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' PARTIAL OBJECTION TO MAGISTRATE JUDGE NOLAN'S DECEMBER 6, 2006 ORDER REGARDING SELECTIVE WAIVER OF THE WILMER, CUTLER & PICKERING DOCUMENTS

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I. PRELIMINARY STATEMENT

Pursuant to Fed. R. Civ. P. 72(a), the Class respectfully objects to the December 6, 2006 Memorandum Opinion and Order (the "Order") entered by Magistrate Judge Nan R. Nolan (the "Magistrate"). *See* Davis Decl., Ex. 1.[1] The Order denied the Class' Motion to Compel Further Responses to the Class' Questions for Per Eckholdt Concerning Exhibit 13 and the Production of Documents Underlying Wilmer, Cutler & Pickering Reports. *See* Davis Decl., Exs. 2-3. The Class objects to the Order because the Magistrate erred in departing from the nearly unanimous federal circuit court rejection of the "selective waiver" theory, which runs contrary to the long standing rule that voluntary disclosure of purportedly privileged or work product documents to a third party adversary constitutes a waiver of that protection. The "selective waiver" theory has been rejected by the circuit courts because it would allow a party to disclose intentionally and voluntarily privileged materials to gain a strategic advantage without forfeiting the purported privilege and would fundamentally alter existing privileges. The Magistrate's ruling expands these well-established evidentiary privileges, which have long been narrowly construed because they impede the truth finding process. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). Further, the ruling expands those privileges in a manner that contradicts existing case law and the purposes of the attorney-client privilege and work product immunity. For these reasons, and the reasons discussed below, the Magistrate's ruling is clearly erroneous, contrary to law and must be overturned.

II. THE DISPUTED EVIDENCE AND ITS RELEVANCE TO THE CLASS' CLAIMS

A. The Wilmer, Cutler & Pickering Documents

Wilmer, Cutler & Pickering ("WCP") was retained by the Audit Committee of Household International, Inc.'s ("Household" or the "Company") Board of Directors in 2002 to investigate allegations by Elaine Markell, former Director of Default Servicing for Household Mortgage Services ("HMS"), concerning Household's illegal loan restructuring manipulation and its violations of bankruptcy laws.[2] WCP provided a final report to the Audit Committee regarding its

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[1] "Davis Decl." refers to the Declaration of Jason C. Davis, a copy of which has been filed herewith under seal pursuant to L.R. 26.2 and pursuant to the Minute Order, dated October 10, 2006 (Docket No. 704), instructing the Clerk to file all confidential materials under seal.

[2] HMS is a business unit of Household Finance Corporation, which is a subsidiary of Household.

investigation around March 24, 2003. The report at issue (the "Restructuring Report") concerns HMS' loan restructuring practices and whether these practices were consistent with Household's public disclosures or with HMS' internal policies. *See* Davis Decl., Ex. 4. Specifically, WCP was hired to conduct a ***factual investigation*** of Ms. Markell's allegations. As stated in the report, WCP's task was to address three separate factual questions regarding Household's restructuring practices, policies and public disclosures. *Id.* at 4. WCP conducted its investigation by reviewing thousands of documents and interviewing numerous Household employees. *Id.* at 2.

The Restructuring Report and related documents are highly relevant to the Class' claims that the defendants manipulated the Company's credit quality numbers by improperly restructuring delinquent accounts and made false and misleading statements about Household's restructuring policies. ¶¶107-24.[3]

B. The Deposition Testimony of Household Witness Per Ekholdt, Exhibit 13 to the Deposition, and Subsequent Incomplete Ekholdt Declaration

