

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

LAWRENCE E. JAFFE PENSION PLAN, ON
BEHALF OF ITSELF AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

- against -

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants.

Lead Case No. 02-C-5893
(Consolidated)

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

**THE HOUSEHOLD DEFENDANTS' BACKGROUND MEMORANDUM
ON NON-PUBLIC DOCUMENTS IN PLAINTIFFS' POSSESSION**

The Household Defendants respectfully submit this memorandum to explain the background and status of Plaintiffs' request for release of certain non-public documents belonging to federal bank regulators. For the Court's convenience, it is accompanied by an Appendix that collects relevant regulations and correspondence.

Overview

The non-public documents in question belong to one of three federal bank regulators: the Office of the Comptroller of the Currency ("OCC"), which charters, regulates and supervises all national banks; the Office of Thrift Supervision of the U.S. Treasury Department ("OTS"), which is the primary regulator of all federally-chartered thrift institutions; and the Federal Deposit Insurance Corporation ("FDIC") an independent agency created by Congress to supervise banks and insure deposits (collectively, the "Agencies"). The documents fall into three categories: (i) Reports of Examination reflecting the Agencies' normal-course supervision of various aspects of Household's banking or thrift institutions; (ii) copies of ongoing "supervisory communications" between Household and the Agencies (as that term is used in the regulations

discussed below); and (iii) internal Household documents (or correspondence with Household's outside auditor) reflecting the substance of such Reports or communications. These documents (including numerous duplicates) were mistakenly produced by present and former counsel for Household, Arthur Andersen and KPMG in the process of producing nearly four million pages of documents in this litigation.

Under federal regulations and law, Plaintiffs may not retain or use the non-public documents without seeking express authorization from the relevant Agency through an established administrative process. Plaintiffs have already filed such requests with the OCC and the OTS, but not with the FDIC. If Plaintiffs should be dissatisfied with an Agency's eventual determination, they may seek judicial review, based on prescribed factors that include relevance, need, and the proper balance between a private litigant's wishes and the public interest in preserving the confidentiality of regulators' deliberations and supervisory communications. A good overview of the relevant public interest considerations can be found in *In re Bank One Securities Litigation*, 209 F.R.D. 418, 426 (N.D. Ill. 2002):

"The deliberative process privilege protects communications that are part of the decision-making process of a government agency. Since frank discussion of legal and policy matters is essential to the decision making process of a government agency, communications made prior to and as part of an agency determination are protected from disclosure." (quoting *United States v. Farley*, 11 F.3d at 1389, citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)). The bank examination privilege falls under this broad category of government protections and "is designed to promote the effective functioning of an agency by allowing the agency and the regulated banks the opportunity to be forthright in all communications." (quoting *In re Bankers Trust Co.*, 61 F.3d 465, 471 (6th Cir. 1995)).

Practicality necessitates the bank examination privilege in order to preserve a safe banking environment. (citing *In re Subpoena Upon the Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992)).

Since defense counsel and counsel for KPMG and Arthur Andersen had no power or permission to disclose the Agencies' non-public information or to waive attendant privileges and exemptions, there is no merit to Plaintiffs' distinction between information that is still in the

Agencies' possession and information belonging to the Agencies that was mistakenly produced in discovery. (As one Agency informed Plaintiffs' counsel, "[a]t this point, your firm is not in lawful possession of the confidential materials." Letter from Charles L. Cope to Luke O. Brooks, Esq., dated February 16, 2006). For the same reason, Plaintiffs' argument that the disposition of the mistakenly produced documents is ripe for judicial determination is incorrect. *See generally Denny v. Carey*, 78 F.R.D. 370, 372 (E.D. Pa. 1978) ("When a party seeking discovery from such departments has not complied with the regulations [governing requests for release], a motion for discovery of such material must be denied.") (citations omitted).

The balance of this Memorandum provides a more detailed summary of the contested documents and related regulations, after a brief review of the context underlying Plaintiffs' requests.

