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

DECLARATION OF D. CAMERON BAKER IN SUPPORT OF THE CLASS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS PERTAINING TO HOUSEHOLD'S CONSULTATIONS WITH ERNST & YOUNG LLP

[REDACTED VERSION]

I, D. CAMERON BAKER, declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of California and am admitted to the General Bar of the United States District Court in the Northern District of Illinois. I am of counsel at the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins LLP, lead counsel for plaintiffs and the Class in the above-entitled action. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

2. Attached are true and correct copies of the following exhibits:

Exhibit A: August 30, 2002 Ernst & Young Compliance Engagement Presentation (three copies);

Exhibit B: Documents produced by Household regarding Ernst & Young's interviews;

Exhibit C: Technology & Services, Consumer Lending Systems, August 2002 Monthly Status Report;

Exhibit D: Technology & Services, Consumer Lending Systems, September 2002 Monthly Status Report;

Exhibit E: List of electronic documents authored by Ernst & Young;

Exhibit F: Letter dated September 24, 2002 from Kenneth H. Robin to the Members of the Multistate Working Group;

Exhibit G: Letter dated December 11, 2002 from Watchell, Lipton, Rosen & Katz to Ken W. McAllister of the Securities and Exchange Commission;

Exhibit H: Household Bank, f.s.b. notes from the Office of Thrift Supervision Examination Update Meeting;

Exhibit I: Correspondence between the Class' and Ernst & Young regarding production of documents;

Exhibit J: Correspondence between the Class' and Household regarding Ernst & Young documents;

Exhibit K: Email dated June 20, 2002 from Ken Robin to Household;

Exhibit L: Household's internal documents regarding Ernst & Young's audit;

Exhibit M: Excerpt of Jenner & Block, *Practice Series, Protecting Confidential Legal Information, A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine* by Jerold S. Solovy, Robert L. Byman, Michael T. Brody, David M. Greenwald, Blair R. Zanzig, Anders C. Wick, Kathy A. Karcher, Marek H. Badyna and Adam A. Hachikian

Exhibit N: Spreadsheet produced by Household, Bates Nos. HHS-E 0001208.001 through HHS-E 0001208.0050.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 16th day of October, 2006.

s/D. Cameron Baker
D. Cameron Baker

T:/Cases/SF/Houshold Intl/DEC0035781_UnderSeal.doc

Exhibit A

Document Filed Under Seal

Exhibit B

Document Filed Under Seal

Exhibit C

Document Filed
Under Seal

Exhibit D

Document Filed Under Seal

Exhibit E

BEGNO	ENDNO	FILENAME	AUTHOR	TEXT
HHS-E0012102	HHS-E0012102.0001	HHS-E 0012102 PRIV __ JW Action Items Feb 14.doc.T	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012103	HHS-E0012103.0001	HHS-E 0012103 PRIV __ JW PPP Review Status Tracker	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012120	HHS-E0012120.0001	HHS-E 0012120 PRIV __ JW Action Items Feb 21.doc.T	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012121	HHS-E0012121.0001	HHS-E 0012121 PRIV __ JW PPP Review Status Tracker	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012156	HHS-E0012156.0001	HHS-E 0012156 PRIV RECAST FILE ORIGINAL.xls.TXT	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012176	HHS-E0012176.0001	HHS-E 0012176 PRIV __ JW Action Items Mar 6.doc.TX	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012177	HHS-E0012177.0001	HHS-E 0012177 PRIV __ JW PPP Review Status Tracker	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012183	HHS-E0012183.0001	HHS-E 0012183 PRIV __ Points on Points TN VA NY CT	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012203	HHS-E0012203.0001	HHS-E 0012203 PRIV __ CA_ARMS_REFUNDS.XLS.TXT	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012207	HHS-E0012207.0001	HHS-E 0012207 PRIV __ CA_ARMS_REFUNDS _ addition.x	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012217	HHS-E0012217.0001	HHS-E 0012217 PRIV CA_ARMS_REFUNDS.XLS.TXT	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012221	HHS-E0012221.0001	HHS-E 0012221 PRIV __ CA_ARMS_REFUNDS _ addition2.	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012225	HHS-E0012225.0001	HHS-E 0012225 PRIV __ JW Action Items Mar 14.doc.T	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012226	HHS-E0012226.0001	HHS-E 0012226 PRIV __ JW PPP Review Status Tracker	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012228	HHS-E0012228.0001	HHS-E 0012228 PRIV __ CE File Request Matrix 3_14_	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.

BEGNO	ENDNO	FILENAME	AUTHOR	TEXT
HHS-E0012234	HHS-E0012234.0001	HHS-E 0012234 PRIV __ CA_ARMS_REFUNDS_ addition3.XL	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.
HHS-E0012248	HHS-E0012248.0001	HHS-E 0012248 PRIV CA_ARMS_REFUNDS.X LS.TXT	Ernst & Young	___Page___ 1 This document has been withheld for PRIVILEGE.

Exhibit F

Document Filed
Under Seal

Exhibit G

Document Filed
Under Seal

Exhibit H

Document Filed
Under Seal

Exhibit I

ERNST & YOUNG LLP ▪ 1225 Connecticut Avenue, N.W., 2nd Fl. Washington, D.C. 20036 ▪ Phone: 202 327-6000 Direct: 202 327-7605 Fax: 202 327-7601

Thomas L. Riesenberg
Deputy General Counsel

June 6, 2006

REC'D JUN 07 2006

VIA FACSIMILE AND FEDERAL EXPRESS

D. Cameron Baker
Lerach Coughlin Stoia Geller
Rudman & Robbins LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Subpoena Duces Tecum to Ernst & Young LLP:
Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al.

Dear Mr. Baker:

Ernst & Young LLP ("Ernst & Young") has received the subpoena duces tecum served on May 23, 2006.

1. Ernst & Young, a non-party to this litigation, objects to the subpoena to the extent it purports to require, in the absence of an appropriate protective order, the disclosure of information which is the confidential and proprietary information of Ernst & Young.

2. Ernst & Young objects to the subpoena on the grounds that the subpoena violates Rule 45(c)(1) and its express mandate that "[a] party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense" on Ernst & Young, including without limitation defendants' failure to narrow the scope of each and every request insofar as it is vague, ambiguous and overbroad.

