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

HOUSEHOLD DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ARTHUR ANDERSEN LLP'S MOTION FOR THE RETURN OF INADVERTENTLY PRODUCED PRIVILEGED 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") in support of the Motion of Arthur Andersen LLP For Determination of the Court as to the Return of Privileged Documents Inadvertently Produced to Plaintiffs and to Set a Schedule for Further Briefing By the Parties, filed on April 27, 2006 (the "Andersen Motion").

INTRODUCTION

Defendants respectfully request that the Court order Lead Plaintiffs to return the following documents (the "Challenged Documents"),[1] all of which were inadvertently produced by Arthur Andersen ("Andersen"), Household's former outside auditor, in connection with this litigation (each document has been designated with a number for ease of reference):

1	AA059988-059993
2	AA059994-060007
3	AA060008-060047
4	AA16216-16219
5	AA036959-036966
6	KPMG03407-03440 (AA036967-037000)
7	AA060068-060069
8	AA058181-058214
9	AA058215-058229
10	AA058177-058179
11	AA049469-049473
12	AA049442-049468
13	AA058175-058176
14	AA042597-042603
15	AA042574-042596
16	AA049474-049476
17	AA049477-049478

As set forth in the Andersen Motion, Andersen and plaintiffs have exchanged correspondence regarding plaintiffs' refusal to return these documents, fundamentally disagreeing as to whether such

[1] If it would be helpful to the Court in considering this motion, Defendants will deliver a copy of these documents to the Court under seal for *in camera* inspection.

documents are protected from disclosure as attorney work product. The Challenged Documents consist of three categories of documents. Category One (Documents 2, 3, 5, 6, 8, 9, 11, 12, 14 and 15) consists of opinion letters written by Kenneth H. Robin, Esq., Household's Senior Vice President, General Counsel, and Corporate Secretary, to Andersen (the "General Counsel Opinion Letters"). These General Counsel Opinion Letters generally summarize the pending and threatened litigation and claims then outstanding against Household and its subsidiaries, indicate the estimated financial exposure to Household posed by such cases, and provide Robin's legal opinion as to Household's liability in these cases, if any. Category Two (Documents 1, 4, and 10) consists of internal Andersen memos written to its files, based largely on discussions with Robin and Mark Leopold, Esq., Household's Assistant General Counsel (currently Household's Deputy General Counsel-Litigation, Employment and Antitrust), and on the contents and issues contained in the General Counsel Opinion Letters described in Category One. Category Three (Documents 7, 13, 16 and 17) consists of draft and final internal Household letters, written by and/or to internal Household counsel, requesting and detailing the process for creating the General Counsel Opinion Letters contained in Category One.

As set forth below, all three of these categories are protected from disclosure as attorney work product. Thus, this Court should compel plaintiffs to return the Challenged Documents to Andersen.

ARGUMENT

The work product doctrine is recognized by Federal Rule of Civil Procedure 26(b)(3), which protects material "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 importance of protecting an attorney's work product has long been recognized by the Supreme Court, which in 1947 stated that "the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to estab-

lish adequate reasons to justify production through a subpoena or court order." *Hickman* v. *Taylor*, 329 U.S. 495, 512 (1947).

Even greater protection is given to opinion work product, which "includes counsel's mental impressions, conclusions, or legal theories," as opposed to ordinary work product, which "includes raw factual information." *Hollinger International Inc.* v. *Hollinger Inc.*, 230 F.R.D. 508, 511 (N.D. Ill. 2005) (Nolan, M.J.) (citations and internal quotation marks omitted). Courts only permit work-product privilege to be overcome upon a "showing of 'substantial need' and 'undue hardship,' but the courts are cautioned to give even greater protection to attorney opinions which include mental impressions, conclusions, or legal theories concerning prospective litigation." *National Jockey Club* v. *Ganassi*, No. 04 C 3743, 2006 WL 733549, at *1 (N.D. Ill. Mar. 22, 2006) (Nolan, M.J.) (citations omitted).[2]

1. This Court Should Hold That The General Counsel's Opinion Letters Are Protected As Work Product

The threshold issue for the Court is whether the General Counsel Opinion Letters constitute work product, *i.e.*, whether they were prepared "in anticipation of litigation or for trial." This precise question has not yet been decided by the Seventh Circuit, and case law is divided on this issue in other courts. However, the weight of authority, as well as the better reasoned authority, holds that such letters are protected as work product. Courts that have held that such letters are *not* work product have relied on an older, minority interpretation of the work product doctrine, which maintained that "[i]f the primary motivating purpose behind the creation of the document is not to assist in pending or impending litigation, then a finding that the document enjoys work product immunity is not mandated." *United States* v. *Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emerg. Ct. App. 1985).

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[2] An appendix of unreported cases is attached hereto at Exhibit A for the Court's convenience.

