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**FILED**  
**MAR 11 2005**

U.S. District Court  
Northern District of Illinois  
Eastern Division

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On )	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly )	(Consolidated)
Situated, )	
	<u>CLASS ACTION</u>
Plaintiff, )	Judge Ronald A. Guzman
	Magistrate Judge Nan R. Nolan
vs. )	
HOUSEHOLD INTERNATIONAL, INC., et )	
al., )	
Defendants. )	
_____ )	

**LEAD PLAINTIFFS' RESPONSE TO HOUSEHOLD DEFENDANTS'  
SUPPLEMENTAL SUBMISSION IN SUPPORT OF THEIR MOTION TO AMEND  
PROTECTIVE ORDER**

**REDACTED VERSION**

*[Faint, illegible text]*

## I. INTRODUCTION

The Household Defendants' colorful submission attached to the affidavits of David Owen and John Cobb ("Household's Supplemental Submission") once again fails to satisfy their burden of establishing good cause for adding organizational charts as a category of protected documents under the November 5, 2004 Protective Order ("Protective Order"). It fails for the following reasons:

- A statistical analysis of 2,101 employees within select isolated business units of a handful of subsidiaries is woefully inadequate to establish good cause where Household International, Inc. ("Household") had approximately 32,000 employees in 2001 and 31,000 in 2002.
- Providing the Court only with the relatively low employee turnover percentages for a very small business unit is misleading when the turnover percentages for certain other business units relevant to the allegations in this case range from 20%-69%.
- Household's own documents demonstrate that employee attrition was primarily due to firing of employees by Household and reasons other than poaching by recruiters.
- The Household Defendants have failed to provide "specific examples of articulated reasoning" or demonstrate "clearly defined very serious injury to its business" as required by applicable law in this District. Their unsupported conclusory statement that the organizational charts "would be valuable to professional recruiters and Household's competitors who *could* use them to accurately target and poach such individuals" is simply inadequate.

Additionally, the Household Defendants' continuous filing of disputed Confidential Information *in camera*, rather than under seal, violates the Protective Order and underscores the burden of filing documents under seal. Protective Order, ¶¶21-22. If, as the Household Defendants assert, the mechanics of filing under seal are "hardly too burdensome," then they should practice what they preach. If filing documents under seal were that simple, they would have complied with the very requirements they want the Court to impose on plaintiffs with respect to the organizational charts at issue here and virtually every other document the Household Defendants produced in this case.

The Household Defendants' Motion to Amend the Protective Order should, therefore, be denied.

## II. ARGUMENT

### A. Household's Supplemental Submission Regarding a Small Number of Business Units Is Insufficient to Establish the Current Value of Organizational Charts for All Subsidiaries Within the Class Period

Household's Supplemental Submission is grossly inadequate. The Household Defendants ask the Court for a blanket confidentiality designation for organizational charts of all 362 subsidiaries and affiliated business units during the entire Class Period (October 23, 1997 to October 11, 2002). *See* Exhibit 1, attached to the Declaration of Azra Z. Mehdi filed concurrently herewith. (All exhibits referenced herein are attached thereto.)<sup>1</sup> The statistical analysis in Household's Supplemental Submission, however, is limited to a survey of a grand total of 2,101 employees from select business units cherry-picked by the Household Defendants for the years 2001 and 2002. Affidavit of David Owen in Support of Household Defendants' Motion to Amend the Protective Order ("Owen Aff."), ¶2. In its Annual Reports on Form 10-K, Household disclosed that it had a total of 32,000 employees in 2001 and 31,000 in 2002. Exs. 4-5. Yet the analysis performed by Household only looks at the status of 1,804 employees or 5.6% of the 32,000 employees for 2001, and only evaluates the information for 297 employees or 0.9% of the 31,000 employees at Household for 2002. Because the sample size used by the Household Defendants is so small, the

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<sup>1</sup> The Household Defendants' production of organizational charts has been woefully inadequate. Exs. 2-3. Despite the existence of hundreds of subsidiaries, the Household Defendants have cherry-picked the organizational charts they wish to provide, and even those they have provided have been incomplete. Despite repeated requests and documents demonstrating that Household maintained meticulous organizational charts, the Household Defendants have taken the position that they cannot locate any organizational charts other than the ones produced to lead plaintiffs. Although it was lead plaintiffs' intention to file a motion to compel production of the organizational charts for the entire Class Period as well as certain other documents, pursuant to the Court's guidance during the March 8, 2005 hearing, lead plaintiffs will defer this motion until after the mediation, if necessary.

resulting information cannot be used to make a statistically reliable assumption about Household as a whole, and thus, the information is irrelevant.

