

FILED

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

JUL 6 2006

**MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT**

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' SUR-REPLY TO PLAINTIFFS'
CROSS-MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS**

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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") to respond to arguments raised for the first time in Plaintiffs' Reply in Support of Their Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors By Household Defendants, filed on June 23, 2006 (the "Reply Brief" or "Pl. Reply Br.").

INTRODUCTION

Plaintiffs argue for the first time on reply that Household's internal litigation analyses and documents discussing litigation reserves for individual cases are not entitled to protection as attorney work product because (i) they supposedly are mere business documents shared with Household's outside auditors, *see* Pl. Reply Br. at 5-6, and (ii) they were not created in connection with *this* litigation. *See id.* at 7-9. As set forth below, and in the accompanying Supplemental Affidavit of Mark Leopold, Plaintiffs' arguments rely on flawed and unsubstantiated inferences that are easily dispelled. Moreover, Plaintiffs' narrow view of work product protection is squarely at odds with the majority view in this Circuit and beyond, and as Defendants demonstrated elsewhere, sharing attorney work product with an outside auditor (even if that had happened here) does not give rise to a waiver.¹ Plaintiffs' final new point, as to the supposed relevance of Household's work product, *see* Pl. Reply Br. at 13, stretches the concept of rele-

¹ See Memorandum of Law in Support of Arthur Andersen LLP's Motion for the Return of Inadvertently Produced Privileged Documents, dated May 12, 2006 ("Def. Br."), and Defendants' Reply Memorandum of Law in Support of Arthur Andersen 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 Defendants, dated June 2, 2006 ("Def. Reply Br.").

vance beyond the breaking point, and is itself irrelevant on this motion, given the protection afforded to an attorney's mental impressions, conclusions, opinions, and legal theories.

ARGUMENT

I. Household's Internal Litigation Analyses and Documents Regarding Litigation Reserves for Individual Cases Are Classic Work Product

Plaintiffs argue for the first time on reply that Household's litigation database and documents relating to individual case reserves are not work product because certain information they contain was used as a tool in drafting audit letters. Pl. Reply Br. at 5-6. From this unremarkable fact, Plaintiffs leap to the invalid conclusion that the database was "created and maintained for a business purpose" and "was not something 'for use' in any particular litigation." *Id.* The logical and legal limitations of this reasoning are evident. As an initial matter, to the extent that the database was used by Household in connection with its preparation of the audit letters, its contents, like the audit letters themselves, are protected from disclosure under the work product doctrine. *See generally* cases cited at pages 3-5 of Defendants' May 12, 2006 Memorandum in support of Arthur Andersen's motion for return of privileged documents, and pages 4-9 of Defendants' June 2, 2006 Reply Memorandum on that motion.

Moreover, as stated in the Affidavit of Mark F. Leopold In Support of the Household Defendants' Partial Response to Plaintiffs' Cross-Motion to Compel Production of Certain Documents, dated June 9, 2006, the litigation database was not created merely as a resource for use in preparing audit letters. Rather, it was created, maintained, updated, and used primarily "for the purposes of understanding, managing, and rendering legal advice about" each lawsuit that Household's Office of the General Counsel initiated or defended on the Company's behalf. *Id.* ¶ 2. These uses, and the regularly updated body of legal theories, strategic planning, and

other mental impressions of Household lawyers put the database squarely within the realm of classic attorney work product. *See id.* ¶ 3 (database reflects attorneys' "mental impressions, conclusions, opinion and strategies"). *See also* Household Defendants' Partial Response to Plaintiffs' Cross-Motion to Compel Production of Certain Documents, dated June 9, 2006, at 3-4.

Plaintiffs argue that Arthur Andersen's 2001 Litigation Review suggests that Household shared its litigation database with this outside auditor. Pl. Reply Br. at 5-6. This inference is mistaken (in addition to being irrelevant). As Mr. Leopold reiterates in his Supplemental Affidavit, it was not Household's practice to share its the litigation database with its outside auditors or any other third party. Supplemental Affidavit of Mark F. Leopold in Opposition to Plaintiffs' Cross-Motion to Compel Production of Certain Documents, dated June 28, 2006, ¶ 2. At 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. Neither fact is inconsistent with Household's demonstration that the litigation database was and is kept confidential. *See id.* ¶ 3.

More to the point, Mr. Leopold confirms that to the extent that Household disclosed any confidential information to its outside auditors, it never did so in a manner that substantially increased the opportunity for potential adversaries to obtain such information. *See id.* ¶ 4. It follows that no waiver was ever intended or achieved. *See generally, Smithkline Beecham Corp. v. Pentech Pharmaceuticals, Inc.*, No. 00 C 2855, 2001 WL 1397876, at *3 (N.D. Ill. Nov. 6, 2001) (Nolan, M.J.) (disclosure of work product to a third party does not waive work product unless "the protected communications are disclosed in a manner which 'substantially increases

the opportunity for potential adversaries to obtain the information”) (citation omitted); Def. Br. at 6-8; Def. Reply Br. at 9-11.

Plaintiffs also argue that documents relating to litigation reserves for individual cases are not work product. See Pl. Reply Br. at 6. However, for the reasons set forth in Household Defendants’ Partial Response to Plaintiffs’ Cross-Motion to Compel Production of Certain Documents, dated June 9, 2006, at 4-5, documents relating to the establishment of individual case reserves are protected from disclosure.

