UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

THE CLASS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF ALL DOCUMENTS PERTAINING TO HOUSEHOLD'S CONSULTATIONS WITH ERNST & YOUNG LLP

[REDACTED VERSION]

I. INTRODUCTION

Before the Court is the Class' motion for an order compelling defendant Household International, Inc. ("Household") to produce documents relating to the retention of Ernst & Young LLP ("E&Y"), a third party, to audit Household's predatory lending practices and refunds owed to consumers. This third party study, even if commissioned by Household's counsel, is not privileged. Further, any such privilege has been waived. Household's Opposition,[1] which was to have provided a thorough explanation supporting the asserted privilege and non-waiver, falls demonstrably short of rebutting the Class' showing. The Court should order production of all E&Y documents.

The party asserting privilege bears the burden of demonstrating via competent evidence the predicate facts for any asserted privilege, including non-waiver. *United States v. Evans,* 113 F.3d 1457, 1461 (7th Cir. 1997). This burden "cannot be "'discharged by mere conclusory or ipse dixit assertions.'" *Hurst v. F.W. Woolworth Co.,* Case No. 95 Civ. 6584 1997 U.S. Dist. LEXIS 2513, *6, (CSH) (S.D.N.Y. 1997) (citations omitted); *see also Sphere Drake Ins. Ltd. v. All American Life Ins. Co.* 221 F. Supp. 2d 874, 884-85 (N.D. Ill. 2002) (burden must be supported by specific facts, which "will often necessitate the submission of an affidavit or declaration with specific facts ... conclusory or blanket assertions about the documents will not suffice"). However, conclusory declarations and a self-serving engagement letter are all that defendants offer. That defendants' declarations are from lawyers renders the reliance on conclusory statements even worse since the lawyer declarants should know that such statements have no evidentiary value. Defendants, thus, do not meet their burden as to application of any possible privilege and as to non-waiver.

We discuss these points as well as the other factual and legal deficiencies of defendants' arguments in detail below.

II. LEGAL ARGUMENT

A. The Attorney-Client Privilege Does Not Apply

As discussed in the Class' opening brief, to assert the attorney-client privilege defendants must present evidence that these documents constitute or incorporate communications between a lawyer and a client for the purpose of obtaining or providing legal assistance to the client. However, here E&Y performed an independent "audit" (or "review") of specific predatory lending practices

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[1] "Opposition" or "Def's Opp." refers to the Household Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Production of All Documents Pertaining to Household's Consultations with Ernst & Young LLP.

and the refunds owed as a result. This audit could have been performed internally and thus, retention of E&Y (and the numerical reports it generated) was not necessary for the rendition of any legal advice. In opposition, defendants rely solely on the conclusory declaration submitted by Mr. Robin and the equally conclusory self-serving engagement letter. Defendants fail to establish the factual predicate necessary to show an attorney-client privilege.

Defendants do not deny that "Ernest & Young has been retained to audit our compliance with laws and policies," Ex. F at 5 (September 24, 2002 letter), nor that this project resulted in detailed factual findings made by E&Y as part of its study.[2] Exhibit N. Similarly, defendants do not deny that the purpose of retaining E&Y was to obtain E&Y's own opinions as to predatory lending violations and refunds arising therefrom. *See* Defs' Opp. at 7. From this, it follows that E&Y's opinions and work papers are not privileged and should be produced even if E&Y were counsel's agent. *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (no privilege where the accountant is retained to give "his or her own ***advice*** about the client's situation."); *see also In re G-I Holdings, Inc.*, 218 F.R.D. 428, 436 (D.N.J. 2003) (where consultant hired for his expertise and independent advice, his assistance is not necessary for rendition of legal advice and his communications are not within attorney-client privilege); *United States v. Frederick*, 182 F.3d 496, 500-01 (7th Cir. 1999) (no privilege as to accountants or accountants' work papers).

