

**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.)	
_____)	

**SUR-REBUTTAL IN SUPPORT OF THE CLASS' CROSS-MOTION TO COMPEL
PRODUCTION**

The Class respectfully submits this memorandum to respond to the arguments put forward by the Household Defendants' Sur-Reply to Plaintiffs' Cross-Motion to Compel Production of Certain Documents ("Sur-Reply"), Docket No. 564.

I. INTRODUCTION

The Household Defendants' Sur-Reply is an attempt to bolster their arguments with new facts, persuade the Court to ignore binding legal authority and introduce a policy-based argument regarding the scope of relevance. The Class does not believe that the Sur-Reply was warranted. Nonetheless, should the Court decide to consider the Sur-Reply, there is nothing in it that weighs in favor of granting Arthur Andersen LLP's ("Arthur Anderson") motion or denying the Class' cross-motion.

II. ARGUMENT

A. The Household Defendants' Sur-Reply and Supplemental Affidavit Show that the Database and Litigation Reserve Documents Were Shown to the Outside Auditors

Defendants have submitted a Supplemental Affidavit of Mark F. Leopold in Opposition to Plaintiffs' Cross-Motion to Compel Production of Certain Documents ("Leopold Supp. Aff."), Dkt. No. 564. This affidavit states that "the litigation data base maintained by Household's Office of the General Counsel (sometimes referred to as 'HAL') is not routinely shared with Household's outside auditors or any other third party." Leopold Supp. Aff. ¶2. For a privilege to be waived, there is no requirement that a document be "routinely shared" – a single disclosure can destroy a privilege.¹ *See*

¹ The parties disagree on whether disclosure to an outside auditor waives work-product protection. The Class believes it does. *See* Class' Response to the Household Defendants' Memorandum of Law in Support of the Return of Certain Arthur Anderson Documents and Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants ("Cross-Motion"), Dkt. No. 523, at 10-13. The Household Defendants believe it does not. *See* Household Defendants' Reply Memorandum of Law in Support of Arthur Anderson LLP's Motion for the Return of Inadvertently Produced Privileged Documents and Partial Response to Plaintiffs' Cross-Motion to Compel Production of Certain Documents

Urban Outfitters, Inc. v. DPIC Cos., 203 F.R.D. 376, 380 (N.D. Ill. 2001) (setting out “five factors to determine if waiver has occurred,” none of which involve the frequency of disclosures).

Moreover, Leopold’s supplemental affidavit is inconsistent with his prior affidavit – the Affidavit of Mark F. Leopold, Esq. in Opposition to Plaintiffs’ Cross-Motion to Compel (“Leopold Aff.”). In his original affidavit, filed less than a month before the supplemental affidavit, Leopold discussed the database and stated that the records of the database “have never been disclosed to Household’s outside auditors or any other third party.” Leopold Aff. ¶4. “Never” is quite different than “not routinely.” This difference has not been explained, but the obvious inference is that Leopold learned that the records were or may have been shared with outside auditors or another third party.

The change in Leopold’s affidavit confirms what is shown by Arthur Andersen’s 2001 Litigation Review. Contrary to defendants’ claims in the Sur-Reply, the Litigation Review affirmatively states that part of the database was reviewed by an Arthur Andersen employee, not just that Arthur Andersen was aware of it.² See Declaration of Azra Z. Mehdi (“Mehdi Decl.”), Dkt. No. 524, Ex. 1.

(“Partial Response”), Dkt. No. 525, at 9-12. Because these issues have already been briefed, the Class does not repeat them here.

² The Household Defendants’ Sur-Reply demonstrates that a primary reason for their request to seal the information contained in the reply brief is to enable them to misrepresent what the documents say. The Household Defendants state in their Sur-Reply that “[a]t most the Litigation Review and other documents cited by Plaintiffs show that Household (a) made its outside auditor aware of the existence and operation of the database as part of the latter’s routine examinations of the adequacy of Household’s systems and controls, and (b) informed Arthur Andersen of the existence and nature of particular litigations.” Sur-Reply, Dkt. No. 564 at 3. However, the Litigation Review shows otherwise. The description of the review carried out by Arthur Andersen is explicit that Arthur Andersen employees reviewed parts of the database. Mehdi Decl., Dkt. No. 524, Ex. 1. Concealing material for the purpose of misrepresenting what it says is a misuse of the Court’s procedures for protecting legitimately confidential information. *United States v. Cosolito*, 488 F. Supp. 531, 537 (D. Mass. 1980).