The Context

This is a purported securities fraud action in search of a viable theory of fraud, loss causation and harm — especially in the wake of the Supreme Court's 2005 ruling that it is *not* sufficient to allege, as Plaintiffs do here, that in reliance on the integrity of the market they paid inflated prices for their shares and were injured thereby. *See Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005). Because the federal securities laws are not meant "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause" (*id.* at 1633), the Supreme Court ruled that a plaintiff must allege and prove a clear connection between a supposed misrepresentation or omission and a significant decline in the price of a defendant's stock triggered by a corrective disclosure. *Id.* at 1633-34. The Complaint in this action does not meet this standard because it relies on exactly the same loss causation and harm allegations struck down in *Dura*. (In fact, Plaintiffs'

counsel drafted both complaints.) The Household Defendants have therefore renewed their motion to dismiss, which is now pending before Judge Guzman.¹

In the meantime, despite (or maybe because of) the ruling in *Dura*, Plaintiffs are casting an ever wider and more onerous discovery net, trolling for any supposed irregularities in Household's operations that might conceivably be linked to a decline in the price of Household stock.² In mid-January of this year, after Plaintiffs had already received nearly four million pages of documents from Household and its present and former outside auditors, Plaintiffs issued subpoenas to the OCC and the OTS, for literally every document in their possession relating to Household over a seven-year period. *See* Appendix, Tab B. Whether Plaintiffs merely wished to take their fishing expedition even further afield, or realized that federal law prohibits their use of the non-public material in their possession without Agency permission (or both), the degree of detail in some categories of the subpoenas alerted Household and the Agencies that Plaintiffs' counsel already had access to specific non-public documents. That led to the realization that in the press of producing a massive volume of material, past and present counsel for Household, and counsel for its outside auditors, had mistakenly produced certain bank examination reports and supervisory communications that belong to the Agencies and should not have been disclosed without their prior consent.

In short order, counsel for Household (i) searched Household's entire production to understand the scope of the problem and compiled a list of the Bates number ranges of the af-

¹ *See* Household Defendants' Motion to Dismiss Pursuant to the Supreme Court's Recent Decision in *Dura Pharmaceuticals, Inc. v. Broudo*. That motion also demonstrates that granting leave to replead would be futile, since Plaintiffs cannot prove, as now required under *Dura*, that a material misrepresentation or omission was the subject of a later "corrective disclosure" that triggered a "significant" decline in the price of Household's securities. *See Dura*, 125 S. Ct. at 1633-34.

² As the Court saw on February 15, Plaintiffs are even trying to expand their focus to Household business units (such as Mortgage Services) whose activities had nothing to do with the predatory lending (or any other) allegations in the Complaint.

affected documents (and all duplicates); (ii) visited the affected Agencies to explain the situation and provide them with copies of mistakenly-produced documents; (iii) notified Plaintiffs' counsel of the federal regulations that preclude their continued possession and use of the materials unless and until they receive formal permission from the relevant Agency; (iv) provided Plaintiffs' counsel with the Bates stamp ranges of affected documents and duplicates and demanded that they return or destroy them immediately; and (v) provided Plaintiffs with redacted versions of every recalled document that was exempt from disclosure only in part. Counsel for KPMG and Arthur Andersen took similar recall steps. The first notification to Plaintiffs' counsel was made on February 1, 2006, and supplemented over the next sixteen days as additional documents and (mostly) duplicates were identified. (These letters, with annexed schedules, are collected at Tab C of the Appendix.)

In the meantime, Counsel for the OCC, the OTS, and the FDIC issued strong letters to Plaintiffs' counsel requiring the immediate return or destruction of their material and, in one case, alerting them that unauthorized retention and use of the materials could subject them to criminal penalties. The OCC and the OTS also arranged for Plaintiffs to stay their subpoenas (which are not enforceable against the Agencies in any event) pending their evaluation of Plaintiffs' requests under the governing regulations. Put mildly, the responses of Plaintiffs' counsel reflected a lack of respect for the Agencies' authority and prerogatives. (Copies of the communications between the Lerach firm and the OCC, the OTS and the FDIC, respectively, are collected at Tab D of the Appendix.)