II. Attorney Work Product is Protected from Disclosure in Unrelated and/or Subsequent Litigations.

In another new argument on reply, Plaintiffs contend that in order to qualify for work product protection, the document in question must have been created for use in litigation against the particular opponent seeking discovery. See Pl. Reply Br. at 7-9. They derive this supposed principle from an out-of-context remark taken from the Court of Appeals’ opinion in *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 767-68 (7th Cir. 2006), which Plaintiffs cite repeatedly. In *Mattenson*, however, the Court merely explained — in the course of rejecting a demand by one party for its opponent’s work product *in the same lawsuit* — why that is a bad idea. Speaking expressly about that context, the Court noted that an 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.* at 767-68. From this innocuous dictum, Plaintiffs would ask the Court to conclude that the Court of Appeals for this Circuit has affirmatively broken from the majority of Circuits, and repudiated its own statements in other cases, by ruling out

work product protection where the attorneys' reflections and mental impressions were about a different case. That position is not even plausible.

In the first place, because *Mattensen* dealt only with a demand for an opponent's work product in the same litigation, *see id.* at 768, the Court limited its rationale to that situation and had no occasion to discuss the broadly-accepted principle that work product prepared in anticipation of a different and/or previous litigation is also protected from disclosure.² *See, e.g., See Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002) ("The work product privilege extends beyond the termination of litigation"); *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 703 (10th Cir. 1998) (observing that "every circuit to address the issue has concluded that . . . the work product doctrine does extend to subsequent litigation" and joining those circuits); *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977) ("the mischief engendered by allowing discovery of work product in *Hickman v. Taylor*, 329 U.S. 495 (1947),] would apply with equal vigor to discovery in future, unrelated litigation"); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976) ("we view the work product doctrine as protecting work produced in anticipation of other litigation"); *Duplan Corp. v. Moulinage et Retorderie de Cavanoz*, 487 F.2d 480, 484 (4th Cir. 1973) ("we think the legal profession and the interests of justice are better served by recognizing the qualified immunity of

² Plaintiffs point to the fact that the court inserts the words "by one's opponent" into a quote from Rule 26(b)(3). *See* Pl. Reply Br. at 7. Plaintiffs are being less than candid. The quote to which they refer discusses "materials 'prepared [by one's opponent] in anticipation of litigation' . . ." *Mattensen*, 438 F.3d at 768. Thus, the "by one's opponent" language refers to the party who prepared the materials, not the party seeking discovery. Clearly, Household, which is indisputably Plaintiffs' "opponent" in this litigation, is also the party who prepared the materials.

work product materials in a subsequent case as well as that in which they were prepared"); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967). Defendants are aware of, and Plaintiffs have cited, no Court of Appeals decision that adopts Plaintiffs' contrary viewpoint.³

Moreover, although the Seventh Circuit has not expressly ruled on the protection afforded to work product in different and/or subsequent cases, it has given every indication that it agrees with the position taken by at least seven other circuit courts. *See, e.g., Hogley v. City of Chicago*, 433 F.3d 946, 949 (7th Cir. 2006) (noting that plaintiff did not dispute the majority rule that work product protection endures after the termination of the proceedings for which the documents were created, and citing *In re Grand Jury Proceedings*, 43 F.3d at 971, and *In re Murphy* with approval).

Plaintiffs make much of a lone opinion from this district that did depart from the majority rule on this subject. *See Ferguson v. Laurie*, 139 F.R.D. 362, 368 (N.D. Ill. 1991). However, they fail to inform the Court that in *Jumper v. Yellow Corp.*, 176 F.R.D. 282, 286

³ Furthermore, in *Fed. Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 25 (1983), the Supreme Court strongly indicated, in dicta, that work product protection extends to all subsequent litigation, even if it is unrelated to the litigation that led to the creation of the document. In *Grolier*, the Court stated that "the literal language of the Rule [26(b)(3)] protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *Id.* While the Court ultimately based its holding in that case on Exemption 5 to the Freedom of Information Act, Justice Brennan stated in his concurrence that he would have based the Court's holding squarely on Rule 26(b)(3), which he viewed as protecting materials from disclosure in all subsequent litigation, related or not. *Id.* at 29-33 (Brennan, J., concurring). Of particular relevance to this case, Brennan observed that "[a]ny litigants who face litigation of a commonly recurring type . . . have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes. Counsel for such a client would naturally feel some inhibition in creating and retaining written work product that could later be used by an 'unrelated' opponent against him and his client." *Id.* at 31.

(N.D. Ill. 1997), the court specifically rejected *Ferguson* and endorsed the “emerging majority view . . . that the work product privilege does extend to subsequent litigation.” *Id.* (quoting *In re Grand Jury Proceedings*, 43 F.3d at 971). Plaintiffs also overlook *McCook Metals L.L.C. v. Alcoa, Inc.*, 192 F.R.D. 242, 263 (N.D. Ill. 2000), which held that the work product doctrine continues to apply in subsequent unrelated cases. *Id.* (“The work product doctrine applies in a subsequent case even if the documents were prepared in a prior litigation. . . . The two cases need not be related as long as the documents were created by the parties to subsequent litigation.”) (citation omitted).

