

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN,)
on behalf of itself and all others similarly)
situated,)
)
Plaintiff,)
)
v.)
)
HOUSEHOLD INTERNATIONAL, INC.,)
et al.,)
)
Defendants.)
_____)

No. 02 C 5893

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

DOCKETED
AUG 18 2004

FILED
AUG 17 2004
MICHAEL W. ROBBING
CLERK, U.S. DISTRICT COURT

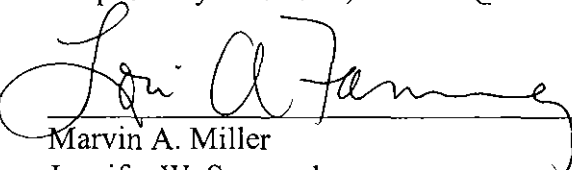
NOTICE OF FILING

To: Counsel on the Attached Service List

PLEASE TAKE NOTICE that on August 17, 2004, we filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois, the *Lead Plaintiffs' Opposition to Defendants' Motion to Compel*, a copy of which is hereby served upon you.

Dated: August 17, 2004

Respectfully submitted,

By: 

Marvin A. Miller
Jennifer W. Sprengel
Lori A. Fanning
MILLER FAUCHER and CAFFERTY LLP
30 North LaSalle Street, Suite 3200
Chicago, Illinois 60602
(312) 782-4880

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CERTIFICATE OF SERVICE

I, Lori A. Fanning, an attorney, hereby certify that I caused the *Lead Plaintiffs' Opposition to Defendants' Motion to Compel* to be served on all counsel on the attached service list by facsimile transmission and by placing a copy of the same in the United States Mail at 30 North LaSalle Street, Chicago, Illinois this 17th day of August, 2004.


Lori A. Fanning

SERVICE LIST

Nathan P. Eimer
Adam Deutsch
EIMER STAHL KLEVORN & SOLBERG LLP
224 S. Michigan Ave., Suite 110
Chicago, IL 60605

Stanley Parzen
Lucia Nale
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, Illinois 60603

David R. Gelfand
Michael L. Hirschfeld
Douglas W. Henkin
**MILBANK, TWEED, HADLEY
& McCLOY LLP**
1 Chase Manhattan Plaza
New York, New York 10005

William S. Lerach
**LERACH COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP**
401 B Street
Suite 1700
San Diego, California 92101
(619) 231-1058

Patrick J. Coughlin
Azra Z. Mehdi
Luke O. Brooks
**LERACH COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP**
100 Pine Street, Suite 2600
San Francisco, California 94111
(415) 288-4545

Lawrence G. Soicher
**LAW OFFICES OF LAWRENCE G.
SOICHER**
305 Madison Avenue
46th Floor
New York, New York 10165

David R. Scott
Michael A. Swick
SCOTT & SCOTT, LLC
108 Norwich Avenue
Colchester, Connecticut 06415

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED
AUG 18 2004

LAWRENCE E. JAFFE PENSION PLAN, On) Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly) (Consolidated)
Situating,)

Plaintiff,)

vs.)

HOUSEHOLD INTERNATIONAL, INC., et)
al.,)

Defendants.)

CLASS ACTION

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

FILED
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MICHAEL W. DORRINS
CLERK, U.S. DISTRICT COURT

LEAD PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

Lead plaintiffs, the Glickenhau Institutional Group,¹ submit this opposition to Household Defendants and Andersen's (collectively, "defendants") motion to compel lead plaintiffs to disclose the computation of the damages on which their claims are based as well as all evidence upon which this computation is based.² In support of their opposition, lead plaintiffs state as follows:

¹ The Glickenhau Institutional Group comprising three institutional plaintiffs, Glickenhau & Company, Pace Industry Union Management Pension Fund, and the International Union of Operating Engineers Local No. 132 Pension Plan, was appointed as lead plaintiff by this Court on December 18, 2002.

² Although Andersen advised plaintiffs that it had the same issues with plaintiffs' Rule 26(a)(1) disclosures as were raised in Household defendants' July 2, 2004 letter, noticeably absent from the motion is a statement of efforts made by Andersen to meet and confer about Andersen's objections. At no point did Andersen meet and confer with plaintiffs' counsel regarding its objections in accordance with L.R. 37.2 prior

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1. On June 25, 2004, lead plaintiffs served their Initial Disclosures Pursuant to Federal Rule of Civil Procedure 26(a)(1) (“Initial Disclosures”).³ As required by Fed. R. Civ. P. 26(g), plaintiffs’ Initial Disclosures were based upon the information available to them at the time, after making a reasonable inquiry. Defs’ Mem., Ex. A at 11. Plaintiffs objected to providing a detailed computation of damages on June 25, 2004 on the grounds that the damages issues in this case are complex and would require expert analysis. *Id.* Plaintiffs expressly reserved their right to clarify, amend, modify or supplement the information in the Initial Disclosures, when plaintiffs obtain supplemental information, as required by the Federal Rules of Civil Procedure or the Local Rules. *Id.* at 1. Additionally, plaintiffs expressly reserved all objections based upon attorney-client privilege, work product protection, and any other applicable privilege or protection under federal or state law. *Id.*