The Non-Public Information in Plaintiffs' Possession

As shown below, the documents at issue are not investigative findings, but rather materials generated by regulators of Household's banking or thrift institutions as part of the "iterative process of comment by the regulators and response by the bank" that is the hallmark of ongoing bank supervision. *In re Subpoena Served Upon the Comptroller of the Currency, and*

the Secretary of the Board of Governors of the Federal Reserve System, 967 F.2d 630, 633 (D.C. Cir. 1992). In explaining why courts have long recognized a qualified bank examiner privilege in this context, then Circuit Judge Ginsberg described the supervisory process in the following terms:

The success of the supervision depends vitally upon the quality of communication between the regulated banking firms and the bank regulatory agency. This relationship is both extensive and informal. It is extensive in that bank examiners concern themselves with all manner of the bank's affairs: Not only the classification of assets and the review of financial transactions, but also the adequacy of security systems and of internal reporting requirements, and even the quality of managerial personnel are of concern to examiners.

The supervisory relationship is informal in the sense that it calls for adjustments, not adjudication. In the process of comment and response, the bank may agree to change some aspect of its operation or accounting; alternatively, if the bank and the examiners reach impasse, then their dispute may be elevated for resolution at higher levels within the bank regulatory agency. . . .

Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communications between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank about expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged. *Id.* at 633-34 (citations omitted).

In keeping with this qualified privilege, the OCC, the OTS and the FDIC have promulgated regulations that restrict the disclosure of non-public information arising from their ongoing examination and supervision of banks, and establish a process for litigants to request release of such material only upon an appropriate showing. The relevant regulations are collected at Tab A of the Appendix and are summarized briefly below, along with descriptions of the non-public material that was mistakenly produced in this action.

1. Office of the Comptroller of the Currency

OCC regulations define non-public OCC information to include, *inter alia*,

[a] record created or obtained by the OCC in connection with the OCC's performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of a national bank, a bank holding company, or an affiliate [and a] report of examination, supervisory correspondence, or investigatory file compiled by the OCC in connection with an investigation, and any internal agency memorandum, **whether the information is in the possession of the OCC or some other individual entity.** 12 C.F.R. § 4.32(b)(1)(i), (iii) (2006) (emphasis added).

Household's document production in this litigation included copies of certain OCC Reports of Examination of Household Technology Services and Household Bank (Nevada), N.A. within the period 1998 through 2001, and supervisory correspondence falling squarely within the OCC's definition of non-public information. The OCC regulations expressly preclude the unauthorized disclosure and use of such material. *See* 12 C.F.R. § 4.37(b)(1)(i):

Without OCC approval, no person, national bank, or other entity, **including one in lawful possession of non-public OCC information . . .** may disclose information covered by this subpart in any manner, except: (A) [a]fter the requester has sought the information from the OCC pursuant to the procedures set forth in this subpart; and (B) [a]s ordered by a Federal court in a judicial proceeding **in which the OCC has had the opportunity to appear and oppose discovery.**" (emphasis added).

See also 12 C.F.R. § 4.37(b)(1)(ii):

Any person who discloses or uses non-public OCC information except as expressly permitted by the Comptroller of the Currency or as ordered by a Federal court, under paragraph (b)(1)(i) of this section, may be subject to the penalties provided in 18 U.S.C. § 641.

