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

THE CLASS' REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH SUBPOENAS

I. INTRODUCTION

Plaintiffs' subpoenas seek limited documents from defendants' retained experts related to their knowledge, bias and prior opinions. Defendants and their experts have responded by refusing to produce a single document and erecting various artificial hurdles. Indeed, in dealing with the subpoenas defendants have reached new heights in delay and obfuscation.

For example, defendants misquote the parties' stipulation in an effort to attach a meaning neither party intended. However, a plain reading of the stipulation reveals that it restricts only certain narrowly defined discovery and does not preclude the use of a subpoena to obtain additional documents from the experts.

Defendants also insist that plaintiffs must open up new cases in foreign jurisdictions to enforce their subpoenas on experts who have been hired to give testimony in this case. However, these experts have agreed to participate in this action, and this Court has authority to compel the requested documents.

Finally, defendants and Mr. LaSusa argue that Mr. LaSusa has not had a chance to be heard on these issues. However, despite their claim that Cahill Gordon & Reindel LLP ("Cahill") does not represent Mr. LaSusa, Cahill dedicated four pages of its six-page brief to arguing on his behalf. Additionally, the objections from all three experts (undoubtedly prepared by the Cahill firm) are almost identical, and Mr. LaSusa's other lawyer filed a brief in opposition. Mr. LaSusa has been amply represented in these proceedings.

The Court should not allow defendants' various fictional constructs to confuse or prolong this relatively straightforward issue. Plaintiffs' motion to compel should be granted.

II. ARGUMENT

A. The Parties' Stipulation Regarding Expert Discovery Does Not Prohibit Discovery of the Information Plaintiffs Seek

The stipulation entered into between the parties created two specific limitations on expert discovery. The parties agreed that: (1) communications between experts and lawyers for the parties; and (2) notes, drafts or other types of preliminary work created by or for the experts would not be discoverable.[1] Defendants now seek to extend these specifically enumerated limitations to cover all discovery from expert witnesses.[2] As evidenced by the face of the stipulation, the parties did not agree to or intend such a result.

If the parties actually intended the stipulation to limit all discovery relating to expert opinions, it would include language to that effect and there would have been no need to include the specific and narrow limitations on discovery enumerated in paragraph 4. However, the stipulation contains no language supporting defendants' construction, because the parties never agreed to any such limitation. Defendants reference an "extensive negotiation" between the parties to the stipulation, but point to nothing in the negotiated text that supports their position. The notion of broadly prohibiting any expert discovery not specifically identified in the stipulation was never discussed, let alone agreed to. As plaintiffs discussed in their opening papers, a plain reading of the stipulation reveals that the only limitations on expert discovery are specifically enumerated in the agreement. Defendants know this, and had to resort to misquoting the stipulation to make their point. Paragraph 1 of the stipulation reads as follows, with the portion omitted by defendants in their brief highlighted in bold:

---

[1] The Class' Motion to Enforce the January 31, 2008 Order and to Compel Production of Documents by Defendants' Experts Pursuant to Plaintiffs' Subpoenas ("Motion"), Exhibit 7, ¶4.

[2] The Household Defendants' Response to Plaintiffs' Motion to Compel Production of Documents by Defendants' Experts Pursuant to Plaintiffs' Subpoenas ("Defs' Response") at 4-5.

> The purpose of this Stipulation is to modify the provisions of Fed. R. Civ. P. 26(a)(2)(B) with respect to required disclosures relating to persons retained to provide expert testimony ("Testifying Experts") and to limit the scope of discoverable information relating to such experts' opinions ***as follows***:

Motion, Ex. 7, ¶1 (emphasis added to language omitted by defendants). If the "as follows" language did not limit the scope of the stipulation as a plain reading of the document suggests, ***defendants would have no reason to omit it from their brief***. Because the parties never agreed to a blanket limitation on expert discovery, plaintiffs' subpoenas are proper under the stipulation.

Defendants also complain that the subpoenas are untimely. However, the expert discovery cut-off – extended numerous times at defendants' request – is March 25, 2008. The subpoenas at issue were served on February 6, 2008 (Mr. Litan and Mr. Bley) and February 8, 2008 (Mr. LaSusa), well in advance of the cut-off, and had return dates sufficiently in advance of each witness's deposition so as to allow plaintiffs to use the documents produced in their examinations. If defendants' experts had simply complied with plaintiffs' subpoenas, instead of asserting frivolous objections and taking all possible measures to avoid adjudicating them, the timing of plaintiffs' subpoenas *vis-à-vis* the scheduled depositions would not be an issue.[3]

