

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

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, <p style="text-align:right">Plaintiff,</p> <p style="text-align:center">- against -</p> HOUSEHOLD INTERNATIONAL, INC., ET AL., <p style="text-align:right">Defendants.</p>	}	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan
---	---	--

**THE HOUSEHOLD DEFENDANTS' PARTIAL RESPONSE TO PLAINTIFFS'
CROSS-MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS**

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 Inter-
national, Inc., Household Finance Corpora-
tion, William F. Aldinger, David A. Schoen-
holz, Gary Gilmer and J.A. Vozar*

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
ARGUMENT.....	2
I. Plaintiffs’ Motion to Compel Should Be Denied Outright as Plaintiffs Offer No Explanation of or Support for Their Position	2
II. The Requested Litigation Analyses and Reserve Information Are Protected as Attorney Work Product	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>American National Bank and Trust Co. v. AXA Client Solutions, LLC</i> , No. 00 C 6786, 01 C 9974, 2004 WL 438505 (N.D. Ill. Mar. 5, 2004)	3
<i>Caremark, Inc. v. Affiliated Computer Services, Inc.</i> , 195 F.R.D. 610 (N.D. Ill. 2000).....	4
<i>Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.</i> , 181 F.3d 799 (7th Cir. 1999)	2-3
<i>Certain Underwriters at Lloyd’s, London v. Fidelity & Casualty Insurance Co.</i> , No. 89 C 876, 1998 WL 142409 (N.D. Ill. Mar. 24, 1998)	4-5
<i>Estate of Phillips v. City of Milwaukee</i> , 123 F.3d 586 (7th Cir. 1997).....	3
<i>Harper v. AutoOwners Insurance Co.</i> , 138 F.R.D. 655 (S.D. Ind. 1991)	5
<i>In re Pfizer Inc. Securities Litigation</i> , No. 90 Civ. 1260, 1993 U.S. Dist. LEXIS 18215 (S.D.N.Y. Dec. 23, 1993).....	5
<i>In re Pfizer Inc. Securities Litigation</i> , No. 90 Civ. 1260, 1994 U.S. Dist. LEXIS 7454 (S.D.N.Y. June 6, 1994).....	5
<i>Renaldi v. Sears Roebuck and Co.</i> , No. 97 C 6057, 2001 WL 290372 (N.D. Ill. Mar. 21, 2001).....	3
<i>Simon v. G.D. Searle & Co.</i> , 816 F.2d 397 (8th Cir. 1987).....	5
<i>Smithkline Beechman Corp. v. Pentech Pharmaceuticals, Inc.</i> , No. 00 C 2855, 2001 WL 1397876 (N.D. Ill. Nov. 6, 2001).....	4
 Rules	
Fed. R. Civ. P. 26(b)(3).....	1, 4

This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. (“Household”), Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, “Defendants”) in partial response to Plaintiffs’ Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors By Household Defendants, filed on May 26, 2006 (the “Cross-Motion” or “Pl. CM”). This submission addresses only Plaintiffs’ demand for an order compelling Defendants to comply with Requests Nos. 17 and 18 of their of their [Corrected] Third Request for Production of Documents, calling respectively for documents regarding Household’s internal litigation analyses and documents regarding Household’s litigation reserves for individual cases. (*See* Pl. CM at 2).¹

INTRODUCTION

Although Plaintiffs’ Cross-Motion purports to seek compliance with Requests Nos. 17 and 18, their supporting memorandum is literally devoid of any explanation for their attempt to invade the quintessential work product contained in the requested documents. Plaintiffs say nothing to dispel the well-settled principle that litigation analyses by a party’s counsel is entitled at a minimum to work product protection². They make no showing of waiver and cannot do so because, as shown in the accompanying Affidavit of Mark F. Leopold, Esq., the material they seek was at all times strictly protected from disclosure to third parties. They utterly ignore the heavy burden established by Rule 26(b)(3) for seeking disclosure of protected work product. With the exception of their demonstrably incorrect (and in any