2. **Office of Thrift Supervision of the U.S. Department of the Treasury**

The OTS's regulations preclude unauthorized disclosure of "unpublished OTS information", 12 C.F.R. §510.5(c)(4)(v), including

records created or obtained in connection with OTS's performance of its responsibilities, such as records concerning supervision, regulation, and examination of savings associations, their holding companies, and affiliates, and records compiled in connection with OTS's enforcement responsibilities. Unpublished OTS information also includes information that current and former employees, officers, and agents obtained in their official capacities. Examples of unpublished infor-

mation include . . . (ii) reports of examinations, supervisory correspondence, internal agency memoranda and investigatory files compiled in connection with an investigation **whether such records are in the possession of the OTS or some individual entity**. 12 C.F.R. § 510.5(a)(2) (emphasis added).

Household's document production in this litigation included copies of certain OTS Reports of Examination of Household International, Inc., Household Bank, f.s.b., and Household Bank (SB), N.A. within the period 1998 through 2002, and supervisory correspondence falling squarely within the above definition and prohibition.

3. Federal Deposit Insurance Corporation

FDIC regulations preclude the unauthorized disclosure of, *inter alia*, "[r]ecords that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of financial institutions." 12 C.F.R. § 309.5(g)(8). Household's document production in this litigation included one FDIC Report of Examination of Household Bank, f.s.b. issued in 2000 and supervisory correspondence falling squarely within the above definition and prohibition.

Household's production also included certain internal documents and/or correspondence with Household's auditors that constituted draft supervisory communications with the Agencies or otherwise reflected the substance of an Agency's deliberations. As the regulations suggest and federal courts have recognized, such material is also subject to protection because to extend protection only to materials generated by an Agency in connection with an examination "while allowing discovery of responsive documents prepared by the financial institution would circumvent the objective of the regulation — to protect the confidentiality of the examination process." *In re Atlantic Financial Federal Securities Litigation*, Civ. A. No. 89-645, 1992 WL 50074, at *4 (E.D. Pa. Mar. 3, 1992).³ Counsel for the Household Defendants and Household's

³ Household's counsel have informed Plaintiffs of the Bates stamp ranges applicable to Reports of

auditors provided a full set of the mistakenly-produced documents to each relevant Agency to enable the Agency to make its own determination as to whether particular documents are non-public as defined in its regulations, and to make an informed evaluation of Plaintiffs' request for release of this material.

The Required Procedure for Obtaining Release of Non-Public Information

Each of the relevant Agencies has established an administrative procedure for requesting disclosure of non-public information and prescribed standards for the evaluation of such requests. As the judicial precedents summarized below confirm, an applicant for release of non-public information must exhaust the required administrative procedure before applying for judicial intervention.

Applications for release of non-public OCC information are governed by 12 C.F.R. § 4.33, which provides that the requesting person

must submit a request in writing to the OCC. The requester must explain, in as detailed a description as is necessary under the circumstances, the bases for the request and how the requested non-public OCC information relates to the issues in the lawsuit or matter. *Id.* § 4.33(a)(1).

Where, as here, the request arises in the context of a lawsuit, the request must also, *inter alia*,

- (A) Show that the information is relevant to the purpose for which it is sought;
- (B) Show that other evidence reasonably suited to the requestee's need is not available from any other source;

Footnote continued from previous page.

Examination, supervisory correspondence, and internal documents, respectively. *See* correspondence collected at Tab C of the Appendix.

- (C) Show that the need for the information outweighs the public interest considerations in maintaining the confidentiality of the OCC information and outweighs the burden on the OCC to produce the information;
- (D) Explain how the issues in the case and the status of the case warrant that the OCC allow disclosure; and
- (E) Identify any other issue that may bear on the question of waiver of privilege by the OCC.

Id. § 4.33(a)(3)(iii).

