

**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
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF THE CLASS' MOTION FOR
RECONSIDERATION OF THE COURT'S FEBRUARY 17, 2006 ORDER**

I. INTRODUCTION

The Class respectfully moves this Court for reconsideration of its February 17, 2006 Order and its directions as stated during the telephonic conference on that date. As explained further below, the Class requests that the Court defer requiring it to remove all electronic copies of the disputed Office of the Comptroller of the Currency, Office of the Thrift Supervision (“OTS”), Federal Deposit Insurance Corporation and Federal Financial Institutions Examination Council documents from the case files, including electronic files, until after the Court has ruled on whether the Class may retain these documents. As discussed in the accompanying Declaration of Christine Sanders in Support of the Class’ Motion for Reconsideration of the Court’s February 17, 2006 Order (“Sanders Declaration” or “Sanders Decl.”), there is a substantial burden on the Class in terms of expense and time in removing all electronic copies. Moreover, given the limited and qualified nature of the privilege at issue, it is likely that the Class will be allowed to retain the disputed documents. Accordingly, it is more efficient for all parties if the Class retains the electronic copies until after the Court has ruled. Further, during the pendency of the dispute, the Class should be entitled to use these documents to brief the Court. This approach is consistent with the existing case law as well as the approach set forth in the Protective Order entered on November 5, 2004 (“Protective Order”) in this case. *See Delozier v. First Nat’l Bank of Gatlinburg*, 113 F.R.D. 522 (E.D. Tenn. 1986); *see also* Protective Order, ¶¶28-30. Reconsideration is appropriate on these issues because prior to the issuance of the Court’s Order, the Class could not present the evidence contained in the Sanders Declaration and did not have the opportunity to provide the Court with case law as to this issue. For the reasons discussed below, reconsideration of the Court’s decision is warranted in light of this new evidence and case law.

II. ARGUMENT

A. The Burden of Removing All Electronic Copies of the Disputed Documents Is Substantial

In the Court's February 17, 2006 Order and in its oral directions during the February 17, 2006 telephonic conference, the Court directed the Class to provide it with hard copies of the disputed federal regulatory documents by February 21, 2006. At that time, Household International, Inc. ("Household") and its outside consultants/auditors, KPMG LLP ("KPMG") and Arthur Andersen, LLP ("AA") had identified approximately 850 documents representing over 6,500 pages of documents. Sanders Decl., Exhibits A-D. By letter dated February 17, 2006, Household has since identified 329 more documents consisting of 7,735 pages. *Id.*, Ex. E. The Class submitted the first 850 documents to the Court on February 21, 2006 and will submit the 329 later-identified documents to the Court tomorrow. As detailed in the Sanders Declaration, there is a substantial burden involved in removing all electronic versions of these documents.

The difficulties in removing electronic versions of these documents result from the production process and the incorporation of these documents into the Class' network and electronic databases. *Id.*, ¶¶9-14. During over two years of document discovery, Household has produced documents in electronic form and in hard copy. *Id.*, ¶¶4-8. Household's electronic production has occurred on both hard drives (the initial United States Securities and Exchange Commission production of over 1.8 million documents) and on individual computer disks ("CDs"). *Id.*, ¶¶4, 6-8. As to the hard copy production, the Class initially images the documents as part of the copying process, then converts these electronic images into a searchable form, using the optical character recognition ("OCR") process, and finally uploads the text and OCR files onto the network and databases. *Id.*, ¶5. Thus, for every document identified as disputed, whether a duplicate or not, there will be multiple electronic copies in existence that must be removed. *Id.*, ¶¶4-8.

Removal of the electronic copies is not a simple process. For documents produced in hard copy, which include all the KPMG and AA documents, the process will involve three steps as detailed in the Sanders Declaration each step will involve several tasks: (1) locating and removing the documents on the Class' network and each of its seven databases; (2) searching multiple CDs containing the initial images of the individual pages produced and deleting; and (3) searching and deleting the OCR images on multiple CDs. Sanders Decl., ¶¶3, 9-14. The Class has begun this process by electronically tagging the disputed documents for identification. Sanders Decl., ¶¶3, 9-14. This complex process is made more complex in that the Class has learned that documents identified by Household by Bates numbers do not always correspond to the documents in the databases. *Id.*, ¶10. Put differently, what Household identifies in one of its three schedules as a single document is not recognized as a single document in the network or databases. *Id.*, ¶10.

Based on what the Class has learned to date, it would take the majority of Lerach Coughlin Stoia Geller Rudman & Robbins LLP's ("Lerach Coughlin") five-person litigation support team approximately three weeks, and cost approximately \$9,500 paid to an outside vendor, to delete the disputed documents from the Class' network and databases.¹ *Id.*, ¶¶3, 13.

Further, the Class does not have the means internally to locate and remove the disputed documents from the CDs and hard drive. *Id.*, ¶14. An outside vendor has estimated that this will take 300 hours and cost an additional \$24,900. *Id.*, ¶14; Ex. G.

