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, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY IN SUPPORT OF THE CLASS' CROSS-MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS PROVIDED TO OUTSIDE AUDITORS BY HOUSEHOLD DEFENDANTS

I. INTRODUCTION

The Household Defendants ignore Seventh Circuit law, miscast cases decided by this Court, and import out-of-circuit law in an attempt to broaden the protection offered by the work-product doctrine. But the law in the Seventh Circuit is clear. The attorney work-product doctrine shields from discovery only those documents that were created for the purpose of being used in litigation against the party seeking discovery. *Mattenson v. Baxter Healthcare Corp*., 438 F.3d 763, 767-68 (7th Cir. 2006). The Disputed Documents are not work product.[1] Accordingly, all of the disputed documents must be produced promptly so depositions may proceed smoothly and the Class can complete fact discovery.

II. THE DISPUTED DOCUMENTS ARE NOT ATTORNEY WORK PRODUCT UNDER SEVENTH CIRCUIT LAW

To shield a document from discovery under the work-product doctrine, the party resisting discovery must show that the document was "prepared in anticipation of litigation" and that the document was created "for use in litigation" and not for a business purpose. *Mattenson*, 438 F.3d at 767-68; *United States v. Frederick*, 182 F.3d 496, 501-02 (7th Cir. 1999); *Binks Mfg. Co. v. National Presto Indus., Inc*., 709 F.2d 1109, 1118 (7th Cir. 1983). Moreover, Seventh Circuit law does not protect dual-purpose documents as work-product, even where one of those purposes is "for use in litigation." *Frederick*, 182 F.3d at 501-02.

"The burden is on the discovery opponent to establish that the work product doctrine immunizes the documents at issue from discovery." *Basf Aktiengesellschaft v. Reilly Indus*., 224 F.R.D. 438 (S.D. Ind. 2004). Unsupported assertions are insufficient to carry that burden,

[1] Plaintiffs herein use the terms Andersen Documents, Household Documents, and Disputed Documents as they were used in 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 ("Class Memorandum" or "Class Mem.") at 1.

particularly where the face of the documents themselves establishes that they were prepared in "the normal course of business" or "in connection with an examination of the financial statements." *See also* Mehdi Decl., Ex. 1 at AA 059988; Ex. 4 at AA16216; Ex. 8 at AA 060068; Ex. 10 at AA 058177; Ex. 13 at AA 058175; Ex. 16 at AA 049474; Ex. 17 at AA 069477.[2]

A. The Work-Product Doctrine Shields Only Materials Prepared for Use in Litigation and Does Not Protect Dual-Purpose Documents

Under Seventh Circuit law, only those materials "prepared in anticipation of litigation" are shielded from discovery as attorney work product. *Mattenson*, 438 F.3d at 767-68; *Binks*, 709 F.2d at 1118. The *Binks* court specifically adopted the holding that, for the work-product doctrine to apply, "a primary motivating factor behind creating the report must be to aid in litigation." 709 F.2d at 1119 (quoting with approval *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982)); *see also Caremark, Inc. v. Affiliated Computer Servs., Inc*., 195 F.R.D. 610, 615 (N.D. Ill. 2000) (quoting *Binks*, 709 F.2d at 1119). This Court has previously recognized and followed this holding. *National Jockey Club v. Ganassi*, No. 04 C 3743, 2006 WL 733549, at *2 (N.D. Ill. Mar. 22, 2006) ("the primary motivation behind the creation of the legal memorandum was to assist in determining whether to pursue litigation and to aid in possible future litigation").

