

**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.)	
_____)	

**THE CLASS' MOTION TO ENFORCE THE COURT'S
MARCH 9 AND MARCH 17, 2006 ORDERS**

I. INTRODUCTION

The Class respectfully requests an order requiring the Household Defendants¹ to comply with the Court's March 9, 2006 Order directing parties to prioritize depositions, and the March 17, 2006 Order directing Household to identify email boxes and files that have been deleted for all deponents in the February 13 and March 1, 2006 Notices.

The Household Defendants have refused to provide the Class with basic information necessary to comply with this Court's Orders. Instead, the Household Defendants continue to stall the progress of depositions and ongoing discovery by imposing on the Class unreasonable preconditions and limitations. Notwithstanding the Class' efforts to engage in productive discussions, the Household Defendants remain inflexible.

Accordingly, the Class seeks the Household Defendants' compliance with the March 9 and March 17, 2006 Orders.

II. ARGUMENT

A. Household Refuses to Comply with the Court's March 9 Order Requiring the Parties to Prioritize Depositions Unless the Class Agrees to Rigid Preconditions Not Included in the Court's Order

At the March 9 hearing, the Court ordered Household Defendants' counsel and the Class counsel to "sit down and prioritize" depositions. This Court clearly explained what it meant by prioritize:

If you know Ms. Jones knows more than Ms. Smith or Ms. Jones has been more involved, I mean, then if you told Ms. Mehdi that, then maybe she could pick Ms. Jones over Ms. Smith.

* * *

¹ The Household Defendants are Household International, Inc. ("Household" or the "Company"), Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and Joseph A. Vozar.

Ms. Farren or Ms. Best, you give Ms. Mehdi, you know, an idea of in a certain area who you think would be the most – the person with most knowledge. And the same thing, Ms. Mehdi, when they get to your witnesses, too.

Declaration of Luke O. Brooks in Support of the Class' Motion to Enforce the Court's March 9 and March 17, 2006 Orders ("Brooks Decl."), Exhibits A-B.

Class counsel has repeatedly requested that Household's counsel identify (1) which individuals in the February 13 and March 1, 2006 Notices the Household Defendants believe have cumulative knowledge and why; (2) which of the individuals in the Notices Household believes were involved in or had information relating to the disputed Office of Thrift Supervision ("OTS"), Office of the Comptroller of the Currency ("OCC"), and Federal Deposit Insurance Corporation ("FDIC") regulatory issues so those depositions may be deferred until the resolution of the dispute; and (3) which individuals Household believes are the persons most knowledgeable on the subject matters relevant to this litigation. Brooks Decl., Exs. C-D.

In a further effort to advance discussions, without receiving a response from the Household Defendants on the deposition prioritization issue, the Class identified certain individuals it believed had substantial contact with, or have information regarding, the OTS, OCC and FDIC, and indicated that those depositions should proceed only after the current dispute regarding the agency documents has been resolved. Brooks Decl., Ex. C.

On March 15, 2006, the parties engaged in a lengthy meet and confer regarding deposition prioritization. Brooks Decl., Ex. E. The Class again reiterated its request for basic information that would assist the Class in possibly eliminating certain deponents. *Id.* Household refused to answer any of these questions, and instead referred the Class to Household's Initial Disclosures. Brooks Decl., Ex. F. Following the meet and confer, Class counsel again reminded Household's counsel of the Court's orders during the March 9 hearing and again urged an exchange of information. Brooks

Decl., Ex. G. The Household Defendants refused to provide the information sought. Brooks Decl. Exs. H-I.

During a second lengthy meet and confer on March 31, the Household Defendants stated that their position is as follows: (1) Household will not identify individuals in the February 13 and March 1 Notices who possess cumulative or duplicative information; and (2) Household will not identify additional individuals whose depositions should be deferred pending resolutions of the dispute over the regulatory agency documents. Brooks Decl. Ex. J.

Indeed, the Household Defendants have refused to engage in any meet and confers with the Class on deposition prioritization unless the Class first agrees to limit the number of depositions to 35 *and* provides Household with a specifically detailed list of areas or topics on which the Class seeks deposition testimony. *Id.* Only after these two preconditions have been met will the Household Defendants provide information regarding individuals who they believe have the “most knowledge.” Further, as explained by Household, even if the Household Defendants identify more than 35 individuals as having the most knowledge, the Class would be limited to a selection of only 35 deponents from the Household list. As an alternative, the Household Defendants suggested that the Class agree to a total of 43 depositions to “buy total peace,” *i.e.*, the Class could never go back and ask for more even if the “most knowledgeable individuals” were inadequate. Household’s counsel confirmed their position in calls to Class counsel at the end of the day on Friday March 31, 2006. Brooks Decl., Ex. K. The Household Defendants’ starting premise is inflexible and does not evidence a willingness to reach a compromise as directed by the Court.