3. The subpoena is unduly burdensome, in that it requests the production of 16 categories of documents.

4. Ernst & Young objects to the subpoena to the extent that it seeks documents available from other sources.

5. Ernst & Young objects to the subpoena to the extent that it seeks production of information that is protected from disclosure by attorney-client privilege and confidentiality, the work-product doctrine, the accountant-client privilege, and/or other duties of confidentiality or privilege.

6. Ernst & Young reserves its right to modify or supplement these objections. Ernst & Young remains willing to work with you to narrow the subpoena to a reasonable scope, with a reasonable time for the collection and production of relevant, nonprivileged documents. Please do not hesitate to contact me with any proposed modifications.

Regards,

Thomas L. Riesenberg

cc: Susan Buckley
Cahill Gordon & Reindel LLP

LERACH COUGHLIN STOIA GELLER & RUDMAN ROBBINS LLP

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D. Cameron Baker
CBaker@lerachlaw.com

June 14, 2006

VIA FACSIMILE

Thomas L. Reisenberg, Esq.
Deputy General Counsel
Ernst & Young LLP
1225 Connecticut Avenue, N.W. 2nd Fl.
Washington, D.C. 20036

Re: *Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al.*
Case No. 02-CIV-5893 (N.D. Ill.)

Dear Mr. Reisenberg:

During the past week, we have discussed telephonically the June 6, 2006 objections raised by Ernst & Young LLP as to the subpoena served on it by the Class in the above-referenced action. As I have tried to convey, we are amenable to working with you to determine if there is a mutually agreeable process to minimize the burden on your client in producing responsive documents, but will insist upon the production of all responsive documents should Ernst & Young LLP be unwilling to work cooperatively.

Your June 6, 2006 letter raises on behalf of Ernst & Young LLP a set of objections to the subpoena that have no merit on their face. For example, there is no undue burden merely because the Class has requested 16 different categories of documents. Nor is there any merit to the objection that the Class could obtain the documents from other sources.

In our conversations, you have requested that the Class limit the subpoenas to specific engagements. As I indicated to you in our first conversation, we are amenable to limiting the subpoena in this fashion but need to learn from Ernst & Young LLP about all of the engagements that it performed on behalf of Household during the relevant time period, including the time frame and subject matter of each engagement. As a proposal, we discussed whether your client could commence this process with the production of engagement letters. You have indicated that this proposal will not work based on the view that engagement letters are privileged. During our discussions, you have refused to provide clarification regarding the nature of the asserted privilege(s).

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP

I note that your letter of June 6 includes an objection based on various privileges, including the attorney-client privilege, the work product doctrine and the accountant-client privilege. *See* June 6, 2006 letter, Objection No. 5. As you are aware, the case at issue is in federal court. There is no accountant-client privilege in federal court. *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000). Accordingly, the only possible privileges would be the attorney-client privilege or the attorney work product doctrine. As we discussed in our first conversation, if these privileges in fact apply, the privilege holder in this situation would be Household International, Inc. ("Household"). Please inform me whether Ernst & Young LLP has been instructed by Household to withhold all documents based on these two privileges. Further, please provide case authority for the proposition that either of these privileges covers the engagement letters at issue.

Finally, to the extent that Ernst & Young LLP is concerned about the confidentiality of the documents, please be advised that there is a Protective Order entered in this case and Ernst & Young LLP may protect the confidentiality, if any, of these documents by designating them as Confidential under the terms of the Protective Order.

I look forward to your response on these issues.

Sincerely,

D. Cameron Baker

DCB:jpc

T:\CasesSF\Household Intl\Corres\Reisenberg_06-14-06.doc

Exhibit J

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WRITER'S DIRECT NUMBER
(212) 701-3862

June 29, 2006

Re: Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al. (Case No. 02-CV-5893)

Dear Mr. Baker:

I am writing concerning the subpoena served by lead plaintiffs on non-party Ernst & Young.

Counsel for Ernst & Young, Mr. Thomas Riesenberg, has forwarded to us a copy of your letter to him of June 14, 2006 concerning the Ernst & Young subpoena wherein you inquire as to whether Household has instructed Ernst & Young to withhold documents called for by the subpoena on grounds of privilege. Although we would have expected to be copied on any such letter, we respond to your question all the same.

Our firm is currently in the process of gathering information about all Ernst & Young engagements for Household during the class period. To date our investigation has revealed that Ernst & Young was engaged during the class period on several occasions to conduct work for and at the direction of Household's General Counsel in a manner explicitly and specifically contemplated to be protected by the attorney-client privilege, the attorney work product doctrine, the self-test privilege established pursuant to Section 704A of the Equal Credit Opportunity Act (15 U.S.C. § 1691 *et seq.*) and the self-evaluative privilege recognized under common law. We are in the process of interviewing relevant personnel to confirm that appropriate steps were taken during the course of those engagements to preserve the privileged nature of Ernst & Young's work product and to determine if any such privilege as attached to that work was ever thereafter waived. We have uncovered no information to date to suggest that the work was not protected by privilege or that any privilege was thereafter waived but I should be clear that we have not completed our investigation at this point. We hope to be able to do so in the near future.

I would suggest in the first instance that it would be most sensible for us to complete our inquiries and notify you as soon a we do as to what we have found. If we do conclude that the work undertaken in connection with each of the engagements (or any of them) is protected by privilege, I would anticipate that, after fulfilling our obligations to meet and confer on this issue, the parties could agree on an efficient schedule for Defendants to file a motion for a protective order to place the issue before the Court so as not to unduly burden Ernst & Young.

Please don't hesitate to call me if you would like to discuss this matter.

Sincerely,

Susan Buckley

D. Cameron Baker, Esq.
Lerach Coughlin Stoia Geller
Rudman Robbins LLP
100 Pine Street
26th Floor
San Francisco, CA 94111

By Facsimile and By First Class Mail

cc: Thomas L. Riesenberg, Esq. (By Facsimile)
Adam B. Deutsch, Esq. (By Facsimile)
Marvin Miller, Esq. (By Facsimile)
Patricia Farren, Esq.

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D. Cameron Baker
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July 10, 2006

DELIVERY METHOD

Susan Buckley, Esq.
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005-1702

Re: *Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al.*
Case No. 02-CIV-5893 (N.D. Ill.)