On March 28, 2006, the Class deposed Per Ekholdt, former Group Director of Credit Risk for HMS. During the deposition, counsel for defendants improperly instructed Mr. Ekholdt not to answer questions concerning Exhibit 13, a document that was provided to WCP by Mr. Ekholdt to assist in WCP's investigation, on the grounds that it is protected by the attorney-client privilege and the attorney work product doctrine. *See* Davis Decl., Ex. 11 at 183-84. Less than a week after depriving the Class of the opportunity to examine Mr. Ekholdt on the exhibit, defendants withdrew their privilege claim: "[W]e have now had an opportunity to further evaluate our privilege claim and hereby withdraw it." *See* Davis Decl., Ex. 12 at 2. Because Mr. Ekholdt resides in Hong Kong, the Class agreed to submit written questions rather than recalling the witness. *See* Davis Decl., Ex. 6. On September 5, 2006, the Class propounded questions for Per Ekholdt regarding Exhibit 13. On September 29, 2006, defendants served their responses and objections and again refused to answer questions, citing privilege. *Id.* Defendants cannot have their cake and eat it too. The Magistrate erred in allowing them to do so. The deposition questions propounded by the Class are related to the Restructuring Report and are relevant for the same reasons.

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[3] Paragraph ("¶") reference is to the [Corrected] Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws, filed March 13, 2003.

III. RELEVANT PROCEDURAL HISTORY

In 2004, the Restructuring Report and certain other related documents were produced to the Class with the agreement that production of these specific documents in this litigation would not waive any applicable privilege. *See* Davis Decl., Ex. 5. In subsequent productions, Household has voluntarily produced other documents concerning the Restructuring Report that are not subject to the parties' agreement, including workpapers prepared by Household for WCP. *See* Davis Decl., Exs. 6-9. Defendants consistently refused to produce any underlying documents related to the Restructuring Report, except for those documents defendants have cherry-picked to include in the record. Likewise, defendants refused to answer questions related to the Restructuring Report and related documents. For example, defendants did not confirm that they had produced copies of the Restructuring Report, related letters and additional memoranda to the Securities and Exchange Commission ("SEC") until they produced their cover letter to the SEC – for the first time in this case, contradicting numerous prior representations made by defendants before the Magistrate that their SEC production was "complete" – as an attachment to their response. *See* Davis Decl., Ex. 10, (Declaration of Janet Beer, Ex. H (Docket No. 747)).

On October 16, 2006, the Class moved to compel the production of all documents (including interview notes, statistical studies and draft reports) underlying the Restructuring Report because such documents are not privileged, and even if they were, Household waived any privilege by deliberately producing such materials to its adversary. In addition, the Class moved to compel further responses to the Class' written deposition questions for Per Ekholdt concerning Exhibit 13 (*see* §II.B *supra*), which reflects statistics used in the Restructuring Report; and further responses to the Class' deposition questions of audit committee member Louis Levy.

IV. ARGUMENT

A. Applicable Legal Standard

Under Fed. R. Civ. P. 72(a), a party may serve and file objections to a magistrate judge's order within 10 days after being served with a copy of that order. The district court "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." *Id.*; *see also Raymond v. Ameritech Corp.*, 03 C 4509, 2004 U.S. Dist. LEXIS 8083 (N.D. Ill. May 6, 2004) (applying "clearly erroneous or contrary to law" standard).

B. The Magistrate's Order Fails to Follow the Federal Circuit Courts' Near Unanimous Rejection of the Selective Waiver Theory

The Magistrate's Order contradicts black letter law confirmed by six circuit courts and left untouched by the United States Supreme Court. There is no "split as to the viability and application of this [selective waiver] theory." *See* Order at 28. Six circuits reject the selective waiver theory with respect to work product and attorney-client privilege. The Magistrate cites these decisions. *See* Order at 28 (citing *Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981), 29 (citing *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) ("*M.I.T.*"); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991) (rejecting theory even where disclosure made pursuant to confidentiality agreement); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 308 (6th Cir. 2002) (rejecting theory even where disclosure made pursuant to confidentiality agreement)), and 30 (citing *In re Qwest Communs. Int'l*, 450 F.3d 1179, 1181 (10th Cir. 2006) *cert denied*, No. 06-343, 2006 U.S. LEXIS 8627 (Nov. 13, 2006) (rejecting theory even where disclosure made pursuant to confidentiality agreement)); *accord In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 845 (8th Cir. 1988) (rejecting theory even where disclosure made pursuant to confidentiality agreement)).

