

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

---

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

Plaintiff,

- against -

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants.

---

Lead Case No. 02-C5893  
(Consolidated)

CLASS ACTION

Judge Ronald A. Guzman  
Magistrate Judge Nan R. Nolan

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR  
SANCTIONS AND AN ORDER TO SHOW CAUSE WHY BRIAN DUFFY SHOULD NOT  
BE HELD IN CONTEMPT**

EIMER STAHL KLEVORN & SOLBERG LLP  
224 South Michigan Ave.  
Chicago, Illinois 60604  
Suite 1100  
(312) 660-7600

CAHILL GORDON & REINDEL LLP  
80 Pine Street  
New York, New York 10005  
(212) 701-3000

*Attorneys for Defendants Household  
International, Inc., Household Finance  
Corporation, William F. Aldinger,  
David A. Schoenholz, Gary Gilmer and  
J. A. Vozar*

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
FACTUAL BACKGROUND .....	1
ARGUMENT .....	5
I.    Brian Duffy’s Brazen Disregard of the Protective Order in this Case Warrants a Determination of Contempt and the Imposition of Sanctions .....	5
II.   Plaintiffs Should Pay the Fees and Expenses Incurred by Defendants in Bringing This Motion .....	9
III.  Beyond the Authority Conferred by Rule 37(b), this Court has Inherent Authority to Enter an Appropriate Order .....	9
CONCLUSION AND PRAYER .....	10

## TABLE OF AUTHORITIES

<b>Cases</b>	<b><u>Page</u></b>
<i>American National Bank and Trust Co. v. AXA Client Solutions, LLC</i> , 2002 U.S. Dist. LEXIS 9511 (N.D. Ill. May 24, 2002) .....	9
<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32 (1991).....	9
<i>Grove Fresh Distributors, Inc. v. John Labatt Ltd.</i> , 888 F. Supp. 1427 (N.D. Ill. 1995).....	8
<i>Marrocco v. General Motors Corp.</i> , 1989 U.S. Dist. LEXIS 8102 (N.D. Ill July 11, 1989) .....	6
<i>Nevil v. Ford Motor Co.</i> , 1999 U.S. Dist. LEXIS 23222 (S.D. Ga. Dec. 23, 1999).....	6
<i>Tome Engenharia E Transportes, Ltda. v. Malki</i> , 1997 U.S. Dist. LEXIS 16791 (N.D. Ill. Oct. 21, 1997) .....	5n
<i>Whitehead v. Gateway Chevrolet</i> , 2004 U.S. Dist. LEXIS 11979 (N.D. Ill. June 28, 2004) .....	5-6, 9
<b>Rules</b>	
Fed. R. Civ. P.	
23(a)(4) .....	9
26(c) .....	6, 9
37(b).....	1, 5, 9-10
37(b)(2)(D) .....	5
<b>Statutes</b>	
Judicial Code	
28 U.S.A. § 636(e)(1) (2000), as amended .....	5n, 8
28 U.S.A. § 636(e)(6)(B) (2000), as amended.....	5n

This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, “Household” or “Defendants”) pursuant to Fed. R. Civ. P. 37(b).

## **INTRODUCTION**

Defendants have been responding to Plaintiffs’ requests for discovery in this litigation for nearly two years. In the course of discovery, Defendants have produced nearly four million pages of documents as well as thousands of emails, native format electronic spreadsheets and many other documents. Much of the material produced by Household in this litigation consists of confidential and sensitive proprietary business information, the disclosure of which would be harmful to Household’s ongoing business operations. In recognition of this legitimate and serious concern, the Court entered a Protective Order to govern the use and disclosure of this Confidential Information. It has now become apparent that certain consultants hired by the Class, who have been provided access to this Confidential Information subject to the protections provided by the Protective Order, cannot be trusted to safeguard the confidentiality of these materials. It has also become apparent that Class counsel is either unable or unwilling to control the consultants and ensure their compliance with the terms of the Protective Order. It is therefore imperative that the Court act to enforce the terms of its Protective Order and ensure that Household’s Confidential Information remains subject to its protections.