2. Plaintiffs again outlined in greater detail their objections to providing Household Defendants with a computation of damages during a July 14 meet and confer and a July 23, 2004 letter, maintaining that the information and materials being used for the computation of damages are protected work product and not subject to the disclosure requirements of Rule 26(a)(1)(C) at this time.⁴

3. Indeed, even the language of Fed. R. Civ. P. 26(a)(1)(C) does not contemplate the disclosure that defendants seek here – documents or other evidentiary material that is privileged or

to filing a motion to compel. To the extent that Andersen has failed to comply with L.R. 37.2, Andersen’s motion to compel should be summarily denied.

³ See Motion to Compel Lead Plaintiffs to Comply with Their Initial Disclosure Obligations Under Federal Rule of Civil Procedure 26(a)(1) (“Defs’ Mem.”), Ex. A.

⁴ Defendants inaccurately state that lead plaintiffs did not respond to the July 2 letter. Defs’ Mem. at ¶3. Household’s July 2 letter was sent late on the eve of the Fourth of July weekend and was followed by a voicemail message for plaintiffs’ counsel on July 7, 2004. Plaintiffs’ counsel responded on July 7, 2004, agreeing to a meet and confer at a mutually acceptable date.

otherwise protected from disclosure. *See* Fed. R. Civ. P. 26(a)(1)(C) (requiring a party to provide to other parties “a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, ***not privileged or protected from disclosure***, on which such computation is based, including materials bearing on the nature and extent of injuries suffered”) (emphasis added).⁵ Incredibly, defendants fail to include this language in their submission to the Court. Defs’ Mem. at ¶2.

4. What defendants are seeking from lead plaintiffs at this time is work product of non-testifying experts which is protected from the duty of disclosure. Courts in this Circuit have denied similar motions to compel. In *Crouse Cartage Co. v. Nat’l Warehouse Inv. Co.*, Cause No. IP 02-071 C T/K, 2003 U.S. Dist. LEXIS 478 (S.D. Ind. Jan. 13, 2003) (attached hereto as Exhibit 1), Magistrate Judge Tim Baker denied defendants’ motion to compel plaintiff to comply with Fed. R. Civ. P. 26(a)(1)(C) to the extent that it required plaintiff to disclose its preliminary damage analysis to defendants. The court found that disclosure of the real estate broker’s rough market analysis was not required as it was entitled to the protection afforded by the facts known and opinions of a non-testifying expert under Rule 26(b)(4)(B). *Id.* at *6. The district court subsequently adopted and affirmed Magistrate Judge Baker’s decision finding that “[t]he duty of disclosure does not require production of documents which are privileged or otherwise protected.” *Crouse Cartage Co. v. Nat’l Warehouse Inv. Co.*, IP 02-0071-C-T/K, 2003 U.S. Dist. LEXIS 9066, at *14 (S.D. Ind. Apr. 10, 2003) (attached hereto as Exhibit 2).⁶

⁵ *See also* Fed. R. Civ. P. 26(a)(1) advisory committee’s note (1993 amendments). (This obligation applies only with respect to documents then reasonably available to the party and not privileged or protected as work product.)

⁶ The special protection of “opinion work product” is codified in Rule 26(b)(3), which provides that “the court shall protect against disclosure of the mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation.”

5. Lead plaintiffs are presently unable to provide a computation of damages because they have not yet retained or designated an expert to testify with respect to damages in this case or otherwise compute the amount of damages that will be claimed at trial. The damages issues in this case are complex, requiring expert analysis, and may depend on documents and information in defendants' possession and not presently available to plaintiffs. The damage computations include, among other things, an analysis of the prices plaintiffs paid for Household securities, the price at which plaintiffs sold Household securities, the proper valuation of Household securities during the Class Period due to defendants' fraudulent conduct, and prices of such securities immediately following the Class Period. Computation of damages is made even more complicated by the five-year Class Period, Household's use of its securities to acquire numerous companies during the Class Period, and other factors that caused the price of Household securities to be artificially inflated.

6. Defendants' confuse the concept of tabulation of losses with the computation of actual compensatory damages. Defs' Mem. at ¶7, n.9. Lead plaintiffs are sophisticated institutional investors who undoubtedly have the ability to keep track of the *losses* in their portfolio as provided to the Court in their lead plaintiff motion. Losses and the computation of damages for a class, however, are simply not the same. "In securities fraud cases under Rule 10b-5, damages are usually the difference between the price of the stock and its value on the date of the transaction if the full truth had been known." *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 n.6 (7th Cir. 1997). The value of Household stock, if the full truth had been known at the time of purchase, will be the subject of damages computation and entails expert analysis and complex calculations.