In short, the overwhelming weight of authority, including in this district, categorically rejects the proposition that work product should be protected from disclosure only when it was created in connection with the litigation in which discovery is sought. Plaintiffs’ argument to the contrary is at best unreliable, because it ignores the many cases that articulate the flaws in their discredited approach.

III. Acceptance of Plaintiffs’ Relevancy Arguments Would Expand the Scope of this Case to Unreasonable Bounds

The application of the attorney work product doctrine makes it unnecessary for the Court to consider the ramifications of Plaintiffs’ strained arguments on relevance. (Among other things, Plaintiffs argue that Household should disclose its highly confidential litigation database and individual reserve analyses because they might show something about spoliation of documents in other cases or about what management knew about “predatory lending” from the existence of lawsuits — apparently irrespective of merits, materiality or outcome. *See* Pl. Reply Br. at 13.) Even if this were not the case, opening the door to such amorphous and collateral inquiries (and the inevitable demands for follow-up) would expand the burden, cost and duration

of this case to an unacceptable degree, especially at a time when discovery should be winding down so that Defendants can finally seek a disposition on the merits.

CONCLUSION

Plaintiffs' Cross-Motion to Compel Production of Certain Documents should be denied in full.

Dated: June 30, 2006
Chicago, Illinois

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APPENDIX OF UNREPORTED CASES

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1. *Smithkline Beechman Corp. v. Pentech Pharmaceuticals, Inc.*, No. 00 C 2855, 2001 WL 1397876 (N.D. Ill. Nov. 6, 2001)

Tab 1

Westlaw

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2001 WL 1397876 (N.D.Ill.)
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Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

SMITHKLINE BEECHAM CORPORATION and BEECHAM GROUP, p.l.c., Plaintiffs,
v.

PENTECH PHARMACEUTICALS, INC. and ASAHI GLASS CO., LTD. Defendants.

No. 00 C 2855.

Nov. 6, 2001.

MEMORANDUM OPINION AND ORDER

NOLAN, Magistrate J.

*1 This patent infringement action is before the Court on Plaintiffs' Motion to Compel Production of Communications for Which Defendants Assert Attorney-Client Privilege or Work Product Immunity. In their motion, Plaintiffs SmithKline Beecham, Inc. and Beecham Group, p.l.c. (collectively "SB"), claim that Defendant Pentech Pharmaceuticals, Inc. ("Pentech") improperly withheld from production many of their documents; objected to the production of documents from two third parties; and prevented deposition testimony about two meetings. SB further claims that Defendant Asahi Glass Co., Ltd. ("Asahi") improperly withheld from production many of its documents.

For the reasons explained below, Plaintiffs' Motion is GRANTED in part and DENIED in part.

DISCUSSION

I. Attorney-Client Privilege

For procedural issues in a patent case that are not unique to patent law, courts are directed to "apply the law of the circuit in which the district court sits." McCook Metals L.L.C. v. Alcoa Inc., 192 F.R.D. 242, 251 (N.D.Ill.2000) (quoting In re Spalding Sports Worldwide, Inc., 203 F.3d 800 (Fed.Cir.2000)). Because SB's motion involves general issues of privilege, the law of the Seventh Circuit applies. The Seventh Circuit test to determine

attorney-client privilege is: (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected from disclosure by himself or by the legal advisor, (8) except the protection may be waived. United States v. Evans, 113 F.3d 1457, 1461 (7th Cir.1997).

The privilege is narrowly construed in this Circuit, and communications to an attorney are not always cloaked with the privilege. SmithKline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530, 534 (N.D.Ill.2000). For example, the fact that an attorney has requested or received documents does not, by itself, mean the documents are privileged. Blanchard v. EdgeMark Financial Corp., 192 F.R.D. 233, 238 (N.D.Ill.2000); IBJ Whitehall Bank & Trust Co. v. Cory & Assocs., Inc., No. 97 C 5827, 1999 WL 617842, at *4 (N.D.Ill. Aug. 12, 1999). In determining whether a document is subject to the attorney-client privilege, the primary question is whether "the document in question reveal[s], directly or indirectly, the substance of a confidential attorney-client communication." SmithKline, 193 F.R.D. at 534. Communication of business or technical information not involving legal advice is not privileged. McCook, 192 F.R.D. at 252.

The attorney-client privilege can be waived if the communication is voluntarily disclosed to a third party. Blanchard, 192 F.R.D. at 236. However, an exception to the waiver rule may exist if (1) the disclosure to the third party is for the purpose of assisting the attorney in rendering legal advice or (2) the third party shares a common legal interest with the party claiming the privilege. Id. at 236-37. "The [common interest] rule can apply to any two parties who have a 'common interest' in current or potential litigation, either as actual or potential plaintiffs or defendants." IBJ Whitehall, 1999 WL 617842, at *3, n. 1.

*2 In this case, Pentech claims the following documents are protected from disclosure by the attorney-client privilege: ^{EN1} PN11-14, 16-24; IO(P)6; and OR(P)2-4. ^{EN2} Asahi claims the privilege applies to all of its withheld documents, AS1-11.