The Seventh Circuit recently reaffirmed that it is the ***purpose*** for which a document is created that determines whether it is work product. In *Mattenson*, an employment discrimination case, the Seventh Circuit considered whether some notes written by an attorney were work product. 438 F.3d at 767-68. The notes were taken at a meeting between a lawyer and two of Charles Mattenson's

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[2] The Household Defendants have reiterated their perspective of meet and confer, which is to demand that the Class capitulate to their wishes. Household was not a participant in any of the discussions with Arthur Andersen LLP ("Andersen") counsel and despite the Court's April 28 Order, failed to initiate any discussions with Class counsel or to satisfy their burden of establishing privilege as to the Andersen or the other Disputed Documents. *See* Declaration of D. Cameron Baker Certifying Compliance with the Court's April 28, 2006 Order and Local Rule 37.2, ¶¶2-7.

supervisors regarding the procedures for and potential repercussions of disciplining Mattenson. The notes related to the risk that Mattenson would sue the company for discrimination, and described the perceived strengths and weaknesses of the potential case. *Id.* The court held that because the purpose for which the notes was created was litigation, the notes were therefore entitled to work product protection. *Id.*

Moreover, to be shielded from discovery in this Circuit, not only must documents have been created for use in litigation, they must not have been created for an additional purpose. *Frederick*, 182 F.3d at 501-02. In *Frederick*, the Seventh Circuit court examined certain documents that otherwise arguably qualified as work product, but the court held that the documents were discoverable because they were created for a non-litigation purpose (tax preparation) as well as "for use in litigation." *Id.* Under Seventh Circuit law on the work-product doctrine, "a dual-purpose document . . . is not privileged." *Id.*; *see also Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 661 (S.D. Ind. 1991)("Documents prepared for concurrent purposes, therefore, should not be classified as work product.").

Indeed, even one of the cases relied on by defendants, *SmithKline Beecham Corp. v. Pentech Pharms., Inc.*, No. 00 C 2855, 2001 WL 1397876 (N.D. Ill. Nov. 6, 2001), explains that the application of the work-product doctrine depends on the purpose for which the document was created: the party seeking to withhold documents "must demonstrate the documents in question were created ***for the purpose of litigation***, not in the ordinary course of business." *Id.* at *4 (emphasis in original). Where a company creates a document for "business reasons," it is not created "solely for the purpose of litigation," and is not entitled to work-product protection. *Id.*

The Disputed Documents here were created for a business purpose, not for use in litigation. The Andersen Documents and the similar Household Documents (the challenged documents listed in Household International, Inc.'s ("Household" or the "Company") privilege log) were prepared for

the business purpose of preparing financial reports, as stated on the face of the Andersen Documents. *See* Class Mem. at 4-8, 10-12. The letter that starts off the cycle of audit letters each year begins: "In connection with an examination of the financial statements of Household International, Inc. and subsidiaries at December 31, 2001 and for the year then ended, please furnish to our independent auditors . . . ." *See* Mehdi Decl., Ex. 8 at AA 060068; Ex. 13 at AA 058175; Ex. 17 at AA 049477; *see also* Mehdi Decl., Ex. 16 at AA 049474.[3]

Defendants do not deny that the audit letters (and related documents) were created for a business purpose. Rather, they admit that "Household had a ***business reason*** to cooperate with its outside auditors" by creating the documents and providing them to the auditors. Defs' Opp. at 7.[4] Under the law of this Circuit, by Household's own admission, the documents are not entitled to work-product protection. *Frederick*, 182 F.3d at 501-02; *see also SmithKline Beecham*, 2001 WL 1397876, at *4.

Besides there being a business reason for the creation of these documents, which itself is fatal to the work-product assertion, defendants have made no showing that the documents were "to aid in litigation" or "for use in litigation." *See Binks*, 709 F.2d at 1118 (work-product doctrine protects documents created "to aid in litigation"); *National Jockey Club*, 2006 WL 733549, at *2 (protecting documents created "to assist in determining whether to pursue litigation and to aid in possible future litigation"); *cf. Frederick*, 182 F.3d at 501 (noting that dual-purpose documents are not protected

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[3] "Mehdi Decl." refers to the Declaration of Azra Z. Mehdi in Support of the Class Response to 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.