## **FACTUAL BACKGROUND**

In the course of ongoing discovery in this matter, Plaintiffs took the deposition of Per Ekholdt on March 28, 2006. Present at the deposition were a court reporter; a videographer; Janet A. Beer and Jeremy Reiss of Cahill Gordon & Reindel LLP and Donna L. Marks and Alan Burden of HSBC, counsel for the witness and Defendants; D. Cameron Baker of Lerach

Coughlin Stoia Geller Rudman & Robbins LLP, counsel for the Class; and, Kirsten U. Flanagan and Brian F. Duffy of Shechtman Marks Devor PC, consultants hired by the Class. During the course of the deposition, Mr. Baker marked as Exhibit 13 a document that had been produced by Defendants bearing production number HHS-E 0013179.001 through HHS-E 0013180.011 and designated “confidential.” (Tr. 182:14) The witness, recognizing that the document constituted work product that a member of his staff had developed at the direction of Household counsel, Wilmer Cutler & Pickering, requested a recess (Tr. 182:18) and informed Ms. Beer of the potentially privileged nature of the document. Immediately thereafter Ms. Beer asserted Defendants’ good faith privilege claim with respect to the document and requested its return. (Tr. 183:4-14) Mr. Baker, acting consistently with the terms of the Protective Order entered by the Court on November 5, 2004 (the “Protective Order”), acknowledged Defendants’ privilege assertion, collected several copies of the document from among the documents on the table and in folders located behind him and returned them to Ms. Beer.<sup>1</sup> *See* Affidavit of Donna L. Marks in Support of Defendants’ Motion for Sanctions and an Order to Show Cause, dated April 5, 2006 (“Marks Aff.”).

After Household asserted a privilege over the document, after Ms. Beer requested its return, after Mr. Duffy observed Mr. Baker gather and return several copies of the document to Defendants’ counsel and after Mr. Baker and Ms. Beer had returned their attention to continuing Mr. Ekholdt’s deposition, Ms. Marks observed that Mr. Duffy appeared to make a handwritten record of at least a part of the contents of the document before secreting a copy of the document

---

<sup>1</sup>

After the conclusion of Mr. Ekholdt’s deposition, the Household Defendants further investigated the status of the subject document and discovered that it had previously been produced to the Securities Exchange Commission in connection with its investigation of Household and thus withdrew the claim of privilege. *See* Letter of Janet A. Beer, Esq. to D. Cameron Baker, Esq., dated April 3, 2006, annexed hereto as Exhibit C. The status of the privilege claim is, however, of no consequence as Mr. Duffy’s actions must be viewed in light of the facts that existed at the time that he took it upon himself to act as he did.

among the collection of documents resting on the table in front of him. *See Marks Aff.* Mr. Duffy returned that copy of the document only after Ms. Beer specifically asked him if he had retained a copy and insisted that it be returned. (Tr. 210:9-211:7; *Marks Aff.*). He (and Mr. Baker) refused to return his handwritten version of its contents, even after Defendants' counsel specifically requested that he do so. (Tr. 211:2-13) Mr. Baker has since confirmed that Mr. Duffy did in fact take notes regarding the document. *See Letter of D. Cameron Baker, Esq. to Janet A. Beer, Esq. dated March 31, 2006, annexed hereto as Exhibit B* ("I have had the opportunity to review Mr. Duffy's notes relating to this document . . ."). Mr. Duffy's actions constitute a blatant disregard for Defendants' privilege assertion, the terms of the Protective Order, and Mr. Baker's direction.

The Court entered the Protective Order in recognition that discovery in this action would require Household to produce "confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted." Protective Order at p. 2. By the terms of the Protective Order, "[a]ny Disclosure or Discovery Material that is designated as "Confidential" under the terms of this Protective Order" is "Protected Material" subject to the terms and protections of the Protective Order. *Id.* at ¶ 6. The Protective Order further provides that prior to disclosure of any Confidential Information to an expert, that person "must receive a copy of this Order and agree to be bound by the terms of this Order by executing the Confidentiality Agreement annexed hereto as Exhibit A." *Id.* at ¶ 19. Finally, the Protective Order provides specific guidelines to be followed in the case of an inadvertent production of privileged information. The Protective Order provides that once a claim of privilege is asserted, "all Receiving Parties that have received a copy of such document promptly shall return it to the Producing Party and shall destroy any other copies thereof unless there is a pending good faith dispute about the privileged nature of the document." *Id.* at ¶ 28. In the event of a good faith dispute about the privileged nature of a