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 Not Reported in F.Supp.2d, 2001 WL 1397876 (N.D.Ill.)
 (Cite as: Not Reported in F.Supp.2d)

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FN1. Pentech's privilege log contained additional attorney-client privilege claims, but to reduce the number of issues in this case, Pentech dropped their privilege claims as to 14 documents. (See Defs.' Mem. in Opp'n at 3, n. 2.)

FN2. For the sake of convenience and clarity, the Court will use the document identification system the parties used in their briefs. Documents designated "PN" are from Pentech's privilege log; "AS" documents are from Asahi; "IO" documents are from the University of Iowa, a third party; and "OR" documents are from Oread, a third party.

SB argues that Pentech cannot claim the attorney-client privilege for (1) documents disclosed to third parties (PN17-18, 20-22; AS4, 11; IO(P)6; and OR(P) 2-4); (2) documents that relate to routine technical issues (PN17, 20, 22, 24; IO(P)6); and (3) documents that exhibit no attorney involvement (PN18; OR(P)4).

Pentech responds that disclosure of certain documents to third parties did not waive the attorney-client privilege because Pentech and Asahi share a common legal interest, and the disclosure to third parties was necessary to assist Pentech's attorneys in rendering legal advice. Pentech further argues that documents SB describes as involving "routine technical issues" were in fact related to legal advice.

II. Work Product Doctrine

The work product doctrine is distinct from, and broader than, the attorney-client privilege. Blanchard, 192 F.R.D. at 237; Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 145 F.R.D. 84, 86 (N.D.Ill.1992). The work product doctrine protects "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed.R.Civ.P. 26(b)(3).

The threshold determination of work product generally is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared for or obtained because of the prospect of litigation." North Shore Gas Co. v. Elgin, Joliet & Eastern Ry. Co., 164 F.R.D. 59, 61 (N.D.Ill.1995)

(quoting Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1119 (7th Cir.1983)) (emphasis added); Allendale, 145 F.R.D. at 86. Therefore, documents that were prepared for other reasons, such as documents created in the ordinary course of business, cannot be withheld as work product. See Allendale, 145 F.R.D. at 87 (holding that documents prepared in the ordinary course of business are not work product even if litigation is imminent or ongoing); see also In re General Instrument Corp., 190 F.R.D. 527, 530 (N.D.Ill.2000) ("[A] document prepared for both legal and non-legal review is not privileged."); IBJ Whitehall, 1999 WL 617842, at *4 (quoting Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir.1981)) (holding that only documents " 'primarily concerned with legal assistance' " are cloaked with immunity).

Moreover, to be subject to work product immunity, documents must have been created in response to "a substantial and significant threat" of litigation, which can be shown by "objective facts establishing an identifiable resolve to litigate." Allendale, 145 F.R.D. at 87 (citations omitted). Documents are not work product simply because "litigation [is] in the air" or "there is a remote possibility of some future litigation." McCook, 192 F.R.D. at 259; IBJ Whitehall, 1999 WL 617842, at *5. "The articulable claim likely to lead to litigation must pertain to this particular opposing party, not the world in general." McCook, 192 F.R.D. at 259.

*3 The protection of the work product doctrine may be waived "where the protected communications are disclosed in a manner which 'substantially increases the opportunity for potential adversaries to obtain the information.'" Blanchard, 192 F.R.D. at 237 (quoting Behnia v. Shapiro, 176 F.R.D. 277, 279 (N.D.Ill.1997)); see also Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co. of Wausau, 183 F.R.D. 627, (N.D.Ill.1999) ("A waiver only occurs, however, if the disclosure to a third party 'is inconsistent with the maintenance of secrecy from the disclosing party's adversary.'").

An opponent may discover a party's work product "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3). Furthermore, if the work product involves "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the

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litigation," the immunity from production is "for all intents and purposes absolute," whether or not the party seeking discovery has demonstrated a substantial need. Fed.R.Civ.P. 26(b)(3); Scurto v. Commonwealth Edison Co., No. 97 C 7508, 1999 WL 35311, at *2 (N.D. Ill. Jan. 11, 1999).

Pentech alleges documents PN1-12, 15, 17-18, 20-31; AS1-11; IO(P) 1-42; and OR(P) 1, 4, are subject to work product immunity. SB challenges the immunity claim, arguing that Pentech has failed to establish that the documents were prepared in anticipation of litigation, and that documents involving testing or routine investigations were created in the ordinary course of business and therefore are not work product. Pentech answers by stating that when a generic drug company decides to compete with an established drug maker, litigation "is a virtual certainty," and communications are therefore made in anticipation of litigation.

In response to SB's argument that many of Pentech's withheld documents pertain to technical analysis and therefore are not work product, Pentech argues that Iowa personnel were involved in two research projects, only one of which involved product development. Pentech goes on to state that "[i]f Pentech is required to go into greater detail about the nature of [the research project not involving product development], Pentech would be forced to disclose the very information that the work-product doctrine seeks to protect." (Defs.' Mem. in Opp'n at 12.)

III. Findings

This Court has reviewed the briefs submitted by the parties,^{FN2} the relevant case law, and the documents at issue, which were submitted *in camera* pursuant to the Court's request. Following are the Court's findings as to the application of the privilege to each of the documents Pentech and Asahi seek to withhold:

^{FN3} The parties' briefs included many arguments relating to the sufficiency of the Defendants' privilege logs. Because the Court chose to view the documents *in camera*, the privilege logs' sufficiency is no longer relevant and arguments related to sufficiency are not included in this Opinion.

