

**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-C5893  
(Consolidated)

CLASS ACTION

Judge Ronald A. Guzman

**DEFENDANTS' MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE ANY ARGUMENT THAT DEFENDANTS FULLY DISCLOSED ALL LITIGATION RISKS TO HOUSEHOLD'S OUTSIDE AUDITORS AND TO EXCLUDE ANY EVIDENCE OF OR REFERENCE TO THE ADEQUACY OF HOUSEHOLD'S CLASS PERIOD RESERVES**

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**(PLAINTIFFS' MOTION *IN LIMINE* NO. 5)**

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. (“Household” or the “Company”), William F. Aldinger, David A. Schoenholz and Gary Gilmer (collectively, “Defendants”),<sup>1</sup> in response to Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Motion *in Limine* to Exclude any Argument that Defendants Fully Disclosed All Litigation Risks to Household’s Outside Auditors and to Exclude any Evidence of or Reference to the Adequacy of Household’s Class Period Litigation Reserves (January 30, 2009) (“Pls.’ Mem.”). As described below, *Defendants consent to an Order precluding their introduction of or reliance on certain documents and opinions subject to work product protection that were withheld from Plaintiffs during discovery pursuant to Magistrate Judge Nolan’s Orders of July 6, 2006 and January 24, 2007.* A [Proposed] Order is attached to this memorandum at Exhibit A.

### **INTRODUCTION**

At first read, Plaintiffs’ Motion seems to ask the Court to do nothing more than enforce the well-settled legal principle that work product protection cannot be used as both a sword and a shield. Upon closer inspection, however, the deliberate ambiguity in Plaintiffs’

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<sup>1</sup> Defendants Joseph A. Vozar and Household Finance Corporation join in this opposition and expressly reserve the right to amend, supplement or re-assert objections to any future motions by Plaintiffs to exclude documents and testimony from any proceeding or submission.

drafting reveals Plaintiffs' real purpose, which is to force Defendants to sit silently while Plaintiffs present to the jury a version of reality very different from the one that actually existed. This motion is part and parcel of the way Plaintiffs apparently intend to attempt to prove their case — not by actually trying the facts, but by trying to prevent any facts that don't have a place in their alternate reality from making it into the courtroom.

Plaintiffs' varying formulations of relief, based solely on Defendants' having with Court approval withheld as work product a small set of litigation-related documents, include exclusion of any argument by Defendants that they:

- “fully disclosed to . . . outside auditors all potential risks stemming from the Company's deceptive lending practices . . . .” (Pls.' Mem. at 1.)
- “fully disclosed to Andersen and KPMG all information about Household's business model, its products, its financial results and the regulatory, legislative, political and litigation risks to which the Company was subjected.” (Pls.' Mem. at 2.)
- “fully disclosed all risks to Household's outside auditors . . . .” (Pls.' Mem. at 4.)

Premitting the fact that the fundamental thrust of Defendants' defense is that they fully disclosed all of this (and much more) *to the market*, and not simply to the auditors, Plaintiffs' misdirected statement that “despite withholding and retracting . . . critical work papers, defendants have stated that they intend to invoke an advice of auditor defense” is misleading. (Pls.' Mem. at 4.) This broad statement, and Plaintiffs' shifting formulations of relief, are

wholly unsupported by the narrow set of documents and information withheld from Plaintiffs as work product and upon which they otherwise appear to base their motion.