[4] "Defs' Opp." refers to the Household Defendants' Reply Memorandum of Law in Support of Arthur Andersen LLP's Motion for the Return of Inadvertently Produced Privileged Documents and Partial Response to Plaintiffs' Cross Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household. (All emphasis is added unless otherwise noted.)

even if one of the purposes is "for use in litigation"). There is nothing about the audit letters that suggests that defendants intended to or even could use them in their preparation for any of the litigation discussed in them.

Nor were the documents sought through Document Request Nos. 17 and 18 created in anticipation of litigation.[5] Document Request No. 17 seeks the parts of Household's litigation database that detail class actions or actions brought by governmental agencies for violations of consumer protection laws and regulations.

A database setting forth, for every actual or threatened claim or action, the "date of the claim, summary of the claim, the amount of damages sought by the defendant, external counsel assigned to the case and the current status" is not something "for use" in any particular litigation. *See* Mehdi Decl., Ex. 1 at AA 059988. Rather, it is a management tool for a company that "[i]n the normal course of business [ ] is involved in certain pending or threatened litigation." *Id*. As described by Danielle Valkner of Andersen, Household had standard procedures for how the database was maintained and how, when and by whom information was added. *Id*. The description of the database by Ms. Valkner belies Household's statement that the database and litigation reserve documents were not shown to Andersen, as does the description of the review process in the same document. The 2001 Litigation Review, drafted by the Andersen employee, states that Andersen "review[ed] a sample of cases from the legal database to ensure completeness." Mehdi Decl., Ex. 1

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[5] Defendants argue that the Class Memorandum does not address Document Request Nos. 17 and 18. Plaintiffs necessarily have less information about the documents neither produced nor logged and thus can provide less specific information about the documents responsive to these requests. Nonetheless, plaintiffs stated that these documents made up one part of the Household Documents and Disputed Documents. Class Mem. at 1-2. Throughout the brief, plaintiffs made arguments about the Household Documents and the Disputed Documents. Plaintiffs also specifically noted that the documents in the litigation database reviewed by the auditors and the documents relating to litigation reserves were part of underlying factual support for the audit letters. *Id*. at 4. Finally, plaintiffs specifically stated that the same arguments apply to these documents as to the audit letters produced by Andersen and withheld by Household. *Id*. at 2 n.2.

at AA 059988-89. The same document states that Andersen "reviewed the responses provided by external counsel and compared information such as defendant, description of claim and opinion as to potential outcome and damages to the legal representation letter provided by [Household]." *Id*. at AA 059988. The document goes on to explain that, based on its review of all this information, Andersen "believe[s] the litigation reserves recorded as of December 31, 2001 are reasonable." *Id*. at AA 059989; *see also* Mehdi Decl., Ex. 4 at AA16216; Ex. 10 at AA 058177. The same document then states the reserves and declares: "Management believes the Company has adequately reserved . . . ." Mehdi Decl., Ex. 1 at AA 059992; *see also* Mehdi Decl., Ex. 2 at AA 059998; Ex. 3 at AA 060009-47(noting reserves for specific cases).

Thus, the database was used by Household for the business purpose of drafting the audit letters to the auditors and providing evidential support to the auditors. Because the database was created and maintained for a business purpose, and because it was used in the audit process, it is not work product. *Frederick*, 182 F.3d at 501-02; *SmithKline Beecham*, 2001 WL 1397876, at *4.

The same is true of the documents sought through Document Request No. 18, documents relating to litigation reserves. Although the money reserved for litigation is certainly for use in litigation, the facts of the establishment and amount of the reserves are not. *National Union Fire Ins. Co. v. Continental Illinois Group*, No. 85 C 7080, 1988 U.S. Dist. LEXIS 7826, at **4-5 (N.D. Ill. July 22, 1988) (granting plaintiff's motion to compel information related to litigation reserves). Litigation reserves are an accounting tool to attempt to ensure that there is adequate money put aside so that the financial statements will be materially accurate, regardless of the outcome of the litigation. Thus, defendants' procedures for setting litigation reserves are not privileged as work product because "the setting of the reserve was not identical with the thought processes of counsel." *Id*. at **5-6. Again, this is for the business purpose of having accurate financial statements, not "for use in litigation." *See Frederick*, 182 F.3d at 501-02.