Furthermore, Mr. Litan's testimony (taken after plaintiffs' motion was filed) suggests that he may not have documents responsive to plaintiffs' subpoena. Defendants did not convey this highly relevant information to plaintiffs during the parties' meet and confer, or to the Court in their opposition. If this is true, it begs the question, why was this information withheld during the meet

---

[3] The frailty of this particular argument is evidenced by their attempt to distort the record. They claim that plaintiffs "became aware" of Mr. LaSusa and Mr. Litan in October 2007 when they wrote the Court requesting extensions to serve their reports; however, they did not serve their reports until December 10, 2007. The implication that plaintiffs should have subpoenaed documents related to these experts' opinions before the experts had disclosed them makes no sense. Had plaintiffs proceeded in such a fashion, it would have doubtless resulted in a similarly rancorous attack, just for different reasons.

and confer and omitted from defendants' motion? If defendants wanted to settle these issues quickly, they would have been up-front with plaintiffs and the Court on this point.

B. Plaintiffs' Motion Is Properly Before This Court

Defendants argue that with respect to Mr. Bley and Mr. Litan, the Court cannot adjudicate this simple discovery matter because the documents plaintiffs seek were requested pursuant to subpoenas issued by other district courts.[4] Defs' Response at 2-3. In other words, defendants contend that because they have employed out-of-state experts, this Court has no authority to rule on discovery issues related to those experts. However, Mr. Litan and Mr. Bley are not uninterested, independent third parties objecting to a subpoena in some action to which they have no connection. They are paid experts, who have submitted to the jurisdiction of this Court. They have both prepared expert reports in this case, which were served on plaintiffs. They have agreed to be deposed.[5] And, they have agreed to come to Chicago and, if permitted, testify on behalf of defendants at the trial in this action.[6] Despite these facts, defendants seek to construct the fiction that these witnesses are uninvolved third parties who are unwilling to allow the Court to adjudicate a discovery dispute related directly to their engagements.[7] If this truly is the case, they should be barred from participating in this action.

---

[4] Defendants did not raise this objection during the parties' meet and confer, even though plaintiffs expressly stated they intended to seek relief from this Court.

[5] Mr. Litan was deposed in this action on February 27, 2008, Mr. LaSusa has agreed to sit for deposition on March 6, 2008, and Mr. Bley has agreed to sit for deposition on March 14, 2008.

[6] Indeed, Mr. Litan recognized the Court's authority over matters related to his expert engagement by writing directly to the Court requesting leave for an extension to file his expert report.

[7] Defendants accuse plaintiffs of a "deliberate attempt to obfuscate [the] source" of their subpoenas because plaintiffs attached to their motion only Mr. Bley and Mr. Litan's objections (which also contain each of plaintiffs' requests), and not the subpoenas themselves. Defs' Response at 2-3. Of course, this contention is absurd. The caption on Mr. Bley's objections, on the first page of plaintiffs' Motion, Ex. 5 reads: "United States District Court Western District of Washington." Similarly, the caption on the first page of Mr. Litan's

Under defendants' construction, this Court would have no authority to adjudicate disputes arising from or relating to expert depositions, or to require an out-of-state expert to appear at a *Daubert* hearing. This anomalous result would serve no legitimate purpose and would drastically undermine the Court's authority to oversee the conclusion of expert discovery. Forcing plaintiffs to institute new actions in Missouri and Washington to obtain documents that relate directly to defendants' experts' knowledge, bias and prior opinions would only add additional delay and expense to the process (no doubt defendants' purpose in raising spurious objections and this argument).

In moving before this Court, plaintiffs sought the fastest and most sensible approach to resolving these issues created by defendants' and their experts' refusal to simply comply with plaintiffs' valid subpoenas. This Court has adjudicated and resolved numerous issues relating to out-of-district subpoenas throughout the litigation and is in the best position to rule on the issues presented by plaintiffs' motion. Even if Mr. Bley and Mr. Litan are not subject to the jurisdiction of this Court by virtue of their role as testifying experts for the defendants, the Court can simply order Household International Inc. ("Household") to ensure that their experts comply with the subpoenas. Under the circumstances, there is no good reason to litigate these issues before two out-of-state courts.