If Plaintiffs are requesting simply that Defendants be barred from introducing into evidence, or otherwise relying on at trial, documents and attorney opinions withheld from Plaintiffs as work product pursuant to Magistrate Judge Nolan's July 6, 2006 and January 24, 2007 Orders, Defendants have no objection and a [Proposed] Order to that effect is attached to this memorandum at Exhibit A for the Court's convenience. Magistrate Judge Nolan's Orders covered certain letters exchanged between Household's internal lawyers and its external auditors that discuss Household's exposure to liability on a case-by-case basis and related work papers, as well as information concerning Household's litigation reserve and its in-house litigation-tracking database (the "Litigation Documents"). *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 178 (N.D. Ill. 2006); Minute Order, *Jaffe v. Household Int'l, Inc.*, No. 02 Civ. 5893 (N.D. Ill. Jan. 24, 2007) (Nolan, M.J.) (Dkt. No. 931). Defendants do not disagree that these Litigation Documents cannot be used at trial. In fact, Defendants indicated long ago that they never intended to rely on them. *See, e.g.*, Household Defs.' Mem. of Law in Support of Arthur Andersen LLP's Mot. for the Return of Inadvertently Produced Privileged Docs. at 6, *Jaffe v. Household Int'l, Inc.*, No. 02 Civ. 5893 (N.D. Ill. May 12, 2006) (Dkt. No. 508) ("In addition,

Household asks the Court to order plaintiffs to return the documents to Andersen, as they are not relevant to this action.”).<sup>2</sup>

If, however, Plaintiffs’ Motion is an attempt to persuade the Court to go beyond these Litigation Documents to bar all references to reserves or to Household’s auditors or their work — as Plaintiffs vague formulations of relief and Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Motion *in Limine* to Exclude any Argument that Defendants Fully Disclosed All Litigation Risks to Household’s Outside Auditors and to Exclude any Evidence of or Reference to the Adequacy of Household’s Class Period Litigation Reserves seem to suggest — Plaintiffs’ motion must be denied.

Plaintiffs are very much aware of the importance of Household’s auditors to Defendants’ case, so a sneak attack on facts that contradict Plaintiffs’ theories and undermine their ability to meet their burden of proof comes as no surprise. Defendants’ auditor-related evidence, however, has nothing to do with the documents offering attorney opinion as to litigation on a

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<sup>2</sup> Plaintiffs cite one source for their speculation that Defendants intend to rely on these documents at trial: a preliminary jury instruction proposed by Defendants that states generally that each Defendant “denies having acted with ‘scier.’” (Pls.’ Mem. at 1) (citing Defendants’ Proposed Jury Instruction No. 1.06, Ex. I-3 to the [Proposed] Final Pretrial Order.) Plaintiffs cite nothing whatsoever in support of their speculation that Defendants intend to rely on Household’s litigation reserve data. (Pls.’ Mem. at 7-8.) This is not the first time Plaintiffs have based their arguments on unfounded speculation as to Defendants’ intent. See *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, 244 F.R.D. 412, 429 (N.D. Ill. 2006) (Nolan, M. J.) (in a separate dispute over privileged documents, disapproving of Plaintiffs’ unfounded allegations that Defendants intended to use the work-product doctrine as both a sword and shield).

case-by-case basis that were withheld with the Magistrate Judge's approval. For example, on August 14, 2002, Household publicly announced that it was restating its financial results for the years ended December 31, 1999, 2000 and 2001. The restatement was a response to certain issues raised by Household's newly engaged auditor KPMG LLC ("KPMG") related to Household's accounting treatment of its Mastercard/Visa co-branding and affinity credit card relationships and a credit card marketing agreement with a third party. The cumulative impact to Household's income and equity for the periods affected by the restatement (1994-June 30, 2002) was approximately \$386 million or an average of approximately \$45 million per year.

Plaintiffs' position (which amounts to one-third of their case) is that the restatement shows that Defendants "falsely reported results" by "overstating net income by failing to report timely expenses associated with various credit card agreements in violation of Generally Accepted Accounting Principles ("GAAP")." (*See* Pls.' Trial Br. at 1-2.) Defendants' position is that the restatement was nothing but the result of a good-faith difference of professional opinion between Household's former auditor (Arthur Andersen LLP, or "Andersen") and its new one (KPMG) about a complex and largely uncharted area of accounting. (*See* Defs.' Trial Br. at 27-29.) In fact, the auditors' difference of opinion as to the appropriate accounting treatment for Household's credit card agreements was the only issue that arose when KPMG performed a top-to-bottom re-audit of prior Andersen work upon KPMG's engagement. Of course, Defendants intend to present to the jury documents and information from and related to Andersen and KPMG, demonstrating that good faith difference of professional opinion.

