

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION IN
LIMINE TO EXCLUDE ANY ARGUMENT THAT DEFENDANTS FULLY DISCLOSED
ALL LITIGATION RISKS TO HOUSEHOLD'S OUTSIDE AUDITORS AND TO
EXCLUDE ANY EVIDENCE OF OR REFERENCE TO THE ADEQUACY OF
HOUSEHOLD'S CLASS PERIOD LITIGATION RESERVES**

[PLAINTIFFS' MOTION *IN LIMINE* NO. 5]

[REDACTED VERSION]

Plaintiffs respectfully submit this reply memorandum in support of their motion *in limine* to preclude any evidence of or any argument that defendants fully disclosed to Household International, Inc.'s ("Household" or the "Company") outside auditors all potential risks stemming from the Company's deceptive lending practices and to exclude any evidence of or reference to the adequacy of Household's Class Period litigation reserves.

Defendants incorrectly characterize plaintiffs' motion as a broad-sweeping effort to exclude *all* evidence related to Household's former outside auditor, Arthur Andersen ("Andersen"), and its successor KPMG. Plaintiffs' motion is narrowly focused and seeks to preclude defendants from arguing or asserting that they fully disclosed Household's predatory lending practices and related litigation risks to Andersen and KPMG. Plaintiffs also seek to exclude defendants from introducing any evidence of or making any argument concerning the adequacy of Household's Class Period litigation reserves. Setting aside plaintiffs' disagreement with defendants' characterization of the restatement as "nothing but the result of a good-faith difference of professional opinion" between Andersen and KPMG (Defs' Opp. at 5), plaintiffs' current motion does not seek to exclude defendants from presenting their position on the restatement at trial. Household's restatement was the result of the Company's improper accounting for expenses associated with Household's credit card co-branded, affinity and marketing agreements and was unrelated to Household's litigation reserves.

Defendants' representation that they do not intend to use any of the Litigation Documents, which plaintiffs do not have, rings hollow. Nor could they, as defendants withheld from plaintiffs during discovery all audit-related documents and opinion letters based on claims of work product privilege. Defs' Opp. at 4. But defendants' concession that they will not use any "Litigation Documents" at trial hardly addresses the concerns and prejudice detailed in plaintiffs' motion. Plaintiffs' motion is not limited to blocking defendants from introducing at trial "Litigation

Documents” withheld during discovery and held by this Court to be protected work product. *See Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006).

Defendants’ attempt to limit the relief requested in plaintiffs’ motion should be rejected.

Plaintiffs allege that defendants failed to adequately and timely disclose to investors Household’s predatory lending practices and the impact of the predatory lending practices on Household’s bottom line financials. But defendants’ failure to disclose was not just limited to investors – they withheld crucial information concerning threatened and pending lawsuits stemming from Household’s predatory lending practices from the Company’s own outside auditors.¹ As a result, Household’s audit opinions were based on materially incomplete information and thus, unreliable and Household’s litigation reserves were inadequate in violation of GAAP.

Indeed, despite defendants’ assertions that they “fully disclosed” all predatory lending-related risks to Andersen and KPMG, audit-related documents “inadvertently” produced during discovery evidence the opposite – that no full disclosure ever occurred. *See* Dkt Nos. 519, 537. However, as a result of defendants’ work product claim, plaintiffs have no way of refuting defendants’ contention of “full disclosure” at trial. Defendants should, therefore, be precluded from asserting at trial that they provided all pertinent information about Household’s predatory lending practices and related risks to the Company’s outside auditors, Andersen and KPMG. Defendants should also be precluded from arguing or otherwise implying that Andersen and KPMG were fully aware of and signed off on the Company’s financials with full knowledge of Household’s predatory lending practices and litigation related risks.

¹ Significantly, nowhere in their motion do defendants make any attempt to refute plaintiffs’ contention that defendants withheld from Household’s outside auditors crucial information concerning Household’s predatory lending practices and all regulatory and litigation risks stemming therefrom.