C. Plaintiffs' Motion as to Mr. LaSusa Is Properly Before the Court

With respect to Mr. LaSusa, his opposition presents no new arguments regarding the parties' stipulation. Instead, Mr. LaSusa faults plaintiffs for not meeting and conferring with him separately

---

objections reads "United States District Court Western District of Missouri." *See* Motion, Ex. 4. Furthermore, the Court was already aware these subpoenas were issued from out-of-state courts because Ms. Best, counsel for defendants, repeatedly advised the Court's law clerk of this fact during her improper attempt to argue the merits of this motion during the February 25, 2008 scheduling call.

after a meet and confer with defense counsel established that no agreement was possible.[8] However, counsel for defendants and Mr. LaSusa ignore that any misunderstanding is the direct result of defendants' apparently deliberate obfuscation and misdirection as to who represented their experts.

- On Wednesday February 13, 2008, counsel for plaintiffs asked one of defendants' lawyers, David Owen, in person prior to a deposition whether Cahill represented defendants' experts. Mr. Owen refused to respond, other than instructing plaintiffs not to contact the witnesses.

- Later the same day, plaintiffs wrote an e-mail to Landis Best and Craig Kesch, also of the Cahill firm, repeating the inquiry. Ex. A.[9] Defendants ignored that e-mail.

- Plaintiffs sent another e-mail on Friday, February 15, 2008, repeating the inquiry for the third time. *Id*. Defendants responded: "***Unless and until you hear otherwise, you can operate under the presumption that Cahill represents these individuals*** and, as you were already told by David Owen on Wednesday, Plaintiffs are hereby instructed not to contact them directly." *Id.*

Counsel for defendants said nothing to dispel the notion that Cahill represented all of the experts for purposes of the subpoenas during the meet and confer, even when plaintiffs (1) sought to discuss a briefing schedule for their motion to compel and (2) informed defendants of their intention to call the Court to obtain a briefing schedule, and requested counsel's availability for the call. As LaSusa's objections were served shortly after the meet and confer, it appears Mr. Varga was either made aware of the Friday meet and confer and decided not to participate or defense counsel withheld that information so as to provoke Mr. Varga's sense of outrage. In any case, it is obvious that Mr. Varga practically cut-and-pasted the objections to Mr. LaSusa's subpoena from those of Messrs. Litan and Bley, and is coordinating with the Cahill firm.

---

[8] Mr. LaSusa suggests that plaintiffs were not candid with the Court. That is untrue. Plaintiffs did state that the LaSusa objections were received after the meet and confer. Motion at 3. Further, during the February 25, 2008 scheduling call with the Court's law clerk, counsel for defendants repeatedly stated Mr. LaSusa was represented by a different counsel. Plaintiffs certainly did not intend to mislead the Court on this subject.

[9] Exhibits A and B are attached hereto.

In any event, a meet and confer would likely have been futile. Plaintiffs called Mr. Varga to discuss his objections on February 28, 2008 (after Mr. LaSusa's response to plaintiffs' motion was filed) and again on February 29, 2008, but Mr. Varga was not available either time and sent a letter declining to discuss Mr. LaSusa's objections. *See* Ex. B. Further, even assuming a successful meet and confer with Mr. Varga, plaintiffs would still have had to bring the motion as to Mr. Bley and Mr. Litan.

Mr. LaSusa raises some specific issues regarding the alleged overbreadth of plaintiffs' subpoena. That subpoena consists of six separate document requests. With the exception of Request No. 5, the requests are narrow. Request Nos. 1 and 2 relate to compensation received from Household or services provided to Household. Request No. 3 relates to any legislative testimony Mr. LaSusa gave. Request No. 4 concerns reports or presentations Mr. LaSusa made while an Illinois regulator. Request No. 6 concerns any documents Mr. LaSusa has relating to Household's lending practices. Contrary to defendants' contention (Defs' Response at 4-5), this request does not seek production of documents previously produced in this action that were provided by defense counsel to Mr. LaSusa, which plaintiffs agree are covered by the stipulation.[10] Prior to his career as a consulting expert, Mr. LaSusa worked for the Illinois Department of Financial Institutions where he actively regulated Household. If Mr. LaSusa has documents from his work as a regulator, or has performed any other study, examination or analysis of Household's lending practices, such documents are clearly relevant to his opinions in this case, which relate to those same practices.

Plaintiffs agree that upon further review, Request No. 5 is over-broad and have contacted Mr. Varga to see if a mutually agreeable accommodation can be reached. As indicated above, Mr.

---

[10] Had defendants raised this concern during the meet and confer, plaintiffs would have clarified the point. This argument was not advanced by Mr. LaSusa in his response.

LaSusa's counsel declined to discuss these issues with plaintiffs. To obviate this burden issue, despite Mr. Varga's refusal to meet and confer, plaintiffs withdraw Request No. 5.

III. CONCLUSION

For the foregoing reasons, plaintiffs' motion to compel should be granted.