Because E&Y is a third party professional, defendants must show not only that E&Y was counsel's agent, but that E&Y was necessary to obtain legal advice from counsel. "[W]hen the third party is a professional, such as an accountant, capable of rendering advice independent of the lawyer's advice to the client, the claimant must show that the third party served some specialized purpose in facilitating the attorney-client communications and was essentially indispensable in that regard." *Cellco P'ship v. Certain Underwriters at LLoyd's London*, Case No. 05-3158, 2006 U.S. Dist. LEXIS 28877, at **5-6 (D.N.J. May 11, 2006). Defendants concede that a showing that E&Y was "indispensable" to the provision of legal advice is the applicable standard here. *See* Defs' Opp. at 6 (citing *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)); *compare Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002).

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[2] Lettered exhibits ("Ex.") refer to the 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.

Leaving aside for now the question of what is the legal advice to be rendered, defendants cannot show that E&Y was indispensable for Household's in-house lawyers to understand its business practices or to calculate refunds. In *Cavallaro,* the First Circuit addressed this same issue with respect to services provided by E&Y to a law firm and concluded that it was insufficient to rely upon E&Y's "capacity to benefit the legal advice that Hale and Dorr would render." 284 F.3d at 249. Defendants' brief not only relies upon this same flawed argument as to E&Y's expertise but does so without any specific explanation of what expertise E&Y brings. *See* Defs' Opp. at 7. Moreover, Household had its own internal departments that could and did provide these same tasks. This internal expertise is demonstrated in Ex. N to the opening papers, which sets forth an internal refund analysis as well as one prepared by E&Y.

Defendants' arguments respecting the provision of legal advice are likewise meritless. Defendants' internal documents respecting the E&Y engagement do not describe it as related to legal advice. The Class has submitted examples of these internal documents as part of its initial brief. *See, e.g.*, Exs. A, B, F-H, L. Other internal documents are consistent. An internal presentation from July, 2002 reads [redacted] Ex. 1 at 7.[3] A June 10 document[4] discussed retention of E&Y in the following terms: [redacted] Ex. 3. The July 1, 2002 summary prepared by E&Y is similar and again, there is no mention of preparing reports for use by Household counsel. Ex. A at 2-5.

Finally, defendants' assertions that E&Y was being directed by counsel are contradicted by defendants' internal documents. Indeed, Mr. Robin, the lawyer who assertedly directed and defined E&Y's work, in a June 20 note wrote that David Schoenholz and Robin Allcock, neither of whom are lawyers, are to work with E&Y [redacted] Ex. K. Similarly, Ms.

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[3] Numbered exhibits ("Ex.") refer to the Supplemental Declaration of D. Cameron Baker in Support of the Class Reply in Support of Motion to Compel Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP.

[4] Defendants assert that this document is privileged somehow. However, defendants concede that '[t]he general subject matter of attorney-client communications is not itself privileged." Opp. at 15. Given this concession, defendants have no basis asserting any privilege over this document, a July 9 email from Robin Allcock, or other documents cited as exhibits or on the privilege log. *See, e.g.*, Exs. A-D, & N.

Allcock on July 9, 2002 revealed her control (as opposed to Mr. Robin's control) over what E&Y did, writing [redacted] Ex. 3.

These internal documents demonstrate the reality relating to E&Y's retention as opposed to the fiction suggested by conclusory statements from Mr. Robin's declaration and a self-serving engament letter.[5] Significantly, Household counsel "worked on" that letter from June 20 through July 1. *See* Ex. K. However, the letter is a sham. E&Y was retained by Household (and not counsel) prior to the engagement letter. *See* Ex. B (retention of E&Y occurred prior to June 24). Further, counsel did not direct E&Y, rather they were directed by Ms. Allcock and other non-lawyers. *See* Ex. 3 & Ex. K. The attorney-client privilege does not apply if role of counsel is "intended merely to immunize the documents from production." *In re Air Crash Disaster at Sioux City*, 133 F.R.D. 515, 519 (N.D. Ill. 1990).