¹ Because the balance of Plaintiffs’ Cross-Motion sought production of Household’s counterparts of audit letters covered by Arthur Andersen’s Motion For Determination of the Court as to the Return of Privileged Documents Inadvertently Produced to Plaintiffs, Defendants explained the need for protection of those documents in its June 2, 2006 Reply to that motion, to which we respectfully refer the Court. *See* Household’s Reply Memorandum of Law in Support of Arthur Andersen’s LLP’s Motion for the Return of Inadvertently Produced Privileged Documents and Partial Response to Plaintiffs’ Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors By Household. (“Reply Brief”)

² Certain of the documents may also be subject to protection under the attorney-client privilege.

event insufficient) statement that this work product was disclosed to Household's outside auditors, Plaintiffs offer no explanation at all for this aspect of their Cross Motion, which should therefore be summarily denied.

For the record, and to satisfy the Court that there is no need for further proceedings with respect to Requests Nos. 17 and 18, this submission and the Leopold Affidavit describe the documents in question, explain the bases for the work product protection that precludes their disclosure, and demonstrate the inaccuracy of Plaintiffs' characterization of these documents as "documents provided to outside auditors."

ARGUMENT

I. Plaintiffs' Motion to Compel Should Be Denied Outright as Plaintiffs Offer No Explanation of or Support for Their Position

Plaintiffs' 13-page brief in support of their Cross-Motion mentions Requests Nos. 17 and 18 only in passing. In the introductory section of the brief Plaintiffs state without basis that the requested material was "shared with [Households'] outside auditors" (Pl. CM at 1-2), a mistake they repeat in a sentence on page four. Their only other reference to these Requests is in a parenthetical purporting to distinguish between information shared with accountants in the course of an audit versus those disclosed to an accountant who is acting as a consultant. (*Id.* at 11). Requests Nos. 17 and 18 are also included on Exhibit A to Plaintiffs' Cross-Motion, which simply recites their wording. These Requests are not mentioned at all in the Declaration of accountant Kristen L. Flanagan, which Plaintiffs submitted in support of the Cross-Motion.

Given Plaintiffs' failure to make anything more than a passing—and factually inaccurate—reference to these Requests, their motion for an order overriding Defendants' objections should be deemed abandoned by Plaintiffs and summarily denied. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived"); *American National Bank and*

Trust Co. v. AXA Client Solutions, LLC, No. 00 C 6786, 01 C 9974, 2004 WL 438505, at *3 (N.D. Ill. Mar. 5, 2004) (same); *Renaldi v. Sears Roebuck and Co.*, No. 97 C 6057, 2001 WL 290372, at *17 (N.D. Ill. Mar. 21, 2001) (Nolan, M.J.) (rejecting an argument because its proponent “cite[d] no authority for his assertions”).

Having waived the opportunity to explain their position in their opening submission, Plaintiffs should not be allowed to do so for the first time on reply. *See Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997) (“[S]ince this argument was not clearly presented in [the plaintiffs’] initial brief to this Court, it could be deemed waived[,]” and “[a] necessary corollary to the principle is that ‘[a]rguments raised for the first time in the reply brief are waived.’”) (internal citations omitted).

II. The Requested Litigation Analyses and Reserve Information Are Protected as Attorney Work Product

The material that is the subject of Request No. 17 is classic work product. As the Leopold Affidavit explains, throughout the Class Period Household’s Office of the General Counsel systematically assembled and maintained information about pending litigations in order to understand, manage, and render legal advice about various legal actions brought by or against Household. Leopold Affidavit ¶2. Such data included, *inter alia*, attorneys’ evaluations of the merits and strategic recommendations and plans as to the conduct and disposition of particular cases. *Id.* As a given matter progressed, the responsible attorneys, or their staff under their direction, provided and periodically supplemented comments reflecting the attorneys’ own mental impressions, conclusions, opinions and strategies and those of outside counsel. *Id.* ¶ 3. Such observations were inextricably intertwined with basic factual information regarding a lawsuit. *Id.* Strict controls were and remain in

place to maintain the confidentiality of this material, which is not disclosed to Household's outside auditors or any other third party, and is never produced in litigation. *Id.* ¶ 4-5.³

