

**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.)	
_____)	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL DECLARATION OF AZRA Z. MEHDI IN SUPPORT OF THE CLASS' OBJECTION TO THE MAGISTRATE'S JULY 6, 2006 ORDER REGARDING THE APPLICATION OF THE WORK-PRODUCT DOCTRINE TO AUDIT LETTERS AND RELATED DOCUMENTS BASED UPON THE DECEMBER 7, 2006 TESTIMONY OF KENNETH H. ROBIN

Lead Plaintiffs and the Class respectfully move this Court for leave to file the Supplemental Declaration of Azra Z. Mehdi In Support Of the Class' Objection To The Magistrate's July 6, 2006 Order Regarding The Application Of The Work-Product Doctrine To Audit Letters And Related Documents Based Upon The December 7, 2006 Testimony of Kenneth H. Robin ("Supplemental Mehdi Declaration Regarding Audit Letters Objection" or "Mehdi Supp. Decl.").

By August 30, 2006, briefing on the Class' Objection To The Magistrate's July 6, 2006 Order Regarding The Application Of The Work-Product Doctrine To Audit Letters And Related Documents was complete. On December 7, 2006, the General Counsel for Household International, Inc. ("Household" or the "Company"), Kenneth H. Robin, was deposed. Mr. Robin's testimony and certain documents marked during his deposition further support the Class' position that audit letters created by a public company do not fall under the protection of the work product doctrine. Rather, according to the documents as well as Mr. Robin's testimony, the audit letters contain business and financial information of the Company. Additionally, on November 21, 2006, a third-party Promontory Financial Group ("Promontory") produced certain documents that further reinforce the Class' position. These documents demonstrate that Household provided annual audit letters to the Office of the Comptroller of the Currency ("OCC"), the Office of Thrift Supervision ("OTS"), as well as Promontory, and thus, dissemination of the audit letters was not limited only to outside auditors as Household has represented in its papers to the Magistrate and this Court. These documents are attached to the Mehdi Supp. Decl.

Pursuant to the October 10, 2006 Minute Order entered by the Magistrate Judge in this matter "instructing the clerk's office to accept all filings under seal in this matter, where the documents have been designated as confidential pursuant to the November 5, 2004 Protective Order," the Class does not hereby move separately pursuant to Local Rule 26.2 for leave to file the Supplemental Mehdi Declaration Regarding Audit Letters Objection as a restricted document. However, it is the

Class' position that Exhibits 1, 3 and 4 noted below are not confidential because they are merely cover letters to various parties. The Class does not currently take a position with respect to the confidentiality of Exhibit 2 subject to this Court's decision on the pending objection as well as any challenges to "confidentiality" designations of various documents at summary judgment and trial.

Specifically, the documents that the Class would like the Court to consider in connection with the Class' pending objection to the July 6, 2006 Order, are the following:

(1) Exhibit 1 Bates numbered HHS 03187270-71 is a March 1, 2002 letter from Mr. Robin to John F. Curtis of the OCC, which was marked as Exhibit 62 at the December 7, 2006 deposition of Mr. Robin. Exhibit 1 indicates that a copy of the annual audit letter regarding pending or threatened litigation against Household and its subsidiaries as of December 2001 was attached to the letter sent to the OCC. Notably, Mr. Robin's letter says nothing of the audit letter being privileged material or work product. Rather, Mr. Robin states that the "enclosed materials contain confidential business and financial information concerning Household." Mehdi Supp. Decl., Ex. 1 at HHS 03187270. Further, Mr. Robin testified that he could not recall if the 2001 annual audit letter was the only letter provided by Household to the OCC. It is, therefore, unclear if Household has provided the OCC (the OTS and Promontory, *see* Exs. 3 and 4) with copies of other annual audit letters.

(2) Exhibit 2 is a document bearing the Bates numbers KPMG 04313-52 produced by Arthur Andersen LLP ("Andersen") on August 20, 2004. This documents was marked as Exhibit 63 at the December 7, 2006 deposition of Mr. Robin. Exhibit 2 is a copy of that annual audit letter regarding pending and threatened litigation sent to the OCC. Mehdi Supp. Decl., Ex. 2. Although Household counsel objected at the deposition to the use of this document, neither Household nor Andersen have ever moved to have this document recalled and neither is it included in the documents that are the subject of the Magistrate's July 6, 2006 Order. As such, any privilege, if it

existed at all, has been waived. *See e.g., Trepanier v. Chamness*, No. 00 C 2393, 2005 U.S. Dist. LEXIS 23293, at **7-8 (N.D. Ill. Oct. 12, 2005) (disclosure of work product to a third party that is aligned with the party's adversary waives any privilege that might otherwise have existed); *Urban Outfitters, Inc. v. DPIC Cos.*, 203 F.R.D. 376, 380-81 (N.D. Ill. 2001) (the five factor balancing test "places responsibility for protecting the confidentiality of sensitive documents squarely on the party asserting the privilege" and the party who failed to take adequate measures to insure the confidentiality of its documents waived the privilege as to these documents); *MG Capital LLC v. Sullivan*, No. 01 C 5815, 2002 U.S. Dist. LEXIS 11803, at *10 (N.D. Ill. June 27, 2002) (failure to assert privilege for one month is unreasonable and favors waiver). Copies of the unreported cases are attached hereto as Tabs 1 and 2.

(3) Exhibit 3 is a document bearing the Bates numbers PFG001436 produced by third party Promontory. It is a March 1, 2002 letter by Mr. Robin to Richard M. Riccobono of the OTS with a copy of the 2001 annual audit letter, advising the OTS that the "enclosed materials contain confidential business and financial information concerning Household." This document further reinforces the Class' position that audit letters are not privileged and do not fall under the work product doctrine and that dissemination of the audit letters was not limited only to the Company's outside auditors.

(4) Exhibit 4 is a document bearing the Bates numbers PFG001434-35 produced by third party Promontory. It is a copy of Mr. Robin's March 1, 2002 letter to John Curtis of the OCC, attaching Household's audit letter, with Eugene Ludwig of Promontory being copied on the communication. This document was also produced by Promontory, again bolstering the Class' argument that audit letters are not work product, but rather business and financial information created for the purpose of the annual audit.

The four exhibits submitted above demonstrate as already extensively argued by the Class in its briefs before the Magistrate Judge as well as before this Court: (1) audit letters were part of the ordinary course of the audit process, and (2) even Household considered them to be business and financial information, that they shared with parties other than their auditors when necessary.

For the foregoing reasons, as well as the reasons outlined in prior briefing submitted by the Class, the Class respectfully submits that the Magistrate's July 6, 2006 Order holding that audit letters and related documents are privileged work product, is clear error and should be overturned.

DATED: December 11, 2006

Respectfully submitted,

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