The outside auditors also play a central role in this case with regard to the validity of Household's earnings and delinquency reports, which show the number of customers behind in their loan payments and how far behind they are. Evidence relating to the work of Household's outside auditors is equally important to understanding the comfort level that Household management derived from consistently receiving clean bills of health about Household's internal controls and the adequacy of its reserves in general. To the extent Plaintiffs' Motion is aimed at denying the jury this key evidence, the motion must be denied.

### **BACKGROUND**

On April 27, 2006, Andersen, Household's former outside auditor, moved for the return of litigation-related correspondence and memoranda that it had inadvertently produced to Plaintiffs during discovery on the ground that the papers contained attorney work product.<sup>3</sup> The papers consisted of (1) opinion letters summarizing pending and threatened litigation against Household and its subsidiaries, written by Household's general counsel; (2) internal Andersen memoranda to file based largely on the contents of the opinion letters; and (3) draft and final internal Household letters requesting and detailing the process of creating the opinion letters. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 178 (N.D. Ill. 2006)

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<sup>3</sup> All told, Andersen sought the return of 17 documents. Judge Nolan reviewed all the documents *in camera* before ruling that they were properly protected as attorney work product. *See Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, 237 F.R.D. 176, 182-83 (N.D. Ill. 2006).



(Nolan, M.J.). On May 12, 2006, Household filed a brief in support of Andersen's motion. (*See* Dkt. No. 508.)

Plaintiffs disputed that these documents were protected by the work-product doctrine. (*See* Dkt. No. 523.) Plaintiffs also cross-moved to compel production of documents concerning a litigation-tracking database maintained by Household's in-house Legal Department and the establishment and amounts of Household's litigation reserves. (*See* Dkt. No. 518.)

On July 6, 2006, Magistrate Judge Nolan held that the letters were entitled to work product protection and granted Andersen's request that they be returned to it. *See Jaffe*, 237 F.R.D. at 182-83 ("Having reviewed the letters *in camera*, the court rejects Plaintiffs' assertion that they do not disclose legal strategies or opinions. 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."). Magistrate Judge Nolan also held that the litigation database and litigation reserve information were entitled to work product protection. *Id.* at 185.

In 2002, KPMG replaced Andersen as Household's auditor. During the course of its document production to Plaintiffs, KPMG had inadvertently produced opinion letters similar to those produced by Andersen.<sup>4</sup> On January 24, 2007 Magistrate Judge Nolan held that those

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<sup>4</sup> KPMG sought to recall 36 opinion letters, seven of which were identical to those already covered by Magistrate Judge Nolan's July 6, 2006 Order.

opinion letters were within the scope of her July 6, 2006 Order and were therefore also subject to work product protection. *See* Minute Order, *Jaffe v. Household Int'l, Inc.*, No. 02 Civ. 5893 (N.D. Ill. Jan. 24, 2007) (Nolan, M.J.) (Dkt. No. 931).<sup>5</sup>

## ARGUMENT

### **I. DEFENDANTS DO NOT INTEND AT TRIAL TO RELY ON DOCUMENTS AND OPINIONS WITHHELD AS WORK PRODUCT**

As set forth above, Defendants made perfectly clear in their May 2006 brief in support of Andersen's attempt to recall certain litigation opinions and memoranda that those documents are irrelevant to this litigation. The documents "summarize pending and actually threatened litigation" on a micro level. *See Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 181 (N.D. Ill. 2006) (Nolan, M.J.). They analyze "Household's exposure to liability on a case-by-case basis." *See* Minute Order, *Jaffe v. Household Int'l, Inc.*, No. 02 Civ. 5893 (N.D. Ill. Jan. 17, 2007) (Guzman, J.) (Dkt. No. 923). To the extent that the documents may contain some "fact" as opposed to "opinion," Magistrate Judge Nolan ruled that