B. *Mattenson* Limits Work-Product Protection to Only Those Documents Created for Litigation with the Opponent Seeking to Discover Them

Mattenson v. Baxter Healthcare Corp., 438 F.3d 763 (7th Cir. 2006), is the Seventh Circuit's most recent explanation of the work-product doctrine. In *Mattenson*, the court was called upon to decide whether a document was attorney work-product entitled to protection from discovery. *Id.* at 767-68. The Seventh Circuit stated:

The work-product doctrine shields materials that are prepared in anticipation of litigation *from the opposing party*, on the theory that the opponent shouldn't be allowed to take a free ride on the other party's research, or get the inside dope on that party's strategy, or (as attempted here) invite the jury to treat candid internal assessments of a party's legal vulnerabilities as admissions of guilt.

Id. (emphasis added). The Seventh Circuit thus explicitly limits the work-product doctrine to those documents created for "litigation from the opposing party." *Id.*

Moreover, the explanation the Seventh Circuit gives of the reason for the doctrine supports the plain meaning of its statement that the doctrine protects only those documents prepared in anticipation of litigation with the party seeking discovery. *Id.* The potential harms that the work-product doctrine prevents are unlikely to be implicated in unrelated litigation involving different parties; research issues, strategies and what constitutes an admission of guilt all change depending on the allegations and underlying facts. *Id.*

This limitation on the work-product doctrine is consistent with the numerous district court cases in this circuit. As discussed in the Reply,³ *Ferguson v. Lurie*, 139 F.R.D. 362 (N.D. Ill. 1991) and *SmithKline Beecham Corp. v. Pentech Pharm., Inc.*, No. 00 C 2855, 2001 WL 1397876 (N.D. Ill. Nov. 6, 2001), both limited work-product protection to those documents created in anticipation of litigation with the same opposing party that was seeking discovery. Reply, Dkt. No. 537 at 7. Even

³ "Reply" refers to the Reply in Support of the Class' Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants, Dkt. No. 537.

one of the cases cited by defendants in their Sur-Reply limits the work-product doctrine to situations in which:

some articulable claim has arisen that is likely to lead to litigation. ***The articulable claim likely to lead to litigation must pertain to this particular opposing party***, not the world in general.

McCook Metals L.L.C. v. Alcoa, Inc., 192 F.R.D. 242, 259 (N.D. Ill. 2000) (emphasis added), citing *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119-20 (7th Cir. 1983) and *Int'l Ins. Co. v. Certain Underwriters at Lloyd's London*, No. 88 C 9838, 1990 WL 205461, at *4 (N.D. Ill. Nov. 27, 1990). In *McCook Metals*, the court held that where documents were created for litigation, they were protected from discovery in subsequent litigation because the same parties were involved in both cases. *McCook Metals*, 192 F.R.D. at 263.

Moreover, in every case in which the Seventh Circuit has found that a document was protected as work-product, the document was created for litigation between the party creating it and the party seeking its discovery. See *Mattenson*, 438 F.3d 763 (documents created in anticipation of litigation with *Mattenson* were protected); *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 975 (7th Cir. 1996)(documents pertaining to Logan's workers' compensation claim were protected); *Binks Mfg. Co.*, 709 F.2d at 1118 (defendants' documents relating to the "Binks situation" were protected).

The only Seventh Circuit case that has even contemplated protecting documents created for litigation with someone other than the party seeking discovery is *Hobley v. Burge*, 433 F.3d 946 (7th Cir. 2006). In *Hobley* – decided prior to *Mattenson* – the question was whether a court had properly imposed on defendants' former counsel the discovery sanction of a waiver of work-product protection. *Id.* at 949. The party seeking discovery did not dispute that the privilege applied, and thus the court did not analyze the question or make any ruling on it. *Id.* The court noted that other courts have found the privilege to endure beyond the end of the litigation "especially if the old and

new matters are related.” *Id.* The *Hobley* court decided only that a law firm that had previously represented the party sued by *Hobley* could not be sanctioned for its former client’s errors. *Id.* at 952. The court made no determination as to whether the documents were protected, holding that “the firm’s privilege claims may be tested under the normal procedures for attorney work product.” *Id.* The court was not asked to determine whether the documents were or could be work-product and did not do so. *Id.* at 949, 952.