Dear Ms. Buckley:

I have received your letter of June 29, 2006 respecting the subpoena served on Ernst & Young and my letter of June 14, 2006 to Mr. Reisenberg. In your June 29, 2006 letter, you stated that Household was conducting an investigation into the privileged nature of the various E&Y projects for Household, if any, and whether any applicable privilege had been waived. You further indicated that you anticipated a completion of that investigation in the near future. However, to date, we have received no further communication from you on the subject. Please let me know the status of this investigation.

Additionally, in my letter to Mr. Reisenberg, I specifically raised the question as to how engagement letters could be deemed privileged under any possible theory. Mr. Reisenberg has not responded to that question. Nor has Household. Please provide me with case law supporting this position as soon as possible.

Finally, given the upcoming deposition schedule, we would like to resolve this issue as quickly as possible and thus, cannot delay resolution until Household has "completed" its inquiries. Accordingly, please let me know your availability for the remainder of the week to hold a meet and confer.

Sincerely,

D. Cameron Baker

DCB:jpc

cc: Marvin A. Miller, Esq.
Adam Deutsch, Esq.

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*ADMITTED IN DC, TX, VA ONLY

July 13, 2006

Re: Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al. (Case No. 02-CV-5893)

Dear Mr. Baker:

I have your letter of July 10, 2006 and write to respond.

Our inquiries concerning the E&Y engagements are largely complete. Although we do have some follow up to do, I do not anticipate that it will change our conclusions concerning Ernst & Young's work for Household during the relevant period.

We now understand that Ernst & Young was engaged by Household for three separate projects before the termination of the class period. I should stress that most of their work was completed after the conclusion of the class period and that their findings were relayed to Household's General Counsel after the class period as well. In light of those facts and Magistrate Judge Nolan's opinion of June 15, 2006 denying post class period discovery, we seriously question whether the documents concerning those engagements have any relevance to your case, but I will pass that issue if only for the moment.

The engagements were memorialized in three separate engagement letters: two dated July 1, 2002 and the third dated September 25, 2002. You have inquired as to whether we will provide you with copies of those engagement letters and, if not, to point you to case law authority demonstrating that the letters themselves are privileged. We have looked into that issue and have concluded that those portions of engagement letters revealing the identity of the client and the economic terms of employment are not often viewed as privileged but that confidential information concerning the engagement is.

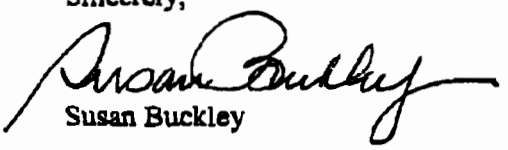
As such, and in a spirit of good faith, I have enclosed redacted copies of the three engagement letters for your consideration. We have redacted only that material that specifically de-

scribes the nature of the confidential work Ernst & Young was to perform. Even as redacted, the letters reveal that Ernst & Young's work was undertaken at the request of and under the direction of Household's General Counsel. Each of the letters also reveals that Ernst & Young's work was specifically intended to be privileged under the attorney-client privilege, the work product doctrine and other cited privileges. You will also see that extraordinary care was to be taken to maintain the privileged nature of the work. And it was.

I hope that when you review the enclosed documents you will conclude that there is little point in wasting the Court's time and resources by our teeing up a motion relating to these engagements, particularly in light of Magistrate Judge Nolan's decision of July 6, 2006 concerning the Arthur Andersen documents. If anything, the issue here is even more clear cut than the issues that were so definitively addressed by the Magistrate Judge in that opinion.

Finally, you had asked for my availabilty for a "meet and confer." Although I view that as somewhat premature at this point, as I tried to make clear in my letter of June 29, 2006, please feel free to call me at any time to discuss this issue.

Sincerely,



Susan Buckley

D. Cameron Baker, Esq.
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Rudman Robbins LLP
100 Pine Street
26th Floor
San Francisco, CA 94111

[Enclosures]

By FedEx (w/enc.) and By Facsimile (w/o enc.)

cc: Thomas L. Riesenberg, Esq. (By Facsimile)
Adam B. Deutsch, Esq. (By Facsimile)
Marvin Miller, Esq. (By Facsimile)
Patricia Farren, Esq.

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July 21, 2006

Re: Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al.
Case No. 02-CV-5893 (N.D. Ill.)

Dear Azra:

It has recently come to the attention of the Household Defendants that the documents bearing the following production numbers contain information relating to the Ernst & Young engagements discussed in Susan Buckley's letter to Cam Baker dated July 13, 2006. These documents are protected from disclosure under the attorney-client privilege and/or the work product doctrine and were inadvertently produced to Plaintiffs:

HHS-E 0001207	HHS-E 0011623
HHS-E 0001208	HHS-ED 001060 - HHS-ED 001061
HHS-E 0001209	HHS-ED 001109 - HHS-ED 001115
HHS-E 0002455	HHS-ED 486499
HHS-E 0002764	HHS-ED 488379 - HHS-ED 488380
HHS-E 0011618	HHS-ED 490483 - HHS-ED 490486
HHS-E 0011620	HHS 03096674 - HHS 03096675

Additionally, it has recently come to the attention of the Household Defendants that portions of the documents bearing the following production numbers also contain information relating to the aforementioned Ernst & Young engagements. Sections of the following documents containing such information are protected from disclosure under the attorney-client privilege, and were inadvertently produced to Plaintiffs in unredacted or partially unredacted form:

HHS-E 0000839 - HHS 0000854	HHS-E 0010123
HHS-E 0000856 - HHS-E 0000871	HHS-E 0010127
HHS-E 0000877 - HHS-E 0000893	HHS-E 0010148

HHS-E 0001158
HHS-E 0001161
HHS-E 0001164
HHS-E 0001188 - HHS-E 0001190
HHS-E 0001192 - HHS-E 0001195
HHS-E 0001442 - HHS-E 0001455
HHS-E 0001457 - HHS-E 0001470
HHS-E 0001496 - HHS-E 0001510
HHS-E 0001968 - HHS-E 0001982
HHS-E 0002090 - HHS-E 0002103
HHS-E 0002105 - HHS-E 0002119
HHS-E 0002695
HHS-E 0002700
HHS-E 0002769 - HHS-E 0002782
HHS-E 0010111
HHS-E 0010282
HHS-E 0022072
HHS-E 0033329
HHS-ED 486301
HHS-ED 486302 - HHS-ED 486303
HHS-ED 486304 - HHS-ED 486305
HHS-ED 486328
HHS-ED 490355
HHS-ED 490356 - HHS-ED 490357
HHS-ED 490358 - HHS-ED 490359
HHS-ED 490512 - HHS-ED 490515
HHS 02003796 - HHS 02003801
HHS 02885121
HHS 02868345 - HHS 02868349
HHS 02980000 - HHS 02980003