Moreover, the Court cannot rely upon the engagement letter for other reasons. First, it is not admissible evidence nor are its contents the subject of sworn statements under penalty of perjury. Second, defendants' submission of this letter *in camera* as opposed to the submission of the underlying documents themselves demonstrates that defendants have no real basis for assertion of privilege. *See In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002,* 318 F.3d 379, 386-87 (2nd Cir. 2003) ("Similarly troubling is the firm's failure to identify or submit the responsive documents for *in camera* review, a practice both long-standing and routine in cases involving claims of privilege.").

Further, during the discussions with the Attorneys General ("AG"), Household offered to make the E&Y compliance audit available to the AG. *See* Ex. F at 5. Significantly, in his September 24 letter, Mr. Robin offered to share "these audit ***results***," thus reflecting a willingness to share the results of the compliance audit **and** the result of the subsequent monitoring audit. *Id.* That this offer was on the table and of interest to the AGs is confirmed by the notes that Ms. Sodeika took contemporaneously. *See* Ex. 4 [redacted]. To combat this point, in its brief Household asserts that it "*never* indicated any willingness to share the audit results of the Compliance

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[5] Assuming arguendo that E&Y was Mr. Robin's agent, then communications between E&Y and Household counsel are not privileged because they are not communications between an attorney and a client. Communications with an attorney and his/her agent are traditionally subject to the work product doctrine, if applicable. While it is true that such communications could be subject to an attorney-client privilege if they would reveal an underlying confidential attorney-client communication, defendants have made no showing of any such revelation of confidential client communications would occur.

engagement" citing Robin's Decl. at ¶6.[6] Defendants' assertion is contradicted by their own documents and does not explain the Class' evidence that defendants offered to share the result of the compliance audit. *See* Ex. F at 5. Further, Mr. Robin's declaration concedes that other E&Y reports were provided or made available to the AGs. Accordingly, the Class is entitled to all reports as well as the underlying work papers.

Household has failed to meet its burden of establishing by credible evidence all the elements of the privilege. E&Y's reports and related documents regarding predatory lending practices and refunds are not privileged under the attorney-client privilege.

B. The *Garner* Exception Precludes the Assertion of the Attorney-Client Privilege

As discussed in the Class' opening brief, *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970) and subsequent cases provides a well-recognized exception to the attorney-client privilege that allows the Class in this instance to access the communications between the corporation and its attorneys. In opposition, defendants suggest that *Garner* is somehow antiquated law and is narrowly construed to apply only to derivative cases. These points are not well-taken. As detailed below, *Garner* remains good law and applies to this securities fraud case. As defendants do not contest application of the *Garner* factors, there is good cause to apply the *Garner* exception here.

Defendants generally attack *Garner* as somehow "no longer good law following subsequent decisions of the United States Supreme Court." Defs' Opp. at 10. This attack is wholly erroneous if not outright ludicrous. In 2002, well after the Supreme Court cases cited by defendants, the Seventh Circuit cited *Garner* for the proposition the Class advances, namely that "a corporate attorney has no right or obligation to keep otherwise confidential information from shareholders." *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 294 (7th Cir. 2002). Similarly, this Court applied *Garner* to find an exception to the attorney-client privilege subsequent to the Supreme Court decisions cited by defendants. *In re General Instrument Corp. Sec. Litig.*, 190 F.R.D. 527 (N.D. Ill. 2000). *Garner* continues to be good law.

Defendants' second argument, that *Garner* does not apply to securities fraud cases, is equally meritless. "While *Garner* arose in the context of a shareholder derivative suit and has been thus limited by the Ninth Circuit, nothing in the language or reasoning of *Garner* so limits its holding.

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[6] "Mr Robin's Declaration" or "Robin Decl." refers to the Decl. of Kenneth H. Robin attached to Defs' Opp.