DATED: March 3, 2008

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154452)
LUKE O. BROOKS (90785469)
JASON C. DAVIS (253370)

/s/ Luke O. Brooks
LUKE O. BROOKS

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN
SPENCER A. BURKHOLZ
JOHN J. RICE
JOHN A. LOWTHER
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G. SOICHER
LAWRENCE G. SOICHER
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

T:\CasesSF\Household Intl\BRF00049605.doc

Exhibit A

Jason Davis

From: Kesch, Craig [CKesch@Cahill.com]
Sent: Friday, February 15, 2008 3:06 PM
To: Jason Davis
Cc: Azra Mehdi; Best, Landis C.; Owen, David
Subject: FW: Household

Jason:

Unless and until you hear otherwise, you can operate under the presumption that Cahill represents these individuals and, as you were already told by David Owen on Wednesday, Plaintiffs are hereby instructed not to contact them directly.

Thanks,
Craig

From: Jason Davis [mailto:jdavis@csgrr.com]
Sent: Friday, February 15, 2008 4:01 PM
To: Best, Landis C.
Cc: Azra Mehdi
Subject: RE: Household

Landis: Please provide a response to the question below today. In the absence of a response, Plaintiffs will assume the Cahill firm does not represent any of these individuals.

From: Jason Davis
Sent: Wednesday, February 13, 2008 2:28 PM
To: 'Best, Landis C.'; 'Kesch, Craig'
Cc: Azra Mehdi
Subject: Household

Landis/Craig: Please advise whether your firm represents Messrs. LaSusa, Litan and/or Bley in connection with the subpoenas plaintiffs served on them last week. Thanks, Jason

have received this communication in error, please notify us immediately by telephone or return e-mail and delete the original message from your system. Thank you.

* *

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

* *

Exhibit B

VARGA BERGER LEDSKY HAYES & CASEY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

SANTA FE BUILDING
224 SOUTH MICHIGAN AVENUE
SUITE 350
CHICAGO, ILLINOIS 60604-2507

TELEPHONE: 312-341-9400
FACSIMILE: 312-341-2900

CRAIG A. VARGA
(312) 341-9820

cvarga@vblhc.com

February 29, 2008

VIA FACSIMILE

Mr. Cameron Baker
Coughlin Stoia Geller
Rudman & Robbins LLP
100 Pine Street
Suite 2600
San Francisco, California 94111

Re: Jaffe v. Household

Dear Mr. Baker:

My filing yesterday of Mr. LaSusa's Response to Plaintiffs' Motion to Compel has prompted your firm to -- now -- call (twice) and want to engage in a meet and confer about the Subpoena and its demands for document searches by Mr. LaSusa. This is a course I predicted would occur in the Response (see pages 4 and 5).

Since Plaintiffs undertook the course they did and since expedited briefing is underway on that motion, I believe that the best way to proceed, under the circumstances, is to finish that briefing, and let the Court make a decision, without matters as to the Subpoena becoming a moving target, so to speak. I've outlined my position for Mr. LaSusa on the course Plaintiffs chose. The Court has before it that document and the Response filed by counsel for the Household defendants. I expect that we will likely get a decision from Magistrate Judge Nolan shortly after briefing concludes.

I have devoted substantial attention to this Subpoena matter this past week as a result of the course Plaintiffs chose. I have other matters for other clients that I need address and that have had to be put aside as a result of Plaintiffs' Motion to Compel, and as a result of needing to prepare a Response on a very expedited basis. I need focus on those other matters now and on some important meetings that I have next week. If the Court rules in such a way as to require any further action as to the Subpoena, I will of course act in compliance therewith. I will, however, request that any briefing that might arise be done on a reasonable schedule that takes into account other competing demands.

VARGA BERGER LEDSKY HAYES & CASEY

I have put this in writing out of a desire to provide you the courtesy of a response and so that my stance is clear and not subject to any mischaracterization.

Very truly yours,

Craig A. Varga

CAV:sto

cc: Craig Kesch (Cahill)
Lori Fanning (Miller)

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 March 3, 2008, declarant served by electronic mail and by U.S. Mail to the parties: **THE CLASS' REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH SUBPOENAS**. The parties' email addresses are as follows:

TKavaler@cahill.com PSloane@cahill.com PFarren@cahill.com LBest@cahill.com DOwen@cahill.com	NEimer@EimerStahl.com ADeutsch@EimerStahl.com MMiller@MillerLawLLC.com LFanning@MillerLawLLC.com

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

David R. Scott, Esq.
Scott & Scott LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of March, 2008, at San Francisco, California.

/s/ Marcy Medeiros
MARCY MEDEIROS