document, the Protective Order provides that “the Receiving Party shall refrain from further using or otherwise disclosing the document or its contents or part(s) of the document claimed to be privileged or protected until the dispute is resolved.” *Id.* at ¶ 30. Mr. Duffy is unquestionably a “Receiving Party” under, and subject to, the terms of the Protective Order. Mr. Duffy has been provided access to Household’s Confidential Information, he has reviewed documents and attended depositions. Moreover, Mr. Baker confirmed that Mr. Duffy has read the Protective Order and executed Exhibit A thereto. *See* Exhibit B.

Mr. Duffy’s surreptitious attempt to retain a copy of the document after a privilege was asserted and after Mr. Baker had, appropriately, agreed to comply with the recall request, is directly contrary to the terms of the Protective Order. Moreover, because the work product privilege unquestionably protects the information contained in the document, and not just the physical pieces of paper, Mr. Duffy’s covert attempt to capture some or all of that information before returning the inadvertently produced document was wholly inappropriate and violated the terms of the Protective Order. Mr. Duffy has demonstrated that he has no respect for Defendants’ privilege assertion or the terms of the Court’s Protective Order and thus cannot be presumed to comprehend or respect the confidential nature of the documents produced in this litigation subject to the terms of the Protective Order. By failing to compel his agent Mr. Duffy to adhere to the terms of the Protective Order, Mr. Baker has demonstrated that he cannot be relied upon to ensure that his consultants adhere to the terms of the Protective Order.

The protection of Household’s Confidential Information is, as recognized by the terms of the Protective Order, of paramount importance to Household and necessitates that Household be vigilant in seeking to ensure the rigorous enforcement of the Protective Order. Given Mr. Duffy’s violation of the terms of the Protective Order and Mr. Baker’s unwillingness — or inability — to rectify the problem, Household is constrained to move this Court to enter an

Order enforcing the terms of the Protective Order and barring Mr. Duffy and his firm from further access to Household's Confidential Information as defined therein.

## ARGUMENT

### **I. Brian Duffy's Brazen Disregard of the Protective Order in this Case Warrants a Determination of Contempt and the Imposition of Sanctions**

#### **A. Mr. Duffy's Actions Were in Contempt of This Court's Explicit Order**

Brian Duffy violated the Protective Order by making further use of the document in question after Defendants had asserted a good faith claim of privilege. Mr. Duffy's apparent indifference to and disregard for an order of this Court necessitate a finding that Mr. Duffy was in contempt and require the imposition of appropriate sanctions to prevent further violations.

Under the Federal Rules of Civil Procedure, this Court may enter just orders to punish any failure to abide by the Court's discovery orders, including the Protective Order entered in this case.<sup>2</sup> Fed. R. Civ. P. 37(b)(2)(D) ("[T]he court in which the action is pending may make such orders in regard to the failure as are just . . . [including] an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination . . ."). Mr. Duffy's flagrant violation of the Protective Order exposed him to a determination of contempt and other sanctions under Rule 37(b). *See Whitehead v. Gateway Chevrolet,*

---

<sup>2</sup> Violation of a Magistrate Judge's lawful order is a contempt of court under 28 U.S.C. § 636(e)(1) (2000). Where a violation constitutes civil contempt, "the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge." 28 U.S.C. § 636 (e)(6)(B) (2000). *See also Tome Engenharia E Transportes, Ltda. v. Malki*, 1997 U.S. Dist. LEXIS 16791, at \*\*2-3 (N.D. Ill. Oct. 21, 1997) (explaining that, upon an act in violation of a Magistrate Judge's order, the Magistrate Judge "is to certify the facts to a district court judge who shall thereafter require such person to appear and show cause why he or she should not be held in contempt of court and, after a hearing and if a finding is contempt is made, punish the contemnor").