The Fifth Circuit has rejected the [Ninth Circuit's] limitation on *Garner,* as has the Sixth Circuit." *In re Bairnco Corp. Sec. Litig.*, 148 F.R.D. 91, 97-98 (S.D.N.Y. 1993) (internal citations omitted). Indeed, numerous Courts, including within this District, have applied *Garner* in the context of securities class actions. *See, e.g.*, *id.* at 98; *In re Transocean Tender Offer Sec. Litig.*, 78 F.R.D. 692, 697 (N.D. Ill. 1978); *Panter v. Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1978)(class action under 15 U.S.C. §78n(e)); *In re International Business Machines Corp. Sec. Litig.*, Case No. 92 Civ. 9076 (GLG), 1993 U.S. Dist. LEXIS 21474 (S.D.N.Y. Nov. 30, 1993); *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 484 (E.D. Pa. 1978).

Put simply, the fiduciary exception established in *Garner* applies to any situation where a fiduciary duty runs from the party claiming privilege to the party seeking discovery. *See, e.g., J.H. Chapman Group, Ltd. v. Chapman*, Case No. 95 C 7716, 1996 U.S. Dist. LEXIS 5866 (N.D. Ill. May 1, 1996); *Heyman v. Beatrice Co.*, Case No. 89 C 7381, 1992 U.S. Dist. LEXIS 14298 (N.D. Ill. Sept. 22, 1992). "In order for the fiduciary duty exception to apply, the party claiming the exception must generally show a fiduciary relation and good cause for overcoming the attorney-client privilege." *J.H. Chapman*, 1996 U.S. Dist. LEXIS 5866, at **4-5. Defendants do not and cannot contest that Household, Mr. Robin and all Household's executive officers, including the named defendants, all owed a fiduciary duty to the shareholder class. *See Witness Before Special Grand Jury*, 288 F.3d at 294 (corporate attorney owes fiduciary duty to shareholders).

Defendants' citation of *In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981) and *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 90 F.R.D. 21 (N.D. Ill. 1980), does not help their argument. Both of those cases turn not on whether the case involved a securities class action, but the fact that the communications at issue were after-the-fact communications that involved the very litigation before the Court. As the *Ohio-Sealy* Court noted, "the information sought in large measure pertains to prospective conduct rather than past conduct, and reflects advice concerning this very litigation." 90 F.R.D. at 31; *see also LTV,* 89 F.R.D. at 607-08. Further, both decisions specifically noted that the *Garner* factors, including whether the communication related to prospective or past actions and whether the communication concerned the litigation itself, supported the decision not to find an exception in the circumstances applicable in those cases. *Ohio-Sealy*, 90 F.R.D. at 31 ("this conclusion is further bolstered by several of the other factors enunciated in *Garner.*"); *LTV*, 89 F.R.D. at 607.

Here, defendants have not contested the Class' showing as to the relevant *Garner* factors. In particular, defendants have not contended that the "advice" at issue was prospective nor that the

"advice" concerned this litigation. Indeed, as is evident from the Robin Declaration, any advice rendered does not concern this litigation. Robin Decl. at ¶3. Nor do defendants contest any other of the *Garner* factors.[7] For the reasons articulated in *General Instrument Sec. Litig.*, 190 F.R.D. 527, the Court should find the fiduciary exception applicable.

C. E&Y Documents Are Not Privileged As Attorney Work Product

As with the attorney-client privilege, the burden is on the party asserting the attorney work product doctrine to establish each of the necessary elements, including that the E&Y report was prepared in anticipation of litigation. Defendants have not met this burden. Further, the E&Y documents are not "opinion" work product and thus, should be disclosed based on the Class' demonstration of substantial need and undue hardship given these documents' relevance on falsity, scienter and materiality and the Class' inability to obtain equally probative evidence. Accordingly, the Court should overrule Household's assertion of the work product doctrine.