We further inform you that duplicates of the document Bates numbered HHS 02868345 - HHS 02868349 can be found at: HHS 02868352 - HHS 02868356; HHS 02980014 - HHS 02980018; HHS 03280980 - HHS 03280984; HHS 02982065 - HHS 02982069; and HHS 02980000 - HHS 02980003. Duplicates of the document Bates numbered HHS 02980000 - HHS 02980002 can be found at: HHS 02980019 - HHS 02980022; and HHS 02982053 - HHS 02982056.

Pursuant to paragraph 28 of the Protective Order, the Household Defendants request that Plaintiffs return these documents, destroy any other copies thereof (and destroy any materials that may contain information derived from these documents), and ensure compliance by any other parties with whom Plaintiffs shared these documents. Please confirm your compliance in writing as soon as possible. Replacement copies of the unredacted or partially unredacted documents will be produced as soon as possible, and for the sake of convenience, will contain the letter "A" following their production numbers.

Sincerely,

Kim A. Smith

Azra Mehdi, Esq.
Lerach Coughlin Stoia Geller Rudman & Robbins LLP
100 Pine Street, 26th Floor
San Francisco, CA 94111

VIA FACSIMILE

cc: Adam Deutsch, Esq. (via fax)
Marvin A. Miller, Esq. (via fax)

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Azra Z. Mehdi

July 25, 2006

VIA FACSIMILE (212/378-2733)

Kim A. Smith
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005-1702

Re: *Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al.*
Case No. 02-CIV-5893 (N.D. Ill.)

Dear Kim:

I am writing in response to your July 21, 2006 letter in which you attempt to claim the attorney-client privilege and/or work product doctrine over documents produced by defendants relating to the Ernst & Young engagements.

Defendants have waived their right to assert any privilege over the subject documents. As stated in ¶28 of Magistrate Nolan's November 5, 2004 Protective Order: "In the event that a Producing Party inadvertently produced a document that the Producing Party considers to be subject to any privilege or protection from disclosure, the Producing Party shall give written notice to Receiving Parties ***no later than ten days after the discovery*** by the Producing Party of the inadvertent production of such document." (Emphasis added.) Defendants' repeated disregard for the Protective Order is inappropriate.

Defendants' assertion that the inadvertent production only came to their attention "recently" lacks credibility. First, as noted in your letter, there are multiple copies of these documents. Accordingly, Household had to have had prior knowledge of their production, which was intentional and voluntary. This production constitutes knowing waiver. Second, the Class issued its subpoena on Ernst & Young on May 19, 2006 and served Household on that date. Since then, the Household defendants have been aware of the Ernst & Young documents; indeed, the parties have engaged in correspondence regarding Ernst & Young. *See, e.g.,* Susan Buckley's June 29, 2006 letter. Finally, we note that your letter purposefully fails to state the date on which the Household defendants became aware of the production of these documents. This is a concession that this alleged discovery took place earlier than ten days prior to the letter. If you contend the contrary, we request a statement under oath as to when Household became aware of the production of each document at issue, including all duplicates.

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Additionally, despite the claim of privilege, we note that these documents do not on their face reflect any privilege but rather demonstrate the opposite. Nor, aside from conclusory statements, has Household sought to establish any privilege over these documents. Indeed, as per Household's usual practice, there has been no evidence provided so as to establish an evidentiary foundation for any asserted privilege.

Given these points, plaintiffs dispute the assertion of privilege as to these documents and will continue to use the documents in compliance with the Protective Order.

Very truly yours,

Azra Mehdi

Azra Z. Mehdi

cc: Marvin A. Miller, Esq. (via facsimile 312/782-4485)
Adam Deutsch, Esq. (via facsimile 312/692-1718)

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Cameron Baker

From: Cameron Baker
Sent: Monday, August 07, 2006 5:10 PM
To: CKesch@Cahill.com; DOwen@Cahill.com
Cc: Azra Mehdi
Subject: Meet and Confer

David and Craig, we are available to meet and confer regarding the E&Y issues later this week, specifically either Thursday or Friday. As a precondition to the discussions, we request that you provide us with a privilege log with an entry for each of the documents at issue, including duplicates. We are particularly interested in ascertaining the recipients for purposes of determining whether there has been a waiver of the asserted privilege. We also request that you identify the date(s) on which Household first discovered the alleged inadvertent production for each of the documents. Finally, we would like a representation that the list contained in Ms. Smith's letter is the comprehensive list of documents at issue with respect to E&Y. I look forward to your response on these matters.

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*ADMITTED IN DC, TX, VA ONLY

August 9, 2006

Re: Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al., Case No. 02-CV-5893 (N.D. Ill.)

Dear Cam:

I write to respond to your email of August 7, 2006.

It is regrettable that you are not in a position to meet and confer on the issues raised in your email until tomorrow or Friday, and I note for the record that we have been prepared to discuss these issues with you for some time. *See* Susan Buckley's letters to you dated June 29 and July 13, 2006; Ira Dembrow's July 31, 2006 email to you and Mr. Brooks; and my August 3, 2006 email to you and Ms. Mehdi, suggesting that we meet and confer on Monday, Aug. 7, 2006. Nonetheless, we are prepared to go forward tomorrow or Friday and would suggest 5 p.m. tomorrow as the appropriate time.

We reject the proposition that you are entitled unilaterally to impose "preconditions" to attending a meet and confer; nor do we believe that Magistrate Judge Nolan would view such a position with favor.

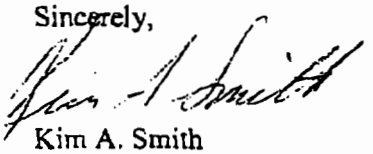
Treating your "preconditions" as ordinary requests, we will certainly be adding the cited documents to our privilege log as required by the Federal Rules of Civil Procedure and provide you with an updated copy of the log. We find your request rather curious in light of the fact that we are recalling documents you already have, but be that as it may. What it does demonstrate is that your cited urgency for receiving an updated log has no basis.