Documents PN1-10, 15, 17, 20-23, 25-27, 29-31^{FN4};
IO(P)2-5, 7-26, 28-38, 40-42:

^{FN4} Document PN31 (and one page of Document PN29) were not included in the materials submitted to the Court. The Court's decision is based on its review of similar documents and of the descriptions included in Pentech's privilege log.

*4 The Court does not dispute that Pentech believed litigation with SB was likely or even probable at the time these studies and analyses were commissioned. Pentech, however, must demonstrate the documents in question were created *for the purpose of litigation*, not in the ordinary course of business. Pentech was required, for purely business reasons, to research the composition and properties of the paroxetine hydrochloride capsules for which it submitted an Abbreviated New Drug Application ("ANDA") to the Food and Drug Administration. Therefore, research conducted before the ANDA was submitted was not done solely for the purpose of litigation, and any documents reflecting that research were not created for litigation, no matter how likely it was that SB would pursue litigation after Pentech filed its ANDA. Accordingly, that research must be produced. See SmithKline Beecham Corp. v. Apotex Corp., No. 98 C 3952, 2000 WL 116082, at *4 (N.D.Ill. Jan. 24, 2000). For the same reasons, Pentech cannot bar testimony regarding the September 1997 and October 1998 meetings with third-party researchers.

Document PN11:

The document is a draft letter from client to attorney and was not sent to third parties. The letter also expressly demonstrates an intention to keep the communication confidential. Therefore, it may be withheld as privileged.

Document PN12:

Page number PEN8252 may be withheld as an attorney-client communication. The remainder of the document, a letter from the FDA and materials sent to or received from SB, is clearly not privileged and must be produced.

Document PN13:

The letter is a communication from the client to his attorney for the purpose of legal advice and may be

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withheld as privileged.

Documents PN14, 16:

The communications are from attorney to client, not client to attorney, and are merely transmissions of technical information, not legal advice. Therefore, the documents are not privileged and should be produced. See McCook, 192 F.R.D. at 252.

Document PN18:

The document is a draft letter and includes handwritten notes from an attorney. It may be withheld as an attorney-client communication and work product.

Document PN19:

The document is merely a transmission of a public document from attorney to client. It does not include legal advice and reveals no client communications, so it must be produced.

Document PN24:

It is not clear from the privilege log or from the document itself whom the recipient attorney represents. In addition, the document does not appear to involve legal advice or a request for legal advice from counsel. Therefore, it must be produced.

Documents PN28, IO(P)1, 6, 27, 39:

As explained above in discussing Documents PN1-10 *et al.*, Pentech cannot claim that scientific analyses created before the ANDA was filed were prepared solely for the purpose of litigation. However, after the ANDA was filed and SB was notified of Pentech's intent to market a competitive generic drug, litigation with "this particular opposing party," McCook, 192 F.R.D. at 259, was anticipated. Moreover, the kinds of tests performed, the materials used in the tests, and the specific compounds tested may reveal the attorney's strategy in defending the infringement claim. See Vardon Golf Co., Inc. v. BBMG Golf Ltd., 156 F.R.D. 641, 648 (N.D.Ill.1994). Finally, SB has made no claim of a substantial need for the materials. These documents, which reflect experiments and analyses created or performed by

Pentech, its attorneys, and/or its consultants after the ANDA was filed, are subject to work product immunity and may be withheld.

Document OR(P)1:

*5 The document may be withheld as work product because it reveals an attorney's litigation strategy. The work product immunity was not waived by disclosing the information to a third party, because disclosure to Oread did not increase the opportunity for potential adversaries to obtain the information and was not inconsistent with the maintenance of secrecy. The nature of the document, coupled with the parties' relationship, indicate that Pentech intended to maintain the confidentiality of the document. Moreover, while not dispositive, Pentech's claim that the parties had executed a confidentiality agreement "militates against a finding of a waiver [of work product immunity]." Blanchard, 192 F.R.D. at 237.

Document OR(P)2:

The document reflects a meeting concerning litigation issues and contains privileged information. The document lists the meeting participants and summarizes privileged communications, and therefore it may be withheld. See SmithKline, 193 F.R.D. at 538; McCook, 192 F.R.D. at 252.

Documents OR(P)3-4:

The documents include privileged communications and disclosure of the communications to Oread was necessary to assist Pentech's attorney in rendering legal advice. They may be withheld.

Documents AS1-5:

These documents are apparently communications between Asahi Tokyo and its Japan-based attorneys at Morrison & Foerster LLP. If the documents are privileged under Japanese law, "comity requires us to apply that country's law to the documents at issue." McCook, 192 F.R.D. at 256. The defendants have the burden to establish that under Japanese law, the communications contained in Documents AS1-5 are protected by the attorney-client privilege. See *id.* at 256-58. Pentech's Memorandum in Opposition to Plaintiffs' Motion to Compel provides no support for the argument that these documents are privileged

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under the applicable law of Japan. Pentech must submit to the Court proof that the documents are privileged, through case law and/or an affidavit of an attorney familiar with Japanese law regarding attorney-client privilege, stating the relevant law and applying it to the communications at issue. If Pentech cannot meet its burden of proving the documents are privileged within 21 days, they must be produced.