B. The Work-Product Doctrine Protects Only Those Documents Prepared for Use in Litigation with the Party Seeking the Documents

Under Seventh Circuit law, not only must the documents have been created for use in litigation to be entitled to protection as work product, they must have been created for use in litigation ***against the particular opponent seeking discovery***. *Mattenson*, 438 F.3d at 767-68; *see also Ferguson v. Lurie*, 139 F.R.D. 362, 368 (N.D. Ill. 1991) ("The work product doctrine does not apply here because . . . the two documents in question were not prepared in contemplation of the present litigation."). The *Mattenson* court highlighted that the work-product doctrine protects only those documents created in anticipation of the litigation with the party seeking their production. 438 F.3d at 767-68 ("the work-product doctrine shields materials that are prepared in anticipation of litigation from the opposing party"). In fact, the court specifically added the phrase "by one's opponent" to a quote of the work-product rule in Rule 26(b)(3) of the Federal Rules of Civil Procedure. *Id*. at 768.

Similarly the *SmithKline Beecham* court distinguished between documents that were not properly considered work product and similar documents that were created when "litigation with '***this particular opposing party***' was anticipated." 2001 WL 1397876, at *4 (citation omitted). Only the latter group was entitled to protection. *Id*.

Another case relied on heavily by defendants and Andersen is *Tronitech, Inc. v. NCR Corp*., 108 F.R.D. 655 (S.D. Ind. 1985). In *Tronitech*, a company's accounting firm asked the company's lawyer "to prepare a legal opinion concerning the financial implications of ***this [Tronitech's] law suit***." *Id*. The court found that the opinion was a document "prepared because of ***the litigation***, and it is comprised of the sum total of the attorney's conclusions and legal theories concerning ***that litigation***." *Id*. at 656. This holding is consistent with the Seventh Circuit reasoning that only those documents prepared for litigation against the opponent seeking production implicate the interest of

preventing an opponent from gaining insight into the strategy of the opposing party. *See Mattenson*, 438 F.3d at 767-68.

There is no indication that the Disputed Documents were created in anticipation of this securities fraud litigation with this class of shareholders or even any other litigation with its shareholders. At the time the audit letters were created, the shareholders had not brought suit and there was no indication that they might. *Cf. id*. at 768 (protecting notes created in meeting where attorney learned of possibility that plaintiff might sue); *see also SmithKline Beecham*, 2001 WL 1397876, at *4 (distinguishing between documents created prior to reasonable anticipation of suit by plaintiffs and those created after suit by plaintiff was anticipated). The audit letters that have been produced do not mention the securities litigation or any risk thereof.

As to the database, even if it had been created to aid in litigation, only one entry on the database – the entry relating to this case – would properly be protected under the work-product doctrine. *See Mattenson*, 438 F.3d at 767-68. Similarly, as with the audit letters and the database, very few of the documents discussing the establishment and amount of litigation reserves will discuss litigation reserves for this litigation against the party now seeking discovery. Under *Mattenson* only information about the litigation reserves for this particular case are protected. *See id*. Notably, the cases relied on by defendants show only that litigation reserves for the case in which they are sought are sometimes protected from discovery. *See Certain Underwriters at Lloyd's v. Fidelity & Cas. Ins. Co. of New York*, No. 89 C 876, 1998 U.S. Dist. LEXIS 3654, at **5-6 (N.D. Ill. Mar. 20, 1998) (noting that analysis must be done on case-by-case basis and redacting reserves calculated for that case); *Harper*, 138 F.R.D. at 675 (redacting reserves taken for that case). Notably, defendants fail to inform the Court of the *National Union* case where litigation reserves and the procedures for setting up such reserves were found by Judge Lefkow not to be work product. 1988 U.S. Dist. LEXIS 7826.

Because the Seventh Circuit protects as work product those documents created only for use in litigation against the particular opponent, none of the documents the Class has challenged is entitled to protection from discovery.

