

**United States District Court, Northern District of Illinois**

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|---|---------------------------------------|---|-----------|
| <b>Name of Assigned Judge or Magistrate Judge</b> | Ronald A. Guzman                      | <b>Sitting Judge if Other than Assigned Judge</b> |           |
| <b>CASE NUMBER</b>                                | 02 C 5893                             | <b>DATE</b>                                       | 1/17/2007 |
| <b>CASE TITLE</b>                                 | Jaffe vs. Household Int'l Inc. et al. |   |           |

**DOCKET ENTRY TEXT**

For the reasons provided in this Minute Order, the Court rejects the class' objections to Magistrate Judge Nan R. Nolan's Memorandum Opinion and Order of 7/6/06 and adopts the ruling in its entirety. The Court grants Anderson's motion for the return of certain privileged documents that were inadvertently produced to plaintiffs during discovery [doc. no. 495] and denies the class' cross-motion to compel production of certain additional and allegedly related documents [doc. no. 518].

■ [ For further details see text below.]

Docketing to mail notices.

**STATEMENT**

Under Federal Rule of Civil Procedure 72(a) a magistrate judge "to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written Order setting forth the disposition of the matter." Fed. R. Civ. P. 72(a). Routine discovery motions are not dispositive. *Adkins v. Mid-Am. Growers, Inc.*, 143 F.R.D. 171, 175 n.3 (N.D. Ill. 1992). The Federal Rules of Civil Procedure grant magistrate judges broad discretion in resolving discovery disputes. *Heyman v. Beatrice Co.*, No. 89 C 7381, 1992 WL 245682, at \*2 (N.D. Ill. Sept. 23, 1992). A magistrate judge's ruling on a nondispositive matter may only be reversed on a finding that the ruling is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1).

The class argues that Magistrate Judge Nolan's finding that the Andersen and Household documents at issue are privileged as defined by Federal Rule of Civil Procedure 26(b)(3) is clearly erroneous or contrary to law. Having reviewed the documents that Andersen inadvertently disclosed ("the Andersen documents") and the discovery requested by the class ("requested discovery"), the Court disagrees.

Contrary to the class' assertions otherwise, Magistrate Judge Nolan's ruling regarding the Andersen documents and the requested discovery breaks no new ground. She applied the correct law to the instant facts. The long and short of it is that they were prepared because of pending or threatened litigation, and they evaluate Household's exposure to liability on a case-by-case basis. *See Logan Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th Cir. 1983). They were either prepared by counsel or memorialize counsel's opinion work product or qualified nonopinion work product. The fact that they were part of an audit or other examination does not remove the protection afforded the thought processes behind the evaluations obviously made by Household's attorneys because of pending litigation. *See United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir. 1998); *In*

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*re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003); *Tronitech, Inc. v. NCR Corp.*, 108 F.R.D. 655, 656 (S.D. Ind.1985); *Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. v. Alcoa Steamship Co.*, No. 04 Civ. 4309 LAKJCF, 2006 WL 278131, at \*2 (S.D.N.Y. Feb.2, 2006). *Cf. Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 515 (N.D. Ill. 2005) (“Applying a distinction between ‘anticipation of litigation’ and ‘business purposes’ is in this case artificial, unrealistic, and the line between is here essentially blurred to oblivion.”) (quotation omitted). The audit letters, related documents, and requested discovery clearly constitute work product. To the extent that any information is subject to a qualified privilege, the class has not objected to Magistrate Judge Nolan’s finding that the class failed to demonstrate a substantial need for the materials or that they would suffer hardship in obtaining the information some other way. Thus, the class has waived those issues.

Magistrate Judge Nolan did not err in holding that the work product doctrine may protect documents other than those created for the instant litigation with the opposing party seeking discovery. There is no binding authority for this proposition and Magistrate Judge Nolan was free to accept or reject persuasive authority as to this issue. The Court finds no error in her conclusion that the purpose behind the work product doctrine is best served by applying the work product privilege to subsequent litigation as well.

Next, the class argues that Magistrate Judge Nolan’s ruling that the work product privilege was not waived with respect to the December 2001 audit letter constituted clear error. Again, the Court disagrees. A “balancing test looks to five factors to determine if waiver has occurred: 1) the reasonableness of the precautions taken to protect the document; 2) the time taken to rectify the error; 3) the scope of discovery; 4) the extent of the disclosure; and 5) the overriding issue of fairness.” *Urban Outfitters, Inc. v. DPIC Cos., Inc.*, 203 F.R.D. 376, 380 (N.D. Ill. 2001).

The class points to the fact that the audit letter was provided to the Office of the Comptroller of the Currency and the Office of Thrift Supervision, which are two federal regulatory agencies, Promontory Financial Group, Household’s consultant regarding matters before these agencies, and KPMG, successor to Andersen as Household’s auditor. First, the record shows that Household took reasonable precautions to protect the audit letter when it disclosed it to these entities and the class does not argue that any of these entities were adversaries of Household. At all times, Household described the information as confidential or as attorney work product. Also, for the reasons discussed above, the fact that such disclosures were made does not remove the protections afforded the thought processes and evaluations by attorneys in assessing pending and threatened litigation against Household. This litigation involves millions and millions of documents, the production of the particular documents at issue was inadvertent, the delay in rectifying the error was reasonable and Household and KPMG are making a concerted effort to recall and secure the return of the audit report and related documents.

Next, the class argues that Magistrate Judge Nolan committed clear error when she held that Household’s litigation database was subject to the work product privilege and the privilege was not waived when Household shared it with its auditor. The database is a collection of attorneys’ mental impressions, conclusions, opinions, and strategies about each pending case involving Household and is maintained by its general counsel’s office in order to understand, manage, and render legal advice about each case. The database is clearly work product. Household took reasonable precautions to protect the database and only disclosed to its auditor the nature and existence of a particular sample of cases, which did not substantially increase the opportunity for potential adversaries to obtain Household’s work product. Due to the particular facts of the case before the Court, in the end, the overriding issue of fairness does not weigh in favor of compelling the discovery of Household’s database. Thus, the privilege has not been waived.

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Finally, the class argues that the magistrate judge clearly erred in ruling that Household's litigation reserve information constituted work product. The class argues that attorneys were not involved in the determination of the litigation reserves because Household listed only non-lawyers in response to the class' interrogatory asking for the names of those responsible for determining accounting treatment to address litigation risk. However, that attorneys were not involved in determining the proper accounting treatment does not mean that the litigation reserve estimates themselves do not reflect Household's attorneys' mental impressions, thoughts and conclusions about Household's probable liability in pending litigation. Accordingly, this argument does not carry the day for the class. In this case, the Court agrees with Magistrate Judge Nolan and finds, based on the affidavit of Marc F. Leopold, that the setting of the litigation reserve recommendations reflects the thoughts and conclusions of attorneys acting in their legal capacity in estimating the merits of the litigation involving Household. Based on the particular facts of this case, the class has failed to show that the reserve information is not synonymous with the thought processes of Household's counsel. To allow discovery of such reserves would enable the class to ask a jury to treat impermissibly internal assessments of Household's legal vulnerabilities as admissions of guilt as to the particular litigation it faced.

Accordingly, the Court rejects the class' objections and adopts Magistrate Judge Nolan's Memorandum Opinion and Order of July 6, 2006 in full.