This time and expense represent a diversion of the Class' resources from prosecuting its case and pursuing discovery. As discussed below, engaging in this time-consuming and expensive exercise at this point is not an efficient use of the Class' resources given the limited and qualified

¹ The litigation support team, which provides database support for 90% of the cases handled by Lerach Coughlin and has six trials to prepare for in the upcoming months, cannot dedicate all of its time for three weeks to this project without severely disrupting its normal work. Sanders Decl., ¶__.

privilege at issue. Accordingly, the better approach would be to permit the Class to defer the removal process until after the Court has ruled on this dispute and to permit the Class to use these documents solely for purposes of briefing the Court on these issues and addressing this dispute.

B. The Removal Process Should Be Deferred Until After the Court Has Ruled

The Court should defer any order requiring the removal of electronic copies until the Court has determined which, if any, documents should be produced and which, if any, documents should be returned to the federal agencies. Deferral is particularly appropriate given that the privilege at issue, the bank examination privilege, is a limited and qualified privilege. Further, pending the Court's ruling, the Class should be entitled to use these documents to brief the Court and prepare for the March 9, 2006 hearing.

The privilege at issue, the bank examination privilege, "is a qualified one. Purely factual material falls outside the privilege, and if relevant, must be produced. . . . Likewise, the privilege may be overridden as to its protection of deliberative material if good cause is shown." *In re Bankers Trust Co.*, 61 F.3d 465, 471-72 (6th Cir. 1995) (citation omitted) (applying the five factor test to determine whether good cause exists to override the privilege); *see also In re Bank One Sec. Litig.*, 209 F.R.D. 418, 426-27 (N.D. Ill. 2002).

In this situation, it is more efficient and practical to defer the expense and burden involved in removing all electronic copies until after the Court has ruled. This will prevent the Class from incurring expenses relating to the removal of documents only to then have to incur additional expenses associated with restoring what was just removed. Household will benefit from this deferral

since it should ultimately bear all the costs associated with the removal process as this whole issue arises from what it admits was a mistake on its part.²

Pending the Court's decision, the Class should be entitled to use these disputed documents to brief the Court and otherwise prepare for and participate in the March 9, 2006 hearing. This is how courts normally approach this issue, including in the case of disputes over the bank examination privilege.³ See *Delozier*, 113 F.R.D. 522.

In *Delozier*, the Court faced the nearly identical situation in which the plaintiff in that case obtained a copy of an OTS examination report without the OTS' prior permission.⁴ *Id.* at 523. The OTS sought to obtain the return of the document by a motion for a protective order. During the pendency of that motion, the plaintiff was allowed to retain custody of the disputed document and to utilize that document in framing the issues before the Court. *Id.* at 524 (comparing the plaintiffs' claims regarding the relevant parts of the document with the redacted version submitted by the OTS). *Id.* at 527.

² Household's counsel, Ms. Farren, admitted this mistake in open Court on February 15, 2006. The Class should not be forced to bear any costs associated with remedying Household's error and thus, is entitled to reimbursement from Household (and KPMG and AA) for the costs associated with the remedial efforts.

³ In the Minute Order dated February 22, 2006, the Court provided the parties until March 1, 2006 "to cite any additional legal authorities." However, to date neither party has provided the Court with any case authorities regarding the present situation. By letter dated February 15, 2006, the Household defendants provided the Court with copies of regulations relating to requests for disclosure of agency documents. As indicated in the case law discussed above, these regulations do not bear on the issues before this Court. See *Bankers*, 61 F.3d at 469-471 (finding Rule 34 of the Federal Rules of Civil Procedure applicable to the situation where a party seeks an agency document from a party opponent rather than the procedure set for the agency's regulations regarding request for disclosure of confidential records).

⁴ The *Delozier* opinion does not discuss how the plaintiff acquired this copy except that it was "[i]n the course of discovery." 113 F.R.D. at 523.

Moreover, the approach requested by the Class is how the parties and the Court agreed to address disputes over any privilege in the Protective Order issued in this case. *See* Protective Order, ¶¶28-30.

Without access to these documents, the Class will be prejudiced in its ability to participate in the Court's proceedings regarding this dispute. As a consequence, the Court will not have the full benefit of the Class' participation in reaching a decision on a very important issue.

III. CONCLUSION

For the reasons stated above, the Class' Motion for Reconsideration of the Court's February 17, 2006 Order should be granted. As the newly produced evidence in the form of the Sanders Declaration and new case law demonstrates, the Class should not have to engage in the burdensome removal of electronic copies of the disputed documents until such time as the Court has had the opportunity to rule on the discoverability of these documents.

DATED: February 23, 2006

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DECLARATION OF SERVICE BY EMAIL AND 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 February 23, 2006, declarant served by electronic mail and by U.S. Mail the: **MEMORANDUM OF LAW IN SUPPORT OF THE CLASS' MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 17, 2006 ORDER** to the parties listed below. The parties' e-mail addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of February, 2006, at San Francisco, California.

/s/ Marcy Medeiros

MARCY MEDEIROS