Household's Supplemental Submission highlights its flawed analysis. For instance, the Household Defendants only provide the Court with employee turnover figures for the Household Technology Services or HTS business unit. Affidavit of John Cobb in Support of the Household Defendants' Motion to Amend the Protective Order ("Cobb Aff."), ¶9 (stating that annual turnover for HTS for the years 2001, 2002, 2003 and 2004 was 6.8.%, 5.7 %, 5.4% and 5.6%, respectively). However, HTS is such a small business unit within the Household corporate framework, that it is not even listed in the subsidiary list provided by the Household Defendants to plaintiffs. *See* Ex. 1.<sup>2</sup> Household's Supplemental Submission fails to provide annual turnover statistics for *any other business unit*.

Documents produced in this litigation demonstrate that the turnover rate for a number of the larger Household subsidiaries or business units was so high that it makes the Household Defendants' analysis for HTS irrelevant. For example, the 2001 annualized turnover for Collections (other than Pomona & Elmhurst) was 54%, HFC Sales was 46%, BFC Sales 41%, Consumer Lending 39%. *See* Ex. 6. The 2002 annualized turnover numbers are similar and even higher for BFC sales at 50%. *See* Ex. 7.

The chart below, along with supporting documentation, highlights why the Household Defendants would want to keep the Court in the dark regarding these more telling turnover statistics

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<sup>2</sup> The Household Defendants' incomplete listing of subsidiaries is yet another example of their inadequate production of documents relating to the organizational and corporate structure of Household. Despite repeated requests, the Household Defendants have failed to provide plaintiffs with documents sufficient to demonstrate the interrelationship among the hundreds of subsidiaries and business units at Household. Again, lead plaintiffs will defer filing a motion to compel production of these documents until after mediation.

which for many of the major business units relevant to this litigation are over 20% and as high as 69%:

<b>Business Unit</b>	<b>Turnover</b>	<b>Period</b>	<b>Supporting Documentation</b>
Collections	69%	1999	Ex. 8
	33.72%	2001 (annualized in 11/01)	Ex. 9
	44.24%	2001 (annualized in 1/02)	Ex. 10
Retail Services Collections	23%	2002 (annualized in 10/02)	Ex. 11
Credit Card Collections	34%-45%	2002	Ex. 12
	23%	2001 (annualized in 4/01)	Ex. 13
Auto Finance	31.31%	2002 (annualized in 6/02)	Ex. 14
	32.8%	2002 (annualized in 10/02)	Ex. 15
	31.3%	2002	Ex. 16
	32.6%	1/03	Ex. 17
Mortgage Services	25.79%	2001	Ex. 18
Mortgage Services Decision One	20.50%	2001	Ex. 19
Mortgage Services	21.9%	2002	Ex. 20
	27.7%	2002 (annualized in 3/03)	Ex. 21
Retail Services	30.2%	2000	Ex. 22
	21.7%	2001 (annualized in 11/01)	Ex. 23
	29.7%	2002 (mid-year analysis)	Ex. 24

The above statistics from Household's own documents evidence the flaws and the inherent unreliability of the selective self-serving statistical analysis in the Household's Supplemental Submission.

**B. Terminations, Job Dissatisfaction, and Personal Reasons, Rather than Poaching by Recruiters Were the Primary Reasons for Employee Attrition**

Evidence from Household's document production contradicts the Household Defendants' rationale for requesting confidential treatment of organizational charts. These documents demonstrate that employee attrition at Household was primarily the result of firings by Household for attendance issues and violations of company policy, among other reasons; job dissatisfaction; personal reasons; and reasons other than poaching by competitors. Exs. 14-17, 24. Indeed, a January 27, 2003 draft of the Consumer Lending call for the Fitch Ratings agency shows that in 2002, the non-voluntary turnover at some branches exceeded 40%. Ex. 25. Exit interviews with employees of the Auto Finance business unit [REDACTED] [REDACTED] Ex. 17. Despite detailing the reasons for employee attrition in many other documents, poaching by recruiters is not listed in any of the documents. Thus, Household's articulated rationale that professional recruiters will poach Household employees without additional protection from the Court merely evinces an "overdeveloped sense of self-importance" rather than any real concern of loss of employees to competitors. *Andrew Corp. v. Rossi*, 180 F.R.D. 338, 341 (N.D. Ill. 1998).

For this reason alone, the Court should deny the Household Defendants' request to modify the Protective Order to include organizational charts.