Additionally, several pages from these documents and others withheld by Asahi are wholly or partly in Japanese. Because the Court cannot review the contents of the documents, Pentech has not met its burden of showing the attorney-client privilege applies to these pages. Unless Pentech provides the Court with English translations of the Japanese portions of the documents within 21 days, those pages must be produced. The pages include: AS1; AS2 (page number AGC6040); AS3 (pages 1 and 3-5 of the document; the Japanese language pages are not numbered); AS4; and AS5 (AGC6044).

Document AS6:

The document is a privileged communication between Asahi and its American attorney regarding patent issues and may be withheld.

Document AS7:

*6 Page AGC6056 of Document AS7 is in Japanese and, as explained above, it must be produced if Pentech does not provide the Court with an English translation. Pages AGC6057-66 of the document contain privileged communications with an American attorney regarding a patent application and a proposed draft of a submission to the United States Patent & Trademark Office, which is also privileged. See *In re Spalding*, 203 F.3d at 805-06. Those pages may be withheld.

Document AS8:

Page AGC6067 is in Japanese and must be produced if Pentech does not provide the Court with an English translation. Pages AGC6068-69 are privileged communications with an American attorney regarding patent issues and therefore may be withheld. Pages AGC6070-84 are documents prepared for submission to the United States Patent & Trademark Office. Because there is no expectation of confidentiality in these documents, they are not

privileged and must be produced. See *McCook*, 192 F.R.D. at 252.

Documents AS9-10:

The documents contain privileged communications with an American attorney regarding patent issues and therefore may be withheld. However, pages AGC6085-86 and AGC6088 are partly in Japanese and those portions must be produced if Pentech does not provide the Court with an English translation.

Document AS11:

The document is a confidential communication from an American attorney to Pentech regarding legal advice concerning patents. The document maintains the privilege even though it was disclosed to Asahi, because Asahi and Pentech share a common legal interest. The entire document may be withheld.

CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' Motion to Compel Production of Communications for Which Defendants Assert Attorney-Client Privilege or Work Product Immunity is GRANTED in part and DENIED in part.

N.D.Ill.,2001.
SmithKline Beecham Corp. v. Pentech Pharmaceuticals, Inc.
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Briefs and Other Related Documents ([Back to top](#))

- [2006 WL 740098](#) (Trial Motion, Memorandum and Affidavit) SKB's Memorandum Regarding Apotex'S Motion to Intervene to Modify Protective Order (Feb. 3, 2006)
- [2003 WL 23417029](#) (Trial Motion, Memorandum and Affidavit) Motion to Dismiss Pending Counterclaims (Jul. 22, 2003)
- [2003 WL 23417018](#) (Trial Motion, Memorandum and Affidavit) Asahi Glass Company's Memorandum in Opposition to Plaintiffs' Motion to Dismiss All Claims and Counterclaims, and These Actions, Between SB and AGC (May. 30, 2003)
- [2003 WL 23831790](#) (Trial Motion, Memorandum and Affidavit) Asahi Glass Company's Memorandum in Opposition to Plaintiffs' Motion to Dismiss all

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Claims and Counterclaims, and These Actions, Between SB and AGC (May 30, 2003)

- [2003 WL 23417350](#) (Trial Motion, Memorandum and Affidavit) Motion to Dismiss All Claims and Counterclaims, and These Civil Actions, Between SB and Asahi (May. 19, 2003)
- [2003 WL 23417026](#) (Trial Motion, Memorandum and Affidavit) AGC's Memorandum in Opposition to the Motion by the Frommer Law Firm to Withdraw from its Representation of AGC (Apr. 29, 2003)
- [2003 WL 23417345](#) (Trial Motion, Memorandum and Affidavit) AGC's Memorandum in Opposition to the Motion by the Frommer Law Firm to Withdraw from its Representation of AGC (Apr. 29, 2003)
- [2003 WL 23417339](#) (Trial Motion, Memorandum and Affidavit) Motion for Temporary Protective Order to Seal Settlement Agreements Submitted for in Camera Review (Apr. 23, 2003)
- [2003 WL 23417332](#) (Trial Motion, Memorandum and Affidavit) Motion Under Local Rule 83.17 to Withdraw as Attorneys of Record on Behalf of Defendant Asahi Glass Co., Ltd. (Apr. 10, 2003)
- [2003 WL 23831788](#) (Trial Motion, Memorandum and Affidavit) Joint Response by Plaintiffs and Defendant Pentech Pharmaceuticals, Inc. to Questions Raised by Court on April 17, 2003 Regarding Agreed Motion to Dismiss (Apr. 2003)
- [2003 WL 23831789](#) (Trial Motion, Memorandum and Affidavit) Response by Defendant and Counterclaim Plaintiff Asahi Glass Co., Ltd., to Questions Raised by Court on April 17, 2003, Regarding Motion to Dismiss (Apr. 2003)
- [2002 WL 32450820](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Unopposed Motion to Amend the Briefing Schedule Regarding Defendants' (1) Motion to Reopen Limited Fact Discovery and (2) Motion to Amend Answer and Counterclaim (Dec. 31, 2002)
- [2002 WL 32450815](#) (Trial Motion, Memorandum and Affidavit) Defendants' Submission of Non-Confidential Version of Defendants' Motion to Amend the Answer and Counterclaim (Dec. 13, 2002)
- [2002 WL 32450809](#) (Trial Motion, Memorandum and Affidavit) Defendants' Motion for Leave to File Oversize Brief (Dec. 10, 2002)
- [2002 WL 32450805](#) (Trial Motion, Memorandum and Affidavit) Defendants' Motion to Reopen Limited Fact Discovery (Dec. 06, 2002)
- [2002 WL 32450798](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Support of Their Motion to Compel Rule 34 Inspections of Sampling of Paroxetine Materials (Dec. 03, 2002)
- [2002 WL 32692922](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Support of

