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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' FIFTH SET OF INTERROGATORIES TO LEAD PLAINTIFFS

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This reply memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Household" or "Defendants") in further support of the Household Defendants' Motion to Compel Responses to Defendants' Fifth Set of Interrogatories To Lead Plaintiffs.[1]

INTRODUCTION

Over the last few years Plaintiffs have engaged in a purported effort to discover evidence that might support the existence of a scheme led by senior management to defraud investors through alleged company-wide illegal predatory lending practices. At its end this process will have resulted in the production of over five million pages of documents and 70+ days of deposition testimony — now repeatedly and unfairly mischaracterized as a "document dump." (Plaintiffs' Brief ("PB") at 2, 8)

Having suffered through this grossly asymmetrical process, Defendants have attempted to obtain very basic information through interrogatories, such as:

a) the document referenced by Plaintiffs in mediation discussions that allegedly supports the "participation or approval of senior Household management in any allegedly illegal practices" (Interrogatory No. 47),

b) the asserted "number and/or percentage" of loans containing prepayment penalties claimed to be illegal (Interrogatory Nos. 56 and 57), and

c) an identification of the "federal and/or state law[s]" that were allegedly violated by any specified "Household product, policy or practice". (Interrogatory No. 45)

Plaintiffs' opposition to this motion does not deny that they have not provided this information, and instead generally argues that "the Class should not be required to undertake the 'make work' defendants seek to impose on Lead Plaintiffs." (PB at 8)

As to (a), Plaintiffs assert that they need not identify a document repeatedly referenced by Plaintiffs in mediation that allegedly demonstrates the "participation and/or approval" of senior Household management in illegal lending practices, because they no longer remember having ever as-

[1] "Interrogatories" refers to Household Defendants' Fifth Set of Interrogatories to Lead Plaintiffs served on December 22, 2006. (See Affidavit of David R. Owen dated February 21, 2007 ("Owen Aff."), Ex. 1.)

serted that such a document exists. (PB at 2) Plaintiffs' opposition fails to note the absence of any such claimed memory loss in their actual responses (which instead asserted settlement privilege), and further refuses to identify any particular document that would fit the reference so conveniently forgotten between the actual responses and their opposition to this motion.

As to (b), Plaintiffs argue that they need not quantify the claim that prepayment penalties were used illegally, because they supposedly were denied "branch-level discovery" which they would need to explain how pervasive they claim the "illegal" practices to be. (PB at 4) Plaintiffs are ignoring their own claims — which do not assert "branch-level" misconduct, but rather a securities fraud allegedly orchestrated by the senior management of the company. There can be no "fraud" in reporting of these disclosed practices, and no possible analysis of materiality, without some quantified indication of what was allegedly misreported. Putting aside the blatant inaccuracy of Plaintiffs' contention that they received no branch-level discovery, Plaintiffs' argument also ignores the fact that they sought and were provided with all management-level documents on the subject.

As to (c), Plaintiffs apparently acknowledge that their reliance on Rule 33(d) to list documents in their response to Interrogatory No. 45 was incorrect under the Federal Rules, as Defendants had observed in a meet and confer. In fact, Plaintiffs' brief notes that they had originally planned to submit a new response that would list the lending law violations. (PB at 7 ("The Class was willing to accommodate Defendants . . . .")). Instead of this supplemental response, however, Plaintiffs now argue that the Court should disregard the Rule and that ***Defendants*** should simply review over 50,000 pages of their own production to find out which lending laws Plaintiffs claim were violated in connection with the scheme Plaintiffs allege. (PB at 8 ("Defendants can just as easily read the documents ***they*** produced." (emphasis in original))

As is readily apparent, these interrogatories are highly relevant to Plaintiffs' allegations. Plaintiffs must be required to answer them in a clear and straight forward manner as required by the Federal Rules.

ARGUMENT

A. Plaintiffs Must Identify a Document That Demonstrates Senior Management's "Participation or Approval" of Illegal Lending Practices (Interrogatory No. 47)

Plaintiffs' response to Interrogatory No. 47 asserts a privilege to withhold disclosure of an allegedly significant document because it was raised (but not identified) by Plaintiffs in the context of settlement discussions. (Owen Aff., Ex. 4 at 47 (objecting that Interrogatory No. 47 "demands information discussed in the context of settlement negotiations in this litigation.")). Recognizing now that Federal Rule of Evidence 408 does insulate from discovery otherwise relevant documents referenced by a party in settlement discussions (and choosing not to defend their response to that effect), Plaintiffs' brief abandons this position and instead asserts that "Class counsel does not recall making the statement." (PB at 2) Since this objection was not asserted in Plaintiffs' responses, this new excuse is untimely according to Fed. R. Civ. P. 33(b)(4). *Id*. (noting that "[a]ny ground not stated in a timely objection is waived").

