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 Magistrate Judge Nan R. Nolan

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S JULY 6, 2006 ORDER

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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 opposition to Plaintiffs' Objections to Magistrate Judge Nolan's annexed July 6, 2006 Order regarding the application of the work product doctrine to audit letters and related documents (the "July 6 Order").

PRELIMINARY STATEMENT

On July 6, 2006, Magistrate Judge Nolan issued an Order granting the motion of Arthur Andersen LLP ("Andersen"), Household's former outside auditor, for the return of privileged documents inadvertently produced to Plaintiffs, and denying Plaintiffs' cross-motion to compel production by Household of certain additional and purportedly related documents listed on Household's privilege log. The dispute centered around three categories of documents: (1) audit letters and related workpapers prepared by Household's counsel that reveal attorneys' mental impressions, conclusions, summaries and theories about various threatened or pending actions against Household; (2) Household's litigation database, in which Household's Office of General Counsel systematically recorded the substantive evaluations and strategic recommendations of the attorneys responsible for particular legal actions; and (3) documents reflecting counsel's advice about the establishment or amount of Household's litigation reserves during the Class Period. In the July 6 Order, following extensive briefing and an *in camera* review, Magistrate Judge Nolan held that all of the disputed documents were protected from disclosure pursuant to the attorney work product doctrine.

As if this were a *de novo* review, Plaintiffs' Objections to the July 6 Order reiterate the inapposite cases and flawed arguments that Magistrate Judge Nolan considered in detail

and rejected. Plaintiffs have not shown Judge Nolan's careful application of governing law to the specific documents at issue to be erroneous in any respect.[1]

JUDGE NOLAN'S JULY 6 ORDER

In her July 6 Order, Judge Nolan granted Andersen's motion and denied Plaintiffs' cross motion on the grounds that the specific documents under review were entitled to protection as attorney work product. In so ruling, Judge Nolan recognized that the test for distinguishing between work product and material produced in the ordinary course of business is "'whether in light of the factual context 'the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation.'" July 6 Order at 6, quoting *Logan* v. *Commercial Union Insurance Co*., 96 F.3d 971, 976-77 (7th Cir. 1996), quoting *Binks Manufacturing Co.* v. *National Presto Industries, Inc*., 709 F.2d 1109, 1119 (7th Cir. 1983) (emphasis in original). Judge Nolan rejected Plaintiffs' argument that work product protection applies only if the primary motivating purpose for creating the document is to "'aid in litigation' [as] overly narrow and contrary to the principles underlying the work product doctrine." July 6 Order at 6. On this basis Judge Nolan declined to find that the subject audit letters were "mere business documents," noting that the letters would not have been created "in the absence of any pending or threatened litigation . . . ." *Id.* at 7.

[1] Defendants' silence on Plaintiffs' description of the alleged merits of their claims should not be taken as agreement. For purposes of Plaintiffs' Objections, the key point is that Plaintiffs have not contested Magistrate Judge Nolan's correct finding that Plaintiffs have not demonstrated a lack of alternative sources for any facts that may be incorporated in the protected work product. *See* July 6 Order at 9-10 & n.2.

Judge Nolan noted that although the Court of Appeals for the Seventh Circuit had not directly decided whether audit letters are entitled to protection from disclosure as work product, a district court within this Circuit has unequivocally held that they are. *See id.* at 6, citing *Tronitech, Inc.* v. *NCR Corp.*, 108 F.R.D. 655 (S.D. Ind. 1985). In rejecting Plaintiffs' argument that the audit letters were "dual-purpose documents" not eligible for work product protection, Judge Nolan recognized that "only an attorney could have drafted" the letters, which would not have existed "without the pending and threatened litigation[.]" July 6 Order at 8.

Judge Nolan followed the majority rule (favorably mentioned by the Seventh Circuit) in rejecting Plaintiffs' argument that the work product doctrine protects against disclosure only to one's opponent in the litigation that prompted their creation. Judge Nolan found "that the purpose behind the work product doctrine is best served by the majority approach" that work product protection continues to apply when a protected document is the subject of a discovery demand in a different litigation. *Id.* at 9.