7. Defendants assert that lead plaintiffs must provide a computation of damages *now*, or face exclusion of evidence or outright dismissal of claims. Defs' Mem. at ¶7. The authority cited by defendants in support of this position in footnote 8, in fact, seriously undermines their premature motion to compel because those cases concern (1) plaintiff's failure to disclose damages just *weeks*

before trial, after discovery had been closed, and plaintiff failed to respond to specific discovery related to damages;⁷ (2) plaintiff's failure to make a specific, separate claim for the type of damages in the complaint upon which recovery was being requested;⁸ or (3) other issues that simply have no application here.⁹

8. Defendants have provided *no* justification for bringing this motion to compel at this early stage. Indeed, just on August 2, 2004, plaintiffs received a total of 15 sets of discovery requests propounded by Household Defendants. In each set of requests for production of documents at least 11 of the 40 individual requests demand production of documents touching in some manner upon damages. See Ex. 3, attached hereto (Requests 4, 6, 7, 9, 12, 14, 15, 23, 25, 26, 30).¹⁰ In fact,

⁷ See, e.g., *Advanced Cleanroom Techs. v. Newhouse*, No. 00 C 6623, 2002 WL 206960, at *5 (N.D. Ill. Feb. 11, 2002) (allegations of particular damages excluded because they were not made until after discovery had closed at the summary judgment stage, where such damages were not disclosed in response to specific written discovery requests or in the Rule 26 disclosures); *Gilvin v. Fire*, No. 99-CV-530, 2002 WL 32170943, at *3 (D.D.C. Aug. 16, 2002) (damages not asserted until pre-trial statements, after discovery deadline, and seven weeks before trial); *Am. Realty Trust, Inc. v. Matisse Partners, L.L.C.*, No. Civ. A.3:00-CV1801-G, 2002 WL 1489543, at *4 (N.D. Tex. July 10, 2002) (plaintiff disclosed claim for particular damages in pre-trial motion after discovery deadline without providing any specifics of the claim upon which the damages were based); *Colombini v. Members of the Bd. of Directors of the Empire Coll. Sch. of Law*, No. C9704500CRB, 2001 WL 1006785, at *8 (N.D. Cal. Aug. 17, 2001), *aff'd*, 61 Fed. Appx. 387 (9th Cir. 2003) (plaintiff failed to disclose computation of damages through summary judgment).

⁸ See, e.g., *Chedick v. Nash*, 151 F.3d 1077, 1084 (D.C. Cir. 1998) (post-judgment appeal challenging the exclusion of certain evidence relating to emotional damages where plaintiff's complaint had no specific, separate claim for mental anguish and where plaintiff had failed to provide any discovery related to such damages).

⁹ See, e.g., *Reytblatt v. Illinois Inst. of Tech.*, No. 97 CV 927, 1999 WL 181995, at *2 (N.D. Ill. Mar. 24, 1999) (willful refusal to comply with court orders because plaintiff was protesting transfer of case from the District of Connecticut to the Northern District of Illinois, where Connecticut had not opted into Rule 26(a) while Illinois had). Defendants' reliance on *Bullard v. Roadway Express*, 3 Fed. Appx. 418, 420 (6th Cir. 2001) is also unsupportable: (1) The facts and circumstances are completely distinguishable – in a sex discrimination case, despite numerous court warnings, plaintiff refused to provide either the medical records, a computation of damages, or a reason for failure to comply with the court's orders; and (2) *Bullard* is an unpublished decision from the Sixth Circuit with no precedential value in this Circuit for the reasons outlined in (1) above. See Sixth Circuit Rule 28(g) and Seventh Circuit Rule 53 limiting citation of unpublished opinions only for the purpose of establishing *res judicata*, estoppel or the law of the case.

¹⁰ Attached hereto is Household Defendants' First Request for the Production of Documents from PACE Industry Union Management Pension Fund. See Ex. 3. Household defendants propounded a similar

Request No. 25 asks each plaintiff to produce “[a]ll Documents concerning any damages You allegedly suffered as a result of the acts alleged in the Complaint.”

For all of the reasons stated above, defendants’ motion to compel lead plaintiffs to provide a computation of damages and to produce all evidence on which their damages claim is based, is premature and must be denied in its entirety.

Respectfully submitted,

DATED: August 17, 2004

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
LUKE O. BROOKS (90785469)
SYLVIA SUM


AZRA Z. MEHDI

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

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

request on each of the lead plaintiffs and named plaintiffs, the AMS Fund and West Virginia Laborers Trust Fund. Household Defendants and Individual Defendants have also propounded two separate sets of interrogatories on each lead plaintiff as well as named plaintiffs.

MILLER FAUCHER AND CAFFERTY LLP
MARVIN A. MILLER
LORI A. FANNING
30 North LaSalle Street, Suite 3200
Chicago, IL 60602
Telephone: 312/782-4880
312/782-4485 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.
SOICHER
LAWRENCE G. SOICHER
305 Madison Avenue, 46th Floor
New York, NY 10165
Telephone: 212/883-8000
212/697-0877 (fax)

Attorneys for Plaintiff

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EXHIBITS**