Plaintiffs' new and different story is also totally lacking in credibility and notably fails to explain why Plaintiffs would object under Rule 408 if no such statement was ever made. Indeed, it is doubtful that Plaintiffs do not recall a document they considered so crucial to their case that they alerted Judge Guzman to its existence. In any event, this quandary can be easily resolved by requiring Plaintiffs to identify any single document that "shows the participation or approval of senior Household management in any allegedly illegal practices." (Owen Aff. Ex. 1 (Interrogatory No. 47))

Plaintiffs' fallback contention that Defendants can obtain the same information from their answer to Interrogatory No. 48 which seeks all such documents is also flawed.[2] Plaintiffs' response to Interrogatory No. 48 is another endless (and useless) list of documents of little or no relevance at all to the identified issue. Plaintiffs once again cite every single deposition transcript as well as over 50,000 pages of documents, including all 33,000 pages of state regulatory documents produced

[2] Plaintiffs waste paragraphs attacking the actions of defense counsel and the truthfulness of the Affidavit of David R. Owen, claiming that the affidavit did not attach a "true and correct copy" of, and purposefully omitted Plaintiffs' response to Interrogatory No. 48. (PB at 1,3) As always, Plaintiffs attempt to attack the character of defense counsel has no basis in fact. Mr. Owen's affidavit accurately states that attached as Exhibit 4 is a "true and correct copy" of Plaintiffs' responses and that it is "excerpted" (Owen Aff. at 2). The exhibit was limited to include only those responses at issue in the motion since the entire documents was 160 pages (of mostly objections and lists of documents).

(the same supposedly "tailored list" of documents Plaintiffs cited in response to Interrogatory No. 45 in violation of Rule 33(d)).[3]

Interrogatory No. 47 seeks identification of a specific document that Plaintiffs loudly held out as being particularly relevant — Plaintiffs' "hottest" document. Plaintiffs' contention that the document must be somewhere among those listed in response to Interrogatory No. 48 (PB at 3), belies their recently professed lack of recollection. Either Plaintiffs posses a compelling document on this subject or they do not. It is "sandbagging" of precisely this kind that prevents early settlement and/or resolution of vague claims such as those asserted by Plaintiffs' here. Given Plaintiffs' belated (and non-credible) claim of lack of recall, Defendants will accept the identification of any *single* document as Plaintiffs' indication of the best document that Plaintiffs have to offer on this subject. It should be no burden for them to do so. If they do not comply, they should be precluded from introducing any such document in further proceedings in this matter.

B. Plaintiffs Must Quantify the Pervasiveness of the Alleged Illegal "Prepayment Penalty" Scheme (Interrogatories Nos. 56 and 57)

Throughout their Complaint and this entire discovery process, Plaintiffs have resisted every effort to quantify the claimed pervasiveness of the allegedly "widespread" illegal predatory practices. Although Plaintiffs have indicated, albeit vaguely, some of the things they say were illegally done at Household (*e.g.*, allegedly "concealing" prepayment penalties at times), they never indicate how often any of those things took place. They also have declined to offer any basis upon which to distinguish the alleged illegal scheme from what was reported by management. Interrogatories Nos. 56

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[3] *See* Part C, *infra*. It has become Plaintiffs' practice to respond to Defendants' interrogatories by indiscriminately citing to the same subset of documents that are largely non-responsive to the given request. For example, after a lengthy review of the 97,000 pages of documents cited by Defendants in response to Interrogatories Nos. 16, 18-21 which concerned the five allegedly illegal lending practices at issue, Defendants discovered that over 90 % of the documents cited did not even mention the particular practice at issue in the interrogatories, much less any claim of illegality.

