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

LEAD PLAINTIFFS' OPPOSITION TO PRESENTMENT OF DEFENDANTS' PREMATURE MOTION FOR SUMMARY JUDGMENT, WHICH THEY ENTITLE A "MOTION TO IMPLEMENT"

Lead plaintiffs submit this brief with respect to the September 4, 2007 presentment of defendants' "Motion for Implementation of this Court's February 28, 2006 Order." Leaving aside the merits, including the gross mischaracterization of the expert damages report submitted by Daniel R. Fischel on behalf of lead plaintiffs, this motion is procedurally improper. It is too tardy to be a motion to dismiss under Rule 12(b) or a motion for judgment on the pleadings under Rule 12(c) and in any event, defendants rely upon matters outside of the pleadings. Thus, defendants' motion is properly considered a summary judgment motion. However, as such, it is premature – defendants previously requested, and this Court ruled, that expert discovery would be completed prior to the scheduling of any summary judgment motion. *See* January 10, 2007 Transcript (Dkt. No. 971), a copy of which is attached hereto as Exhibit A. Accordingly, this Court should summarily deny defendants' motion as procedurally improper at the presentment hearing. Alternatively, the Court should defer further briefing on the motion until such time as the parties have completed expert discovery as contemplated by Rule 56(f). If at that time, defendants believe that they have a good faith basis to assert the substantive argument, defendants may so notify the Court and the Class.

Defendants' "Motion to Implement" is procedurally flawed. As discussed above, it cannot be treated as a motion to dismiss or a motion for judgment on the pleadings due to its timing and reliance upon matters outside of the pleadings, including Mr. Fischel's report and the Class' interrogatory responses. Thus, it is properly designated as a motion for summary judgment.

However, as a summary judgment motion, defendants' motion is premature. Pursuant to defendants' own request, this Court on January 10, 2007 deferred any summary judgment motion until after completion of expert discovery. Transcript at 19 ("We're not going to schedule summary judgment motions before we're done with discovery."). Expert discovery in this case is not complete: defendants have not submitted their expert reports (which are due October 15) nor have lead plaintiffs submitted their rebuttal reports (which are due November 15). Additionally, although

defendants purport to rely upon lead plaintiffs' interrogatory responses, pursuant to Magistrate Judge Nolan's June 29, 2007 Order, these responses are due to be supplemented upon submission of the rebuttal expert reports. Dkt. No. 1116. Thus, this motion is premature and should be summarily denied.

If lead plaintiffs are to respond to this motion on the merits, they should be allowed to do so with the benefit of a complete record as contemplated by Rule 56(f), including the opportunity to complete expert discovery. Lead plaintiffs should be allowed to explore and probe this alleged defect with defendants' own damage expert as well as to address it, if necessary, via a rebuttal report from Mr. Fischel. Similarly, to the extent that defendants truly perceive a fault in Mr. Fischel's initial expert report, they should (consistent with their prior views) be compelled to explore the alleged fault with Mr. Fischel via his deposition.

Denying this motion as procedurally flawed or continuing it until after completion of expert discovery is consistent with this Court's reason for deferring summary judgment until after completion of expert discovery, namely preempting the possibility of sequential summary judgment motions by defendants and the associated waste of resources addressing such motions. As this Court said at the January 10, 2007 hearing:

> I want it all there. I don't want any arguments that, well, now we know something we didn't know before your law clerks spent three weeks dealing with our summary judgment motion and we want to go back and do it again. I don't see the benefit.

Transcript at 15 (statement of Judge Guzman). The Court further noted: "We're not going to schedule summary judgment motions before we're done with discovery.... It's just going to take longer if we do it that way." *Id*. at 19. Defense counsel concurred with the Court, noting that "in the correct sequence, there will only be the need for one. We'll do it one time." *Id*. (statement of T. Kavaler).

Defendants now seek to have multiple sequential summary judgments prior to completion of expert discovery. However, for the reasons stated by the Court then and acknowledged by defense counsel, substantive consideration of defendants' motion at this juncture raises precisely that issue and would result in a waste of the Court's time and resources as well as the parties'. Defendants no doubt will assert that their motion is relatively simple and straight forward and thus, not require much in the way of Court time or scrutiny. This Court should not accept any such assertion at face value. As will become clear if ever necessary, the factual and legal issues presented by defendants' motion are infinitely more complex than defendants will represent.

For the foregoing reasons, the Court should deny as procedurally improper Household defendants' "Motion to Implement." Alternatively, lead plaintiffs should be allowed to complete expert discovery as contemplated by Rule 56(f) prior to submission of a substantive brief on the merits of defendants' motion.

DATED: August 31, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL 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 August 31, 2007 declarant served by electronic mail and by U.S. Mail to the parties: **LEAD PLAINTIFFS' OPPOSITION TO PRESENTMENT OF DEFENDANTS' PREMATURE MOTION FOR SUMMARY JUDGMENT, WHICH THEY ENTITLE A "MOTION TO IMPLEMENT"**. 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 31st day of August, 2007, at San Francisco, California.

s/ Juvily P. Catig
JUVILY P. CATIG