This Court set forth the showing that defendants must make in the following terms:

> [T]o be subject to work product immunity, documents must have been created in response to "a substantial and significant threat" of litigation, which can be shown by "objective facts establishing an identifiable resolve to litigate." Documents are not work product simply because "litigation [is] in the air" or "there is a remote possibility of some future litigation." "The articulable claim likely to lead to litigation must pertain to this particular opposing party, not the world in general."

SmithKline Beecham Corp. v. Pentech Pharms., Inc., Case No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281 at **8-9 (N.D. Ill. Nov. 5, 2001) (citations omitted). Put differently, "mere anticipation of litigation is not sufficient to invoke the doctrine." *Christman v. Brauvin Realty Advisors Inc.*, 185 F.R.D. 251, 256 (N.D. Ill. 1999). Defendants' showing on this point consists solely of Mr. Robin's declaration and fails to meet this standard.

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[7] In the Class' opening brief, the Class addressed the other factors, including that its claims are colorable, the information is not available elsewhere, and there is no risk of disclosure of confidential information here. While defendants do not contest that the Class represents a substantial majority of the shareholders, the Class augments the record in this record. As shown in Ex. 5 hereto, during the Class Period, total stock trading volume was in excess of 1.9 billion shares. This was in excess of four times the average outstanding shares during the Class Period of 466 million. Even if the Court assumed that 50% of the trades were repeat sales, the multiple of shares traded over outstanding shares is still 2. In these circumstances, given the length of the Class Period and the volume of shares sold during it, the Class represents a substantial majority of shareholders.

As noted above, Mr. Robin's declaration consists of a series of sweeping conclusions unsupported by objective facts. This is particularly true of that portion of the declaration designed to show that the E&Y documents were created for use in any anticipated or pending litigation. For example, Mr. Robins asserts that the "Compliance Engagement was triggered by a lawsuit brought by the State of California." Robin Decl., ¶3. Mr. Robin does not identify the subject of this lawsuit nor when it was filed (November 2001). Moreover, Mr. Robin does not disclose that this lawsuit was settled in January of 2002, months before E&Y was retained.

Similarly, there are no objective facts supporting Mr. Robin's statement regarding his subjective concern "that other states and/or class action plaintiffs [sic] lawyers might bring similar claims." *Id.* The E&Y compliance engagement covered [redacted] states. Ex. A at 4. There are no objective facts as to why Household feared litigation from these [redacted] states, particularly in light of Mr. Robin's statement that only two states, Arizona and Washington, had made formal inquiries. Robin Decl., ¶3. Further, Mr. Robin does not set forth any details concerning the formal inquiries from Arizona and Washington so as to draw the link between these inquiries and the practices/refunds being reviewed by E&Y. Nor is there any objective support for the concern that class action lawyers would bring "similar claims" against defendants. *Id.*

Mr. Robin's declaration is likewise devoid of objective facts regarding the connection of the AG settlement talks to the E&Y work. According to the chronology prepared by Household as to these settlement talks, which was previously provided to the Court as Exhibit G, the initial contact between Household and representatives of [redacted] states took place on May 23, 2002. *Id.* at 5. That chronology shows the next contact as a letter dated June 24 from the state of Washington requesting data from Household. *Id.* However, prior to the June 24 letter, defendants had already conceived of retaining E&Y (by June 10) and commenced drafting the retainer agreement (by June 20). *See* Exs. 2 and K; *see also* Ex. B (E&Y retained prior to June 24).

Significantly, Mr. Robin's declaration does not link the initial contact in May with the decision to retain E&Y in early June. Nor does Mr. Robin explain why the scope of E&Y's engagement was 20 states when only 11 states made the initial contact. *See* Ex. A at 4. Finally, Mr. Robin does not tie the predatory lending practices raised by the multistate group to the predatory lending practices within the scope of E&Y's compliance review.