their Motion to Compel Rule 34 Inspections of Sampling of Paroxetine Materials (Dec. 3, 2002)

- [2002 WL 32692926](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Reply in Support of Their Motion to Compel Rule 34 Inspections of Sampling of Paroxetine Materials (Dec. 3, 2002)
- [2002 WL 32450824](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion to Extend Stay on FDA Approval of Pentech's ANDA, Because the Defendants Breached Their Duty to Reasonably Cooperate in Expediting the Litigation (Nov. 18, 2002)
- [2002 WL 32450793](#) (Trial Motion, Memorandum and Affidavit) Motion for Leave to File Additional Appearances of Counsel (Nov. 04, 2002)
- [2002 WL 32450737](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Support of Their Motion to Compel Production of an Unsolicited Document (Jun. 28, 2002)
- [2002 WL 32450744](#) (Trial Motion, Memorandum and Affidavit) Pentech Pharmaceuticals, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Production of an Unsolicited Document (Jun. 28, 2002)
- [2002 WL 32450750](#) (Trial Motion, Memorandum and Affidavit) Pentech Pharmaceuticals, Inc.'s "'Omnibus" Memorandum in Opposition to Plaintiffs' Motion to Compel Defendant to Provide Discovery About its R&D and in Support of Defendant's Motion for A Protective Order Under Rule 26(c)(4) (Jun. 28, 2002)
- [2002 WL 32450755](#) (Trial Motion, Memorandum and Affidavit) Pentech Pharmaceutical Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Production of Documents from Third Parties that Defendant Pentech is Blocking on Relevance Grounds (Jun. 28, 2002)
- [2002 WL 32450761](#) (Trial Motion, Memorandum and Affidavit) Defendants Memorandum In Support of Their Motion for Summary Judgment Under Fed. R. Civ. P. 56(c) (Jun. 28, 2002)
- [2002 WL 32450767](#) (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment Under Fed. R. Civ. P. 56(c) (Jun. 28, 2002)
- [2002 WL 32450772](#) (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum in Support of Their Opposition to Plaintiffs' Motion to Modify the January 11, 2001 Order (Jun. 28, 2002)
- [2002 WL 32450775](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion for Leave to Amend Their Complaint to Deem Case Exceptional and Recover Attorney Fees (Jun. 28, 2002)
- [2002 WL 32450781](#) (Trial Motion, Memorandum and Affidavit) Pentech's Memorandum in Opposition

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to Smithkline's "'Motion to Compel Pentech's Production of X-Ray Testing and Samples of 30 mg Dosage Capsules Made with the Same Formulation as Pentech's Anda Capsules" (Jun. 28, 2002)

- 2002 WL 32450787 (Trial Motion, Memorandum and Affidavit) Pentech's Memorandum in Reply to SB's Opposition to Pentech's "'Motion to Compel Plaintiffs to Produce the Documents and/or Things Sought by Pentech's Request No. 247" (Jun. 28, 2002)
- 2002 WL 32692876 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Support of Their Motion to Compel Production of an Unsolicited Document (Jun. 28, 2002)
- 2002 WL 32692884 (Trial Motion, Memorandum and Affidavit) Pentech Pharmaceuticals, Inc.'s "'Omnibus" Memorandum in Opposition to Plaintiffs' Motion to Compel Defendant to Provide Discovery About its R&D and in Support of Defendant's Motion for a Protective Order Under Rule 26(c)(4) (Jun. 28, 2002)
- 2002 WL 32692886 (Trial Motion, Memorandum and Affidavit) Pentech Pharmaceutical Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Production of Documents from Third Parties that Defendant Pentech is Blocking on Relevance Grounds (Jun. 28, 2002)
- 2002 WL 32692890 (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum in Support of their Motion for Summary Judgment Under Fed. R. Civ. P. 56(c) (Jun. 28, 2002)
- 2002 WL 32692892 (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum in Support of their Motion for Summary Judgment Under Fed. R. Civ. P. 56(c) (Jun. 28, 2002)
- 2002 WL 32692896 (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum in Support of their Opposition to Plaintiffs' Motion to Modify the January 11, 2001 Order (Jun. 28, 2002)
- 2002 WL 32692905 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of "'Pentech's Motion to Compel Plaintiffs to Produce the Documents and/or Things Sought by Pentech's Request No. 247" (Jun. 28, 2002)
- 2002 WL 32692912 (Trial Motion, Memorandum and Affidavit) Pentech's Memorandum in Opposition to Smithkline's "'Motion to Compel Pentech's Production of X-Ray Testing and Samples of 30 MG Dosage Capsules Made with the same Formulation as Pentech's Anda Capsules" (Jun. 28, 2002)
- 2002 WL 32692918 (Trial Motion, Memorandum and Affidavit) Pentech's Memorandum in Reply to SB's Opposition to Pentech's "'Motion to Compel Plaintiffs to Produce the Documents and/or Things Sought by Pentech's Request No. 247" (Jun. 28,