Following its exhaustive analysis of these and other cases, the Tenth Circuit recently enunciated "[t]he only conclusion from the federal case law is that the federal circuits have not expanded [attorney-client privilege or fact work product immunity] by applying selective waiver." *Qwest*, 450 F.3d at 1196 (noting state courts have reached the same conclusion). Significantly, on November 13, 2006, the Supreme Court denied Qwest's Petition for Writ of Certiorari, thus closing debate as to whether selective waiver should be the law of the land. Viewed in this context, it is clear that the Magistrate's Order is contrary to law, and must be reversed.

Only the Eighth Circuit, in its highly controversial decision in *Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977), has adopted the selective waiver theory. But that decision stands alone for good reason. First, *Diversified* was decided in 1977 and thus did not have the benefit of the Supreme Court's 1981 ruling in *Upjohn* clearly articulating the basis of the privilege: "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. As discussed below, each of the six circuits that rejected selective waiver did so based in part on the reasoning in *Upjohn*, recognizing that selective waiver is incongruent with the purpose of the

privilege. Second, the *Diversified* court devoted scant analysis (two sentences) to the selective waiver question, and adopted the theory on the dubious prognosis that a contrary ruling would stifle the then-developing practice of hiring independent counsel to investigate potential corporate malfeasance. *Diversified*, 572 F.2d at 611. Third, while it was the Eighth Circuit's *Diversified* decision that gave rise to the selective waiver theory with respect to attorney-client communications, ten years later the Eighth Circuit rejected the same theory with respect to attorney work product. *See Chrysler Motors Corp.*, 860 F.2d at 845. Thus, the theory has fallen into disfavor in the only circuit to have embraced it.

The Magistrate's Order must be reversed because the rule it adopts runs contrary to the well-reasoned majority decision that selective waiver should remain a theory. While the letter of the Order "decline[d] to adopt a *per se* rule regarding waiver with respect to government disclosures," it applied such a rule in this case. Order at 33. If put into practice, that rule would create a new contract-based evidentiary privilege for disclosures made to government agencies. That new rule violates not only the general principle discussed above, but (i) has been specifically considered and rejected by numerous courts; (ii) is manifestly unfair as it allows parties to turn privileges into strategic tools; (iii) should be left to Congress to enact, if at all; and (iv) is completely unnecessary. These points are discussed in turn.

1. Federal Case Law Rejects a Contract-Based, Governmental Investigation Extension of the Attorney-Client Privilege

This Court should follow the weight of well-reasoned circuit court precedent and reject the Magistrate's proposed rule. The Tenth Circuit's recent decision in *Qwest*, affirmed by the Supreme Court, is instructive in this regard. In a securities fraud case against Qwest, the company produced documents to the SEC pursuant to an agreement that specified that SEC staff would maintain the documents' confidentiality, "except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities." *Qwest*, 450 F.3d at 1181. This is the exact same language as is contained in the "non-waiver" agreement defendants relied on in this case. *See* Davis Decl., Ex. 5. Both contain this enormous exception that gives the SEC the right to disclose the materials to any third party if the "***Staff"*** determines it needs to do so. *See* Davis Decl., Ex. 10. The SEC staff has unfettered discretion in this regard, which it could easily exercise in favor of using the materials at issue in a manner consistent with any of its 23 different routine uses of information pursuant to SEC Form 1662. *See* Davis Decl., Exs. 31 at 1 (referencing SEC Form 1662), 32 at HHS 02764393-94 (SEC

Form 1662). The Magistrate erred in concluding, without any evidence, that the *Qwest* agreement was "much broader" than Household's agreement. Order at 31. And in any case, neither agreement precludes the SEC from distributing purportedly privileged materials to a broader audience.