As to your request that we delineate the dates we learned that each of these documents is entitled to protection under the attorney-client and other privileges please see Ms. Buckley's letters of June 29 and July 13, 2006.

As to your demand for representation that there are no documents other than those cited in my letter concerning the three Ernst & Young engagements Ms. Buckley detailed for you,

please be advised that we have conducted a diligent and good faith search for all such documents and believe that to be so. However, in a production of more than 4 million documents, it is always the case that other documents may come to light later. We therefore reserve all of our rights under the Protective Order should any such documents later come to our attention.

Sincerely,



Kim A. Smith

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VIA FACSIMILE

cc: Adam Deutsch, Esq. (via facsimile)
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D. Cameron Baker
CBaker@lerachlaw.com

August 10, 2006

VIA FACSIMILE

Kim Smith, Esq.
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005-1702

Re: *Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al.*
Case No. 02-CIV-5893 (N.D. Ill.)

Dear Kim:

In your letter of August 9, which was received after 5 p.m., you request that we meet and confer today at 5 p.m. on the E&Y issues. Given this untimely notice, we cannot accommodate your request. Further, you have not provided the information necessary to have a productive meet and confer session, including the requested privilege log. Contrary to your letter, this information needs to be provided prior to the meet and confer. Indeed, the remarkable aspect of this is not that we request this information prior to the meet and confer, but that you refuse to provide it. Normally the privilege log is produced at the same time as the assertion of privilege so that the discovering party may better assess the assertion of privilege. We, therefore, insist that Household will provide this information prior to the meet and confer. In the meantime, we will need to reschedule the meet and confer until a later date. Please let us know when you expect to provide the privilege log and related materials, including any proposed redacted versions of the documents at issue, and we will schedule a meet and confer shortly thereafter.

Additionally, in my email, I requested identification of when Household discovered the allegedly inadvertent production of these documents. In your letter, you refer to Ms. Buckley's letters of June 29 and July 13. While these letters do not address the specific question posed, we understand from your response that Household had become aware of the alleged inadvertent production no later than July 13. If this is incorrect, please let us know the correct date(s).

Finally, in your letter, you represent that Household has not discovered any other documents posing this issue based on a diligent and good faith search. Please provide some details as to how Household conducted its search. For example, we assume that Household,

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like the Class, maintains the documents produced in an electronic database. Has Household conducted a search of this database? If so, using what terms? We would appreciate this information prior to the meet and confer.

Sincerely,

D. Cameron Baker

DCB:jpc

cc: Marvin A. Miller, Esq.
Adam Deutsch, Esq.

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*ADMITTED IN DC, TX, VA ONLY

August 14, 2006

Re: Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al., Case No. 02-CV-5893 (N.D. Ill.)

Dear Cam:

I write to respond to your letter of August 10, 2006.

It is interesting that you cite Defendants' alleged "untimely notice" as the reason you declined to meet and confer last Thursday. It was you who offered to meet and confer on Thursday to begin with. *See* Aug. 7, 2006 e-mail from C. Baker to D. Owen and C. Kesch. Moreover, it is ironic at best that you unilaterally attempt to impose such a deadline on Defendants when Plaintiffs habitually serve not just letters but court papers long past Cahill's close of business and, sometimes, in the case of court papers, not even on the day that service is required to be made.

That aside, we are in the process of preparing redacted copies of the documents at issue. We will provide them to you, along with an updated privilege log, as soon as we are done.

I can also confirm, as you have asked, that you are correct in assuming that we became aware of the inadvertently produced privileged documents listed in my July 21, 2006 letter no later than July 13, 2006.

However, we decline your invitation to provide you with the search terms we used to identify inadvertently produced privileged documents concerning Ernst & Young. You have not offered any reason or explanation as to why we should share our work product with you in this regard and we can think of none.

Sincerely,

Kim A. Smith

D. Cameron Baker, Esq.
Lerach Coughlin Stoia Geller
Rudman & Robbins LLP
100 Pine Street, 26th Floor
San Francisco, CA 94111

VIA FACSIMILE

cc: Adam Deutsch, Esq. (via facsimile)
Marvin Miller, Esq. (via facsimile)

Exhibit K

Document Filed
Under Seal

Exhibit L

Document Filed
Under Seal

Exhibit M

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Practice Series

Protecting Confidential Legal Information

A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine

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3. Fiduciary Exception

An exception to the attorney-client privilege has been developed for actions between an organization and the parties to whom it owes fiduciary duties. This exception originally started in the area of shareholder derivative actions where courts were reluctant to permit corporations to invoke the attorney-client privilege to shield information from shareholders. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1102-04 (5th Cir. 1970). However, the Garner doctrine has been expanded to non-derivative cases and has become an important and sometimes tricky exception to the attorney-client privilege.

a. The Garner Doctrine

In Garner v. Wolfinbarger, 430 F.2d 1093, (5th Cir. 1970), perhaps the most influential decision in this area, the Fifth Circuit held in a shareholder derivative suit that:

> [W]here the corporation is in suit against its stockholders 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.

Id. at 1103-04. The Garner court thus concluded that the protection of the privilege could be removed upon a showing of good cause. In reaching its decision, the court analogized the exception to the crime-fraud and joint-defense exceptions to the attorney-client privilege. Id. at 1102-03 (the joint-defense privilege is discussed in § II(A), below). Garner rationalized that a fiduciary relationship between the corporation and its shareholders creates a commonality of interest which precludes the corporation from asserting the attorney-client privilege against its shareholders. Id.

The Garner court set forth a number of factors relevant to the presence or absence of a shareholder's "good cause" to invoke the exception. Id. at 1104. A court should thus consider:

(1) The number of beneficiaries actively requesting the privileged communication and their share in the organization. *See* Fausek v. White, 965 F.2d 126 (6th Cir. 1992) (40% of shareholders sufficient); Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988) (less than 4% of shareholders not sufficient).

(2) The substantiality of the beneficiaries' claim and whether there is an ulterior motive to place pressure on the organization.

(3) The good faith of the beneficiaries.

