

**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. )                               |                               |
| _____ )                                     |                               |

**THE CLASS' OPPOSITION TO HOUSEHOLD DEFENDANTS' MOTION FOR LEAVE  
TO FILE A SUR-REPLY AND, IN THE ALTERNATIVE, MOTION FOR LEAVE TO  
FILE A SUR-REBUTTAL**

## **I. INTRODUCTION**

The Class raised no new arguments in the Reply in Support of the Class' Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants ("Reply"). Nonetheless, defendants seek to file a Sur-Reply on the motions regarding certain documents produced by Arthur Andersen LLP ("Andersen") and withheld by Household International, Inc. ("Household"). The Household Defendants have no basis for improperly and unnecessarily extending the briefing on the motions, and thereby delaying depositions of Andersen employees. They should not be allowed to do so. If, however, the Court decides to entertain the Household Defendants' Sur-Reply to Plaintiffs' Cross-Motion to Compel Production of Certain Documents ("Sur-Reply"), the Class should be given the opportunity to respond in a Sur-Rebuttal.

## **II. THE CLASS DID NOT RAISE NEW ARGUMENTS IN ITS REPLY**

Defendants assert that the Class raised several new arguments in the Reply. However, this is not true. The Class further developed arguments that were put forth in the opening brief and that defendants could have responded to, had they decided to, in either of their Partial Response(s) to Plaintiffs' Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household at Dkt. Nos. 525 and 529 ("Partial Response I" and "Partial Response II," respectively).

First, the Household Defendants object to the development in the Reply of the arguments relating to the litigation database and documents regarding litigation reserves. Sur-Reply at 2-4. The Class explicitly stated in its opening papers that its "analysis of why the Andersen Documents are not protected by the work-product doctrine *applies equally to the Household's Documents.*" Class Response to the Household Defendants' Memorandum of Law in Support of the Return of Certain Arthur Andersen Documents and Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants ("Cross-Motion") (Dkt. No. 523) at 2 n.2.

The Class argued that the documents were created for business purposes and were provided to the auditors. *Id.* at 2-11. The Class specifically noted that the database and litigation reserve documents were disclosed to the auditors. *Id.* at 11.

Defendants were on notice of these arguments and, in fact, responded to them. In Partial Response II, Dkt. No. 529, they acknowledge that the Class argued that the documents were shown to outside auditors and that such disclosure constitutes waiver. Partial Response II at 1-2, 4 n.3. They also argued that the database was created “to understand, manage, and render legal advice about various legal actions.” *Id.* at 3. Similarly, they argued that the database was not shown to outside auditors. *Id.* at 3-4. They also argued that the documents relating to litigation reserves are work product. *Id.* at 4-5.

Second, the Household Defendants contend that the Class has raised a new argument relating to whether a document must have been prepared in anticipation of the litigation in which the document is sought. Sur-Reply at 4-7. In its Cross-Motion, the Class set out the basic standard for work product in the Seventh Circuit: that a document has been prepared in anticipation of litigation, as set forth in *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) and followed by *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996). Cross-Motion at 2-3. The Household Defendants’ opposed the Cross-Motion, disputing the Class’ interpretation of Seventh Circuit’s definition of work product in *Logan*. Partial Response I at 4-5. The Class, on Reply, further discussed the Seventh Circuit rulings on work product, including post-*Logan* precedent that confirmed that *Binks* and *Logan* are consistent, and applying the work-product doctrine subsequent to the *Logan* decision. See *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 767-68 (7th Cir. 2006); *Untied States v. Frederick*, 182 F.3d 496, 501-02 (7th Cir. 1999). Analyzing and rebutting the arguments made by the Household Defendants in their Response is a proper function of a reply brief.

Moreover, the Household Defendants' objection is largely to the Class' reliance on *Mattenson*. Sur-Reply at 4-7. This Seventh Circuit decision – the Circuit's most recent discussion of the work-product doctrine – is binding on this Court. It could have been addressed by defendants in any of the four briefs they and Andersen filed prior to the Sur-Reply regarding the Disputed Documents. Simply ignoring binding precedent does not allow defendants to escape its effects. *Pawlowske v. Chrysler Corp.*, 623 F. Supp. 569, 571 (N.D. Ill. 1985) (finding against a party because the binding precedent ignored by the party required it).

Finally, in their Sur-Reply, the Household Defendants seek to make a new, policy-based argument regarding relevancy. Sur-Reply at 7-8. They do not claim that this is a newly raised issue. The relevance of the Disputed Documents has been extensively briefed. Household raised it in its original memorandum. The Class addressed it in the Cross-Motion. In their Partial Response I, the Household Defendants argued that the Class did not explain enough about relevance. In the Reply, the Class further explained the relevance of the documents sought. There is no need for additional argument.

### **III. THE CLASS SHOULD BE ALLOWED THE OPPORTUNITY TO RESPOND TO THE ARGUMENTS MADE BY THE DEFENDANTS IN THEIR SUR-REPLY**

As discussed above, the Class does not believe its arguments on Reply are new arguments that justify a Sur-Reply. However, if the Court decides to allow the Sur-Reply, the Class seeks leave to file a Sur-Rebuttal to address the arguments put forward in its Sur-Reply. The Class' Sur-Rebuttal is filed herewith.