C. Seventh Circuit Work-Product Protection Has Narrowed, Not Broadened, Since *Binks*

Defendants attempt to persuade the Court that the definition of work product in the Seventh Circuit is not the one set forth in *Binks*, but a broader "because of actual or potential litigation" standard. Defs' Opp. at 5. The only Seventh Circuit opinion defendants cite to support their proposition that "because of" litigation means something different than "prepared in anticipation of litigation" is *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996).[6] But, as discussed in the Class Memorandum, *Logan* relied on *Binks* and did not distinguish between these two standards because the documents at issue squarely fit within either phrasing of the work-product doctrine. Moreover, in the time since *Logan*, most recently in February 2006, the Seventh Circuit has confirmed its earlier standard: prepared in anticipation of litigation means "prepared in anticipation of litigation from the opposing party." *Mattenson*, 438 F.3d at 767-68; *see also Frederick*, 182 F.3d at 501-02 (finding no work-product protection where a document was created

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[6] Household's reliance on *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), and its progeny, is misplaced. In *Adlman*, the Second Circuit explicitly rejected an interpretation of work product that requires that the "'primary motivating purpose behind the creation of the document was to aid in possible future litigation.'" *Id.* at 1198 (citation omitted). The Seventh Circuit, however, has repeatedly stated that having a motivating purpose (if not the motivating purpose) of assisting in litigation is a requirement for work-product protection. *Binks*, 709 F.2d at 1119; *Frederick*, 182 F.3d at 501-02; *see also SmithKline Beecham*, 2001 WL 1397876, at *4.

Similarly, Household's rejection of *Medinol, Ltd. v. Boston Sci. Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002), is invalid. As explained by Household, *Medinol* has been criticized for not following *Adlman*. However, the analysis set out by *Adlman* is not the one adopted and elucidated by the Seventh Circuit. The *Medinol* opinion is persuasive authority setting out a clean roadmap for deciding cases involving audit work-papers under the purpose-based test of the Seventh Circuit.

for a purpose other than litigation). *Logan* fits within this standard. 96 F.3d at 977 (upholding work-product protection for documents written "after Logan had already filed suit").

Indeed, the scope of the protection in the Seventh Circuit has narrowed since *Binks*, not widened. In *Binks*, all that was required for a document to be entitled to protection under the work-product doctrine was that aiding in litigation was "a primary motivating factor" in the document's creation, suggesting that the doctrine might protect dual-purpose documents. 709 F.2d at 1119. Under *Frederick*, if a document was created "for use in litigation" and for a business purpose, it is not protected from discovery. 182 F.3d at 501-02; *see also SmithKline Beecham*, 2001 WL 1397876, at *4 (finding documents created for a business purpose "were not created for litigation, no matter how likely it was that [the opposing party] would pursue litigation"). In *Mattenson*, the Seventh Circuit clarified yet another limiting factor, that the litigation for which a document was prepared must be litigation against the opponent seeking discovery of the document. 438 F.3d at 767-68.

Logan was not a repudiation of *Binks*. It was simply an application of the facts as required by a consistent, but narrowing, line of cases. *Mattenson*, 438 F.3d at 767-68; *Frederick*, 182 F.3d at 501-02; *Logan*, 96 F.3d at 977; *Binks*, 709 F.2d at 1119. In the Seventh Circuit, the work-product doctrine protects only those documents that are "prepared in anticipation of litigation from the opposing party." *Mattenson*, 438 F.3d at 767-68.

III. THE DISPUTED DOCUMENTS ARE RELEVANT

As this Court has previously recognized, the standard for relevance in discovery is broad. *See Deitchman v. E.R. Squibb & Sons, Inc*., 740 F.2d 556, 566 (7th Cir. 1984). Evidence is relevant if it tends logically to prove or disprove some fact in a case. *Collins v. Old Ben Coal Co*., 861 F.2d 481, 490 (7th Cir. 1988). To be discoverable, evidence need only be reasonably calculated to lead to admissible evidence. *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 930 (7th Cir. 2004).