The Tenth Circuit found that such language affords "the [SEC] broad discretion to use the Waiver Documents as they saw fit," and held that the company's production of documents to the SEC waived any privilege. *Qwest*, 430 F.3d at 1194. Other circuits have reached a similar conclusion. *See, e.g.*, *Columbia*, 293 F.3d at 302 ("any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage'") (citation omitted); Westinghouse, 951 F.2d at 1418 (rejecting selective waiver where holder disclosed materials under confidentiality regulations and under confidential agreements); *accord Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993) ("even if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege; it merely obligates the recipient to comply with the terms of any confidentiality agreement") (citation omitted).

This contract-based selective waiver theory not only conflicts with the foregoing case law, but is inconsistent with attorney-client privilege's underlying rationale articulated in the Supreme Court's ruling in *Upjohn* and logically leads to an adoption *in toto* of the selective waiver theory. Government agencies have no incentive – and no obligation – to guard the public policy imperative that gave rise to the privilege in the first place. As the Third Circuit explained, "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Westinghouse*, 951 F.2d at 1425. As a result, there can be little doubt that the practical effect of the Magistrate's ruling would result in a "per se" governmental investigation privilege: Each company under investigation would simply execute a boilerplate confidentiality agreement with the applicable governmental agencies.

2. Federal Case Law Rejects a Contract-Based, Governmental Investigation Extension of the Work Product Doctrine

The Magistrate erroneously ruled that Household did not waive any attorney work product protection because it entered into a confidentiality agreement with the SEC. Several circuit courts have faced and refused to accept this contract-based selective waiver theory. The Sixth Circuit ruled

in *Columbia* that a defendant was required to produce work product to a private litigant where such materials had been produced by the defendant to a governmental adversary, the Department of Justice ("DOJ"), in response to a prior investigation despite the existence of a confidentiality agreement. *See Columbia*, 293 F.3d at 306; *accord In re Bank One Sec. Litig.*, 209 F.R.D. 418, 424 (N.D. Ill. 2002) (defendant ordered to produce attorney work product to private litigants because documents had been disclosed previously to a government agency that was investigating certain of the bank's "questionable practices"). Similarly, in *Westinghouse* the Third Circuit examined disclosure of a law firm's letter reports and documents accumulated in connection with an internal corporate investigation into bribery allegations. *Westinghouse*, 951 F.2d at 1419. Although the documents at issue were provided to the DOJ pursuant to a confidentiality agreement, the court held that work product protection was fully waived because disclosure to the agencies did not further the doctrine's underlying goal of protecting an attorney's work product from falling into the hands of an adversary, since the documents were disclosed to a governmental adversary. *Westinghouse*, 951 F.2d at 1419. Finally, while it was the Eighth Circuit's controversial ruling in *Diversified* that gave birth to the selective waiver theory as to attorney-client communications, that circuit subsequently rejected the theory as to work product. *See Chrysler Motors Corp.*, 860 F.2d at 845.

In *Chrysler Motors Corp.*, defendant asserted work product over materials it disclosed to a private litigation adversary pursuant to a confidentiality agreement in the context of settlement negotiations – a historically sacrosanct zone from which little evidence escapes. *Id.*; *see also* Federal Rule of Evidence 408. The Eighth Circuit upheld the lower court's order compelling production of those materials in a later litigation because the act of "voluntarily disclosing the [materials] to its adversaries" stripped those materials of work product protection. *Id.* at 844-45; *accord In re Worlds of Wonder Sec. Litig.*, 147 F.R.D. 208 (N.D. Cal. 1992) (finding production to SEC waived work product protection notwithstanding confidentiality agreement); *Martin Marietta*, 856 F.2d at 625 ("disclosure by Martin Marietta to the federal government, the United States Attorney and the DOD, when the government and Martin Marietta were adversaries," waived non-opinion work product protection); *Qwest*, 450 F.3d at 1192 ("having considered the purposes behind . . . the work-product doctrine as well as the reasoned opinions of the other circuits," selective waiver is unavailable).