Based on an *in camera* review of the audit letters and related documents, Judge Nolan concluded that they "disclose legal strategies and opinions" and that, to the extent that they contain some purely factual information, Plaintiffs had failed to demonstrate a substantial need for the documents or undue hardship in otherwise obtaining that information. *Id.* at 9-10 & n.2.

Judge Nolan then turned to the additional documents sought by Plaintiffs on their cross-motion, namely, Household's litigation database and documents relating to its litigation reserves. Judge Nolan determined that the database was work product because it "was created primarily to assist Household's counsel in understanding, managing, and providing legal advice

about pending and threatened litigation" and was not used, as Plaintiffs had argued, as a mere "management tool" for use in drafting Household's audit letters. *Id.* at 11. Judge Nolan noted that Andersen's 2001 Litigation Review emphasized by Plaintiffs establishes "[t]he mere fact that Andersen was aware of the database and some of the litigation it discussed, [but it] does not establish that Andersen actually viewed the database itself." *Id.* at 12-13. Significantly, Judge Nolan concluded that, even if the database *had* been shared with Andersen, such disclosure would not amount to a waiver or work product protection because Household did not act in a manner likely to bring about disclosure to an adversary. *Id.* at 13. With respect to documents regarding litigation reserves, Judge Nolan stated that "Household's attorneys suggested reserve figures based on their assessment of the merits and value of the underlying cases," and that therefore "[t]hose recommendations are protected by the work product doctrine." *Id.* at 14.

Plaintiffs maintain that Judge Nolan failed to follow Seventh Circuit precedent, *see* Pl. Obj. at 5-6, 9-11, and that her factual conclusions were unsupported or contrary to the evidence. *See* Pl. Obj. at 7-9, 11-15. As demonstrated below, they have not carried their burden on these issues in any respect.

ARGUMENT

1. A Magistrate Judge's Disposition of a Discovery Dispute is Entitled to Considerable Deference

Fed. R. Civ. P. Rule 72(a) sets forth the standard that governs a district judge's review of a magistrate judge's decision on a nondispositive motion such as this discovery dispute. *Ocean Atlantic Woodland Corp.* v. *DRH Cambridge Homes, Inc.*, No. 02C2523, 2004 WL 609326, at *3 (N.D. Ill. Mar. 23, 2004) (Guzman, J.) ("Routine discovery motions are considered to be 'nondispositive' within the meaning of Rule 72(a)."). Rule 72(a) provides that the district

judge "'shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be *clearly erroneous or contrary to law.'*" (emphasis added) *See also For Your Ease Only, Inc*. v. *Calgon Carbon Corp*., No. 02C 7345, 2003 WL 21475905, at *3 (N.D. Ill. June 20, 2003); 12 Charles Alan Wright, *et al*., *Federal Practice and Procedure 2d* § 3069 (2006). With respect to factual determinations, the "clearly erroneous" standard "means that the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks* v. *Samsung Heavy Industries Co*., 126 F.3d 926, 943 (7th Cir. 1997). The application of a legal standard to a particular set of facts is also reviewed under the "clearly erroneous" standard. *McFarlane* v. *Life Insurance Co. of North America*, 999 F.2d 266, 267 (7th Cir. 1993).

Determinations of a magistrate judge in the discovery context are entitled to considerable deference because "[t]he Federal Rules of Civil Procedure grant magistrate judges broad discretion in resolving discovery disputes," *Ocean Atlantic Woodland Corp*., 2004 WL 609326, at *3, and "[t]he magistrate judge has a much higher familiarity with the parties and the conduct of discovery than does this court". *Whittaker* v. *NIU Board of Trustees*, No. 00C 50447, 2004 WL 524949, at *1 (N.D. Ill. Mar. 12, 2004). Magistrate Judge Nolan has been supervising discovery matters in this action for the past two years, and even apart from the *in camera* review she conducted here, she has a detailed understanding of the context of this dispute and Plaintiffs' asserted discovery needs. Her July 6 Order reflected a careful and reasoned application of relevant law to the specific documents placed in issue by Andersen's request for a protective order and Plaintiffs' cross motion to obtain corresponding work product from Household's files. Plaintiffs' disagreement with the outcome provides no basis to override Judge Nolan's ruling.