The sweeping statements in Mr. Robin's declaration not only lack underlying objective factual support but are undermined by contemporaneous internal documents. These documents, as

noted above, referred to the E&Y compliance study as an "audit" and "review" without any reference to litigation. Ms. Allcock's July 9 email is a classic example of this. *See* Ex. 3. Defendants have not made an evidentiary showing that the E&Y documents were prepared in anticipation of litigation.[8]

Even if defendants had met their evidentiary burden, the Class has shown good cause to overcome any possible work product protections afforded the E&Y study and related documents. These documents do not reflect any attorney opinions or mental impressions. Indeed, defendants, other than conclusory statements in their brief, do not contest this point seriously. Defs' Opp. at 13. In any event, defendants bear the burden of establishing that the documents are worthy of the heightened protections afforded opinion work product and have not met this burden. Thus, the Court treats the E&Y documents as ordinary work product.

The Class has made a sufficient showing to overcome the qualified protection afforded ordinary work product. Defendants do not deny that these documents have great relevance to a number of issues, falsity of Household's statements respecting its predatory lending practices, scienter and materiality. Defendants also do not deny that to create this study and related workpapers, E&Y conducted interviews of Household employees and obtained specific data from the Technology & Services department. *See* Exs. B-D. Defendants do not contest that given the limitations on discovery in this case, the Class cannot interview (or depose) all of the relevant Household employees or obtain the specific data provided to E&Y.[9] Additionally, while defendants point to the amount of discovery in this case, they do not (and apparently cannot) point to any specific set of documents or other alternative source for information contained in the E&Y documents, such as internal studies of predatory practices or their financial impact. Even if there were an alternative internal source for this information, an audit by E&Y implies a heightened standard of scrutiny and impartiality of judgment. In sum, the Class cannot obtain the substantial equivalent of the E&Y materials without undue hardship, if at all.

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[8] Moreover, since the E&Y study was prepared with the intention of sharing it with the Attorneys General, defendants also cannot establish a second element of the attorney work product doctrine.

[9] Based on the privilege log entries, it appears that defendants have taken the position that the underlying data sets initially provided to E&Y are themselves privileged. *See, e.g.*, Exhibit 12 to the Buckley Decl. at 42 (entry 5953).

In these circumstances, the Class has adequately rebutted the qualified work product privilege, if any, that attaches to the E&Y documents.

III. DEFENDANTS HAVE WAIVED ANY APPLICABLE PRIVILEGE

The Class had demonstrated waiver on three independent grounds: (1) the voluntary revelation of E&Y documents to the Attorneys General; (2) production in this litigation without any evidence to support any claim of "inadvertent" production; and (3) failure to timely provide a privilege log, delaying as long as 16 months after withholding production. Each of these grounds supports a finding of waiver of all E&Y documents under the theory of subject matter waiver. *Vardon Golf Co., Inc. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 533 (N.D. Ill. 2003). Accordingly, Household must now produce all documents pertaining to the E&Y audit.

Defendants concede that after the AG settlement on October 12, 2002, defendants used E&Y as a monitor to enforce compliance with the terms of that agreement. *See* Robin Decl., ¶7 at 4. Sharing the E&Y documents with the Attorneys General means a waiver of any applicable privilege. Moreover, where there is overlap between the E&Y documents provided to the AGs and the prior E&Y work, under the doctrine of subject matter waiver, all prior related documents must be produced. *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 646 and n.8 (C.D. Cal. 2005) ("[O]nce, a party has disclosed work product to an adversary, it has waived work product protection as to all other adversaries.").

Additionally, to prevail on a claim of "inadvertent" production, defendants must demonstrate via declaration that (1) they could not have prevented the production despite reasonable efforts and (2) they made reasonable efforts to timely recover the documents. *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417 (N.D. Ill. 2006); *Mattenson v. Baxter Healthcare Corp.*, Case No. 02 C 3283, 2003 U.S. Dist. LEXIS 21373, at *6 (N.D. Ill. Nov. 25, 2003).