Here, the Disputed Documents are relevant. As stated in the Class Memorandum, the documents are relevant to all the elements of securities fraud, particularly falsity and scienter. Additionally, they are relevant to the underlying facts that Household's business model required predatory lending practices. These practices led to the multistate Attorney General settlement forcing the Company to take a $525 million charge to Household's financials. Such facts relating to the litigation risks associated with Household's business model and the lack of disclosures of that risk are unquestionably relevant to securities fraud claims against defendants.

First, the documents are relevant for what they affirmatively state. The letters produced by Andersen describe numerous lawsuits against Household for predatory lending practices, many of which settled. Such statements tend to prove that Household was engaged in predatory lending practices and that consumers considered Household's lending practices to be predatory. Additionally, the documents tend to prove that Household was aware of the legal risks associated with its lending practices.

Second, and more importantly, the Disputed Documents are relevant for what they do not state. For example, in the fall of 2000 and continuing through 2001, there were numerous demonstrations at Household branches by the community housing organization, ACORN, and ACORN and Household were engaged in negotiations over Household's predatory lending practices. *See* Morris Decl., Exs. E-H.[7] ACORN brought a suit against Household for its predatory lending practices on February 6, 2002. But, again, there is no mention of ACORN in the January 2002 audit letters. *See* Mehdi Decl., Exs. 1-3.

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[7] "Morris Decl." refers to the Declaration of Maria V. Morris in Support of Reply in Support of the Class' Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants.

Further, in November 2001, a nationwide class action was filed against Household, *Cross v. Beneficial Ohio, Inc., et al*. This class action alleged numerous predatory lending practices sought, among other things, damages totaling the amount of all finance charges and fees paid. The description of this litigation, the fifteenth entry under "Other Purported Class Action Cases," gives no indication that it involved such massive amounts of damages. *See* Mehdi Decl., Ex. 3 at AA 060021. This litigation was eventually consolidated with the ACORN litigation, along with eight other cases. From the description of the "Various Class Actions" in Arthur Andersen's 2001 Litigation Review for Household, it is clear that Andersen did not have information regarding the severity of the litigation threat to Household. *See* Mehdi Decl., Ex. 1 at AA 059992.

Similarly, the Disputed Documents ignore or gloss over the investigations by regulators regarding Household's predatory lending practices. Household was responding to large numbers of complaints from regulators throughout the period covered by the audit letters. *See, e.g.*, Morris Decl., Exs. A-E (documenting complaints from regulators). Indeed, the complaints from the regulators were the precursor to the action by the multistate Attorney General group that resulted in a $484 million settlement. Yet, most of the complaints and investigations by the regulators appear nowhere on the audit letters. *See* Mehdi Decl., Exs. 1-16. Even where the complaints had reached the point that defendants had sent a draft settlement agreement to the Minnesota Department of Commerce on January 11, 2002, their January 14, 2002 letter to their auditor indicated that it was too early to express an opinion of liability. *Compare* Morris Decl., C *to* Mehdi Decl., Ex. 3.

These documents tend to prove that Household was not providing complete information to its auditors. This calls into question whether the auditors could adequately assess whether Household had sufficient litigation reserves, and thus whether Household should have been receiving and publishing unqualified audit opinions during the Class Period (July 30, 1999-October 11, 2002). An inability to provide an unqualified audit opinion would likely have required different disclosures to

Class members and invariably impacted Household's stock price. The withholding of information from the auditors is also relevant to defendants' scienter.

Similarly, the database, as described by Andersen employee Danielle Valkner, is relevant in that it shows the types of actions against Household, as well as defendants' knowledge of the allegations against the Company. Again, such facts tend to prove that Household was engaged in predatory lending and that it was aware that its practices would subject it to lawsuits. Such facts in turn are relevant to the question whether Household's public financial statements, including the publicly stated litigation reserves, were knowingly false.