As the foregoing cases illustrate, the proper inquiry with regard to work product waiver is whether the materials at issue were deliberately disclosed to an adversary. That inquiry best serves the objective of the work product doctrine: "[to] promote[] the ***adversary system*** by enabling attorneys to prepare cases without fear that their work product will be used against their clients."

Westinghouse, 951 F.2d at 1428 (citing *Hickman v Taylor*, 329 U.S. 495, 510-11 (1947); *United States v AT&T*, 642 F.2d 1285, 1299 (D.C. Cir 1980)) (emphasis added).

In this case, defendants do not and cannot seriously contest the fact that the SEC stood in an adversarial relationship relative to Household at the time that Household disclosed the purportedly protected materials.[4] Their only argument, and the linchpin of the Magistrate's Order, is that Household gave those materials to the SEC under a confidentiality agreement. *See* Order at 34. However, the work product doctrine announced in *Hickman*, like the attorney-client privilege, is not a "creature of contract, arranged between parties to suit the whim of the moment." *Columbia*, 293 F.3d at 303. The Class respectfully submits that the Order erred in reaching a contrary conclusion.

The Magistrate reached that erroneous conclusion based on inapposite case law and dicta. First, the Court cites *Dellwood Farms v. Cargill, Inc.*, 128 F.3d 1122, 1126 (7th Cir. 1997) for the proposition that the Seventh Circuit "left the door open" for the selective waiver theory. Order at 31. *Dellwood* is inapplicable in this context because it did not even review the attorney-client privilege or work product doctrine. Rather, it focused on the government investigation privilege, which has different policy objectives. *Id.* As the Magistrate correctly noted, that court took no "formal position" on the selective waiver theory. Order at 32. Next, the Magistrate relied on dicta in *Salmon Bros. Treasury Litig. v. Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2nd Cir. 1993). Order at 32. But *Steinhardt* emphatically rejected the selective waiver theory. *Id.* ("[w]hether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliche, the 'Hobson's choice' argument is unpersuasive . . . [an] allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is ***insufficient*** justification for carving a ***substantial exception*** to the waiver doctrine") (emphasis added). *Steinhardt's* single phrase that there may be a situation where a confidentiality agreement matters is pure dicta, and better read to anticipate the situation present in *In re M & L Business Mach. Co.*, 161 B.R. 689, 692 (D. Colo. 1993), another case cited by the Magistrate. *See* Order at 32. In that case, the work product at issue was provided not by one adversary to another, but by a bank cooperating with an investigation into one of its ***clients***. *Id.* Importantly, as noted in the Order, that court was persuaded by the fact there '"was no evidence that

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[4] *See* Order at 34 (quoting language in the confidentiality agreement – attached to defendants' supporting declaration – between Household and the SEC that the SEC was '"determining whether there have been any violations of the federal securities laws . . .'").

the bank's cooperation in the investigation was for its personal benefit.'" *Id.* (citing *In re M&L Business Mach. Co.*, 161 B.R. at 696). The Magistrate erred in adopting a rule that allows parties to pick and chose whom to provide and from whom to withhold purported work product.