Indeed, the Household Defendants’ refusal to engage in a productive dialogue is in direct contravention to the Court’s instructions requiring Household to identify the most knowledgeable individuals without any preconditions. Brooks Decl., Ex. A. Moreover, their refusal flies in the face of the very idea of a meet and confer, wherein parties are to *exchange* information. Class counsel

would be doing an injustice to the interests of the Class in arbitrarily agreeing not to depose individuals without analyzing information received from the defendants.²

Accordingly, the Class requests that they be allowed to depose individuals identified in the Class' March 1 Notice in light of Household's refusal to comply with the Court's Order.

B. Household Refuses to Comply with the Court's March 17, 2006 Order Directing Them to Identify Individuals Whose Email Boxes or Files Had Been Deleted Unless the Class Agrees to Household's Demand to Preconditions on Prioritization of Depositions

On March 16, 2006, the Class requested the Court's guidance regarding a discovery dispute arising from Household's failure to produce or identify documents from Thomas Schneider's files prior to his upcoming deposition. Brooks Decl., Ex. L. On March 17, 2006, the Court ordered "Household to identify within one week of this Order *all noticed deponents* whose email boxes or files have been deleted." See Brooks Decl., Ex. M, Minute Order Regarding Parties' March 16 and 17, 2006 Letters to the Court ("March 17 Order") (emphasis added). Household did not comply with the March 17 Order.

On March 24, 2006, their last day to comply, Household informed the Class that "with the exception of Thomas Schneider, email boxes have been located (and in many instances, emails have already been produced) for the remaining individuals who have been noticed for deposition *prior to the March 1 Notice*." Brooks Decl., Ex. N (emphasis added). No further information was given. Household's scant response did not comply with the March 17 Order for two separate reasons. First, while the Household Defendants confirmed that email boxes were located for the individuals other than Mr. Schneider identified in the February 13 Notice, they did not inform the Class whether any

² The Class' selection of deponents was based upon Household's Initial Disclosures, Responses to Interrogatories and individuals identified in deposition testimony of other Household individuals. Brooks Decl., Ex. E.

of these individuals' electronic files had been deleted. Second, the Household Defendants did not provide any information regarding the email boxes or files of the 54 individuals identified in the March 1 Notice. The Class informed Household of these deficiencies the day it received Household's letter, but the Company has refused to provide any additional information. Brooks Decl., Ex. G.

With respect to the first deficiency, Household has not addressed the issue other than to state: “[W]e have provided full information regarding the February 13 Deposition Notice.” Brooks Decl., Ex. H. Because Household has not provided any information regarding the deletion of electronic files (as opposed to boxes) for any of the noticed deponents, they are in violation of the March 17 Order. The parties had a further meet and confer on this issue on March 31 – Household has refused to provide any further information on this issue until the Class agrees to the proceed under Household's framework of prioritizing depositions. Brooks Decl., Ex. K.

With respect to the second deficiency (Household's failure to provide information related to all noticed deponents), Household has taken the position that “the Order did not specifically include the March 1 Notice in its purview.” Brooks Decl., Ex. H. This position is belied by the specific relief sought by the Class and the plain language of the March 17 Order. Brooks Decl., Ex. O. The Class specifically requested the identity of all individuals listed in the March 1 Notice whose email boxes or files were destroyed and Household was unambiguously ordered to identify “*all noticed deponents* whose email boxes or files have been deleted.” Brooks Decl., Ex. M at 2 (emphasis added).

Household's refusal to provide information about the email boxes and files of the deponents listed in the March 1 Notice is based on its erroneous conclusion that the March 1 Notice is a “nullity” and thus not included in, or considered by, the Court's Order. Brooks Decl., Ex. H. Specifically, although the Household Defendants are fully aware that the appropriate number of

depositions remains an open question and, as discussed above, they have been ordered to cooperate with the Class in determining the appropriate number of depositions, the Household Defendants' position is that the March 1 Notice "is not proper" and thus excluded from the March 17 Order because "Judge Nolan agrees that . . . the deposition limit is 35." Brooks Decl., Exs. H, J. Given that the dispute over the appropriate number of depositions is unresolved – the Court *denied* Household's Motion for a Protective Order with leave to re-file – the March 1 Notice can hardly be characterized as a nullity and clearly is covered by the March 17 Order. Brooks Decl., Ex. A.