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<sup>5</sup> Magistrate Judge Nolan denied Plaintiffs request for reconsideration of her July 6, 2006 opinion and Order. (*See* Dkt. No. 931.) Plaintiffs filed with this Court an objection to the July 6, 2006 Order, and this Court overruled the objection and adopted Magistrate Judge Nolan's ruling in full. (*See* Dkt. No. 923.) Plaintiffs also requested that Magistrate Judge Nolan reconsider her January 24, 2007 opinion. (*See* Dkt. No. 946.) Magistrate Judge Nolan denied that request. (*See* Dkt. No. 1002.) Plaintiffs filed with this Court an objection to the January 24, 2007 Order, and this Court again overruled Plaintiffs' objection and adopted Magistrate Judge Nolan's ruling in full. (*See* Dkt. No. 1046.)

“Plaintiffs did not demonstrate “either a ‘substantial need for the materials [or] that [they] would suffer undue hardship in procuring the requested information another way.” *Jaffe*, 237 F.R.D. at 183 n.2.

Defendants’ position that these documents are irrelevant has not changed. Further, the KPMG documents are identical to the Andersen documents in nature and, in certain instances, in exact substance. *See* Minute Order, *Jaffe v. Household Int’l, Inc.*, No. 02 Civ. 5893 (Dkt. No. 931). In fact, all of the Litigation Documents are irrelevant in this action and Defendants do not intend to introduce or otherwise rely on them at trial. Because Defendants do not intend to use any of the Litigation Documents at trial, this motion may be resolved by the Court’s entry of the proposed Order attached to this memorandum at Exhibit A.

## **II. EXCLUSION OF ALL AUDITOR-RELATED DOCUMENTS AND REFERENCES TO RESERVES IS IMPERMISSIBLE**

Because their motion is so confusingly vague and broadly worded, however, there exists a very real possibility that Plaintiffs intend the motion not only as a straightforward request for the enforcement of the indisputable legal principle that claims of work product protection cannot be used as both a sword and a shield but as protective cover for a sweeping attempt to exclude Defendants’ key evidence *sub rosa*. There is no room for dispute that Defendants’ withholding of a small set of documents offering attorney opinion on a case-by-case basis and clearly held by Magistrate Judge Nolan to be work product does not preclude Defendants’ ability to rely on other fully disclosed advice and consultation with auditors.

Because the Andersen and KPMG documents reflected attorney opinions as to specific litigations, they were withheld. All other audit documents, facts and opinions are and always have been fair game. The “threshold determination” in the evaluation of the work product privilege is whether the documents were “prepared or obtained because of the prospect of litigation.” *Binks Manufacturing Co. v. National Presto Industries, Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1983) (analyzing 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Civil* §2024); Fed. R. Civ. P. 26(b)(3) (codifying *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). That is why these specific Andersen and KPMG documents were withheld — they were prepared because of litigation. That is why other audit information was not withheld — it was not prepared because of litigation.<sup>6</sup> The latter information is in no way rendered inadmissible at trial by Defendants’ invocation of privilege over the former, and it should not be allowed to fall within the sweep of Plaintiffs’ motion.