Defendants ask this Court to ignore the Seventh Circuit’s ruling in *Mattenson*, and look instead to other circuits. Sur-Reply, Dkt. No. 564 at 5-6. However, contrary to defendants’ reasoning, this Court is in the Seventh Circuit and it must follow the Seventh Circuit precedent. *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1124 (7th Cir. 1991); cf. *Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997)(the court is not bound by extra circuit precedent).

C. Defendants’ Arguments About Relevance Are Improper and Unpersuasive

Defendants, in their Sur-Reply, object to the Class’ explanation of the relevance of the disputed documents. Defendants’ argument is improper at this stage. Defendants asked for leave to file a sur-reply on the basis that the Class’ purportedly made new arguments in its Reply. However, the Household Defendants addressed relevance in their memorandum in support of Arthur Andersen’s motion to compel. Dkt. No. 508 at 8-9. The Class responded to the Household Defendants’ argument in the Cross-Motion. Cross-Motion, Dkt. No. 523 at 8-9. The Household Defendants complained that the description of the relevance was insufficient in one of their partial responses to the Cross-Motion. Partial Response, Dkt. 525 at 12-13. The Class further explained the relevance of the documents in the Reply. Reply, Dkt. No. 537 at 10-13. Relevance was thoroughly briefed prior to the Household Defendants’ new policy-based argument that discovery of the facts underlying the securities fraud claims is too burdensome.

Regardless of the impropriety of making a new argument following the end of the ordinary briefing schedule, the Household Defendants' cramped notion of relevance is simply wrong. Relevance for discovery purposes is very broad. *Kodish v. Oakbrook Terrace Fire Protection Dist.*, 235 F.R.D. 447 (N.D. Ill. 2006) ("In ruling on motions to compel discovery, 'courts have consistently adopted a liberal interpretation of the discovery rules.'"); *see also Tice v. American Airlines, Inc.*, 192 F.R.D. 270, 272 (N.D. Ill. 2000); *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108 (N.D. Ill. 2004). A party may obtain discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party." *Kodish*, 235 F.R.D. 447; Fed. R. Civ. P. 26(b)(1). Information is relevant for discovery purposes "if there is any possibility that the information sought may be relevant to the subject matter of the action." *Id.* The burden rests upon the objecting party to show why a particular discovery request is improper. *Id.* Defendants have not done so.

III. CONCLUSION

As discussed in the Cross-Motion, the Reply and this Sur-Rebuttal, the disputed documents are not attorney work-product. Most were prepared for business reasons and for financial reporting purposes, such as audits, preparing accurate financials and for tracking litigation for management and reporting purposes. They were not created to aid in litigation, and certainly not *solely* to aid in litigation. They also were not created to aid in this securities fraud litigation. Moreover, the documents were not intended to be kept confidential and have, indeed, been disclosed to outside auditors. Finally, any privilege that might have attached to Arthur Andersen's documents was waived by the Household Defendants' lengthy inaction following the production by Arthur Andersen.

For all the foregoing reasons elaborated in the Class' briefing on the disputed documents, the Class respectfully requests that the Court deny Arthur Andersen's motion for the return of the documents and grant the Class' Cross-Motion to Compel the Production of Certain Documents Provided to Outside Auditors by Household Defendants.

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

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

T:\CasesSF\Household Intl\mot00032602.doc

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 **SUR-REBUTTAL IN SUPPORT OF THE CLASS' CROSS-MOTION TO COMPEL PRODUCTION** to the parties listed on the attached Service List. The parties' email addresses are as follows:

TKavaler@cahill.com
PSloane@cahill.com
PFarren@cahill.com
DOwen@cahill.com
NEimer@EimerStahl.com
ADeutsch@EimerStahl.com
mmiller@millerfaucher.com
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

MONINA O. GAMBOA

HOUSEHOLD INTERNATIONAL (LEAD)

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

Page 1 of 1

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)