2. Magistrate Judge Nolan Did Not Err in Holding that Work Product Protection Is Not Limited to Documents Created "in Aid of" Litigation

Judge Nolan's application of the "because of" standard is in line with both the majority view of work product and Seventh Circuit precedent. *See Logan*, 96 F.3d at 976-77; *Binks*, 709 F.2d at 1119. Plaintiffs nevertheless contend that Judge Nolan departed from a supposed Seventh Circuit ruling that work product protection applies only to documents created "to aid in litigation." Pl. Obj. at 5-6. In so arguing, Plaintiffs try to wrest a broad and novel rule of law from the Court of Appeals' application of the work product doctrine in *Binks*, in a specific context that is not at issue here. The issue in *Binks* was whether certain letters prepared before litigation began could fairly be characterized as prepared "in anticipation of litigation." 709 F.2d at 1118. The Court distinguished between documents prepared when the prospect of litigation is remote, which would not qualify for work product protection, and those prepared when the prospect of litigation is more tangible. It was solely in this context that the Court stated that "while litigation need not be imminent, the primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation." *Id.* at 1119. Plaintiffs seek to apply this distinction to claims of work product in every other context, leading to the absurd conclusion that documents created in connection with an already-pending litigation cannot qualify for work product protection because the documents were not created "to aid in possible future litigation." *See* Pl. Obj. at 5. This is plainly not the governing standard, as Magistrate Judge Nolan correctly ruled. *See* July 6 Order at 6-7.

3. Magistrate Judge Nolan Did Not Err in Holding that the Audit Letters and Related Documents Are Protected by the Work Product Doctrine

Plaintiffs further contend that, even under the "because of" standard, the audit letters and related documents cannot be considered work product because they were created for what they characterize as a business purpose, *i.e.*, to enable Andersen to audit Household's financial statements. In this regard, Plaintiffs contend that Judge Nolan "erred in ignoring [their] Flanagan declaration", which Plaintiffs contend shows that the audit letters and related documents "were created for a business purpose." Pl. Obj. at 8.

This argument misses the point. There is no dispute as to why the documents were created (obviating any need for Judge Nolan to discuss the Flanagan declaration). The correct question is whether it was clearly erroneous for Judge Nolan to conclude the audit letters were prepared "because of" litigation, in the sense that, unlike documents created in the normal course of business, these documents would not exist "[i]n the absence of any pending or threatened litigation". *See* July 6 Order at 7. In this regard, Judge Nolan plainly did not err by accepting the majority view that opinion letters from a general counsel to his client's outside auditor, like those in dispute here, are protected as work product. For example, in *Tronitech, Inc.* v. *NCR Corp.*, the court stated:

> An 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.

108 F.R.D. 655, 656 (S.D. Ind. 1985). *See also Southern Scrap Material Co.* v. *Fleming*, No. Civ. A. 01-2554, 2003 WL 21474516, at *9 (E.D. La. June 18, 2003) ("the work product doctrine clearly applies to the audit letters"); *In re Honeywell International, Inc. Securities Litiga-*

tion, 230 F.R.D. 293, 300 (S.D.N.Y. 2003) ("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.").

Plaintiffs try to avoid the weight of such precedents by characterizing Household's audit letters as "dual-purpose" documents that are categorically ineligible for work product protection. *See* Pl. Obj. at 10-11, citing *United States* v. *Frederick*, 182 F.3d 496, 501-02 (7th Cir. 1999), and *Harper* v. *Auto-Owners Insurance Co.*, 138 F.R.D. 655, 661 (S.D. Ind. 1991). Judge Nolan correctly rejected this analysis and found *Frederick* and *Harper* to be inapposite. In *Frederick*, the "dual-purpose" documents at issue were tax return preparatory materials that were created by an attorney on behalf of a client who was under investigation by the IRS. 182 F.3d at 499. In *Harper*, the "dual-purpose" documents were the contents of a routine claim file prepared by an insurance company in connection with a claim that the company anticipated would result in litigation. 138 F.R.D. at 658. The difference between the documents discussed in *Frederick* and *Harper* and those at issue here is that the former would have been created even in the absence of threatened or pending litigation, whereas, as Judge Nolan found, "without the pending and threatened litigation, there would be no Opinion Letters." July 6 Order at 8. Furthermore, while the tax returns in *Frederick* could have been prepared by an accountant or other tax preparer rather than a lawyer, Judge Nolan correctly observed that "only an attorney could have drafted" the opinion letters. *Id*.