(4) The apparent relevance of the requested communications to the beneficiaries' claim, and the extent to which the information is available from other non-privileged sources. *See* Fausek v. White, 965 F.2d 126, 133 (6th Cir. 1992) (need uniqueness, not just convenience -- in this case, the desired material was not readily available elsewhere, if at all); In re LTV Sec. Litig., 89 F.R.D. 595, 608 (N.D. Tex. 1981) (availability is an important factor, but true unavailability is needed -- ease and cheapness are not as important).

(5) The extent to which the beneficiaries' claim accuses the managers of the organization of clearly criminal or illegal acts.

(6) Whether the communication related to past acts or to future events.

(7) Whether the communication concerns advice about the litigation which has been brought by the beneficiaries. *See* Zitin v. Turley, No. Civ. 89-2061, 1991 U.S. Dist. LEXIS 10084, at *11 n.1 (D. Ariz. June 20, 1991) (Garner exception did not apply because communications that shareholders sought were not related to the decisions that gave rise to the shareholder's claims).

(8) The specificity of the beneficiaries' request.

(9) The extent to which the requested communications might contain trade secrets or other valuable information.

(10) The extent that protective orders will protect disclosure.

(11) Whether the decision not to waive the privilege was made by a disinterested group of officers or directors.

See Garner, 430 F.2d at 1104. These factors are non-exclusive and of equal weight. Garner, 430 F.2d at 1104. *But see* RMED Int'l, Inc. v. Sloan's Supermarkets, No. 94 Civ. 5587PKLRLE, 2003 WL 41996, at *5 (S.D.N.Y. Jan. 6, 2003) (stating that the apparent necessity of the information and its availability from other sources is considered the most important factor by courts undertaking the Garner analysis). Through this analysis, the court balances the injury that may result to the corporation from disclosure against (A) the benefit to be gained from the proper disposition of the litigation and (B) the rights of the shareholders. Id. at 1101.

In general, the burden is on the party seeking the otherwise privileged materials to show "good cause" to invoke the fiduciary exception to the privilege. Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 326 (S.D.N.Y. 1991).

Most courts have followed Garner. *See* Fortson v. Winstead, McGuire, Sechrest & Ninick, 961 F.2d 469, 475 n.5 (4th Cir. 1992) (even though limited partners could not establish good cause, the court recognized that the fiduciary exception could apply); Fausek v. White, 965 F.2d 126, 133 (6th Cir. 1992) (recognizing that former shareholders had shown good cause to abrogate corporate privilege); In re Gen. Instrument Corp. Sec. Litig., 190 F.R.D. 527, 529-30 (N.D. Ill. 2000); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp 1357, 1363-64 (S.D.N.Y. 1983) (ordering disclosure in a case between a client and the bank that represented it in a real estate transaction); Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 543 F. Supp. 906, 909-10 (D.D.C. 1982) (ordering disclosure of communications between attorney and trustee pursuant to Garner); In re LTV Sec. Litig., 89 F.R.D. 595, 608 (N.D. Tex. 1981); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 31-32 (N.D. Ill. 1980) (applying Garner but not finding good cause); In re Fuqua Indus., Inc., No. CIV.A. 11974, 2002 WL 991666, (Del. Ch. May 2, 2002) (following Garner and finding good cause); Deutsch v. Cogan, 580 A.2d 100, 106 (Del. Ch. 1990); .

However, some federal and state courts have refused to follow Garner. *See* Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 390-91 (D. Conn. 1986) (rejecting the Garner doctrine); Milroy v. Hansen, 875 F. Supp. 646, 650-52 (D. Neb. 1995) (denying request of a director and minority shareholder to obtain privileged documents, and stating that the Garner doctrine's "continued vitality is suspect"); McDermott, Will & Emery v. Superior Court, 83 Cal. App. 4th 378, 385 (Cal. App. Ct. 2000) (rejecting Garner as inconsistent with the Evidence Code of California); *see also* Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454, 463 (Colo. App. 2003) (following Milroy, and declining to extend Garner where director/minority stockholder of a corporation had no right to documents otherwise protected under the attorney-client privilege); Hoiles v. Superior Court, 157 Cal. App. 3d 1192, 1199 (4th Dist. 1984) (rejecting Garner doctrine for shareholder derivative suits).

Several state courts have also adopted the Garner rationale. *See, e.g.*, Neusteter v. District Court of Denver, 675 P.2d 1, 6 (Colo. 1984); Beard v. Ames, 468 N.Y.S.2d 253, 255-56 (N.Y. App. Div. 1983).

b. Extension Of Garner Beyond Derivative Suits

The Garner doctrine originally arose in the context of the shareholder derivative suit. In a derivative suit, the shareholder purports to represent the corporation itself, and in such cases, there is a clear fiduciary duty owed by the directors and officers to the corporation. Recently, however, some courts have expanded the application of Garner to other areas where officers owe fiduciary duties to a company's shareholders. *See*:

> *In re Witness Before Special Grand Jury 2000-2, 288 F.3d 289, 293-94 (7th Cir. 2002). Rejecting claim by then-governor of Illinois George Ryan that his conversations with "in-house" government counsel were privileged and observing that "[j]ust as a corporate attorney has no right or obligation to keep otherwise confidential information from shareholders, Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir.1970), so a government attorney should have no privilege to shield relevant information from the public citizens to whom she owes ultimate allegiance, as represented by the grand jury.*

Fausek v. White, 965 F.2d 126 (6th Cir. 1992). Minority shareholders brought direct action against the former majority shareholder for misrepresentations in valuing their stock. Shareholders sought to depose the attorney who advised the majority shareholder during the stock acquisition. Court found that Garner rationale applied even though the case was a direct action. It reasoned that Garner was not limited to derivative actions, but that the type of action was just a factor to consider in determining "good cause." Minority shareholders alleged that majority shareholder had become the alter ego of the corporation, and that he therefore had a fiduciary duty to plaintiffs which he could not circumvent by resorting to a claim of privilege. Court agreed that the majority shareholder owed a fiduciary duty to the minority, and found that Garner applies whenever the corporation stands in a fiduciary relationship to those seeking to abrogate the privilege. As a result, even though the corporation was not a named party to the case, the existence of the duty to the shareholders permitted an exception to the attorney-client privilege.

Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988). Refused to limit Garner to derivative actions. However, the court noted that it should be more difficult to show good cause in a non-derivative shareholder action because where shareholders seek to recover damages for themselves their motivations are more suspect and "more subject to careful scrutiny."