3. The Magistrate Erred by Allowing Household to Make Tactical Use of the Attorney-Client Privilege and Work Product Doctrine

Many courts reject the selective waiver theory precisely to avoid the situation present in this case: Household disclosed the Restructuring Report and related materials to the SEC for a benefit in that investigation and now withholds those materials for tactical advantage in this case. Thus, the Second Circuit noted that "[a party's] claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes." *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) (agreeing with the *Permian*, 665 F.2d at 1214, assessment that the "'pick and chose'" theory should be rejected). Other courts that have considered the question reject the notion that a litigant can pick and choose to whom it wishes to divulge attorney-client privileged information while retaining the privilege as to others. *See, e.g.*, *M.I.T.*, 129 F.3d at 686; *Westinghouse*, 951 F.2d at 1425 (3d Cir. 1991); *Martin Marietta*, 856 F.2d at 623-24; *Columbia*, 293 F.3d at 302 (6th Cir. 2002); *Qwest*, 450 F.3d at 1192; *see also Genentech, Inc. v. United States ITC*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (acknowledging *Diversifieds'* selective waiver, but noting "[t]his court, however, has never recognized such a limited waiver").[5] The Magistrate's Order must be overturned in order to avoid this abusive practice.

4. The Court Erred in Basing Its Ruling on a Proposed Federal Rule of Evidence, Whose Enactment Is Better Left to Congress

The Order adopted the selective waiver theory at least in part based on an amendment to Fed. R. Evid. 502 by the Advisory Committee on Evidence Rules. *See* Order at 34, n.4. The proposal apparently suggests enacting some form of selective waiver as to disclosures made to governmental entities. *Id.* The Magistrate erred in relying on this proposal for two reasons. First, that the committee has even proposed such a rule shows no such selective waiver was in existence when

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[5] *Genentech* did not present the issue of a selective waiver in circumstances resembling those here, but rather a waiver following inadvertent production of privileged materials. 122 F.3d at 1417. That said, the panel's comment illustrates yet another circuit's disapproval of selective waiver.

Household first decided to gamble by handing over purportedly privileged documents to its adversary, the SEC. Second, because the proposed Rule would affect evidentiary privileges, by statute it must be enacted by Congress. *See* 28 U.S.C. §2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."). Rules affecting evidentiary privileges occupy such a rarified place in our legal system that the ultimate responsibility for their promulgation is reserved to the legislative branch. *See In re Grand Jury Proceedings*, 103 F.3d 1140, 1155 (3d Cir. 1997) (Congress "has recognized the importance of privilege rules insofar as the truth-seeking process is concerned . . . . It did so by identifying and designating the law of privileges as a special area meriting greater legislative oversight."); *see also M.I.T.*, 129 F.3d at 685 (rejecting selective waiver while explaining that "[governmental] agencies usually have means to secure the information they need and, if not, can seek legislation from Congress"). Given the foregoing, the Class respectfully submits that the Magistrate erred in expanding the privileges rather than leaving that task to Congress. *See United States v. Nixon*, 418 U.S. 683, 709-10 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

5. There Is No Need to Adopt a New Privilege in Order to Ensure Parties Cooperate in Governmental Investigations

At bottom, the Order seems to rest on the assumption that by adopting the selective waiver theory in the governmental investigation context, parties will be more inclined to cooperate with such investigations. This assumption has no general empirical support and no support in this particular case. As an initial matter, it bears repeating that nowhere among the reasons for the attorney-client privilege or the work product doctrine is "the ability to 'talk candidly with the Government.'" *See Columbia*, 293 F.3d at 302. The Second Circuit observed "the SEC has continued to receive voluntary cooperation from subjects of investigations, notwithstanding the rejection of the selective waiver doctrine by two circuits and public statements from Directors of the Enforcement Division that the SEC considers voluntary disclosures to be discoverable and admissible." *Steinhardt*, 9 F.3d at 236. And here, Household produced literally hundreds of thousands of pages of documents to the SEC before providing the Restructuring Report and related materials, in the context of near-universal rejection of the selective waiver theory, and ***after*** this litigation had been filed. *See Qwest*, 450 F.3d at 1192. However laudable the objective of aiding governmental investigations may be, the costs associated with adopting a new privilege, or creating a

large exception to the long-standing principle that privileges are to be construed narrowly because they impede the truth finding process, *see Upjohn*, 449 U.S. 383, 389 (1981) (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)), are heaving strongly militate in favor of overturning the Order.

