Plaintiffs' self-serving attempt to wish away the existence of this circuit split, Pl. Obj. at 4 ("There is no 'split' . . . ,") and downplay the considerable uncertainty in the law concern-

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[9] It is precisely this circuit split that led the Advisory Committee on Evidence Rules to suggest clarifying the waiver issue with the addition of Federal Rule of Evidence 502(c), as noted by Judge Nolan, Order at 34 n.4. Moreover, it was entirely proper for the Magistrate Judge to cite — in a footnote — to a relevant proposed Federal Rule of Evidence. *See Ryan* v. *Commissioner*, 568 F.2d 531, 543 (7th Cir. 1977) (examining proposed Rule of Evidence 505 for guidance, despite the plaintiffs' objections, even where Congress had rejected the rule). Plaintiffs state incorrectly, however, that Magistrate Judge Nolan based her ruling on the proposed amendment and that she erred in so doing.

[10] *See Salomon Bros. Treasury Litigation* v. *Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) ("[W]e decline to adopt a per se rule that all voluntary disclosures to the government waive work product protection."); *United States* v. *Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2005) ("Whether the sort of selective waiver McKesson seeks is available in this Circuit is an open question."); *In re Natural Gas Commodity Litigation*, No. 03 Civ. 6186 (VM) (AJP), 2005 U.S. Dist. LEXIS 11950, at *21 (S.D.N.Y. June 21, 2005) ("The Second Circuit has not directly answered the question posed by plaintiffs' motion to compel: whether disclosure of privileged documents to governmental agencies in response to a subpoena constitutes a waiver of that privilege for subsequent litigations where the disclosing party (defendants, here) entered into a confidentiality, 'non-waiver' agreement before producing the documents to the governmental agencies.").

ing selective waiver rests on a dramatic overreading of the impact of *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844 (8th Cir. 1988). In *Chrysler*, a divided panel of the Eighth Circuit held that defendant had waived work product protection by voluntarily disclosing a computer tape to private class action plaintiffs and thus declined to vacate an order requiring that the tape be provided to the U.S. Attorney. *Id.* at 846-47.[11] The finding of waiver in *Chrysler* rests on a unique factual scenario, including the parties' contemplation that the computer tape would not remain confidential but rather would be used and disclosed to the public during the class action settlement hearings. Id. at 847. The court notes no disagreement with or disapproval of its earlier en banc opinion in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc), which had concluded that only a limited waiver of attorney-client privilege occurred where outside counsel's privileged interview memoranda had been disclosed to the SEC. *Chrysler* does not, as Plaintiffs claim, demonstrate that "the [selective waiver] theory has fallen into disfavor" in the Eighth Circuit, nor does it eliminate the circuit split noted by Magistrate Judge Nolan.

Nor, despite Plaintiffs' claims to the contrary, has the Supreme Court "affirmed" the rejection of selective waiver. Pl. Obj. at 4-5. The Supreme Court's denial of a petition for writ of certiorari in *Qwest Communications Internationa, Inc.* v. *New England Health Care Employees Pension Fund*, 127 S. Ct. 584 (2006), neither resolves nor closes the issue. *Teague* v. *Lane*, 489 U.S. 288, 296 (1989) ("the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case'") (quoting *United States* v. *Carver*, 260 U.S. 482, 490 (1923)); *Williams* v. *Chrans*, 50 F.3d 1358, 1361 (7th Cir. 1995) (" the denial of certiorari does not indicate disapproval or even lack of interest in the issue by the Supreme Court").

Contrary to Plaintiffs' overblown assertions that the Order creates new privileges or expands old ones, Magistrate Judge Nolan makes amply clear that she is applying selective waiver with respect to the Restructuring Report only "in this case," Order at 18, 34, and she expressly declines to adopt a *per se* rule regarding waiver with respect to government disclosures, Order at 33. Given the unsettled nature of the law in this area, Magistrate Judge Nolan's reasoned analysis of selective waiver is not contrary to law and cannot constitute clear error. There is no cause to disturb her ruling.

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[11] The Court held that the tape was *not* opinion work product and acknowledged that it was a close call whether the tape was even ordinary work product. *Id.* at 846.

C. Plaintiffs Improperly Raise an Objection as to Subject Matter Waiver, Which Magistrate Judge Nolan Did Not Reach in the Order

Plaintiffs improperly attempt to conflate the doctrines of selective waiver, which Magistrate Judge Nolan discussed in the Order, and subject matter waiver, which she did not reach.[12] Even if this Court were to find that the attorney client privilege and work product protection had been waived as to the Restructuring Report in consequence of its having been produced to the SEC, the production of the Report pursuant to an explicit non-waiver agreement cannot be a predicate for subject matter waiver. *See, e.g.*, Beer Dec. II Ex. 2(H) at 2 ("The Staff agrees that production . . . provides the Staff with no additional grounds to subpoena testimony, documents or other privileged materials . . . ."); *see also* Davis Dec. Ex. 5 ("it is hereby agreed that production of the documents at issue will not be deemed to constitute a waiver by Household Defendants of any privilege which Household has with respect to these documents or any other documents produced in this case . . . .").

Moreover, even if this Court were to find a waiver of privilege as to the Restructuring Report itself and chose to address the issue of subject matter waiver, Plaintiffs' motion must fail as to alleged subject matter waiver of underlying documents because, as discussed above, those documents constitute opinion work product. *See Canel* v. *Lincoln National Bank*, 179 F.R.D. 224, 226 (N.D. Ill. 1998) (explaining that courts have "consistently held that there exists no subject matter waiver for the kind of work product expressly defined in Fed. R. Civ. P. 26(b)(3) as the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation") (citation and internal quotation marks omitted); *see also Hartford Fire Insurance Co.* v. *Pure Air On the Lake L.P*, 154 F.R.D. 202 (N.D. Ind. 1993) (finding that disclosure of a press release which was made public and also given to an opposing party did not waive work product protection as to the report on which the press release was based, nor as to the underlying documents relied upon in its creation). Plaintiffs seek to compel the production of underlying

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[12] Plaintiffs concede that Magistrate Judge Nolan "did not have occasion" to address the scope of any waiver in her opinion. Pl. Obj. at 13. If the court were to find that the question of subject matter waiver must be addressed, one proper course would be to remand the matter to Judge Nolan for development of the factual record. *See For Your Ease Only, Inc.* v. *Calgon Carbon Corp.*, No. 02 C 7345, 2003 WL 21475905, at *5 (N.D. Ill. June 19, 2003) (remanding to Magistrate Judge to consider new evidence); *Neal* v. *Honeywell, Inc.*, No. 93 C 1143, 1995 U.S. Dist. LEXIS 19351, at *10 (N.D. Ill. Dec. 22, 1995) (finding the magistrate judge failed to provide a clear reason for sanctions and remanded to magistrate for clarification).

documents that include interview notes and draft reports, which are necessarily suffused with the opinion work product of the attorneys who recorded their impressions and drafted the reports. Pl. Obj. at 3. In the event the Court finds any waiver of privilege and work product protection with regard to documents provided to the SEC, that waiver should not be extended to the documents Plaintiffs seek.

CONCLUSION

In view of Plaintiffs' failure to demonstrate that Magistrate Judge Nolan's December 6 Order was clearly erroneous as it relates to WilmerHale documents, Plaintiffs' Objections should be overruled.

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Respectfully submitted,

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