In contrast, the majority view of the work product doctrine, and the view adopted by the Seventh Circuit, is that work product is defined as any material prepared *because of* actual or potential litigation. *National Jockey Club*, 2006 WL 733549, at *1 ("The test for determining whether the work product doctrine protects materials from disclosure 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 or obtained *because of* the prospect of litigation.") (emphasis added) (citation and internal quotation marks omitted). *See also Logan* v. *Commercial Union Insurance Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996).

Courts, including one within this Circuit, have applied this majority interpretation of work product to determine that opinion letters from a general counsel to his client's outside auditor are protected as work product. In *Tronitech, Inc.* v. *NCR Corp.*, the Southern District of Indiana stated that

> "[a]n audit letter is not prepared in the ordinary course of business but rather arises only in the event of litigation. It is prepared because of the litigation, and it is comprised of the sum total of the attorney's conclusions and legal theories concerning that litigation. Consequently, it should be protected by the work product privilege."

Tronitech, Inc. v. *NCR Corp.*, 108 F.R.D. 655, 656 (S.D. Ind. 1985).

Similarly, in *Southern Scrap Material Co.* v. *Fleming*, the Eastern District of Louisiana held that "the work product doctrine clearly applies to the audit letters . . . . The documents were generated at the request of general counsel for Southern Scrap and set forth a summary of all ongoing litigation, as well as counsel's mental impressions, opinions, and litigation strategy." *Southern Scrap Material Co.* v. *Fleming*, No. Civ. A. 01-2554, 2003 WL 21474516, at *9 (E.D. La. June 18, 2003).

Further, the Southern District of New York has held that even an auditor's documents memorializing the client's audit letters, as well as the client's audit letters themselves, constitute work product. In *In re Honeywell International, Inc. Securities Litigation*, the Southern District of New York denied plaintiffs' motion to compel production of audit letters and litigation reports, stating that

"Honeywell's assertion of work product protection for its audit letters and litigation reports prepared by its internal and external counsel, *as well as PWC documents memorializing Honeywell's opinion work product*, is proper." *In re Honeywell International, Inc. Securities Litigation*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003) (emphasis added). In so holding, the court cited *United States* v. *Adlman*, in which the Second Circuit stated that "[t]he Wright & Miller 'because of' formulation accords with the plain language of Rule 26(b)(3) and the purposes underlying the work-product doctrine. Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision." *United States* v. *Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). The *Adlman* court also observed that, were it to utilize the narrower standard of work product, "documents assessing the strength and weakness of one's case, or the likelihood of settlement and its expected cost, would be unprotected if prepared for a business purpose rather than to assist in litigation. This result is unwarranted." *Id.*

Household urges this Court to adopt the reasoning set forth above, and hold that the Challenged Documents are protected as opinion work product. The Challenged Documents, as described above, reveal an attorney's mental impressions, conclusions, and theories about various actions threatened and pending against Household, as well as documents laying out the leg-work necessary to reach those conclusions. Categories One and Two of the Challenged Documents either are, or are based directly upon, counsel's interpretations of various actions pending or threatened against Household, and Household's exposure and potential liability in connection with such claims. Category Three consists of draft and final documents to and/or from counsel, intended to elicit information about pending or active litigation, on which Categories One and Two are based. Such documents only exist "because of" litigation pending against Household. This Court should protect such documents under the work product privilege.

2. Disclosure of the Challenged Documents to Outside Auditors Does Not Waive Work Product Protection

Household's disclosure of the Challenged Documents to Andersen does not waive work product protection. Courts that have found that audit letters are protected as work product have likewise also concluded that disclosure of those letters to the Company's outside auditors does not waive this protection as to opposing parties, a view that Household urges this Court to adopt.

The 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." *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.) (emphasis added). In that vein, several courts have found that, as an outside auditor is not considered an adversary to those that it is auditing, there is no waiver of work product when the company's audit letters are disclosed. In *Gutter* v. *E.I. Dupont de Nemours and Co.,* the Southern District of Florida stated that "[w]aiver of work product only occurs if the disclosure substantially increases the opportunity for potential adversaries to obtain the information. 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." *Gutter* v. *E.I. Dupont de Nemours and Co.,* No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) (citations and internal quotation marks omitted). Similarly, in *Gramm* v. *Horsehead Industries, Inc.*, the Southern District of New York found no waiver upon disclosure to auditors, stating that "disclosure to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver of protection of the rule." *Gramm* v. *Horsehead Industries, Inc.*, No. 87 Civ. 5122, 1990 WL 142404, at *5 (S.D.N.Y Jan. 25, 1990). *See also In re Pfizer Inc. Securities Litigation*, No. 90 Civ. 1260, 1993 WL 561125, at *6

(S.D.N.Y Dec. 23, 1993) (holding that the lawyers and independent auditors "obviously shared common interests in the information, and the [independent auditor] is not reasonably viewed as a conduit to a potential adversary. Therefore, no waiver of work product protection occurred by the provision of these documents to [the independent auditor]."); *Southern Scrap*, 2003 WL 21474516, at *9 (no waiver because disclosure of the audit letters to auditors is distinguishable from "those cases where a party deliberately disclosed work-product in order to obtain a tactical advantage or where a party made testimonial use of work-product and then attempted to invoke the work-product doctrine in order to avoid cross-examination"). Furthermore, in *Tronitech*, the Southern District of Indiana noted that there was no waiver upon disclosure of work product to auditors because "audit letters are produced under assurances of strictest confidentiality." *Tronitech,* 108 F.R.D. at 657.