Defendants offer no declaration on this first point – indeed, there is not a single statement, conclusory or otherwise, in the declarations attesting to the reasonable efforts taken by defendants to prevent inadvertent production. *Compare Mattenson*, 2003 U.S. Dist. LEXIS 21373 at **8-9 *with Sulfuric Acid*, 235 F.R.D. at 417; *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, Case No. 99 C 1174, 2001 U.S. Dist. LEXIS 17602, *19 (N.D. Ill. Oct. 16, 2001) (declaration submitted explaining precautions taken and explanation as to why document inadvertently produced).

As to the second point, defendants offer only conclusory statements in Ms. Buckley's declaration. Moreover, this declaration does not answer the critical questions. *How is it possible that no one at Cahill, Gordon & Reindel was aware of the E&Y engagement until mid-2006?* If, as

defendants assert, E&Y was retained specifically by Household's general counsel, Mr. Robin, to prepare work on potential predatory lending litigation involving 20 states and related to the AG settlement discussions, outside counsel should have been aware (and likely were aware) of the E&Y engagement long before July 2006. Moreover, there is no explanation as to (1) why defendants delayed until June 29 to even raise a privilege issue respecting the E&Y documents when the Class subpoenaed E&Y on May 23 and E&Y via a June 6 letter raised a privilege objection, a copy of which letter was sent to Ms. Buckley?; (2) why Ms. Buckley waited to commence her investigation until July despite receiving E&Y's letter in early June?; (3) why defendants did not raise this issue with the Court promptly after the Class' refusal to return the documents in August of this year?; and (4) why defendants withheld E&Y documents in March of this year when they presumably were unaware that these documents were privileged? In sum, the Buckley declaration actually raises more questions than it answers with respect to this second point.

Defendants have failed to demonstrate that they acted in a timely manner to recover the E&Y documents. *MG Capital LLC v. Sullivan*, No. 01 C 5815, 2002 U.S. Dist. LEXIS 11803, at *10 (N.D. Ill. June 27, 2002) (waiting a month after opposing part refused to return documents "was not a reasonable and appropriate response to rectify the error in a timely manner."); *see also Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D. Ill. 1996) (discussing party's failure to act promptly). Defendants' argument that they "had no need to press the issue" (*see* Defs' Opp. at 16 n.9) is wrong; they had a legal obligation to timely act to protect their asserted privilege and not to "drag their feet." *See Harmony*, 69 F.R.D. at 117.

The other key factors involved in this Court's balancing test favor the Class. Disclosure is complete in that the Class counsel has reviewed the documents. Further, fairness supports the Class. The E&Y documents are relevant and indeed, defendants do not contest this. Moreover, this is not the only allegedly "inadvertent" production. To the contrary, this Court (and the Class) has already spent considerable amount of time and effort addressing **five** major "inadvertent" productions with respect to litigation audit reports, federal agency documents, state agency documents, the E&Y documents and the Wilmer, Cutler & Pickering documents.

Only the fifth factor, the scope of discovery, possibly favors defendants, who not surprisingly cite their production number. However, defendants neglect to inform the Court that the bulk of the documents were produced in the prior SEC investigation and ERISA litigation, thus reducing their cited number by at least half. Further, defendants' production has been on a rolling basis over the course of two plus years, such that the individual productions are considerably smaller. Thus, this

case does not present the normal case of inadvertent production, which "most typically arises in a situation where a party is producing large quantities of documents in a compressed time frame." *Advertising to Women, Inc. v. Gianni Versace S.P.A.*, Case No. 98 C 1553, 1999 U.S. Dist. LEXIS 12263, at *16 (N.D. Ill. Aug. 3, 1999). Given these points, the plethora of "inadvertently produced documents and the lack of any evidence of the precautions taken to avoid inadvertent production, the scope of production alone is not meaningful. *See Mattenson*, 2003 U.S. Dist. LEXIS, at *9 ("although the scope of the discovery was relative large, it was not so large that precautions to prevent disclosure could not have been properly taken.").