2004 U.S. Dist. LEXIS 11979, at \*10 (N.D. Ill. June 28, 2004) (finding that plaintiff's counsel's argument "that violations of Rule 26(c) protective orders cannot be sanctioned pursuant to Rule 37(b) remains unpersuasive"); *Nevil v. Ford Motor Co.*, 1999 U.S. Dist. LEXIS 23222, at \*3 (S.D. Ga. Dec. 23, 1999) (recognizing that "Rule 37(b) applies to protective orders entered under Rule 26(c)" and granting sanctions, including a determination of contempt, against plaintiffs' expert who violated the protective order after he had signed an acknowledgement of the protective order).

At issue in *Whitehead*, as here, was violation of a protective order entered under Rule 26(c) to protect the confidentiality of sensitive business documents of the defendant. *Whitehead*, 2004 U.S. Dist. LEXIS 11979, at \*\*2-3. Plaintiffs' counsel in that case used material provided under a protective order in a previous action as the basis for his complaint on behalf of the plaintiff in *Whitehead*. The *Whitehead* court, finding that counsel's action was a "flagrant violation" of the protective order, *id.* at \*3, ordered the imposition of sanctions. Mr. Duffy's actions here are far more egregious — he brazenly and impermissibly made use of the document in question, over which Defendants had asserted a privilege, even *after* Plaintiffs' counsel recognized on the record that a privilege had been asserted and properly agreed to return copies of the document. Mr. Duffy disregarded the plain terms of the Protective Order and, in doing so, rendered its protections meaningless.

Contempt is an appropriate remedy where an individual subject to a protective order deliberately disregards that order. *See Marrocco v. General Motors Corp.*, 1989 U.S. Dist. LEXIS 8102, at \*4 (N.D. Ill. July 11, 1989) (finding, where plaintiffs' counsel and their experts had violated the protective order in that case, that "regardless of whether the violation of the protective order was due to negligence or willfulness, plaintiffs were in violation of the order and hence in contempt of this court"). As a recipient of Household's Confidential Information, Mr.

Duffy is subject to the terms of the Protective Order in this case. His actions constitute a willful violation of that Order and necessitate that he no longer benefit from its provisions.

Mr. Duffy chose to flout an explicit order of this Court. The consequence should be a determination that Mr. Duffy is in contempt and the imposition of sanctions sufficient to ensure that no future violations of the Protective Order will occur.

**B. Mr. Duffy and His Firm Should Henceforth be Denied Access to Protected Material as Defined in the Protective Order**

Mr. Duffy has demonstrated that he cannot be trusted to abide by the terms of the Protective Order. Nonetheless, Plaintiffs insist that Mr. Duffy will attend future depositions and will continue to be given access to Defendants' confidential business documents — the very documents the Protective Order was intended to protect. *See* Exhibit B. Because Mr. Duffy's record of wrongful and unprofessional conduct leaves Defendants with no faith that Mr. Duffy will abide by the Protective Order in the future, Defendants requested that Plaintiffs cease providing Mr. Duffy with Confidential Information and that they demand return of Confidential Information already provided to Mr. Duffy. *See* Letter of Janet A. Beer, Esq. to D. Cameron Baker, Esq., dated March 31, 2006, annexed hereto as Exhibit A. Plaintiffs' refusal to assure Defendants that Protected Materials would no longer be shared with Mr. Duffy left Defendants with no choice but to seek the assistance of the Court.

Passing the serious issues raised by misuse of privileged material, Household — now HSBC Finance Corp. — is a thriving business, in a fiercely competitive industry, which would be irreparably harmed by the public disclosure of information of the type covered by the Protective Order. As recognized in the Protective Order itself, discovery in this litigation requires Household to release “commercially sensitive business information the disclosure of which would . . . impair the commercial value of the information or otherwise be commercially injurious.” Protective Order ¶ 3. Any weak link in the chain of confidentiality is thus cause for

tremendous concern. Experience shows that Mr. Duffy is a weak link and that Plaintiffs' counsel is unable — or unwilling — to control his actions.