In addition to violating the plain language of the March 17 Order, Household's position – that it will not provide the information sought because the Class has not narrowed its deposition notice – defies logic. The information Household refuses to divulge is essential to the Class' attempt to prioritize and *reduce* the number of necessary depositions. Brooks Decl., Ex. J. Whether a deponent's email is available and whether some or all of a deponent's email files have been deleted are important factors in determining, for example, whether that deponent (as opposed to someone with similar knowledge whose email is intact) should be deposed. *Id.* Household's refusal to fully comply with the March 17 Order is emblematic of their approach to this issue. Rather than cooperate with the Class through an exchange of information, Household, in an effort to keep the Class in the dark, has gone to great lengths to avoid providing necessary and helpful information.³

During the parties' March 31 meet and confer, Class counsel sought clarification of certain issues related to the deleted back-up tapes. Specifically, Household's counsel indicated that a "small percentage" of the Lotus Notes back-up tapes were written over. Brooks Decl., Ex. J. Further, KMZ Rosenman (counsel representing Household in the United States Securities and Exchange Commission ("SEC") proceedings) informed the SEC that the technician's error resulted in the

³ As discussed above, Household's defiance of the Court's March 9 Order has not assisted these efforts.

inadvertent recycling of approximately ten weeks of back-up tapes from the October 2002 to late January 2003 time period. Brooks Decl., Exs. J and P at HHS 02765166. Joseph Zarcone's declaration, however, indicates that the Lotus Notes back-up retention tapes prior to January 24, 2003 were reused. Exs. J and P at HHS 02765169, ¶6. Thus, it is unclear whether counsel's suggestion that only ten weeks of back-up tape information was lost comports with Mr. Zarcone's declaration indicating that all back-up tapes created before January 24, 2003 have been lost. Brooks Decl., Ex. J.

Although during the meet and confer, Household's counsel agreed to answer a number of questions raised by Class counsel to clarify this issue, by evening they reversed course, holding hostage information regarding the deletion issues with the Lotus Notes back-up tapes unless Class counsel agreed to proceed under Household's framework of prioritizing depositions. Brooks Decl., Ex. K; *see also* §II.A, *supra*. There is no valid reason to withhold this information which is vital to the resolution of the parties' dispute.

Moreover, the Class is entitled to investigate the scope and impact of Household's admitted failure to preserve relevant documents, including discovery of whose email boxes and files have been deleted, irrespective of the dispute over the appropriate number of depositions. The Class believes, moreover, that Household had an affirmative duty to disclose the documents' destruction and its impact, as soon as they became aware of the problem.

Pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the day the Class' complaint was served, Household was obligated to preserve all documents relevant to the allegations therein:

[A]ny party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (*including electronically recorded or stored data*), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. §78u-4(b)(3)(C)(i) (emphasis added). Congress included the defendants' obligation to preserve and maintain relevant documents under the PSLRA because plaintiffs in securities fraud actions are barred from conducting discovery until such time as their complaint has survived a motion to dismiss.⁴

In addition to its obligation to preserve all relevant documents under the PSLRA, Household has been ordered by this Court to “preserve and maintain within the United States, until the close of document discovery in this action (including the resolution of then-outstanding discovery disputes), all documents in its possession and/or under its control that are relevant to the allegations in plaintiffs' Complaint.”⁵ Brooks Decl., Ex. Q. In the April 8, 2003 Stipulation and Order Providing for Household International, Inc. to Preserve and Maintain Relevant Documents in the United States, Household represented to the Court and the Class that “it has not knowingly undertaken any efforts, and does not have any intention, to destroy or remove from the United States any documents that may be relevant to the allegations in the Complaint.” *Id.* The aforementioned “[p]reservation duties do not exist in the abstract, but to serve a purpose: that is, ***to ensure that discoverable documents are available to be produced.***” *Danis*, 2000 U.S. Dist. LEXIS 16900, at *100 (emphasis added).

Household has now admitted that relevant documents in fact were not preserved despite the obligations imposed on them by this Court and the PSLRA, and despite their affirmative representation that Household would preserve them. Indeed, given their prior representation, Household should have disclosed its failure to preserve these documents as soon as Household

⁴ In this case, the Class' complaint was upheld and discovery began in June 2004, almost two years after the action was filed on August 19, 2002.

⁵ In addition to the PSLRA and this Court's order, defendants have “a common law duty not to spoil documents that might be discoverable in the litigation.” *See Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, at *37 (N.D. Ill. Oct. 20, 2000) (citing *Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993)).