Even Plaintiffs admit in their response that the documents identified in response to Interrogatory No. 48 do not show the participation of management in the fraud, but only Plaintiffs' vaguely alleged contention that "[t]he Officer Defendants were both highly motivated and had ample opportunity to perpetuate the fraud". (Owen Aff., Ex. 4 at 66) In fact, because of these deficiencies, Interrogatory No. 48 was one of the responses that Defendants requested at the February 9, 2007 meet and confer that Plaintiffs redo. No such amendment has been forthcoming.

and 57 were meant to address these problems with respect to claims about the alleged illegal use of prepayment penalties. They ask for the "percentage and/or number of loans" (No. 56) with illegal prepayment penalties, and Plaintiffs' "basis for distinguishing" (No. 57) the legal from the illegal. These matters require an explanation of some kind, given Plaintiffs' contention that some prepayment penalty practices were "fraudulently" reported to the investing public.

Defendants want to know how pervasive Plaintiffs contend the alleged scheme to be—i.e., how often did it happen? Were employees instructed to and did they conceal all prepayment penalties all the time, some of the time, or pursuant to particular company policies in particular places? Plaintiffs contend that they cannot quantify the pervasiveness of their claims because they have not had access to "branch-level discovery" identifying individual loans.[4] Needless to say, Defendants are not asking for individual loan information. Indeed, Plaintiffs have alleged a management-led scheme to commit securities fraud. The scope of the alleged scheme is established by documents and materials produced by or made available to management, and management's statements to the public. Defendants are entitled to know what Plaintiffs contend those documents show on the question of pervasiveness, if they still intend to pursue the claim that this was a widespread, management-led practice.

If Plaintiffs' theory is actually based upon "government reports, and customer complaints, and information relating to the Attorneys General Settlement" as their brief indicates (PB at 5), these reports can be quantified and distinguished from Household's reported performance, and it is Plaintiffs' burden to do so. Defendants only ask how prevalent Plaintiffs contend the alleged illegal practice was, and how the illegal practice can be distinguished from legal uses of prepayment penalties. If Plaintiffs are unable to explain this in interrogatory responses how could they prove at trial that any management-led "scheme" actually took place? Plaintiffs have deposed dozens of witnesses and received voluminous discovery including over 250,000 pages relating to prepayment penalties at

[4] Plaintiffs have, however, requested and been given customer complaints filed with each of the relevant attorneys general. The documents that Plaintiffs have not been permitted to receive are post-Class Period documents that the Court determined were not relevant to litigation.

Household. This should be more than enough material to clarify how extensive the claimed scheme is alleged to be — or at least make a good faith effort to do so. If Plaintiffs have no idea whether the alleged illegality occurred 1% or 100% of the time then they should acknowledge as much.

Distinguishing and quantifying when allegedly illegal and unreported practices did and did not occur is part of Plaintiffs' claims of securities fraud. It is central to many of Defendants' defenses as well. Plaintiffs do *not* contend that Household's loan forms (which were known to regulators) failed to disclose prepayment penalties. Nor do Plaintiffs appear to contend that Household had an identifiable written policy instructing employees not to disclose the existence of prepayment penalties to customers. Plaintiffs have suggested some sources from which they might support their claims (*e.g.*, government reports and customer complaints), but still fail to explain how (if at all) they contend that such materials support their claims. Defendants have asked Plaintiffs to quantify their contentions, as would be necessary and appropriate for them to do at trial to prove materiality, scienter and supposed omissions or misrepresentations on this subject. The Federal Rules therefore require a response in discovery.

C. Plaintiffs' List of Over 50,000 Pages of Documents Is Inadequate to Respond to Interrogatory No. 45

Plaintiffs' brief nowhere addresses the fact that their response to Interrogatory 45 seeking identification of the lending laws allegedly violated by Household products policies or practices identifies no lending laws at all. (*See* PB at 6-7) Plaintiffs' brief also does not explain their impermissible reliance on Rule 33(d) to submit a lengthy (and useless) list of Defendants' own documents — a use explicitly rejected by the rule. (*See* Defendants' Opening Brief ("DB") at 5.) As Defendants noted (and Plaintiffs do not dispute) Rule 33(d) explicitly provides that citation to documents may be used only "[w]here the answer to an interrogatory may be derived or ascertained ***from the business records . . . of the party upon whom the interrogatory has been served***". Fed. R. Civ. P. 33(d) (emphasis added).