These differences explain the Seventh Circuit's holding in *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 61-62 (7th Cir. 1980). In that case, the Seventh Circuit considered whether materials that a law firm prepared on behalf of a client for a report to the

Board of Elections regarding campaign contributions made by the client were protected by the work product doctrine. *Id.* The court concluded that the materials were entitled to work product protection because, at the time they were prepared, the law firm was aware that the client was under investigation for these contributions. *Id.* ("the material called for in the subpoena at issue here, though prepared for the filing of reports, was prepared also in anticipation of the criminal proceedings which could result from the Grand Jury's investigation"). The Seventh Circuit did not discuss *Special September* in the *Frederick* opinion, but the Ninth Circuit concluded that the two cases did not conflict. *See In re Grand Jury Subpoena*, 357 F.3d 900, 909 (9th Cir. 2004). In the words of the court:

> [T]he two cases can be reconciled by the extent to which the so-called independent purpose is truly separable from the anticipation of litigation. In *Frederick*, at issue were accountants' worksheets, albeit prepared by a lawyer, in preparation of his clients' tax returns. Although his clients were under investigation (which the court acknowledged was a "complicating factor"), work product protection was ultimately inappropriate because tax return preparation is a readily separable purpose from litigation preparation and "using a lawyer in lieu of another form of tax preparer" does nothing to blur that distinction. *Frederick*, 182 F.3d at 501. In *Special September*, on the other hand, the materials used to prepare the Board of Elections reports were compiled by lawyers and were necessarily created in the first place *because of* impending litigation.

357 F.3d at 909 (emphasis in original). Here, the litigation purpose behind the creation of the opinion letters is inseparable from the audit purpose, since the entire point of the letters is to capture attorneys' evaluation of pending and threatened litigation. They are accordingly entitled to work product protection.

4. Magistrate Judge Nolan Did Not Err in Holding that Work Product Protection Is Not Limited to Documents Created for This Litigation

Judge Nolan correctly rejected Plaintiffs' assertion that documents are protected as work product only if they were created for use against the party seeking their production.

Plaintiffs' assertion that *Mattenson* v. *Baxter Healthcare Corp.*, 438 F.3d 763, 767-68 (7th Cir. 2006) constitutes a "Seventh Circuit pronouncement" to this effect (Pl. Obj. at 9-10) is based on a misreading of *Mattenson,* as Judge Nolan observed. *See* July 6 Order at 9. Because *Mattenson* dealt only with a demand for an opponent's work product in the same litigation; the Court limited its focus to that context and had no occasion to discuss the broadly-accepted principle that work product prepared in anticipation of a different litigation is also protected from disclosure. *See Mattenson,* 438 F.3d at 768. Plaintiffs nevertheless cite out-of-context snippets from the opinion to argue the Court of Appeals for this Circuit has affirmatively broken from the majority of Circuits by precluding work product protection where the attorneys' reflections and mental impressions pertain to a case other than the instant litigation. It was not clearly erroneous for the Magistrate Judge to reject this tortured reading of *Mattenson.*

Indeed, Defendants are aware of, and Plaintiffs have cited, no Court of Appeals decision in the Seventh Circuit or elsewhere that adopts Plaintiffs' viewpoint on this subject, and the great weight of authority rejects Plaintiffs' stance.[2] *See, e.g., Pamida, Inc.* v. *E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002) ("The work product privilege extends beyond the termi-