**C. The Household Defendants Have Failed to Demonstrate Clearly Defined Specific Injury, But Rely Instead on Speculative Claims of Injury**

Even if the Court determines that any portion of Household's organizational charts may conceivably be deemed a trade secret or other proprietary information, the Court must still evaluate whether the Household Defendants have satisfied the other prong of good cause, *i.e.*, a clearly defined and very serious injury to its business. *Id.* at 340. Despite having at least three separate opportunities to make this showing, the Household Defendants have failed to do so. The reason is simple – they cannot demonstrate an injury, much less a very serious injury.

The Household Defendants have done no more than speculate that the organizational charts “would be valuable to professional recruiters and Household's competitors who could use them to accurately target and poach such individuals.” Owen Aff., ¶3. Additionally, even the affidavits submitted do nothing more than state in a conclusory manner that certain departments have been devastated through the loss of personnel to raiders. Affidavit of Michael Woodward in Support of Household Defendants' Motion to Amend the Protective Order (“Woodward Aff.”), ¶7; Reply Mem. at 3. The Household Defendants fail to identify the department, the number of employees lost, when this occurred or which competitor acquired such personnel. This information is quite clearly in Household's possession. Such self-serving statements are precisely the type of support that the court dismissed as deficient in *Andrew* stating that “[w]ithout more than Andrew's self-serving statements, this Court cannot determine whether such assertions are legitimate, or merely due to an overdeveloped sense of self-importance.” 180 F.R.D. at 341; *see also Sterbens v. Sound Shore Med. Ctr.*, 01 Civ. 5980 (SAS) (KNF), 2001 U.S. Dist. LEXIS 19987, at \*5 (S.D.N.Y. Dec. 5, 2001) (conclusory allegations that competitors might use the information contained in the organizational charts to “lure away employees” held to “fall short of the specificity required to establish good cause”).

The Household Defendants have not provided a single example of an actual injury. Mr. Woodward's affidavit estimated the cost of replacing one technology employee at \$50,000. Woodward Aff., ¶6. Estimates, however, are insufficient to meet the stringent test for good cause of a concrete injury. Household's Supplemental Submission fails to correct this deficiency. The Household Defendants do not offer evidence of even a single instance of an actual injury. Because the Household Defendants have failed to meet this prong of the good cause requirement as well, their motion should be denied.

**D. The Household Defendants' Persistent Circumvention of the Protective Order by Filing Disputed Confidential Information *In Camera* Requires a Careful Evaluation of Confidentiality Designations**

The Protective Order in place in this litigation provides that all:

Discovery Material claimed to contain Confidential Information that is subject to a dispute as to whether it does in fact contain Confidential Information shall, until further order of the Court, be treated as Confidential Information in accordance with the provisions of this Order notwithstanding the existence of such dispute.

Protective Order, ¶21. The Protective Order further requires that all pleadings and other documents filed with the Court containing Confidential Information must be filed under seal pursuant to Local Rule 26.2. *See id.* at ¶22. Yet, the Household Defendants have continually disregarded the very provision they insisted on including in the Protective Order by submitting disputed Confidential Information (here the organizational charts) *in camera*, rather than undertaking the effort to file it under seal as required by the Protective Order.

The Household Defendants scoff at lead plaintiffs' contention that adding the organization charts as an additional category imposes an additional burden on lead plaintiffs. Reply Mem. at 8-9. They claim it is "hardly too burdensome" to file documents under seal. *Id.* at 9. By flagrantly disregarding the Protective Order and instead filing disputed confidential material *in camera*, the Household Defendants have effectively demonstrated just how burdensome it is to file documents



under seal. The Household Defendants' failure to comply with the Protective Order should not be further countenanced.

If organizational charts are permitted to be marked confidential, the burden on plaintiffs increases exponentially. As it stands currently, the Household Defendants have marked practically every document as confidential. Indeed, lead plaintiffs' ongoing review of the documents demonstrates that the Household Defendants have completely ignored the Protective Order's good faith belief requirement in making their designations. Some examples of documents the Household Defendants have designated as confidential include: (1) hundreds of blank pages (*see* Ex. 26 for a sampling of blank pages); (2) press releases (*see* Ex. 27, for some examples); (3) airline discount program and frequent flier program emails (*see* Ex. 28); (4) birthday and anniversary celebration invites (*see* Ex. 29); (5) Krispy Kreme order forms (*see* Ex. 30); (5) library pickup notices (Ex. 31); and (6) marketing materials for Experian (*see* Ex. 32).<sup>3</sup>

Thus, lead plaintiffs have amply demonstrated that should the Court permit modification of the Protective Order to include organizational charts, it would unnecessarily burden lead plaintiffs.

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<sup>3</sup> Given the Household Defendants' flagrant abuse of the "Confidential" designation and the resulting burden, lead plaintiffs intend to seek an order requiring the Household Defendants to review and properly designate the documents produced. Plaintiffs will wait until after the mediation to seek this relief, if necessary.

### III. CONCLUSION

For the foregoing reasons and the reasons outlined in Lead Plaintiffs' Opposition to Household Defendants' Motion to Amend the Protective Order, the Motion to Amend the Protective Order should be denied in its entirety.

DATED: March 11, 2005

Respectfully submitted,

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LEXSEE 2001 US DIST LEXIS 19987

PAULA STERBENS, ET AL., Plaintiffs, -against- SOUND SHORE MEDICAL  
CENTER OF WESTCHESTER, ET AL., Defendants.

01 Civ. 5980 (SAS)(KNF)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

2001 U.S. Dist. LEXIS 19987

December 4, 2001, Decided

December 5, 2001, Filed

**DISPOSITION:** [\*1] Sound Shore's application for a protective order denied with respect to the documents described as Category I and granted with respect to the documents described as Categories II, III and IV.

**LexisNexis(R) Headnotes**

**COUNSEL:** For PAULA STERBENS, KAREN LEON, plaintiffs: Steven Arenson, Arenson, Dittmar & Karban, New York, NY.

For SOUND SHORE MEDICAL CENTER OF WESTCHESTER, KATHY HAGAN, defendants: Wendy S. Van Dorn, L'Abbate, Balkan, Colavita & Contini LLP, Garden City, NY.

**JUDGES:** KEVIN NATHANIEL FOX, UNITED STATES MAGISTRATE JUDGE.

**OPINIONBY:** KEVIN NATHANIEL FOX

**OPINION:**

**MEMORANDUM and ORDER**

KEVIN NATHANIEL FOX  
UNITED STATES MAGISTRATE JUDGE

**I. INTRODUCTION**

In this action, which contains, inter alia, allegations of sex discrimination and pregnancy discrimination, the parties are engaged in discovery. A dispute has arisen concerning whether certain documents the defendants have should be classified as confidential and be withheld

from public disclosure pursuant to *Rule 26(c) of the Federal Rules of Civil Procedure*. Defendants Sound Shore Medical Center of Westchester and Kathy Hagan (collectively "Sound Shore") urge that a protective order be issued by the Court to prevent disclosure to non-parties [\*2] of certain personnel documents and documents that reflect the organization of its corporate structure. Plaintiffs oppose Sound Shore's request. They maintain that to grant Sound Shore's request would not be in keeping with applicable case law or the presumption in favor of public access to court records. Sound Shore has submitted the documents in question for *in camera* review. The Court has reviewed the documents and, for the reasons which follow, Sound Shore's application that the documents be withheld from public disclosure is granted in part and denied in part.

**II. DISCUSSION**

The scope of discovery, under the Federal Rules of Civil Procedure, is broad. Parties to an action may obtain discovery regarding any matter that is not privileged, if it is relevant to the claim or defense of any party to the action. Moreover, upon a showing of good cause, a court may order discovery of any matter relevant to the subject matter involved in the pending action. See *Fed. R. Civ. P. 26(b)(1)*.

Discovery is presumptively open to public scrutiny unless a valid protective order directs otherwise. See *In re "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 145 (2d Cir. 1987)*. [\*3] Under *Fed. R. Civ. P. 26(c)*, a court, upon a showing of good cause, may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Fed. R. Civ. P. 26(c)*. The party seeking a

protective order has the burden of showing that good cause exists for issuance of the order. See *In re Agent Orange*, 821 F.2d at 145. To establish good cause under Rule 26(c), courts require a "particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Havens v. Metropolitan Life Ins. Co. (In re Akron Beacon Journal)*, 1995 U.S. Dist. LEXIS 5183, No. 94 Civ. 1402, 1995 WL 234710, at \*10 (S.D.N.Y. April 20, 1995)(quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 [3d Cir. 1986]). In the context of a claim of confidential business information, "this standard demands that the company prove that disclosure will result in a clearly defined and very serious injury to its business." *Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993)(internal quotations omitted)(citations omitted). In determining the weight to be accorded an assertion [\*4] of a right of privacy, courts should consider whether the subject matter is traditionally considered private rather than public, the nature and degree of injury, and the reliability of the information. See *United States v. Amodeo, et al.*, 71 F.3d 1044, 1050-51 (2d Cir. 1995).

Sound Shore submitted four categories of documents for *in camera* inspection; the Court's analysis of each category of documents follows:

#### Category I: Tables of Organization and Position Control Documents

The tables of organization submitted by Sound Shore consist of diagrams depicting the hierarchical structure of the administrative component of Sound Shore's finance department and medical, nursing home, and extended care facilities. The "position control documents" submitted by Sound Shore consist of records of administrative positions within its finance department, the occupants of those positions, and the number of hours of weekly employment associated with each position, for the years 1995, 1997, 1999 and 2000. The "position control documents" do not include explicit references to salaries or salary histories.

Sound Shore contends that disclosure of these documents to persons [\*5] who are not parties to the action will injure its business because the information contained in them could be used by competitors to "lure away employees and potential patients," and to interfere with "the marketing of its medical and extended care services." In addition, Sound Shore opposes publication of the material to non-parties on the ground that the documents contain job title and job-related references to Sound Shore employees who are not parties to this action.

No showing has been made that Sound Shore's documents which reflect the organization of its corporate

structure and the "position control documents" contain valuable commercial information that could adversely affect Sound Shore's competitive position in the healthcare market. All that is before the Court are Sound Shore's conclusory allegations respecting the adverse consequences to it that disclosure of this material to non-parties would have. Sound Shore's conclusory statements regarding the effects of disclosure of these documents to non-parties fall short of the specificity required to establish good cause for a protective order. Further, no showing has been made that the privacy interests of the parties whose [\*6] names appear in these documents outweigh the public's presumptive right of access to discovery materials.

Accordingly, the Court finds that the documents that reflect the organization of Sound Shore's corporate structure and "position control documents" need not be protected from public disclosure.

#### Category II: Memorandum of John R. Spicer

The memorandum of Sound Shore executive John R. Spicer ("Spicer Memorandum") records the substance of a conversation that took place on April 5, 2000, between Mr. Spicer and defendant Charles Thevnin, an employee of Sound Shore. Sound Shore contends that the Spicer Memorandum should be withheld from public view because of "the sensitive nature of the litigation" in this case and the need to protect the parties from "annoyance, embarrassment, and oppression," as contemplated by *Fed. R. Civ. P. 26(c)*. Plaintiffs contend that Sound Shore's position with respect to the Spicer Memorandum is untenable in light of the defenses it has asserted to the allegations of sexual harassment made in this action. Specifically, plaintiffs argue that, since Sound Shore will probably rely on the Spicer Memorandum to establish that it exercised reasonable care [\*7] to prevent and correct any misconduct of the type alleged in the complaint, the document is likely to play a significant role in determining the litigants' rights in this action. Consequently, according to plaintiffs, the Court should accord "strong weight to the public's interest in access" to this document.

The Court finds that Sound Shore has met its burden and shown good cause for the protective order with respect to the Spicer Memorandum. Public disclosure of the contents of the Spicer Memorandum has a high potential for embarrassment or harm to defendant Charles Thevnin. Therefore, the privacy interest of this defendant constitutes an exception to the presumption of public access. The plaintiffs will not suffer any prejudice by the granting of the protective order with respect to this document because they will still be able to prosecute their action.

Accordingly, the Court finds that the information contained in the Spicer Memorandum should be withheld from public disclosure.

Category III: Personnel File of Charles Thevnin

The personnel file of Charles Thevnin contains documents pertaining to employment, health, financial, and personal data that are typically viewed [\*8] as private. The documents in the personnel file, for the most part, pertain to private rather than public matters. The quantum of documents that are of a sensitive and private nature is such that withholding the entire personnel file from disclosure to non-parties is warranted. In addition, the Court finds that disclosure of the information contained in the documents which touch upon private and sensitive matters has a high potential for causing embarrassment or harm to defendant Thevnin. Accordingly, the Court finds that the information contained in the personnel file of defendant Charles Thevnin should not be disclosed to the public.

Category IV: Personnel File of Kathy Hagan

The personnel file of Kathy Hagan contains documents pertaining to employment, health, financial, and personal data that are typically viewed as private. As

noted in connection with the documents described in Category III, above, a large portion of the documents included in this file pertain to private matters, such that disclosure of the information contained in them is potentially embarrassing or harmful to this defendant. Accordingly, the Court finds that the information contained in the personnel [\*9] file of defendant Kathy Hagan should not be disclosed to the public.

**III. CONCLUSION**

For the reasons set forth above, Sound Shore's application for a protective order is denied with respect to the documents described as Category I and granted with respect to the documents described as Categories II, III and IV. The items that comprise Categories II, III and IV shall be disclosed to the plaintiffs and shall not be disclosed by them to the public or be used by them for any purpose other than the prosecution of this action.

Dated: New York, New York

December 4, 2001

SO ORDERED:

KEVIN NATHANIEL FOX

UNITED STATES MAGISTRATE JUDGE