The suggestion that Defendants should have to review their own documents to figure out what Plaintiffs' claims of illegality are would turn the principles of discovery and Rule 33(d) on their head. Defendants disagree with virtually every claim that Plaintiffs have made in this case —

particularly that any document they have produced either individually or collectively supports any of Plaintiffs' contentions. Listing Defendants' documents does absolutely nothing to help Defendants ascertain Plaintiffs' claims. The purpose of Interrogatory No. 45 is not to get Defendants' own documents back, it is to require Plaintiffs' to explain ***their*** claims of illegal products, policies and/or practices. It asks Plaintiffs to:

> Identify each federal and/or state law that Plaintiffs contend Defendants violated, with reference to particular provisions and the Household product, practice or policy that allegedly violated the law and the basis for that contention.

(Owen Aff., Ex. 1 at 1) Plaintiffs' citation to many thousands of pages of Defendants' documents is pointless given Plaintiffs' refusal to provide any guide as to why they consider any of the cited material to be relevant or to provide any of the requested answers.

Plaintiffs claim that they "painstakingly assembled a tailored list of documents that enumerate 'federal and/or state law[s] that Plaintiffs contend Defendants violated.'" (PB at 6) This is inaccurate. Plaintiffs cite well over 50,000 pages of documents, including all of the 33,000 pages produced by state and federal regulators. (Owen Aff., Ex. 4 at 19 - 35) The latter are the same documents which the Court has indicated do *not* accuse the Company of illegal conduct. (*See* Nov. 16, 2006 Order, Owen Aff., Ex. 5 at 8 ("The court's review of similar agency documents from states that authorized disclosure, and *in camera* review of the agency documents at issue here, confirms that the state agencies did not in those documents affirmatively charge Household with predatory lending practices"). Apart from Plaintiffs violation of Rule 33(d), a list of this type is not an acceptable response to a clear contention interrogatory that asks for a list of *Plaintiffs'* contentions.

Plaintiffs fail to cite even one case that has permitted a party to respond to a contention interrogatory by referencing such massive amounts of documents, much less one that has permitted a party to utilize Rule 33(d) to cite massive numbers of the opposing party's own documents. This is because the law is the exact opposite. *See* Fed. R. Civ. P. 33(d); *In re Industrial Gas Antitrust Litigation*, No. 80 C 3479, 1985 U.S. Dist. LEXIS 15646, at *6 n.3 (N.D. Ill. Sept. 24, 1985) ("The documents that plaintiffs have submitted are not its own records, therefore, Rule 33[d] is inapplicable."); *see also EEOC* v. *General Dynamics Corp.*, 999 F.2d 113, 118 (5th Cir. 1993) ("Rule 33[d] does not

authorize the party being served to tell the serving party that it must find the answer by a search of its own (i.e. the serving party's) records."). The Federal Rules are very clear.

Plaintiffs argue unpersuasively that they regard Defendants' discovery requests as merely "make work" designed to interfere with their own widely asymmetrical discovery program, and to which they should not be required to devote any time and/or effort. (PB at 8 ("[T]he Class should not be required to undertake the 'make work' defendants seek to impose on Lead Plaintiffs."), 5 ("[Defendants'] real objective is . . . to drag out discovery and harass Lead Plaintiffs.") Plaintiffs arguments and their perspective on discovery itself are inconsistent with the Federal Rules and with this Court's clearly articulated expectations as to Plaintiffs' obligations to provide detailed, good faith answers to Defendants' contention interrogatories, especially in view of the extensive extra time they were give to comply. It is nothing short of outrageous for Plaintiff to play the burden card, now that they are finally called upon to explain their own allegations. If they have found any support for their grandiose allegations of a company-wide, management-led illegal scheme, they must be required now to say what they contend it is — not by simply sending Defendants to a mass of Defendants' own documents that do not begin to provide the required answers.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Defendants' motion to compel be granted and that Plaintiffs be ordered to respond forthwith to Interrogatory No. 45, 56 and 57, and that Plaintiffs be ordered to respond forthwith to Interrogatory No. 47 either by: (i) identifying the document referenced by Mr. Coughlin and Ms. Mehdi, (ii) indicating that no such document exists, or (iii) identifying any particular document that Plaintiffs contend to be directly probative of senior management's alleged participation in or approval of any alleged illegal predatory lending practices.

Furthermore, in light of Plaintiffs' persistent lack of cooperation in complying with Defendants' discovery of Plaintiffs' claims, Defendants seek a recommendation that the Court, pursuant to Fed. R. Civ. P. 37(d) and 37(b)(2)(B), limit Plaintiffs' proof on these and other subjects covered by Defendants interrogatories to those matters identified in Plaintiffs' responses.

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