Here, the work product embodied in the Challenged Documents was provided by Household to Andersen in confidence to assist Andersen in opining on Household's financial statements. Household provided these documents in confidence, and had no reasonable belief that the documents would end up in the hands of its adversaries. (Indeed, documents two and three (both in Category One) bear the legend "Confidential Attorney Client Privilege Attorney Work Product.") Under the reasoning articulated by this Court in *Beecham, supra*, Household's provision of the Challenged Documents to its non-adversarial outside auditors does not waive the work product protection as to opposing parties. Plaintiffs have neglected to demonstrate any "showing of 'substantial need' and 'undue hardship'" that might warrant the disclosure of its attorney's work product.[3] Household

[3] Nowhere in plaintiffs' three letters to Andersen did they articulate a substantial need, or even any need, for the Challenged Documents, or what hardship they would suffer should they be ordered to return the Challenged Documents. (Andersen Motion at Exhibits 2, 4 and 6). Indeed, Defendants are hard-pressed to see what need plaintiffs could have for said documents.

therefore respectfully requests the Court to order plaintiffs to return the documents to Andersen. *National Jockey Club*, 2006 WL 733549, at *1.

3. Relevance and Public Policy Concerns Further Mitigate Against The Production of the Challenged Documents

In addition, Household asks the Court to order plaintiffs to return the documents to Andersen, as they are not relevant to this action. As previously stated, the Challenged Documents are either Household's counsel's analysis of pending or threatened litigation against the company, Andersen's memos based largely on Household's counsel's analysis of pending or threatened litigation against the company, or documents which mechanically facilitate the creation of Household's counsel's letters. In *Tronitech*, in reviewing a similar document, the Northern District of Indiana stated that it had "reviewed the [audit letter] submitted in camera and determined that it did not contain any factual references which would be discoverable. Rather, it is precisely what it purports to be, an opinion. An attorney's opinion as to liability or settlement value of a case would not be admissible at trial." *Tronitech*, 108 F.R.D. at 655-656. The *Tronitech* court further noted that "the expression of such opinion would not be proper argument," citing to the ABA Model Code of Professional Responsibility, Disciplinary Rule 7-106(C)(4), and stated that "[n]either is there anything in this opinion which conceivably would lead to admissible evidence." *Tronitech*, 108 F.R.D. at 656.

Further, even if some relevance could be ascribed to the Challenged Documents, public policy reasons supporting the work product doctrine would outweigh any possible relevance. In *United States* v. *Arthur Young & Co.*, the court denied the government's petition for an order compelling Arthur Young and Company to produce documents including attorney opinion letters from its in-house and external counsel, as well as documents disclosing communications relating to those letters. *United States* v. *Arthur Young & Co,* No. 84-C-606-B, 1984 U.S. Dist. LEXIS 22991, at *11 (N.D.

Okla. Oct. 5, 1984). In so holding, the court discussed the public interest concerns protecting work product, and stated that

> "[t]he office of Federal Rule of Evidence 403 prevents the jury from receiving evidence, although relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. If some theory of relevance can be advanced concerning the documents under review, the Court would conclude its probative value is substantially outweighed by the danger of unfair prejudice and public interest concerns. Courts may deny discovery of information notwithstanding some claim of relevance when the balance of the benefit is outweighed by the harm to other interests."

Arthur Young, 1984 U.S. Dist. LEXIS 22991, at *11-*12.

Here, the Challenged Documents are not relevant. However, even if a putative relevancy argument could be concocted, such "relevance" would clearly be outweighed by the strong public policy underlying the work product doctrine. Thus, for these additional reasons, Defendants respectfully request the Court to order plaintiffs to return the Challenged Documents to Andersen.

CONCLUSION

Defendants respectfully request that Andersen's motion for the return of privileged documents inadvertently produced to plaintiffs be granted in its entirety, and respectfully request a ruling ordering plaintiffs to return the Challenged Documents to Andersen.

Dated: May 12, 2006
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Certificate of Service

I hereby certify that on May 12, 2006 I caused copies of the Household Defendants' Memorandum of Law In Support of Arthur Andersen LLP's Motion For the Return of Inadvertently Produced Privileged Documents to be served upon the following persons by electronic service and Federal Express.

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