

This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, “Household” or “Defendants”) in opposition to the “Supplemental Declaration of Azra Z. Mehdi in Support of the Class’ Objection to the Magistrate’s 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” (the “Mehdi Declaration”).

The Mehdi Declaration adds no credence to Plaintiffs’ position that audit letters should not be protected as attorney work product, as Magistrate Judge Nolan ruled in a detailed opinion dated July 6, 2006. *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, No. 02-C-5893, 237 F.R.D. 176 (N.D. Ill. 2006) (Nolan, M.J.) (the “July 6 Order”). Distilled, the Mehdi Declaration makes the following three points: (i) cover letters sent by Household to the Office of the Comptroller of the Currency (“OCC”) and Office of Thrift Supervision (“OTS”) stated that an enclosed December 2001 audit letter (which was stamped on its face “Confidential/Attorney Client Privilege/Attorney Work Product”) contained confidential business and financial information (Mehdi Decl. at Exhibits 1, 2, 3); (ii) Household shared a copy of the December 2001 audit letter with its agent, Promontory Financial Group (“Promontory”) (Mehdi Decl. at Exhibits 3, 4); and (iii) Plaintiffs chose to use a document at a deposition despite knowing it was protected as work product. (Mehdi Decl. at ¶4, Exhibit 2) None of these unremarkable points supports Plaintiffs’ Objection to the Magistrate’s Order Regarding the Application of the Work Product Doctrine to Audit Letters and Related Documents, or undermines the Magistrate Judge’s ruling.

A. THE WORDING OF A COVER LETTER DOES NOT NEGATE THE WORK PRODUCT PROTECTION AFFORDED A DOCUMENT

As Magistrate Judge Nolan stated, audit letters are protected as work product as they are documents that “only an attorney could have drafted” and which would not have been drafted “[i]n the absence of any pending or threatened litigation.” *Lawrence E. Jaffe Pension Plan*, 237 F.R.D. at 181-82. *See also, In re Honeywell International, Inc. Securities Litigation*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003); *Southern Scrap Material Co. v. Fleming*, No. Civ. A. 01-2554, 2003 WL 21474516, at *9 (E.D. La. June 18, 2003); *Tronitech, Inc. v. NCR Corp.*, 108 F.R.D. 655, 656 (S.D.

Ind. 1985). Indeed, after reviewing the letters in camera, it was evident to Magistrate Judge Nolan that, in drafting Household's audit letters, the "attorney clearly exercised judgment in assessing the potential liability for each case and in determining which matters and information to include in the report." *Lawrence E. Jaffe Pension Plan*, 237 F.R.D. at 182-83.

These conclusions are not undermined in the least by the fact that in providing a copy of a December 31, 2001 audit letter to federal bank regulators, Household stated that the "enclosed materials contain confidential business and financial information concerning Household" (*See Mehdi Decl. at Exhibit 1.*) Although this particular reference was not before the Magistrate Judge, the July 6 Order contains a detailed rejection of Plaintiffs' underlying premise that the supposed "dual purpose" of audit letters renders them ineligible for attorney work product protection. *See id.* at 179-183 and cases cited therein. That analysis applies with equal force to Plaintiffs' renewal of that argument here. Plaintiffs' further argument that the cover letter "says nothing of the audit letter being privileged or work product" is specious, as the enclosed December 31, 2001 audit letter on its face contains, in bold-faced type, the legend "**Attorney-Client Privilege/Attorney Work Product**". (*See Mehdi Decl. at ¶3; Exhibit 2.*)

Moreover, the manner in which Household disclosed the December 31, 2001 audit letter to the OTS and OCC show that Household made every effort to ensure that these documents were maintained confidentially, in accord with preserving its work product protection. *See Minnesota School Boards Ass'n Insurance Trust v. Employers Insurance Co. of Wausau*, 183 F.R.D. 627, 631-32 (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.'") (internal citations omitted) The cover letters to the OCC and OTS specifically state that Household intended the enclosed December 31, 2001 audit letter to be maintained in a confidential manner. *See Mehdi Decl. at Exhibits 1, 4* (" [REDACTED] ") (emphasis added); *Mehdi Decl. at Exhibit 3* (" [REDACTED] ")

[REDACTED]”) (emphasis added). Those regulations include 12 C.F.R. § 510.5, which precludes unauthorized disclosure of “unpublished OTS information”, 12 C.F.R. § 510.5(c)(4)(v), including “records created or obtained in connection with OTS’s performance of its responsibilities.” 12 C.F.R. § 510.5(a)(2). Similarly, in its cover letter to the OCC, Household invoked the protection of the confidentiality provisions that govern communications between the OCC and a regulated entity, including 12 C.F.R. § 4.32(b)(1)(i), (iii) (2006), which provides that “[a]ny person who discloses or uses non-public OCC information except as expressly permitted by the Comptroller of the Currency or as ordered by a Federal court . . . may be subject to the penalties provided in 18 U.S.C. § 641.”