In fact, Plaintiffs’ own Exhibit List contains numerous documents related to KPMG’s opinion that Household should restate its financials after audits revealed KPMG’s professional disagreement with Andersen related to Household’s treatment of various credit card

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<sup>6</sup> Indeed, the numerous audit-related documents produced in this action by Household, KPMG, and Andersen were utilized by Plaintiffs in their depositions of two Arthur Andersen witnesses and two KPMG witnesses. (See, e.g., Long Dep. Tr. at 70-99 (Exhibit 46 to the Declaration of Thomas J. Kavalier in Opposition to Plaintiffs’ Motions *In Limine* Nos. 1, 3-10 (“Kavalier Decl.”)); Stephens Dep. Tr. at 168-87 (Kavalier Decl. Ex. 47); Keller Dep. Tr. at 35-40, 143-48, 186-90 (Kavalier Decl. Ex. 48); Bianucci Dep. Tr. at 87-94, 116-21 (Kavalier Decl. Ex. 49).)

agreements. *See e.g.*, P. Ex 1210 (HI KPMG 008614 – 008618, summarizing restatement decision for various credit card contracts (Kavaler Decl. Ex. 50)); P. Ex. 1211 (HI KPMG 016990 – 017002, discussing contracts relevant to the restatement (Kavaler Decl. Ex. 51)); P. Ex. 1212 (HI KPMG 017077 – 017090, same (Kavaler Decl. Ex. 52)); and P. Ex. 1213 (HI KPMG 017091 – 017104, same (Kavaler Decl. Ex. 53)). Presumably, Plaintiffs do not seek to exclude documents currently on their own Exhibit List.<sup>7</sup> Nevertheless, Defendants set forth their position as to documents like these out of an abundance of caution due to the vague nature of Plaintiffs’ motion. To the extent Plaintiffs’ motion requests exclusion of all documents or information related to Household’s auditors or its reserves, Plaintiffs’ motion must be denied.

Finally, in their repeated attempts to compel production of the KPMG and Andersen documents, Plaintiffs argued that those documents contained *factual* evidence that was highly probative of “falsity, scienter, and materiality.” (Dkt. No. 941.) To the extent that the documents contain “facts” as opposed to protected “opinions,” both this Court and Magistrate Judge Nolan held that Plaintiffs have not demonstrated either “a substantial need for the materials [or] that [they] would suffer undue hardship in procuring the requested information some other way.” Minute Order, *Jaffe v. Household Int’l, Inc.*, No. 02 Civ. 5893 (N.D. Ill. Mar. 5, 2007) (Nolan, M.J.) (Dkt. No. 1002). Consequently, any argument that Plaintiffs are prejudiced

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<sup>7</sup> Several of these exhibits are on Defendants’ exhibit list, as well.

by Defendants' introduction of facts contained in or related to those documents that also may be available to Plaintiffs elsewhere is specious.

**CONCLUSION**

On the flimsy pretext that certain Litigation Documents were properly protected from disclosure, Plaintiffs are asking the court to keep the jury in the dark about two sets of independent auditors' extensive and intensive review (and blessing) of Household's financial results, internal controls, and reserves in general. If this were to happen, the only audit-related documents the jury would see would be the cherry-picked, out-of-context set that Plaintiffs intend to use. Consequently, for the foregoing reasons, except as indicated by the proposed Order, the Court should deny Plaintiffs' Motion *in Limine* to Exclude any Argument that Defendants Fully Disclosed All Litigation Risks to Household's Outside Auditors and to Exclude any Evidence of or Reference to the Adequacy of Household's Class Period Litigation Reserves.

Dated: February 10, 2009  
New York, New York

Respectfully submitted,

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**EXHIBIT A**



**UNITED STATES DISTRICT COURT  
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	)	02 C 5893 (Consolidated)
Plaintiff,	)	
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- against -	)	Judge Ronald A. Guzmán
	)	
HOUSEHOLD INTERNATIONAL, INC., ET AL.,	)	
	)	
	)	
Defendants.	)	

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**[PROPOSED] ORDER**

Defendants shall not introduce into evidence or rely upon at trial any document or attorney opinion withheld from Plaintiffs during discovery pursuant to Magistrate Judge Nolan's Orders of July 6, 2006 and January 24, 2007.

SO ORDERED

ENTERED:

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HON. RONALD A. GUZMÁN

United States District Judge