In re ML-Lee Acquisition Fund II, L.P., 848 F. Supp. 527, 564 (D. Del. 1994). Fact that a suit was not a derivative action was only one factor to consider under the Garner doctrine, and that factor alone did not preclude disclosure.

In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91, 97-98 (S.D.N.Y. 1993). Court refused to limit Garner to derivative actions. It allowed shareholders in a class action against the corporation to discover corporate materials involving pending asbestos litigation.

Nellis v. Air Line Pilots Ass'n, 144 F.R.D. 68, 70-71 (E.D. Va. 1992). Court applied the fiduciary exception in a suit by union members against their national union. The court found that communications between union officials and union attorneys came within the exception.

Ferguson v. Lurie, 139 F.R.D. 362 (N.D. Ill. 1991). Court permitted limited partners suing for securities fraud to invoke Garner doctrine to obtain communications between the real estate limited partnership and its counsel.

Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 676-682 (D. Kan. 1986). Garner doctrine applied to grant former union members access to the attorney-client communications and work product of the union.

Donovan v. Fitzsimmons, 90 F.R.D. 583, 584-87 (N.D. Ill. 1981). Secretary of Labor, bringing suit on behalf of beneficiaries of a pension fund, was granted access to privileged materials on the basis of Garner.

Broad v. Rockwell Int'l Corp., No. CA-3-74-437-D, 1977 WL 928 (N.D. Tex. Feb. 18, 1977). Garner rationale applied where corporation was sued by debenture holders.

*In re Fuqua Indus., No. C.A. 11974, 1992 WL 296448, at *3-4 (Del. Ch. Oct. 8, 1992). Garner applies in a case involving breach of fiduciary duty through misrepresentations to shareholders.*

*Metro. Bank and Trust Co. v. Dovenmuehle Mortg., Inc., No. CIV. A. 18023-NC, 2001 WL 1671445, at *2-3 (Del. Ch. Dec. 20, 2001). Following Garner, but holding that limited partner failed to show good cause for access to otherwise privileged communications of general partner on showing of good cause.*

Because courts have expanded the Garner doctrine to include other cases where a fiduciary duty is owed to constituents, courts usually require the shareholder in non-

derivative actions to have been a shareholder when the alleged misfeasance or misrepresentations occurred. They reason that purchasers who acquired their interest after the wrongful actions took place were not owed any duty at the time, and therefore cannot show good cause. *See* Moskowitz v. Lopp, 128 F.R.D. 624, 637 (E.D. Pa. 1989); In re Atlantic Fin. Mgmt. Sec. Litig., 121 F.R.D. 141, 146 (D. Mass 1988); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1363-64 (S.D.N.Y. 1983). Other courts will allow subsequent purchasers to invoke the Garner exception to the privilege. In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91, 97-98 (S.D.N.Y. 1993); Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484-485 (E.D. Pa. 1978) (Garner rationale applied in shareholder class action where plaintiffs were not shareholders at the time of the allegedly fraudulent conduct).

Some courts have extended the Garner doctrine to situations outside of the shareholder/corporate client context to include other fiduciary relationships. For example, in In re Baldwin-United Corp., 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984), the court held that a creditor's committee, in its fiduciary capacity, ought to "go about [its] duties without obscuring [its] reasons from the legitimate inquires of [the] beneficiaries." The court held that the Garner doctrine provided the best balance between the "creditor's right to information and the committee's need for confidentiality" and held that the committee should establish good cause for withholding privileged information from the creditors. In Dome Petroleum, Ltd v. Employers Mutual Liability Insurance Co. of Wisconsin, 131 F.R.D. 63 (D.N.J. 1990), the court relied on the doctrine in part to apply to a dispute between an insurance subrogor and subrogee.

The extension of the Garner doctrine has been particularly noteworthy in the context of pension plans, where courts have extended the doctrine to communications made by attorneys acting as employee benefits plan fiduciaries. *See* In re Occidental Petroleum Corp., 217 F.3d 293, 297-98 (5th Cir. 2000) (attorney-client privilege did not preclude employees of a corporation's former subsidiary, who were participants in ESOP funded by corporation's stock, from discovery of relevant corporate documents in ERISA action against corporation alleging breach of fiduciary duty in relation to ESOP); Wildbur v. ARCO Chem. Co., 974 F.2d 631, 645 (5th Cir. 1992) ("When an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney's clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator."); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 83-88 (N.D.N.Y. 2003) (Garner doctrine applied to ESOP participants' derivative action against officers, directors and shareholders of their employer, who also served as plan fiduciaries); Helt v. Metro. Dist. Comm'n, 113 F.R.D. 7, 9-10 (D. Conn. 1986) (Garner doctrine applied where beneficiary of a pension plan sought to discover correspondence between attorneys for the pension plan and the plan's trustee); Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 543 F. Supp. 906, 909-10 (D.D.C. 1982) (court recognized that fiduciary exception could apply to allow beneficiary of a pension plan to discover the communications between attorneys for the pension plan and the plan's trustee).

However, in In re Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997), the Second Circuit held that the fiduciary exception embodied in the Garner doctrine did not apply to communications between an employer and its counsel regarding amendments to an employee benefits plan even though the counsel was also the plan's

fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA). While acknowledging that the fiduciary exception applied to communications made by an ERISA plan fiduciary that are intended to aid an employer in administering its benefits plan, the court concluded that the communications at issue were not related to the fiduciary obligations the attorney owed to the plan beneficiaries. Id. at 272. The court found that the employer did not waive the attorney-client privilege by employing the same attorney to handle both fiduciary and non-fiduciary matters pertaining to its benefits plan. Id.

Most courts have placed the burdens of production and persuasion on the plaintiff/shareholder/beneficiary to show good cause to invoke the Garner exception. *See* Garner, 430 F.2d at 1103-1104; Ward v. Succession of Freeman, 854 F.2d 780, 786-87 (5th Cir. 1988); Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 323 (S.D.N.Y. 1991).