[2] Significantly, in *FTC* v. *Grolier Inc.*, 462 U.S. 19, 25 (1983), the Supreme Court strongly indicated in dicta that work product protection extends to all subsequent litigation, even if it is unrelated to the litigation that led to the creation of the document. In *Grolier*, the Court stated that "the literal language of the Rule [26(b)(3)] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *Id.* While the Court ultimately based its holding in that case on Exemption 5 to the Freedom of Information Act, Justice Brennan stated in his concurrence that he would have based the Court's holding squarely on Rule 26(b)(3), which he viewed as protecting materials from disclosure in all subsequent litigation, related or not. *Id.* at 29-33 (Brennan, J., concurring). Of particular relevance here is Justice Brennan's observation that "[a]ny litigants who face litigation of a commonly recurring type . . . have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes. Counsel for such a client would naturally feel some inhibition in creating and retaining written work product that could later be used by an 'unrelated' opponent against him and his client." *Id.* at 31.

nation of litigation"); *Frontier Refining Inc.* v. *Gorman-Rupp Co., Inc.*, 136 F.3d 695, 703 (10th Cir. 1998) (observing that "every circuit to address the issue has concluded that . . . the work product doctrine does extend to subsequent litigation" and joining those circuits); *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977) ("the mischief engendered by allowing discovery of work product in *Hickman* [v. *Taylor*, 329 U.S. 495 (1947),] would apply with equal vigor to discovery in future, unrelated litigation"); *United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976) ("we view the work product doctrine as protecting work produced in anticipation of other litigation"); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 (4th Cir. 1973) ("we think the legal profession and the interests of justice are better served by recognizing the qualified immunity of work product materials in a subsequent case as well as that in which they were prepared"); *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967).

Moreover, although the Seventh Circuit has not expressly ruled on the protection afforded to work product in different and/or subsequent cases, it has given every indication that it agrees with the position taken by at least seven other circuit courts. *See, e.g.*, *Hobley* v. *Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (noting that plaintiff did not dispute the majority rule that work product protection endures after the termination of the proceedings for which the documents were created, citing *In re Grand Jury Proceedings*, 43 F.3d at 971, and *In re Murphy* with approval).

Plaintiffs cite isolated district court cases such as *Ferguson* v. *Lurie*, 139 F.R.D. 362, 368 (N.D. Ill. 1991), in support of their contrary position. However, they fail to inform the

Court that in *Jumper* v. *Yellow Corp.*, 176 F.R.D. 282, 286 (N.D. Ill. 1997), the court specifically rejected *Ferguson* and endorsed the "'emerging majority view . . . that the work product privilege does extend to subsequent litigation.'" *Id.* (quoting *In re Grand Jury Proceedings*, 43 F.3d at 971). Plaintiffs also rely on an out-of-context remark in *McCook Metals L.L.C.* v. *Alcoa, Inc.*, 192 F.R.D. 242, 259 (N.D. Ill. 2000), even though the opinion *in that very case* explicitly states that "[t]he work product doctrine applies in a subsequent case even if the documents were prepared in a prior litigation. . . . The two cases need not be related as long as the documents were created by the parties to subsequent litigation." *Id.* at 263 (citation omitted).

In short, the overwhelming weight of authority, including in this district, categorically rejects the notion that work product should be protected from disclosure only when it was created in connection with the litigation in which discovery is sought. In light of this authority, Judge Nolan's holding is certainly not erroneous.

5. Magistrate Judge Nolan Did Not Err in Holding that the Litigation Database is Work Product

Judge Nolan correctly ruled that Household counsel's internal litigation database is work product. As outlined in the Affidavit of Mark F. Leopold in Opposition to Plaintiffs' Cross-Motion to Compel (Dkt. No. 529), dated June 9, 2006 (the "Leopold Affidavit"), at ¶ 2, this database is maintained by Household's Office of the General Counsel in order to understand, manage, and render legal advice about various legal actions brought by or against Household, based on input by responsible attorneys as to their mental impressions, conclusions, opinions and strategies. *See also id.* ¶ 3. In short, the database is the epitome of work product.