Where future disclosure in violation of a confidentiality order is feared, it is sometimes appropriate for the “weak link” to post a bond to provide some measure of assurance against future violations. *See, e.g., Grove Fresh Distributors, Inc. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1452 (N.D. Ill. 1995) (requiring former counsel for plaintiff who had violated a confidentiality order to post a \$50,000 bond because of a “significant risk of repetition of [his] disobedience of court orders” and noting that future violations would result in forfeiture of the bond “if not further sanctions”). Here, given the highly sensitive nature of the business information covered by the Protective Order, any monetary bond will provide little solace to Defendants. Disclosure of Confidential Information would be potentially devastating.

Given the invaluable nature of the Confidential Information to Household's ongoing business, and given Mr. Duffy's demonstrated disregard for the requirements of the Protective Order, the only fitting remedy is that Mr. Duffy and his firm must henceforth be excluded from the set of individuals and entities eligible to receive Confidential Information under the Protective Order.<sup>3</sup> Accordingly, Defendants respectfully request that this Court certify the facts to Judge Guzman and enter an order requiring Mr. Duffy to show cause why he should not be adjudged in contempt and why he and his firm should not be barred from future access to Household's Confidential Information. *See* 28 U.S.C. § 636(e)(1), *supra*, at n.2.

---

<sup>3</sup>

The set of individuals and entities which may receive Confidential Information is defined at Paragraph 19 of the Protective Order.

**II. Plaintiffs Should Pay the Fees and Expenses Incurred by Defendants in Bringing This Motion**

Plaintiffs have refused to turn over or destroy the notes Mr. Duffy made from the document in question despite oral and written demands by Defendants. *See* Exhibit B. Plaintiffs have rejected Defendants' request that Mr. Duffy be prohibited from receiving material provided under the Protective Order. *Id.* Plaintiffs have thus left Defendants with no option but to seek a further order of this Court to protect their vital interest in the confidentiality of documents provided under the Protective Order.

Plaintiffs and their Counsel were responsible for hiring Mr. Duffy and were responsible for enabling his continued failure to obey the Protective Order. *See generally* Fed. R. Civ. P. 23(a)(4). Therefore, they should be held responsible to pay the fees and expenses incurred by Defendants in bringing this issue to the Court for resolution. *See American National Bank and Trust Co. v. AXA Client Solutions, LLC*, 2002 U.S. Dist. LEXIS 9511, at \*15 (N.D. Ill. May 24, 2002) (requiring the party that violated the protective order in that case to pay "an amount equal to the attorney's fees and expenses that [the other party had] incurred as a result of the investigation into this dispute").

**III. Beyond the Authority Conferred by Rule 37(b), this Court has Inherent Authority to Enter an Appropriate Order**

"It is well-settled that a court has inherent authority to sanction an attorney's bad-faith conduct." *Whitehead v. Gateway Chevrolet*, 2004 U.S. Dist. LEXIS 11979, at \*16 (N.D. Ill. June 28, 2004) (relying on the court's inherent authority as well as Rule 37(b) as the basis for sanctions for an attorney's violation of a Rule 26(c) protective order (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991))). Unquestionably, this Court's inherent authority provides a basis for the imposition of the relief sought herein.

**CONCLUSION AND PRAYER**

For the foregoing reasons Defendants respectfully request the imposition of sanctions against Plaintiffs' counsel under Fed. R. Civ. P. 37(b) and an order to show cause why Plaintiffs' consultant, Brian Duffy, and his firm, should not be held in contempt and barred from continued access to Household's Confidential Information.

Dated: April 6, 2006  
Chicago, Illinois

Respectfully submitted,  
EIMER STAHL KLEVORN & SOLBERG LLP

By: /s/ Adam B. Deutsch

Nathan P. Eimer  
Adam B. Deutsch  
224 South Michigan Avenue  
Suite 1100  
Chicago, Illinois 60604

-and-

CAHILL GORDON & REINDEL LLP

Thomas J. Kavalier  
Howard G. Sloane  
Landis C. Best  
David R. Owen  
80 Pine Street  
New York, NY 10005  
(212) 701-3000

*Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J. A. Vozar*