Household’s disclosure of the audit letter to the federal regulators that supervised its banking operations was also implicitly protected by the qualified bank examiner privilege. *See, e.g., In re Subpoena Served Upon the Comptroller of the Currency, and the Secretary of the Board of Governors of the Federal Reserve System*, 967 F.2d 630, 634 (D.C. Cir. 1992) (“Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank about expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.”); *In re Bank One Securities Litigation*, 209 F.R.D. 418, 426 (N.D. Ill. 2002) (“The deliberative process privilege protects communications that are part of the decision-making process of a government agency. Since frank discussion of legal and policy matters is essential to the decision making process of a government agency, communications made prior to and as part of an agency determination are protected from disclosure.”) (citations and internal quotation marks omitted).

In short, Plaintiffs’ argument that Household regarded its audit letters, which are drafted by its legal department and reveal attorney’s mental impressions, conclusions, and theories about various actions threatened and pending against Household, as mere business documents because of the wording of two cover letters (enclosing one December 2001 audit letter) is entitled to no weight. Further, Household’s disclosure of that single audit letter to the OCC and OTS did nothing to waive the work product protection afforded that document because, as shown, that disclosure carried no perceived risk that the attorney work product embodied in that letter would be shared with

Household's adversaries. *See generally Wsol v. Fiduciary Management Assocs.*, No. 99 C 1719, 1999 WL 1129100, at *6 (N.D. Ill. Dec. 7, 1999) ("Disclosure of materials protected by the work product doctrine to a third party does not automatically waive the protection. For waiver, the disclosure must be to an adversary."); *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") (citations and internal quotation marks omitted) (emphasis added).

B. HOUSEHOLD'S SHARING OF THE AUDIT LETTERS WITH ITS AGENT PROMONTORY DID NOT WAIVE WORK PRODUCT PROTECTION

The fact the Household's agent, Promontory, was copied on or provided with the cover letters to the OTS and OCC (*see* Medhi Decl. at ¶¶ 6, 7) does not undermine the Magistrate Judge's conclusion that Household's audit letters were entitled to work product protection. Promontory served as a consultant to Household regarding certain matters before federal regulatory agencies. *See* Declaration of Janet A. Beer. In that capacity, Promontory obviously needed to see the information Household provided to these federal agencies. Household's provision to Promontory of the cover letters or a copy of the December 2001 audit letter does not begin to suggest that Household widely distributed this or any other audit letter, or in any other way treated them as not confidential. Further, as Promontory is Household's agent, disclosure of the audit letter to Promontory does not waive the work product protection. *See, e.g., Wsol v. Fiduciary Management Assocs.*, 1999 WL 1129100 at *6; *Smithkline Beecham Corp.* 2001 WL 1397876, at *3. Whatever inferences Plaintiffs would have this Court draw from Household's disclosure of a single audit letter to its agent are plainly inadequate to overcome the ruling that this document was properly withheld under the attorney work product doctrine.

C. KPMG'S PRODUCTION OF AN AUDIT LETTER DOES NOT CONSTITUTE A WAIVER

Plaintiffs should have returned document KPMG 04313-52, a document produced by counsel for third-party KPMG, not counsel for Household, to Defendants as soon as they discovered it in their possession, as they are fully aware of the privileged nature of this document. Document KPMG 04313-52 is an exact duplicate, down to the handwritten notes on the side, of the letter Ms. Mehdi herself attached as Exhibit 3 to her Declaration "In Support of the 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". That document, like all Household audit letters, has been deemed by the Magistrate Judge to be protected as work product. *See Lawrence E. Jaffe Pension Plan*, 237 F.R.D. 176. Further, the document on its face bears the legend "**Confidential/Attorney Client Privilege/Attorney Work Product.**" (*See* Mehdi Decl. at Exhibit 2) Nonetheless, Plaintiffs tried to introduce document KPMG 04313-52 at the December 7, 2006 deposition of Kenneth H. Robin. (Mehdi Decl. at ¶4). Plaintiffs' use of this document at a deposition, knowing full well that it is identical to a document that the Magistrate Judge has ruled is protected as work product, smacks of gamesmanship.

In addition, the third-party that produced this document, KPMG, was the successor to Arthur Andersen as Household's auditor. Accordingly, the Magistrate Judge's ruling that Household's disclosure of the document to Arthur Andersen did not constitute a waiver applies in equal force, based on the same rationale, to the disclosure of the same document to KPMG. *See* 237 F.R.D. 176 at 183-184; *Gutter v. E.I. Dupont de Nemours and Co.*, No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) ("Transmittal of documents to a company's outside auditors does not waive the work product privilege because such a disclosure cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs.") (citations and internal quotation marks omitted)

Furthermore, the use of document KPMG 04313-52 was challenged by counsel for Household as soon as it was presented at Mr. Robin's deposition. In addition, counsel for KPMG

sent a formal recall letter for this and similar documents on December 15, 2006. KPMG's possession or production of this document should therefore have no bearing on this Court's decision regarding Plaintiffs' Objection to the Magistrate's Order Regarding the Application of the Work Product Doctrine to Audit Letters and Related Documents.

In sum, nothing in the Medhi Declaration lends support to Plaintiffs' Objection, which should be overruled in full for the reasons stated herein, as well as in Defendants' Memorandum in Opposition to Plaintiffs' Objections to the Magistrate Judge's July 6, 2006 Order.

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