**IV. CONCLUSION**

For the foregoing reasons, this Court should not grant the Household Defendants leave to file a Sur-Reply. However, if the Court decides otherwise, the Class respectfully requests leave to file a Sur-Rebuttal.

DATED: July 7, 2006

Respectfully submitted,

LERACH COUGHLIN STOIA GELLER  
RUDMAN & ROBBINS LLP  
PATRICK J. COUGHLIN (90785466)  
AZRA Z. MEHDI (90785467)  
D. CAMERON BAKER (154452)  
MONIQUE C. WINKLER (90786006)  
LUKE O. BROOKS (90785469)  
MARIA V. MORRIS (223903)  
BING Z. RYAN (228641)

s/ Maria V. Morris  
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MARIA V. MORRIS

100 Pine Street, Suite 2600  
San Francisco, CA 94111  
Telephone: 415/288-4545  
415/288-4534 (fax)

LERACH COUGHLIN STOIA GELLER  
RUDMAN & ROBBINS LLP  
WILLIAM S. LERACH  
655 West Broadway, Suite 1900  
San Diego, CA 92101  
Telephone: 619/231-1058  
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER FAUCHER AND CAFFERTY LLP  
MARVIN A. MILLER  
30 North LaSalle Street, Suite 3200  
Chicago, IL 60602  
Telephone: 312/782-4880  
312/782-4485 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.  
SOICHER

LAWRENCE G. SOICHER  
110 East 59th Street, 25th Floor  
New York, NY 10022  
Telephone: 212/883-8000  
212/355-6900 (fax)

Attorneys for Plaintiff

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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 July 7, 2006, declarant served by electronic mail and by U.S. Mail the **THE CLASS' OPPOSITION TO HOUSEHOLD DEFENDANTS' MOTION FOR LEAVE TO FILE A SUR-REPLY AND, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A SUR-REBUTTAL** to the parties listed on the attached Service List. The parties' email addresses are as follows:

[TKavaler@cahill.com](mailto:TKavaler@cahill.com)  
[PSloane@cahill.com](mailto:PSloane@cahill.com)  
[PFarren@cahill.com](mailto:PFarren@cahill.com)  
[DOwen@cahill.com](mailto:DOwen@cahill.com)  
[NEimer@EimerStahl.com](mailto:NEimer@EimerStahl.com)  
[ADeutsch@EimerStahl.com](mailto:ADeutsch@EimerStahl.com)  
[mmiller@millerfaucher.com](mailto:mmiller@millerfaucher.com)  
[lfanning@millerfaucher.com](mailto:lfanning@millerfaucher.com)

and by U.S. Mail to:

Lawrence G. Soicher, Esq.  
Law Offices of Lawrence G. Soicher  
110 East 59th Street, 25th Floor  
New York, NY 10022

David R. Scott, Esq.  
Scott & Scott LLC  
108 Norwich Avenue  
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of July, 2006, at San Francisco, California.

s/ Monina O. Gamboa  
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MONINA O. GAMBOA

HOUSEHOLD INTERNATIONAL (LEAD)

Service List - 7/6/2006 (02-0377)

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**Counsel for Defendant(s)**

Thomas J. Kavalier  
Peter Sloane  
Patricia Farren  
Cahill Gordon & Reindel LLP  
80 Pine Street  
New York, NY 10005-1702  
212/701-3000  
212/269-5420(Fax)

Nathan P. Eimer  
Adam B. Deutsch  
Eimer Stahl Klevorn & Solberg LLP  
224 South Michigan Avenue, Suite 1100  
Chicago, IL 60604  
312/660-7600  
312/692-1718(Fax)

**Counsel for Plaintiff(s)**

Lawrence G. Soicher  
Law Offices of Lawrence G. Soicher  
110 East 59th Street, 25th Floor  
New York, NY 10022  
212/883-8000  
212/355-6900(Fax)

William S. Lerach  
Lerach Coughlin Stoia Geller Rudman &  
Robbins LLP  
655 West Broadway, Suite 1900  
San Diego, CA 92101  
619/231-1058  
619/231-7423(Fax)

Patrick J. Coughlin  
Azra Z. Mehdi  
Monique C. Winkler  
Lerach Coughlin Stoia Geller Rudman &  
Robbins LLP  
100 Pine Street, Suite 2600  
San Francisco, CA 94111-5238  
415/288-4545  
415/288-4534(Fax)

Marvin A. Miller  
Jennifer Winter Sprengel  
Lori A. Fanning  
Miller Faucher and Cafferty LLP  
30 N. LaSalle Street, Suite 3200  
Chicago, IL 60602  
312/782-4880  
312/782-4485(Fax)

David R. Scott  
Scott + Scott, LLC  
108 Norwich Avenue  
Colchester, CT 06415  
860/537-5537  
860/537-4432(Fax)