The final basis for waiver is defendants' failure to timely provide a privilege log. Defendants cannot to justify their unreasonable delay in providing privilege logs as to the E&Y documents. Indeed, the alleged "complete" privilege log remains patently incomplete, lacking entries relating to the reports required to be provided to defendants, including the Final Report, workpapers and interview memoranda. *See* Engagement Letter, Robin Decl., Ex. 1 at 11 and 14. Defendants' untimely provision of incomplete privilege logs warrants a finding of waiver.

"[T]he Committee Notes to Rule 26 make clear that the privilege log is not an afterthought to claiming privilege or protection, it is the claim of privilege or protection. 'To withhold materials without such notice is contrary to the rule, subjects a party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of privilege or protection.'" *Hobley v. Burges*, 226 F.R.D. 312, 320 (N.D. Ill. 2005) (quoting Advisory Committee notes), *vacated on other grounds*, 433 F.3d 946 (7th Cir. 2006) ("An attorney asserting privilege must timely support that claim with a 'privilege log' which describes the nature of each document being withheld."); *see also Anderson v. Hale,* 202 F.R.D. 548, 553 (N.D. Ill. 2001), ("[E]vidence of foot-dragging or a cavalier attitude towards adhering to court orders and the discovery rules supports finding waiver.")

Defendants have dragged their feet knowing that delay benefits them. First, as defendants acknowledge, they withheld documents from a March production and only provided a privilege log as to those documents in September. Defs' Opp. at 17. They provide no explanation for this delay. Second, although defendants first asserted a privilege over the E&Y documents in June, they did not provide their "comprehensive" privilege log until October, after the Class brought this motion. This was in the face of the Class' repeated requests in July and early August for this log. *See* Ex. J. Third, even the allegedly comprehensive log is incomplete and fails to include entries for the Final Report and interview memoranda, documents required to be provided by E&Y under the terms of the engagement letter. Robin Decl., Ex. 1 at 11, 14. These points make a mockery of defendants'

assertion that they provided a privilege log "less than two months after the privilege determinations were made." Defs' Opp. at 17.

Fourth, defendants provide no explanation as to why the first privilege log entries relating to the E&Y compliance review were delayed until September of this year, more than two years after document production commenced. Defendants' version is that Mr. Robin as general counsel retained E&Y to investigate potential litigation relating to predatory lending practices in some 20 states. In this case, counsel must have been aware of the E&Y retention well before the first production in this case, which took place on June 24, 2004. Thus, defendants withheld documents from production without related privilege log entries for over two years. Indeed, as noted above, even now, defendants have failed to identify all E&Y documents on their privilege log.

These four points demonstrate a pattern of persistent and intentional delay that more than satisfies the standards for waiver articulated in *Burlington Northern & Santa Fe Railway v. District Court,* 408 F.3d 1142 (9th Cir. 2005) and *Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.,* 230 F.R.D. 688 (M.D. Fla. 2005).

As shown above, this Court should find waiver on each of three independent grounds: 1) defendants' disclosure to adverse third parties; 2) defendants' production in this case and 3) defendants' unreasonable delay in providing privilege logs.

IV. CONCLUSION

For the foregoing reasons, the Court should grant this motion and compel Household to produce all of the E&Y documents.

DATED: November 17, 2006

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

I, the undersigned, declare:

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

2. That on November 17, 2006, declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF ALL DOCUMENTS PERTAINING TO HOUSEHOLD'S CONSULTATIONS WITH ERNST & YOUNG LLP [REDACTED VERSION]**. The parties' email addresses are as follows:

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

s/ Marcy Medeiros
MARCY MEDEIROS