The OTS, which imposes similar requirements, *see* 12 C.F.R. § 510.5(c),⁴ explains that the purpose of such process is (1) to afford an orderly mechanism to process such requests expeditiously and, “where appropriate,” for the Agency to assert evidentiary privileges; (2) to balance the need for confidentiality of non-published information with the private litigant’s interest in disclosure; (3) to ensure that the time of the Agency’s staff is utilized in the most efficient manner, consistent with the Agency’s statutory mission; (4) to prevent undue burdens on the Agency; (5) to limit the expenditure of Agency funds for private purposes; and (6) to maintain the impartiality of the Agency among private litigants. 12 C.F.R. § 510.5(b).

Plaintiffs have submitted formal requests to the OCC and the OTS for release of non-public documents regarding Household. By definition, these requests cover the non-public information mistakenly produced to Plaintiffs in this litigation. The Agencies’ evaluations (including requests for additional information) are underway, and both Agencies have committed to issue decisions as promptly as possible. The FDIC has a comparable formal process for seeking release of non-public records, *see* 12 C.F.R. § 309.6, but to date Plaintiffs have not submitted a request to the FDIC.

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Among other things, the applicant must demonstrate in detail that the requested non-public information is “highly relevant to the purpose for which it is sought.” 12 C.F.R. § 510.5(c).

The Need to Exhaust Administrative Process

Plaintiffs have repeatedly suggested to the Agencies and this Court that the Court should immediately address the disposition of the non-public documents already in their possession under the Protective Order in this action — as though the determination of their administrative requests is somehow on a separate and unrelated track. They are mistaken for at least three dispositive reasons.

First, as the regulations themselves provide, the protections and procedures applicable to non-public Agency information apply with equal force to all non-public materials, whether in the possession of an Agency or a third party. *See, e.g.*, 12 C.F.R. § 4.32(b)(1)(iii) (defining examination reports and related correspondence and memoranda as non-public “whether the information is in the possession of the OCC or some other individual or entity”); *id.* § 4.32(b)(2) (providing that such material “[i]s the property of the Comptroller”); 12 C.F.R. § 510.5(a)(2)(ii) (confirming that the regulations apply “whether such records are in the possession of the OTS or some other individual or entity”); *id.* § 510.5(e)(4) (providing that possession of non-public OTS material by a third party does not waive any privilege of the OTS or the OTS’s right to supervise further dissemination of these records); 12 C.F.R. § 309.6(a) (providing that all copies of non-public documents remain the property of the FDIC and under no circumstances may be disclosed in any manner except with authorization of the Director of the FDIC having primary authority over the records).

Second, each of the relevant Agencies has notified Plaintiffs’ counsel in no uncertain terms that Plaintiffs are not in lawful possession of the Agencies’ non-public information and must return or destroy it immediately in keeping with the Court’s Order. These directives confirm that defense counsel and counsel for KPMG and Arthur Andersen had no permission or power to waive any protections or privileges applicable to the Agencies’ documents. *See* correspondence collected at Tab D of the Appendix.

Third, Plaintiffs are required to exhaust the prescribed administrative process before seeking a judicial order as to the disposition or use of the mistakenly-produced documents. *See, e.g., American Savings Bank, f.s.b. v. UBS Financial Services, Inc.*, 347 F.3d 436, 440 (2d Cir. 2003):

As noted, ASB has filed several requests with the OTS, under 12 C.F.R. § 510.5, the last of which is currently pending. The fact that ASB has not yet exhausted its administrative remedies counsels in favor of invoking the prudential ripeness doctrine. This approach would avoid both interference with administrative activity and prematurely addressing the novel issues of first impression raised in this appeal, such as the relationship between 12 C.F.R. § 570.5, 512.4 and Federal Rules of Procedure 26 and 45 Moreover, our review will only benefit by awaiting the OTS's views on these issues involving its own regulations. For these reasons . . . we prudentially dismiss this appeal as unripe and remand the case to the District Court.” (citation omitted).