Without question this requested material is protected attorney work product. *See* Fed. R. Civ. P. 26(b)(3) (“[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”); *Smithkline Beecham Corp. v. Pentech Pharmaceuticals, Inc.*, No. 00 C 2855, 2001 WL 1397876, at *5 (N.D. Ill. Nov. 6, 2001) (Nolan, M.J.) (holding that a “document may be withheld as work product because it reveals an attorney's litigation strategy”); *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 195 F.R.D. 610, 615 (N.D. Ill. 2000) (“[W]ork product includes ‘[s]ubject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses of the action, or to the activities of the attorneys involved’”).

Documents on individual case reserves demanded by Plaintiffs' Request No, 18 are likewise entitled to protection from disclosure as attorney work product. The determination of the level of a reserve, if any, for a particular lawsuit necessarily entails consideration of the responsible attorneys' evaluation of the merits of related claims, defenses and strategies. Written expressions of such opinions and mental impressions are classic work product and protected as such. *See Certain Underwriters at Lloyd's, London v. Fidelity & Casualty Insurance Co.*, No. 89 C 876, 1998 WL 142409, at *2 (N.D. Ill. Mar. 24, 1998) (holding that reserve recommendations were privileged as they revealed “attorney mental impressions, thoughts, and conclusions since the reserve figures were calculated only after an attorney acting in his legal capacity carefully determined the merits and value

³ By noting the lack of any possible waiver with respect to these closely-held documents, Household does not mean to imply that disclosing attorney work product to a company's outside auditors would constitute a waiver. The legal authorities that reject a finding of waiver in that context are discussed at pages 9-11 of Defendant's Reply Brief.

of the underlying case”); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (“The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product.”); *See also Harper v. Auto-Owners Insurance Co.*, 138 F.R.D. 655, 675 (S.D. Ind. 1991) (ordering that section discussing reserve established with respect to fire loss be redacted as work product); *In re Pfizer Inc. Securities Litigation*, No. 90 Civ. 1260, 1994 U.S. Dist. LEXIS 7454, at *3 (S.D.N.Y. June 6, 1994) (“if a document sets forth the methodology for calculating the case reserve for an individual claimant, it is privileged as work product”); *In re Pfizer Inc. Securities Litigation*, No. 90 Civ. 1260, 1993 U.S. Dist. LEXIS 18215, at *10-*11 (S.D.N.Y. Dec. 23, 1993) (“The reserve figure set for an individual case reflects an attorney's professional opinion as to the value of the tort claimant's suit These are typical examples of opinion work product.”).

CONCLUSION

For the reasons stated herein Plaintiffs' Cross-Motion for an order compelling Household to produce litigation analyses and individual case reserves responsive to Requests Nos. 17 and 18 of The Class' [Corrected] Third Request For Production of Documents should be denied in full.

Dated: June 9, 2006
Chicago, Illinois

EIMER STAHL KLEVORN & SOLBERG LLP

By: Adam B. Deutsch
Nathan P. Eimer
Adam B. Deutsch

224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

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

CERTIFICATE OF SERVICE

Adam B. Deutsch, an attorney, certifies that on June 9, 2006, he caused to be served copies of The Household Defendants' Partial Response to Plaintiffs' Cross-Motion to Compel Production of Certain Documents, to the parties listed below via the manner stated.

/s/ Adam B. Deutsch
Adam B. Deutsch

Via E-mail and Fed-Ex

Marvin A. Miller
Lori A. Fanning
MILLER FAUCHER and CAFFERTY LLP
30 North LaSalle Street, Suite 3200
Chicago, Illinois 60602
(312) 782-4880
(312) 782-4485 (fax)

Via E-mail and Fed-Ex

Patrick J. Coughlin
Azra Z. Mehdi
Cameron Baker
Luke O. Brooks
LERACH COUGHLIN STOIA
& ROBBINS LLP
100 Pine Street, Suite 2600
San Francisco, California 94111
(415) 288-4545
(415) 288-4534 (fax)