C. The Documents at Issue Are Not Even Privileged, and the Magistrate Erred in that Finding

The Magistrate erred in finding that defendants had met their burden to demonstrate that the Restructuring Report and related documents are privileged. *See* Order at 21. They were not created in "anticipation of litigation." *See Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 767-68 (7th Cir. 2006). The Class provided an overwhelming amount of support for this proposition. First, the Restructuring Report plainly states that it was created for the purpose of answering factual questions. *See* Davis Decl., Ex. 4 at 4. Second, WCP's own declaration and retainer agreement, and the Company's independent Audit Committee minutes clearly show that the firm's client was the Audit Committee, not Household. *See* Davis Decl., Exs. 13-14. The Order emphasizes the fact that ultimately Household was required to pay the Audit Committee's legal bill, and arrives at the conclusion that WCP worked for both entities. Order at 23. The point, however, of requiring Household to sign the engagement letter was to make it clear that the interests of the Audit Committee may conflict with the interests of Household. WCP was required to get this conflict waiver from Household under applicable ethical rules which specifically provide that fee payment arrangements must comply with the lawyer's duty to avoid conflicts.[6] In addition, although the partner who did work on the matter is apparently still employed by WCP, *see* Davis Decl., Exs. 20, 22-25, 29 the firm chose to have an uninvolved individual execute the declaration, which undermines any *post hoc* statements suggesting WCP believed it was Household's client. *See* Davis Decl., Ex. 13, 26. Third, the claim that WCP represented Household vis-à-vis the SEC or Elaine Markell has no factual support. The exact opposite is true as shown by the fact that other firms represented Household in these matters. *See* Davis Decl., Exs. 15, 27-28. In addition, the WCP declarant, an attorney, did not even state that WCP was hired in anticipation of any litigation. *See* Davis Decl., Ex. 13.

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[6] *See* District of Columbia Rules of Professional Conduct §1.8(e) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . .").

That WCP was hired to conduct a factual investigation is further proven by the fact that the Audit Committee hired the firm to conduct an investigation in order to comply with the obligations imposed on the Company's public ***auditors*** set forth in §10(a) of the Securities Exchange Act of 1934. *See* Davis Decl., Ex. 14. Section 10(a) imposes an affirmative obligation on auditors to investigate and, under some circumstances, disclose those results to the SEC. 15 U.S.C. §78j-1(b)(1) ("If, in the course of conducting an audit . . . [auditors become] aware of information indicating that an illegal act . . . may have occurred, the firm shall . . . (A)(i) determine whether it is likely that an illegal act has occurred"). In enacting §10(a), Congress did not intend to allow companies to cloak such investigations by outsourcing them to law firms. *See, e.g.*, *SEC v. Solucorp Indus. Ltd.*, 197 F. Supp. 2d 4, 11 (S.D.N.Y. 2002) ("This provision, while ultimately aimed at preventing the abuses directly proscribed in § 10(b) . . . requires independent public accountants to conduct audits in accordance with Generally Accepted Auditing Standards . . . and to comply with certain enumerated reporting requirements should they uncover suspicious activity during an audit."). If the Magistrate's decision had heeded the public watchdog function of the accountants, *see United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984), and their statutory obligations to disclose investigative information like the Restructuring Report ***to the SEC*** under certain circumstances (thus eliminating any real expectation of confidentiality), it would have been completely unnecessary to foist a new contract-based governmental investigation privilege because those documents enjoy no privilege in the first instance.