See also Union Planters Bank v. Continental Casualty Co., No. 02 CV 2321 MA/P, 2003 WL 23142200 (W.D. Tenn. Nov. 26, 2003) (declining to address request to use non-public OCC information before the parties had submitted a formal request to the OCC, and noting that if the OCC should refuse to allow the requesting party to use the information, that party may then seek judicial review); *Raffa v. Wachovia Corp.*, 242 F. Supp. 2d 1223, 1225 (M.D. Fla. 2002) (declining to evaluate the discoverability of non-public information pending determination by the OCC); *American Savings Bank v. PaineWebber, Inc.*, 210 F.R.D. 721, 722 (D. Haw. 2001) (“Courts, in construing regulations which control the release of official information, have held that such information should not be compelled to be produced in violation of these regulations.”); *National Union Fire Insurance Co. of Pittsburgh, PA. v. Midland Bancor, Inc.*, 159 F.R.D. 562, 572 (D. Kan. 1994) (“When the party seeking documents has not completed the proper procedures, it is unnecessary for the Court to pursue a balancing test to determine if the information sought is confidential or privileged and whether or not such information should be disclosed.”); *Denny v. Carey*, 78 F.R.D. 370, 372 (E.D. Pa. 1978) (“When a party seeking discovery from such departments has not complied with the regulations, a motion for discovery of such material must be denied.”).

Plaintiffs place predominant reliance on cases in which courts have balanced relevant interests only *after* an Agency had made a formal evaluation of a request for non-public information. These cases reinforce the need to exhaust the required administrative process before seeking judicial consideration of Plaintiffs' demands.

Where Matters Stand

In mid-January 2006 Plaintiffs formally requested release of Household-related documents from the OCC and the OTS in letters that accompanied their subpoenas to these Agencies. (These letters are included at Tab B of the Appendix.) At best, the Plaintiffs' requests paid only lip-service to the requirements of 12 C.F.R. §§ 4.32 and 510.5(c). In response to the OCC's request for clarification, Plaintiffs filed a supplemental request on February 15, 2006, and another on February 24, 2006. The OCC has asked the Household Defendants to submit comments by March 7, 2006.

On February 13, 2006, the Household Defendants submitted a detailed response to Plaintiffs' request for non-public OTS material. Plaintiffs' "reply," submitted on February 24, 2006, attempted for the first time to address the key requirements of 12 C.F.R. § 510.5(c). The OTS has asked the Household Defendants to respond by March 3, 2006.

On February 15, 2006, this Court ordered Plaintiffs' counsel to deposit the non-public documents into Court pending further proceedings. Counsel for Household promptly informed the Agencies of this directive by email, but Plaintiffs' counsel sent a counter-email, inexplicably stating that the Court had *not* ordered them to deposit the documents in Court. This mistake was clarified in a conference call with the Court later that day.⁵

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That same afternoon, Plaintiffs' counsel sent a letter telling counsel for the FDIC that their willingness to abide by the Protective Order in this action ought to allay the FDIC's concerns. It is not clear whether this preceded or followed the Court's Order and clarification.

On the adjourned compliance date of February 21, 2006, Plaintiffs reported to the Court that they had (i) complied with their obligation to deliver the hard-copy documents to the Court (except for certain documents and duplicates identified by defense counsel on February 17, 2006), (ii) issued a required notice to all firm personnel barring further use of the material, and (iii) begun the process of deleting electronic versions. During a conference call on February 28, 2006, the Court relieved Plaintiffs of their duty to delete all electronic versions immediately, but denied their application to use protected documents before the relevant Agencies have had a chance to be heard.

At the Court's invitation, representatives of the OCC, the OTS and the FDIC will attend a conference with the Court and parties on March 9, 2006 to discuss their interests in this matter.

The Household Defendants would be pleased to submit any additional information that the Court may find helpful.

CERTIFICATE OF SERVICE

Adam B. Deutsch, an attorney, certifies that on March 1, 2006, he served copies of The Household Defendants' Background Memorandum on Non-Public Documents in Plaintiffs' Possession to the parties listed below via the manner stated.

/s/ Adam B. Deutsch

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