realized that they had been destroyed. Household did not. Brooks Decl., Ex. P. Household has known these documents were destroyed since October 2003, conducted a two-week investigation into the matter and informed the SEC of their destruction in *January 2004*. *Id.* In the two plus years since the Company informed the SEC of Household's failure to preserve all relevant documents, which according to Household's letter to the SEC resulted in the *deletion of all Lotus Notes back-up tapes made prior to January 23, 2003*, and despite its obligation to preserve these documents, Household neglected to directly inform the Class of their deletion. Household finally disclosed this deletion to the Class when the parties were negotiating the list of custodians whose electronic files must be searched.⁶ This list includes Mr. Schneider which means that at the time Household agreed to search Mr. Schneider's files, Household knew, and did not inform the Class, that there were no files to search.⁷ Even when counsel for Household represented to the Court on October 13, 2005 that "Defendants have complied with their document preservation obligations, implementing appropriate document holds shortly after the complaint was received," they did not disclose that all Lotus Notes back-up tapes prior to January 23, 2003 had been deleted. Brooks Decl., Ex R. Nor has Household corrected the testimony of Christine Cunningham who, when asked: "Do you know what efforts have been made to preserve all e-mails since the institution of this litigation?" responded on behalf of Household: "We have retained our tapes on an indefinite schedule." Brooks Decl., Ex. S at 74.

⁶ During a March 31 meet and confer, counsel for Household Defendants conceded that they never directly informed the Class of this deletion issue stating, "I can't recall it ever coming up." Brooks Decl., Ex. J. Household's rationale is that the Class should have known of the destruction of the Lotus Notes file by virtue of Household's document production and deposition testimony. Contrary to Household's assertions, the Household Defendants were under an affirmative obligation both under the PSLRA, the Federal Rules of Civil Procedure and most significantly the Court's April 13, 2003 Order to inform the Class of this backup tape destruction.

⁷ For these same reasons, the fact that Mr. Schneider is no longer a Household employee does not explain or excuse Household's inability to identify Mr. Schneider's hard-copy files which, pursuant to the PSLRA, should have been maintained "as though subject to a continuing request for production of documents," *i.e.*, in the manner in which they were kept in the ordinary course of business.

Given these representations by Household's counsel and the Company itself, Household's suggestion that the Class was aware of this problem based on a single five-page document contained within about a four-million page production is ludicrous.

Thus, Household's admitted failure to preserve relevant documents as required provides an additional reason to enforce full compliance with the Court's March 17 Order.

III. CONCLUSION

For all the reasons stated above, the Class should be permitted to take the depositions noticed in the March 1 Notice. Further, Household should be required to respond fully and to comply with the March 17 Order and ordered to identify if *any* email boxes or files have been deleted.

DATED: April 3, 2006

Respectfully submitted,

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154452)
MONIQUE C. WINKLER (90786006)
SYLVIA SUM (90785892)
LUKE O. BROOKS (90785469)

/s/ Luke O. Brooks

LUKE O. BROOKS

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
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER FAUCHER AND CAFFERTY LLP
MARVIN A. MILLER
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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DECLARATION OF SERVICE BY EMAIL AND BY 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 April 3, 2006, declarant served by electronic mail and by U.S. Mail the **NOTICE OF DEPOSITIONS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 26 AND 30** to the parties listed on the attached Service List. The parties' email addresses are as follows:

TKavaler@cahill.com
PSloane@cahill.com
LBest@cahill.com
NEimer@EimerStahl.com
ADeutsch@EimerStahl.com
sparzen@mayerbrownrowe.com
mmiller@millerfaucher.com
lfanning@millerfaucher.com

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
305 Madison Ave., 46th Floor
New York, New York 10165

David R. Scott, Esq.
Scott & Scott LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of April, 2006, at San Francisco, California.

/s/ Monina O. Gamboa

MONINA O. GAMBOA

HOUSEHOLD INTERNATIONAL (LEAD)

Service List - 4/3/2006 (02-0377)

Page 1 of 2

Counsel for Defendant(s)

Thomas J. Kavalier
Peter Sloane
Landis Best
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005-1702
212/701-3000
212/269-5420(Fax)

Nathan P. Eimer
Adam B. Deutsch
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
312/660-7600
312/692-1718(Fax)

Stanley J. Parzen
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
312/782-0600
312/701-7711(Fax)

Counsel for Plaintiff(s)

Lawrence G. Soicher
Law Offices of Lawrence G. Soicher
305 Madison Avenue, 46th Floor
New York, NY 10165
212/883-8000
212/697-0877(Fax)

William S. Lerach
Lerach Coughlin Stoia Geller Rudman &
Robbins LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
619/231-1058
619/231-7423(Fax)

Patrick J. Coughlin
Azra Z. Mehdi
Monique C. Winkler
Lerach Coughlin Stoia Geller Rudman &
Robbins LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111-5238
415/288-4545
415/288-4534(Fax)

Marvin A. Miller
Jennifer Winter Sprengel
Lori A. Fanning
Miller Faucher and Cafferty LLP
30 N. LaSalle Street, Suite 3200
Chicago, IL 60602
312/782-4880
312/782-4485(Fax)

HOUSEHOLD INTERNATIONAL (LEAD)

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David R. Scott

Scott + Scott, LLC

108 Norwich Avenue

Colchester, CT 06415

860/537-5537

860/537-4432 (Fax)