Plaintiffs challenge Judge Nolan's ruling on the basis of irrelevant speculation that the database was shared with Andersen as Household's outside auditor.[3] Pl. Obj. at 11-12. Besides being unpersuasive, their tortured parsing of certain documents and affidavits for "proof" of such sharing (like their unworthy intimations that Household misled the Magistrate Judge on this subject) is totally beside the point, given Judge Nolan's well-founded conclusion that disclosure of work product to a party's outside auditor is not a waiver in the circumstances present here. July 6 Order at 10-11.

As Judge Nolan correctly observed, disclosing work product to a third party constitutes a waiver only if the disclosure is made in a way that substantially increases the opportunity for potential adversaries to obtain the information. *Id.* *See generally*, *Smithkline Beecham Corp. v. Pentech Pharmaceuticals, Inc*., No. 00 C 2855, 2001 WL 1397876, at *3 (N. D. Ill. Nov. 6, 2001). For all of their painstaking search for alleged discrepancies in the Leopold Affidavits, Plaintiffs are unable to contradict the affiant's clear statements that Household took pains to protect the database from disclosure to adversaries. *See* Leopold Affidavit ¶ 4; Supplemental Affidavit of Mark F. Leopold in Opposition to Plaintiffs' Cross-Motion to Compel Production of Certain Documents (Dkt. No. 564), dated June 28, 2006, at ¶ 2. Thus, even if Plaintiffs had demonstrated that information from the litigation database had been shared with Household's

[3] Plaintiffs also make the semantic argument that the database is not work product because it is a "management tool" that "is not something 'for use' in any particular litigation." Pl. Obj. at 13. While the database *as a whole* is not something "for use" in any particular litigation, the individual database entries for each case certainly are, as the Affidavits of Mark Leopold clearly establish. *See, e.g.*, Leopold Affidavit ¶ 2 (database was maintained "for the purposes of understanding, managing, and rendering legal advice to management about each . . . lawsuit" and database entries "invariably included attorneys' evaluations of the merits, and strategic plans and recommendations as to the conduct and disposition of the lawsuit").

outside auditor, work product protection would still apply. *See also Gutter* v. *E.I. Dupont de Nemours and Co.*, No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) (disclosure of work product to outside auditor did not waive protection); *Gramm* v. *Horsehead Industries, Inc.*, No. 87 Civ. 5122, 1990 WL 142404, at *5 (S.D.N.Y Jan. 25, 1990) (same); *In re Pfizer Inc. Securities Litigation*, No. 90 Civ. 1260, 1993 WL 561125, at *6 (S.D.N.Y Dec. 23, 1993) (same); *Southern Scrap*, 2003 WL 21474516, at *9 (same).

6. Magistrate Judge Nolan Did Not Err in Holding that Information Relating to Household's Litigation Reserves is Work Product

Plaintiffs argue that Judge Nolan erred in extending work product protection to Household's litigation reserve information because the cases on which Judge Nolan relied do not hold that reserve information is *never* discoverable. Pl. Obj. at 13-14. This unremarkable observation aside, that fact remains that individual reserve information generally *is* protected as work product, especially where, as here, a party's "attorneys suggested reserve figures based on their assessment of the merits and value of the underlying cases". July 6 Order, Ex. A at 14. "Those recommendations are protected by the work product doctrine" because they "reveal attorney mental impressions, thoughts, and conclusions . . . [regarding] the merits and value of the underlying case." *Id.* at 13-14 (internal citation omitted). As a careful application of settled legal authority to specific, uncontested facts, this ruling is clearly not erroneous.[4]

[4] Plaintiffs assertion that Household's interrogatory responses establish "that attorneys were not involved in the determination of litigation reserves" (Pl. Obj. at 15) deserves no weight. The cited interrogatory sought identification of the individuals responsible for determining *accounting treatment* to address litigation risk. See Pl. Obj., Ex. 7 at 58. The fact that attorneys were not involved in determining the proper accounting treatment says nothing about whether attorneys revealed mental impressions, thoughts and conclusions in connection with the different function of establishing estimates of probable liability in individual litigation matters.

CONCLUSION

In view of Plaintiffs' failure to demonstrate that any aspect of the Magistrate Judge's July 6 Order was clearly erroneous, Plaintiffs' Objections should be overruled.

Dated: August 8, 2006
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Respectfully submitted,

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