Additionally, the database is relevant because it shows when defendants became aware of different actual and threatened claims against the Company relating to its use of improper sales techniques. There are several serious issues of spoliation in this case. As this Court is aware, defendants have acknowledged the loss of Housemail and Lotus Notes' email files. The database will help show whether defendants were on notice of litigation that would have triggered the obligation to save such files and other documentary evidence that has been destroyed. *See, e.g.*, *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102, 112 (E.D. Pa. 2005) (granting adverse inference where defendant destroyed potentially discoverable evidence after receiving notice of filing of an action); *Keck v. Union Bank of Switzerland*, 94 Civ. 4912 (AGS) (JCF), 1997 U.S. Dist. LEXIS 10578 (S.D.N.Y. July 22, 1997) (information relating to defendants' role in the destruction of evidence would affect their credibility at trial and could be the basis for the imposition of sanctions, including invocation of an adverse inference that the evidence would have been damaging to defendants' case).

Finally, the documents relating to the establishment and amounts of litigation reserves are also directly relevant to the questions whether Household's reserves were in fact as they were represented and whether defendants knew that the reserves they had established were inadequate.

IV. ANY PRIVILEGE FOR THE ANDERSEN DOCUMENTS AND THE SIMILAR HOUSEHOLD DOCUMENTS HAS BEEN WAIVED BY HOUSEHOLD'S INACTION

Defendants waived any privilege that may have attached to any of the documents produced by Andersen and to any copies or originals of the same documents that have been withheld by Household. Household does not deny that it knew that Andersen produced the documents from the time of production, starting in August 2004 and continuing through December 2005. *See* Defs' Opp. at 11; *see also* Ex. A, attached hereto. Yet defendants did nothing to protect those documents. Even after January 31, 2006, when Andersen first raised the issue in a letter to plaintiffs, copied to Household, Household did nothing. Household did not participate in the discussions regarding whether the documents should be returned, and did not, itself, move to assert its purported privilege in any way. Indeed, defendants have developed a pattern of inaction until the Class has relied upon previously produced documents in its analysis and issued further discovery (subpoenas or deposition notices), belatedly asserting privilege to stall the progress of this litigation.[8]

Under each of the factors for determining waiver, Andersen's actions support a finding of waiver. *See* Class Mem. at 12. Defendants' total inaction in the face of Andersen's failure to protect any privilege that may have applied – for nearly two years after the first purportedly privileged document was produced, sixteen months after most were produced, and three months after the issue was specifically raised by Andersen – weighs heavily for waiver. *See Urban Outfitters, Inc. v. DPIC Cos*., 203 F.R.D. 376, 380 (N.D. Ill. 2001). Defendants' failure to do anything to seek the return of the documents cannot be deemed a reasonable precaution taken to protect the documents. Further, as

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[8] A recent example was defendants' belated assertion of privilege over documents related to regulatory agencies. This issue ate up almost six months in this litigation. Similarly, defendants continue to refuse to give Class counsel a "heads up" regarding the discovery privileged documents prior to a witness' deposition despite the Court's explicit instructions at the May 11 Status Conference, instead asserting privileged documents for the first time during depositions.

discussed in the Class Memorandum, defendants knew that the disclosure of these documents was a complete disclosure. Finally, as to the fairness factor, again, defendants' lengthy delay while plaintiffs incorporated these documents into their case strategy weighs in favor of waiver.

V. CONCLUSION

For the foregoing reasons and the reasons set forth in the Class Memorandum and supporting declarations, Arthur Andersen's and Household's Motion to Compel the Return of Documents should be denied and the Class' Cross-Motion to Compel the Production of Household Documents should be granted.

DATED: June 23, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on June 23, 2006, declarant served by electronic mail and by U.S. Mail the **REPLY IN SUPPORT OF THE CLASS' CROSS-MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS PROVIDED TO OUTSIDE AUDITORS BY HOUSEHOLD DEFENDANTS** to the parties listed on the attached Service List. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of June, 2006, at San Francisco, California.

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