UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

THE HOUSEHOLD DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' FEBRUARY 28, 2007 FURTHER SUPPLEMENT TO THEIR MOTION TO COMPEL PRODUCTION OF ERNST & YOUNG LLP DOCUMENTS AND FOR SANCTIONS

CAHILL GORDON & REINDEL LLP
80 PINE STREET
NEW YORK, NEW YORK 10005
(212) 701-3000

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar

Defendants respectfully submit this response to Plaintiffs' February 28, 2007 second supplemental filing to their February 22, 2007 Motion to Compel.

The Household Defendants are not asking this Court to reconsider its December 6, 2006 Order and Judge Guzman's February 1, 2007 affirmance, rulings with which they have already complied in full. Household has already produced privileged documents from its privilege log related to the Ernst & Young ("E&Y") Compliance Engagement that are dated prior to October 11, 2002 — the end of the Class Period. *See* February 26 Memorandum at 2-3.[1] Thus, Plaintiffs' citation to law-of-the-case doctrine is entirely beside the point. In defending itself against Plaintiffs' February 22 Motion to Compel, and as explained during the hearing on February 27, 2007, Defendants merely demonstrated that Plaintiffs' expansive new reading of the December 6 Order, which this Court intended to be "narrowly construed" (*see* December 6 Order at 14), is insupportable and inconsistent with Plaintiffs' own representations to the Court as well as relevant case law. For the reasons stated in Household's February 26, 2007 Memorandum, and those set forth below, Plaintiffs' Motion to Compel and for Sanctions should be denied.

Contrary to Plaintiffs' assertions, the December 6 Order did not require production of E&Y Compliance Engagement documents falling after the Class Period. The underlying rationale in any *Garner* analysis is the existence of a fiduciary relationship between the privilege holder and those seeking to share in the privilege. Plaintiffs made no showing of the existence of a fiduciary relationship after the end of the Class Period (October 11, 2002). Hence, Defendants never appealed this issue to Judge Guzman,[2] and Plaintiffs' assertion that

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[1] Citations in this form are to Household's Memorandum in Opposition to Plaintiffs' Motion to Compel Production of Ernst & Young LLP Documents and For Sanctions, dated February 26, 2007.

[2] To be sure, Defendants did object to this Court's December 6 ruling and continue to believe

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"this Court has not fulfilled its obligations with respect to the February 1, 2007 Order" is as baseless as it is offensive. (Pl. Br. 3)[3] Plaintiffs' insistence that Judge Guzman considered and ruled that *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), may be applied outside the time period of any possible fiduciary relationship continues to ignore their own representation to the district court that the "three year Class Period (July 31, 1999 through October 11, 2002)" was "*the time frame for which they seek E&Y documents*." (January 11 Response at 8)(emphasis added). This concession made it unnecessary for the district court to consider Defendants' grievance that the December 6 Order had appeared to assume incorrectly that virtually all of the Compliance Engagement communications were created during the Class Period, when, in fact, the vast majority were not.[4] (*See* December 21 Objections at 4-5).

Plaintiffs' effort to argue exactly the opposite now should be rejected. Plaintiffs' arguments are belied by their own representations to this Court and Judge Guzman, as summarized in Household's February 26, 2007 Memorandum at 7-9. Moreover, Plaintiffs are asking the Court to agree that it knowingly rejected the well-established principle that proof of a fiduciary relationship at the time the privileged communications are created is the

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that the *Garner* exception should not have been recognized. If the Court were inclined to revisit its December 6 ruling, there is nothing in the law-of-the-case doctrine that would prevent it from doing so. Judge Guzman merely found that this Court's prior ruling, based upon the record at that time, was not clearly erroneous.

3 Citations in this form are to Plaintiffs' Further Supplement In Support of the Class' Motion to Compel Production of Ernst & Young LLP Documents and For Sanctions for Defendants' Continuing Violations of Judge Guzman's February 1, 2007 Order.

4 Plaintiffs cannot claim that they were unaware at the time of the original briefing on this issue that the E&Y Compliance Engagement was largely conducted after the end of the Class Period, as Defendants informed them of this in a letter dated July 13, 2006. *See* Exhibit 3 to the Declaration of Susan Buckley in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP, dated November 3, 2006.

basic prerequisite for even considering the *Garner* exception. *See* February 26 Memorandum, at 7-9. As Plaintiffs did not even try to show a supposed alignment of interests with Household at any time after the end of the Class Period, it is specious for them to argue that the Court made any finding at all as to the period following October 11, 2002.