While many courts have extended Garner beyond derivative actions, some courts have refused. The Ninth Circuit has limited Garner to derivative actions, and refused to create an exception for individual shareholder actions. Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23 (9th Cir. 1981). In Weil, the court distinguished Weil's individual action from the derivative suit in Garner and therefore refused to grant a Garner exception. In addition, the court noted that Weil was a former, not present shareholder of the corporation. Despite this fact, the court allowed the requested discovery based on a finding of waiver. *See also* Ward v. Succession of Freeman, 854 F.2d at 786 (recognizing that "good cause" is more difficult to establish in an individual suit, but rejecting Weil); Shirvani v. Capital Inv. Corp., 112 F.R.D. 389, 390-91 (D. Conn. 1986) (court rejected Garner doctrine in action brought directly against the corporation by shareholders); Opus Corp. v. IBM Corp., 956 F. Supp. 1503, 1509-10 (D. Minn. 1996) (the Garner doctrine did not apply to prevent a general partner from invoking the attorney-client privilege to protect disclosure of communications to other partners).

The Restatement favors an expansive application of the Garner doctrine for two reasons. First, the function of the directors and managers of an organization is to advance the interests of the shareholders, members, and beneficiaries, and thus they should not keep information from their constituents. Second, in litigation between the directors and officers and their constituents, the officers have an incentive to place their own interests above those of the organization in deciding whether to waive the privilege. REST. 3D § 85 cmt. b. The Restatement thus sets out several factors that should be considered in order to invoke the exception in "organizational fiduciary" cases:

1) the extent to which beneficiaries seeking the information have interests that conflict with those of opposing or silent beneficiaries;

2) the substantiality of the beneficiaries' claim and whether the proceeding was brought for ulterior purpose;

3) the relevance of the communication to the beneficiaries' claim and the extent to which information it contains is available for. non-privileged sources;

4) whether the beneficiaries' claim asserts criminal, fraudulent, or similarly illegal acts;

5) whether the communication relates to future conduct of the organization that could be prejudiced;

6) whether the communication concerns the very litigation brought by the beneficiaries;

7) the specificity of the beneficiaries' request;

8) whether the communication involves trade secrets or other information that has value beyond its character as a client-lawyer communication;

9) the extent to which the court can employ protective orders to guard against abuse if the communication is revealed; and

10) whether the determination not to waive the privilege made on behalf of the organization was by a disinterested group of directors or officers.

REST. 3D § 85 cmt. c.

c. Disclosure Of Special Litigation Committee Reports

Special Litigation Committee (SLC) reports are likely to be discoverable upon a motion to terminate a derivative action. In Joy v. North, 692 F.2d 880, 893-94 (2d Cir. 1982), the court held that upon a motion to terminate, an SLC must disclose its report and supporting data since the motion to terminate operates as a waiver of the attorney-client privilege.

Similarly, in In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984), the trial court had ordered public disclosure of an SLC report upon the motion of several newspapers for access during a hearing on a motion to terminate. The Seventh Circuit declined to adopt a per se rule requiring disclosure of the SLC report upon a corporation's motion to terminate. Instead, the court held that the presumption of public access to information before the court outweighed the corporation's need for confidentiality. Id. at 1314.

In In re Perrigo Co., 128 F.3d 430 (6th Cir. 1997), the trial court held that a report prepared by an independent director that was protected by both the attorney-client privilege and the work product immunity would become a public record if submitted to the court by either party for consideration in connection with the corporation's motion to dismiss. The Sixth Circuit reversed, and held that while the report should be disclosed to other parties to the litigation under a protective order, it was "clear error . . . to direct that simply . . . submitting [the] report . . . to . . . the court . . . automatically places it in the public domain." Id. at 441. The court explained that the trial court's order requiring

automatic public disclosure left the corporation with the "choice of waiving the protection of the [r]eport or withdrawing its motion to dismiss" and that it would have "the effect of giving the derivative plaintiffs . . . the untrammeled power to waive [the corporation's protection]. . . Id. at 438-39. However, the court did indicate that there may be some point where the trial court may, after a full hearing on the matter, conclude that public disclosure of the report or certain portions of the report is necessary for limited purposes. Id. at 441.

See also:

> *In re Dayco Corp. Derivative Sec. Litig., 99 F.R.D. 616, 619 (S.D. Ohio 1983). Privilege not waived when only portions of the SLC's findings are released to the court and the public, and not the SLC report itself.*
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> *Abbey v. Computer & Communications Tech. Corp., No. 6941, 1983 WL 18005 (Del. Ch. Apr. 13, 1983). "Plaintiff will be limited to taking the deposition of the Special Litigation Committee with a view toward establishing just what was done in the course of its investigation, and why. This will include production of the documentary materials utilized or relied upon by the Committee during its investigation."*
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> *Watts v. Des Moines Register & Tribune, 525 F. Supp. 1311, 1329 (S.D. Iowa 1981). Shareholders may discover the bases for the SLC's conclusions but not why certain factors were or were not considered.*

II. EXTENSIONS OF THE ATTORNEY-CLIENT PRIVILEGE BASED ON COMMON INTEREST

Courts have recognized several extensions of the attorney-client privilege which allow clients and lawyers with common interests to share privileged communications. *See, e.g.*, Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (protection of privilege extended to communications between different persons or separate corporations when the communications are part of an on-going and joint effort to set up a common defense strategy); Gottlieb v. Wiles, 143 F.R.D. 241 (D. Colo. 1992) (no waiver occurs from exchange of privileged materials between persons with common interest); In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91, 102 (S.D.N.Y. 1993) (joint-defense privilege is an extension of the attorney-client privilege); FDIC v. Cheng, No. 3:90-CV-0353-H, 1992 WL 420877 (N.D. Tex. Dec. 2, 1992) (same). These common interest extensions do not themselves confer privilege status to any of the communications involved. Instead, they merely allow communications which are already privileged to be shared between commonly interested parties without causing waiver; the communications themselves must independently satisfy the elements of the privilege. Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466, 470 (S.D.N.Y. 2003); Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992). These extensions are a form of selective waiver which allow disclosure to some persons without waiving the privilege toward others. The burden is on the party asserting the privilege to show that a common interest does in fact exist. United States v. LeCroy, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004); LaForest v. Honeywell Int'l Inc., No. 03-CV-6248T, 2004 WL 1498916, at *3 (W.D.N.Y. July 1, 2004).

Unfortunately, courts have not been consistent in their terminology and many courts apply the terms common interest exception, common defense privilege, or joint-

Exhibit N

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