2002)

- 2002 WL 32692870 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for a Protective Order for Deposition of Plaintiffs' In-House Counsel, Charles M. Kinzig, Esq. (Jun. 23, 2002)
- 2002 WL 32450730 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion to Close Fact Discovery and Defer Expert Discovery Pending an Election by Pentech (Jun. 04, 2002)
- 2002 WL 32692880 (Trial Motion, Memorandum and Affidavit) Pentech Pharmaceuticals, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Production of an Unsolicited Document (Jun. 2002)
- 2002 WL 32450723 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion for A Protective Order for Deposition of Plaintiffs' In-House Counsel, Charles M. Kinzig, Esq. (May. 31, 2002)
- 2002 WL 32450715 (Trial Motion, Memorandum and Affidavit) Pentech's Memorandum in Opposition to Smithkline's "'Motion to Compel Pentech's Production of X-Ray Testing and Samples of 30 mg Dosage Capsules Made With the Same Formulation as Pentech's Anda Capsules" (May. 13, 2002)
- 2002 WL 32692864 (Trial Motion, Memorandum and Affidavit) Pentech's Memorandum in Opposition to Smithkline's "'Motion to Compel Pentech's Production of X-Ray Testing and Samples of 30 Mg Dosage Capsules Made with the Same Formulation as Pentech's Anda Capsules" (May 13, 2002)
- 2002 WL 32450698 (Trial Motion, Memorandum and Affidavit) Defendant Pentech Pharmaceuticals, Inc.'s Motion to Submit an Oversized Memorandum (May. 10, 2002)
- 2002 WL 32450708 (Trial Motion, Memorandum and Affidavit) Notice of Defendant Asahi Glass Company, Ltd.'s Motion to Submit an Oversized Memorandum in Opposition to Plaintiffs' Motion for Leave to Amend Their Complaint to Deem Case Exceptional and Recover Attorney Fees (May. 10, 2002)
- 2002 WL 32450691 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion for Leave to Amend Their Complaint to Deem Case Exceptional and Recover Attorney Fees (Mar. 29, 2002)
- 2001 WL 34483667 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion to Modify January 11, 2001 Order to Permit Discovery of Defendants' Business Relationships Concerning Paroxetine (Nov. 29, 2001)
- 2001 WL 34483670 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion to Compel Production of Additional Communications for Which Defendant Asahi Asserts Attorney-Client Privilege or

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Work Product Immunity (Nov. 29, 2001)
• 2000 WL 34304588 (Trial Pleading) Complaint
(May 11, 2000)
• 2000 WL 34442519 (Trial Pleading) Complaint
(May 11, 2000)
• 1:00CV02855 (Docket) (May. 11, 2000)

END OF DOCUMENT

**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

**SUPPLEMENTAL AFFIDAVIT OF MARK F. LEOPOLD IN OPPOSITION TO
PLAINTIFFS' CROSS-MOTION TO COMPEL PRODUCTION OF CERTAIN
DOCUMENTS**

STATE OF ILLINOIS)
 : ss.:
COUNTY OF COOK)

Mark F. Leopold, being first duly sworn, deposes and says:

1. I am a member of the bar of the State of Illinois and am employed as legal counsel for Defendant HSBC Finance Corporation ("HSBC") (f/k/a Household International, Inc.). I submit this Affidavit to correct certain invalid assumptions in Plaintiffs' Reply in support of their Cross-Motion to Compel Production of Certain Documents.

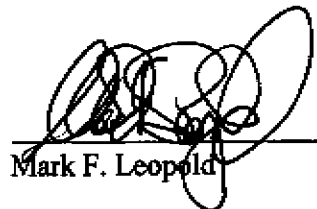
2. Having reviewed Plaintiffs' Reply and related exhibits, I hereby confirm and reiterate the representation in my Affidavit of June 9, 2006 that the litigation data base maintained by Household's Office of the General Counsel (sometimes referred to as "HAL") is not routinely

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shared with Household's outside auditors or any other third party, but rather is maintained in strict confidence.

3. Plaintiffs' exhibits do not indicate otherwise. At most they show that Household (a) made Arthur Andersen (its outside auditor until 2002) 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. Neither fact is inconsistent with Household's showing that the attorney work product embedded in the litigation database, including attorneys' substantive evaluations and strategic planning, was and is kept confidential.

4. Moreover, to the extent that Household disclosed any confidential information to its outside auditors, no waiver of attorney work product was intended because Household never did so in a manner that substantially increased the opportunity for potential adversaries to obtain such information. Nothing in Plaintiffs' submission undermines this fact or its legal implications, which are discussed in the accompanying Sur-Reply.


Mark F. Leopold

Sworn to before me this
28th day of June, 2006.


Notary Public