It is also true that any one-time alignment between the Plaintiff class and Household was severed when Plaintiffs initiated this lawsuit on August 16, 2002 — and that courts in this district have drawn the line at ordering production of privileged documents created after the adversarial relationship commenced. (*See* February 26 Memorandum at 9-10, and cases cited therein.) On this issue, too, the Court made no suggestion that it intended to depart from precedent in this jurisdiction. In sum, even if it were not already a month after the formal close of fact discovery, Plaintiffs simply cannot be allowed to assert that the scope of their *Garner* demand was limited to documents during the Class Period to induce a favorable ruling, and then try to leverage that ruling beyond all intended limits by claiming that they were seeking post-Class Period documents all along.

Defendants should not be required to produce any documents relating to the E&Y Compliance Engagement other than those already produced from their privilege log. Plaintiffs never requested *any* category of Ernst & Young documents from Household, much less the work papers from the E&Y Compliance Engagement, in any of their document demands. All documents that related to E&Y that were responsive to Plaintiffs' document requests to Household were logged on Defendants' privilege log; any that concerned the July 1, 2002 Compliance Engagement that pre-dated the end of the Class Period were produced to Plaintiffs in connection with this Court's December 6 Order.

Pursuant to the Court's instruction at the February 26 conference, Household is still making inquiries into the contents of the 400+ warehoused E&Y documents that Plain-

tiffs are now demanding from Household in the absence of any document request seeking them. Household has learned from E&Y that the boxes contain E&Y's working papers (preliminary data tests, data sampling, analyses, drafts and the like) in connection with the July 1, 2002 Compliance Engagement. *See* Declaration of Landis C. Best, dated March 1, 2007, at ¶2. E&Y has also reported that none of the substantive analytical work reflected in these papers (as opposed to preliminary testing of sample data) was performed by E&Y before 2003, thus falling entirely outside of the scope of the *Garner* exception because it is after the commencement of this action on August 16, 2002. Best Decl. at ¶3. E&Y's report is consistent with the privileged documents within the Class Period that Household has already produced to Plaintiffs, which consist primarily of planning documentation. *Id*. E&Y has also confirmed that the Compliance Engagement was not completed until 2004. *Id.*

As the Court has previously found, all of this material was prepared by E&Y as agents of Household's General Counsel, Mr. Kenneth Robin, for the purpose of rendering legal advice to the Company. December 6 Order at 8 ("It is clear from the Compliance Engagement letter that E&Y was acting as an agent of Household's General Counsel's office . . . Both Household and E&Y understood that the engagement was to assist in-house counsel in providing legal advice regarding pending or anticipated litigation"); 9 ("the Compliance Engagement letter confirms that Mr. Robin and Ms. Curtin intended to use E&Y's work product to provide legal advice to Household in [their] capacity as General Counsel") (internal quotation omitted). At base, Mr. Robin asked E&Y to gather facts, conduct analyses and present the General Counsel's office with information sufficient to determine what if any additional or different legal steps the Company should take. This is classic attorney-client privileged material as this Court has found. Since that is so, it is Household's view that there is no need to conduct an inquiry under the work product doctrine and no need to expend further resources reviewing the contents of 400+ boxes of E&Y workpapers.

As a final note, Plaintiffs' unjustifiable demand for sanctions against Defendants is based on two distortions that cannot go unanswered. First, as discussed above, Defendants could not possibly "know" or even believe that their "mutuality of interest" argument regarding post-class period documents (Pl. Br. 4) had supposedly been rejected by Judge Guzman, since Judge Guzman said no such thing, and had no occasion to do so, in view of Plaintiffs' express representations that they were only seeking documents from within the Class-Period. S*ee* January 11 Response at 8. Like Judge Guzman, Defendants had every right to rely on these representations. Second, Plaintiffs' after-the-fact demand for sanctions based on non-production of Ernst and Young's warehoused workpapers is off base for several reasons. Plaintiffs never requested such work papers from Household. Thus, there was never any order for Household to produce documents that had never been requested of it. Nor was there any occasion for Household to look for these documents and discover their whereabouts. Sanctions are completely unwarranted under these circumstances.

CONCLUSION

Plaintiffs' Motion to Compel Production of Ernst & Young LLP Documents And for Sanctions should be denied in its entirety.

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New York, New York

EIMER STAHL KLEVORN & SOLBERG LLP
By: /s/ Adam B. Deutsch
Nathan P. Eimer
Adam B. Deutsch
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

-and-

CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar