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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
JUN 6 2005

LAWRENCE E. JAFFE PENSION PLAN, On)
Behalf of Itself and All Others Similarly)
Situating,)
)
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

FILED

JUN - 6 2005 *sp*

MICHAEL W. DOBSON
CLERK, U. S. DISTRICT COURT

**LEAD PLAINTIFFS' MOTION TO COMPEL THE HOUSEHOLD DEFENDANTS TO
PRODUCE SOURCE LOGS FOR DOCUMENTS PRODUCED IN THIS LITIGATION**

Pursuant to Fed. R. Civ. P. 37(a), lead plaintiffs respectfully move this Court for an order compelling defendants Household International, Inc. ("Household" or the "Company") Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar ("defendants") to produce logs identifying the source and/or custodian of documents produced in this litigation.

I. INTRODUCTION

Lead plaintiffs' motion to compel presents straightforward issues that the parties were unable to resolve despite protracted meet and confer sessions. Plaintiffs have asked Household to identify where the documents it produced were found, by providing the names of employees or departments that maintained those files. In refusing to produce source logs for the documents in this action, defendants are withholding basic information about critical evidence in this case. For instance, plaintiffs have no way of ascertaining whether there has been any production from the files of the individual defendants at all. Information regarding which documents were in whose possession and when is critical to establishing knowledge and scienter, and clearly is discoverable.

In addition to being highly relevant, source logs are necessary for the efficient prosecution of this complex case. Most of the three million pages produced by Household thus far, represent a small portion of the outstanding discovery.¹ Information regarding the source of documents in this massive production will, among other things, allow plaintiffs to conduct a more efficient review of the documents, more easily authenticate documents, and determine whom to depose and the proper

¹ Most of this production was previously produced to the United States Securities and Exchange Commission ("SEC"), and, according to defendants, produced in the same manner and form to plaintiffs as it was to the SEC. On June 10, 2004, in *Cokenour v. Household Int'l*, Case No. 02 C 7921 (an ERISA case involving many of the same issues as this action), in that case, Judge Der-Yeghiayan ordered Household to produce to plaintiffs the index to those documents and any document index provided to state regulators. Declaration of Luke O. Brooks in Support of Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Source Logs for Documents Produced in This Litigation, ("Brooks Decl.") Exhibit 1.

order of depositions. Moreover, responding to plaintiffs' request for source information would impose only a negligible burden at worst, as Household necessarily catalogues the source of each document for its own use as they are gathered. For these reasons, the Court should compel Household to provide source logs identifying the custodian of all documents produced in this action.

Additionally, given the size of Household's production and the time it has taken thus far – over 11 months – plaintiffs' seek an order requiring Household to certify completion of its production in response to Plaintiffs' First Request for Production of Documents to Household Defendants by July 1, 2005. Without such certification, and given defendants' refusal to identify the source of documents produced or the specific requests to which the documents are responsive, discovery cannot proceed in an orderly and efficient manner.

II. STATEMENT OF COMPLIANCE WITH LOCAL RULE 37.2

On July 30, 2004, plaintiffs first requested defendants to produce source logs or custodian logs for the documents produced in this case. Brooks Decl., Ex. 2. Plaintiffs' request, made at the onset of discovery, was for Household to identify where the documents it produced were found. *Id.* The request was made immediately following Household's initial lump sum production of 1.85 million pages of documents and was intended to facilitate the efficient management of this case. *Id.* Plaintiffs' request, however, was flatly denied by Household on August 3, 2004: “[w]e are not obligated to, and will not, provide you with ‘source logs or custodian logs.’” Brooks Decl., Ex. 3.

Thereafter, the parties met and conferred on August 4, 2004. Brooks Decl., Ex. 4. Plaintiffs reiterated their request, reasoning that source logs would facilitate the ease of litigation and move the case forward much faster. Brooks Decl. ¶2. Household again refused, stating that it had complied with the Federal Rules of Civil Procedure and were not obligated to provide source logs on the grounds of the attorney work product privilege. Brooks Decl., Exs. 4-5.

By letter dated August 27, 2004, plaintiffs once again objected to the manner of Household's production in part because it was impossible to identify the source of the documents being produced. Brooks Decl., Ex. 6. At this time plaintiffs first announced their intention to move to compel on this issue. *Id.* Thereafter, Household changed counsel, and on October 8, 2004, for the benefit of Household's new lawyers, plaintiffs reiterated their objection to the manner of Household's document production, in particular Household's failure to identify the source of the documents being produced. Brooks Decl., Ex. 7. And once again, at a October 21, 2004 meet and confer, plaintiffs reiterated their belief that a source log accompanying the documents was a reasonable request based upon the size and scope of the production. Brooks Decl. ¶3. New to the case, counsel for Household said that it would research this issue and respond shortly. Brooks Decl. ¶3. At a November 2, 2004 meet and confer, Household refused plaintiffs' request stating that it had researched the issue and did not see an obligation to produce a source log for this production. Brooks Decl. ¶4. Finally, on April 15, 2005, plaintiffs again requested that Household provide source logs. Brooks Decl., Ex. 8. Again Household declined. *Id.* Plaintiffs have made good faith efforts to resolve this issue and now seek the Court's assistance in light of defendants' continued refusal.

In addition, during meet and confers on December 7 and 9, 2004, defendants estimated that production of hard-copy documents responsive to plaintiffs' first request for production would be complete by March 2005. Brooks Decl., Ex. 9. One month before this date, plaintiffs reminded defendants of this assurance, outlining significant categories of documents that remained outstanding. *Id.* On March 21, 2005, plaintiffs again urged production on the outstanding categories. Brooks Decl., Ex. 15. Defendants responded that pending documents would be produced "as part of future productions." *Id.* On March 30, 2005, plaintiffs again urged, without success, production on the outstanding document requests and verification of requests pursuant to

which production was complete. Brooks Decl., Ex. 16. However, six months later Household's hard-copy production is not complete and it has not yet begun to produce electronic documents.

III. ARGUMENT

Trial courts "have broad discretion in matters relating to discovery." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002); *Portis v. City of Chicago*, No. 02 C 3139, 2004 U.S. Dist. LEXIS 12640 (N.D. Ill. July 6, 2004).² And, the Court is expressly authorized to take steps to manage the litigation before it in an efficient and expeditious manner. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 877 (2005). Household has refused to produce source logs despite the overwhelming evidence that the source of the documents being produced is relevant; Household can produce a source log with little or no burden; and a source log will assist in the efficient prosecution of this complex case involving millions of pages of documents.

A. The Source of Documents Produced by Household Is Relevant

Plaintiffs have asked Household to identify the source or custodians of the documents by providing the names of the employees or departments from whose files the documents were produced. This information is highly relevant. If a document evidencing fraud was located in the files of one of the individual defendants, it would be highly probative of scienter. If such a document were in the files of a non-defendant, plaintiffs would likely want to depose that individual. Further, the types of documents located in an individual's files evidence that person's responsibilities, while the location of a document may signify its importance. For example, if a business unit's audit file was produced from the files of the Chief Financial Officer rather than the internal audit unit, that would suggest that there were accounting issues surrounding the account.

² All citations are omitted and all emphasis is added unless otherwise indicated.

Moreover, if a document evidencing fraud was located in the files of one of the individual defendants, it would be highly probative of scienter. Such information will also aid plaintiffs in identifying deponents likely to possess relevant information.

Plaintiffs seek information so relevant and so important that it far outweighs any burden imposed on Household. Notably, Household has never challenged the relevance of source logs, because it cannot: the location of evidence is key to proving knowledge and even scienter. Even documents that may seem innocuous, often take on an entirely different significance based upon where they are found. In the criminal context, for example, a gun found in a weapons store has profoundly different import than a gun found in a suspect's home. In the civil context, the location of documents is no less important and can prove deliberate recklessness, particularly if the location shows possession, control or even authorship of incriminating documents.

The Federal Rules of Civil Procedure make it clear that plaintiffs are entitled to know the source from where the documents were produced. Fed. R. Civ. P. 26(b)(1) states:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, *including the . . . location of any books, documents, or other tangible things* and the identity and location of persons having knowledge of any discoverable matter.

Fed. R. Civ. P. 26(b)(1).

The location of relevant documents, the exact information sought by plaintiffs' request, is explicitly within the proper scope of discovery pursuant to Rule 26(b)(1). As such, the Court should compel Household to provide source logs to plaintiffs.

B. Production of Source Logs Will Assist in the Efficient Prosecution of This Complex Case

Aside from the substantive significance of the source information plaintiffs seek, production of source data is compelling from a cost-efficiency perspective. If source logs are not produced, plaintiffs will be required to take many more depositions in order to identify the handwriting of

various individuals, to determine the authors of countless spreadsheets, to establish the foundation of business records, etc. The simplest way to obtain this information is for Household to provide a source log. Moreover, if Household does not produce source data, it is impossible to cross-check that all responsive documents have been produced from the files of individuals prior to their deposition. If plaintiffs later discover that Household failed to produce all such documents, plaintiffs must then recall the witness. Household's obstinance here is costly and unwieldy.

Indeed, many courts require that all parties produce source information immediately, with the understanding that certain basic information that would normally be learned by counsel anyway, should be made available to the other side at the time of production, as if it were a response to a standing interrogatory. *See, e.g.*, Brooks Decl., Exs. 10 at 5;³ 11 at 4. Moreover, understanding the overriding principles of discovery in voluminous document productions, parties generally provide this information voluntarily in securities actions.⁴ *See, e.g.*, Brooks Decl., Exs. 12-13.

Furthermore, this information is not available through any other means. Because of Household's manner of production, only defense counsel can identify where these documents came from. While a given witness may be able to identify certain documents as coming from his or her files, no witness can point to the documents produced by Household in this litigation and

³ This Order expressly notes that "[t]he Court has found that *certain basic information normally learned by counsel anyway* should be made available to the other side at the time of production, *as if it were a response to a standing interrogatory*, as follows. At the time of production, the responding party should provide a written list to the requesting party setting forth in detail each specific source and location searched. . . . *The producing party shall also provide a list describing the specific source for each produced item.*" Brooks Decl., Ex. 10 at 5 (emphasis added).

⁴ For these same reasons, courts addressing questions regarding the production of e-mail in civil litigation have consistently held that metadata – which includes information about the source of electronic information – must be produced, even if collection of such metadata is burdensome and expensive. *See* Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Electronic Evidence in Native Electronic Format.

affirmatively identify which documents came from their files, without the assistance of defense counsel.

In *Washington Bancorporation v. Said*, 145 F.R.D. 274 (D.D.C. 1992), a case similar to this case, the court heard a motion to compel an index of 2,400 boxes of documents that had been produced to counsel by the Federal Deposit Insurance Corporation ("FDIC"). The FDIC objected to producing the index on work product grounds. In that case, the court ordered the FDIC to produce the index while finding that the movant had established "substantial need" because recreating the index would have cost time and money. *Id.* at 279-80. The court found that substantial need was met because "such an index would create enormous efficiencies and allow them to identify more expeditiously those files they need from the 2400 boxes." *Id.* at 279. "This court can see no reason to force defendants to repeat this effort [of recreating the index] when such a document already exists and can be disclosed without harm to its creator." *Id.* at 280. This is precisely the situation presented here: It would be obscenely wasteful and inefficient if plaintiffs were forced to recreate the factual information reflected in Household's source logs.

C. Production of Source Logs Would Not Impose an Unreasonable Burden on Household

Responding to plaintiffs' request would not impose an unreasonable burden – or even a minor burden – upon Household because it necessarily catalogues the source of each document for its own use as documents are gathered. Any claim of burden made by Household calls into question whether it has maintained any logs themselves that identifies the source of each document. Without such a log, Household cannot have complied with Fed. R. Civ. P. 34(b), which provides in relevant part:

A party who produces documents . . . shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Fed. R. Civ. P. 34(b).

Household has repeatedly represented to plaintiffs that it is producing documents as they were kept in the ordinary course of business. Brooks Decl., Exs. 4, 6, 14.⁵ If this is true, counsel for Household must have recorded, somewhere, the source of the documents it is producing. In a production this large, there can be no other way. Nonetheless, Household has refused to simply reveal the source. Given the relevance of the information plaintiffs seek and the negligible burden of producing it, this position is untenable.

Household's position that source logs reflect protected attorney work product is simply wrong. Plaintiffs are entitled to know, and indeed may be required to prove, the source of documents; these are discoverable facts. The fact that such documents were collected by attorneys does not render the identity of their source privileged. Indeed, source logs do not reflect an attorney's "mental impressions, conclusions, opinions, or legal theories." Fed. R. Civ. P. 26(b)(3). Plaintiffs are not asking Household to indicate which of the documents produced are most relevant to our claims; but rather, where they came from. As Judge Easterbrook observed, "[t]here is no need for a privilege to cover information exchanged in the course of document searches, which are mostly mechanical yet which entail great risks of dishonest claims of complete compliance." *In re Feldberg*, 862 F.2d 622, 627 (7th Cir. 1988).

D. Defendants' Should Be Ordered to Certify Completion of Their Production by July 1, 2005

Plaintiffs propounded their first request for production of documents more than a year ago on May 17, 2004. Since that time, plaintiffs have received more than 3,000,000 pages of documents,

⁵ In fact, Household has repeatedly refused to identify the request to which its productions are responsive. This in itself is troublesome, given that Household's rolling production in response to plaintiff's first request for production has been ongoing for more than a year. Plaintiffs have no way to determine when production relating to any of the numerous discreet issues has been completed. Again, this impedes the orderly prosecution of plaintiffs' case. At the very least, Household should be required to inform plaintiffs upon completion of its production responsive to each of plaintiffs' requests.

most of which were previously produced in other proceedings. During meet and confers between the parties on December 7 and 9, 2004, defendants estimated that production of hard-copy documents responsive to plaintiffs' first request would be complete by March 2005. Brooks Decl., Ex. 9. However, plaintiffs continue to receive documents from defendants; six months later, production is not complete. Defendants have not yet even begun to produce, let alone complete production of, electronic documents.

The discovery cut-off in this action is January 13, 2006. It is essential that plaintiffs receive all documents responsive to their first request in order to move forward in their prosecution of this case, including taking depositions and propounding further written discovery and document requests. Thus, plaintiffs seek an order imposing a deadline of July 1, 2005, for defendants to produce all remaining documents responsive to plaintiffs' first request for production.

Additionally, plaintiffs request that the Court order defense counsel to verify that the documents produced represent all documents that are responsive to plaintiffs' first request for production. Courts routinely order parties to finish production and certify that production is complete by a certain date. *See, e.g., Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004); *Safeco of Am. v. Rawstron*, 181 F.R.D. 441 (1998); *Amon v. Harrison*, No. 91 C 980, 1993 U.S. Dist. LEXIS 9565 (N.D. Ill. July 14, 1993). Ordering defendants to complete production by an exact date and verify that the production is complete is the only course of action that will ensure plaintiffs' first request for documents will be completed before the merits discovery deadline.

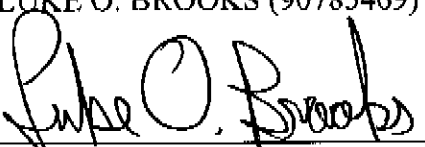
IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion to compel source logs for documents produced in this litigation, identifying names of employees from whose files the documents were produced and the departments where such documents were maintained should be granted. Additionally, plaintiffs seek an order requiring Household to verify completion of its production by July 1, 2005.

DATED: June 6, 2005

Respectfully submitted,

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