As is the case in selective waiver, it is bad public policy and contrary to existing case law to extend the attorney-client privilege and work product doctrines beyond their purposes and create an "an accountant's privilege useable only by lawyers." *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999). Next, answering the factual questions addressed in the Restructuring Report was crucial to Household's ability to consummate its multi-billion dollar merger with HSBC Holdings, plc in March of 2003. *See* Davis Decl., Exs. 16, 17-19, 21. Finally, the Restructuring Report provides neither legal analysis nor legal advice. The Magistrate erred in citing an analysis of "quantitative and qualitative materiality" to arrive at the contrary conclusion. Order at 21. As to quantitative materiality, a review of the Restructuring Report shows that the analysis consists of subtracting one number from another. *See* Davis Decl., Ex. 7 at 7. As to qualitative materiality, that "analysis" consists of a recital of WCP's factual findings. *Id.* Next, to the extent the court did not err in finding a single line of "legal advice as to whether Household should take corrective action" the court did err in allowing the *de minimis* part to control the whole. Order at 21. In this circuit, it

is well-established that dual-purpose documents are not protected as work product. *See Frederick*, 182 F.3d at 501-02 (finding that the documents at issue were not privileged as work product, stating simply "[m]ost are ***dual-purpose documents, about which no more may be said***") (emphasis added). The purpose of the Restructuring Report was not to provide legal advice in anticipation of litigation, but to summarize a factual investigation for the purposes of satisfying accounting obligations and to achieve critical business objectives. It is not privileged and it is a clear error to reach a the opposite conclusion.

D. While the Court Failed to Reach Subject Matter Waiver on Account of Its Erroneous Findings on Selective Waiver, It Is Clear Defendants Have Effected Such a Waiver

Because the Order adopts the selective waiver theory, it did not have occasion, or any reason, to address the scope of any waiver. However, as demonstrated herein, and in the Class' filings before the Magistrate, Household voluntarily and deliberately disclosed the Restructuring Report and related materials for its own benefit. Subject matter waiver is therefore required here as it is in all "instances where a selective disclosure is intended to 'gain a tactical advantage in the context of litigation.'" *In re Brand Name Prescription Drugs Antitrust Litig.*, 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 17110, at *8 (N.D. Ill. Nov. 14, 1995); *Vardon Golf Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 532 (N.D. Ill. 2003); *see also §IV.B.3, infra*. Since defendants vehemently claim the Restructuring Report and related materials are protected from discovery based on the attorney-client or work product doctrine, there is no question they gave such materials to the SEC to benefit from that disclosure. In addition, because defendants have cherry-picked some privileged documents to disclose while withholding others, the facts surrounding the Restructuring Report and related materials have been distorted.[7] Such actions result in subject matter waiver as to these materials.

E. The Magistrate Erred in Ignoring the Class' Argument that Defendants' Witness Should Be Required to Answer Questions Regarding the Restructuring Report

As to Mr. Ekholdt and Exhibit 13, the Order recounts the history surrounding this issue, *see* Order at 5-6, but completely fails to address the Class' argument that defendants should be

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[7] Just as defendants "inadvertently" produced Restructuring Report documents to the Class, they also "inadvertently" produced Restructuring Report documents to the SEC, recalled them, and then produced them again. Similarly, Household "inadvertently" destroyed its email files, which further illustrates defendants' gamesmanship with regard to document production. *See* Davis Decl., Exs. 27, 30.

compelled to answer the written deposition questions. As detailed in §2B, *supra*, defendants cannot retract their claim of privilege with respect to Exhibit 13 and then refuse to answer questions about the exhibit on the basis of privilege. The Magistrate's failure to even consider this inequity constitutes plain error.

V. CONCLUSION

For the reasons set forth above, the Class respectfully objects in part to the Order and urges this Court to overturn the Magistrate's rulings.

DATED: December 21, 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 December 21, 2006, declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' PARTIAL OBJECTION TO MAGISTRATE JUDGE NOLAN'S DECEMBER 6, 2006 ORDER REGARDING SELECTIVE WAIVER OF THE WILMER, CUTLER & PICKERING DOCUMENTS.** 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 21st day of December, 2006, at San Francisco, California.

s/ Marcy Medeiros
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