Moreover, while defendants represent that they have no intention of relying on the *actual* “Litigation Documents” withheld during discovery, defendants’ exhibit list makes clear that they have *every* intention of relying on documents related to or based on information set forth in the withheld documents. For example, defendants’ exhibit list contains numerous “KPMG working papers” relating to KPMG’s re-audit of Household’s financial statements.² See Exhibit D-2 to [Proposed] Final Pretrial Order, Exhibit Nos. 921, 922, 923, 1000 and 1001; Defs’ Opp. at 5 (indicating intent “to present to the jury documents and information from and related to Andersen and KPMG”). However, KPMG’s re-audit was based in part on unreliable opinion letters provided by Household’s General Counsel to Andersen – the same letters withheld during discovery due to defendants’ assertion of the work product doctrine. See August 9, 2006 deposition transcript of William Long at 50:19-24 [REDACTED]

[REDACTED]

[REDACTED] *id.* at 54:3-8 [REDACTED]

[REDACTED]

[REDACTED] attached as Ex. A hereto. These documents should not be “fair game,” and defendants should not be permitted to rely on KPMG’s working papers because plaintiffs were not allowed access to the opinion letters that formed the basis for KPMG’s re-audit. Thus, defendants should also be precluded from relying on any documents related to or based on information set forth in the “Litigation Documents.” In other words, defendants should not be permitted to rely on the fruit of the poisonous tree. See, e.g., *Cook v. Taser Int’l Inc.*, No. 2:04-cv-01325-PMP-GWF, 2006 U.S. Dist. LEXIS 38770, at *12 (D. Nev. May 26, 2006)

² Plaintiffs objected to these exhibits on grounds of Unfair Prejudice, Confusion of Issues, Waste of Time (FRE 403), Hearsay (FRE 802) and Failure to Produce in Response to Discovery Requests (FRCP 34).

(barring defendants from introducing at trial exhibits substantially similar to or prepared based on privileged documents).

Nor should defendants be permitted to refer to or rely on documents relating to Household's litigation reserves or in-house litigation database, as defendants withheld this information from plaintiffs during discovery on work product grounds. As a result of defendants' assertion of the work product doctrine, plaintiffs were blocked from obtaining *any* information at all concerning Household's litigation reserves. It is therefore axiomatic that defendants should be precluded from relying on any document, making any reference to, or asserting that Household's litigation reserves were adequate during the Class Period, as plaintiffs will have no way to rebut any such argument at trial.

Finally, defendants contend that plaintiffs will suffer no prejudice by defendants' introduction of facts contained in or related to the withheld "Litigation Documents." Defendants rest their argument on Judge Nolan's finding that plaintiffs failed to demonstrate a substantial need for the material or undue hardship in procuring the information elsewhere. Defs' Opp. at 11; Minute Order, *Jaffe v. Household Int'l, Inc.*, No. 02 Civ. 5893 (N.D. Ill. Mar. 5, 2007) (Nolan, M.J.) (Dkt No. 1002). But defendants have it backwards. Having succeeded in sustaining the privilege and in blocking plaintiffs' ability to obtain the "Litigation Documents," defendants relinquished the ability to rely on *any* of the information contained in the documents, whether it be "opinion" or "fact." *Manning v. Buchan*, 357 F. Supp. 2d 1036, 1049 (N.D. Ill. 2004) ("Defendants seem to think that having succeeded in sustaining the privilege, they now have free rein to use the unnamed informants' information for whatever purpose they believe is appropriate. The defendants . . . have it backwards. . . . [D]efendants have relinquished the right to use that information for their own benefit at trial."). As a result of defendants' assertion of the work product doctrine, plaintiffs were required to return all "inadvertently" produced documents and were completely denied discovery of

all “withheld” documents and information. To allow defendants to rely on “facts” set forth in documents plaintiffs have never even seen would be patently unfair. Defendants should, therefore, be precluded from relying on or referring to facts contained in or related to the “Litigation Documents.”

For the foregoing reasons, and those in plaintiffs’ opening brief, defendants should be precluded from arguing or asserting that they fully disclosed Household’s predatory lending practices and related litigation risks to Andersen and KPMG. Defendants should also be precluded from introducing any evidence or making any argument concerning the adequacy of Household’s Class Period litigation reserves.

DATED: February 13, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL 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 Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway Suite 1900, San Diego, California 92101.

2. That on February 13, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE ANY ARGUMENT THAT DEFENDANTS FULLY DISCLOSED ALL LITIGATION RISKS TO HOUSEHOLD'S OUTSIDE AUDITORS AND TO EXCLUDE ANY EVIDENCE OF OR REFERENCE TO THE ADEQUACY OF HOUSEHOLD'S CLASS PERIOD LITIGATION RESERVES.**

The parties' e-mail addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February, 2009, at San Diego, California.

/s/ Teresa Holindrake

TERESA HOLINDRAKE