

**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' MEMORANDUM IN SUPPORT OF MOTION REGARDING STATE
AGENCY DOCUMENTS AND SANCTIONS**

On July 31, 2006, Household International, Inc. (“Household”) made available for production certain documents sourced to Robin Allcock.¹ At that time, Household indicated that some documents were being withheld from production due to state regulatory agency issues and that they were in contact with the relevant agencies to address the issue. However, this version of the facts proved to be only half the story. As the Class learned on August 8, 2006, Household omitted the fact that previously produced documents relating to 27 different state regulatory agencies may be subject to recall and that Household has been engaged in *ex parte* communications with the relevant state agencies regarding this issue. To protect the Class’ interests, the Class promptly requested that Household identify the documents at issue by Bates numbers and provide names and other contact information for each of the relevant state officials. Despite the provision in the Protective Order requiring identification of inadvertently produced documents within ten days, *see* ¶28 of the Protective Order, and the Class’ citation of this provision, Household has refused to provide this information. Household’s purposeful refusal to provide this information is prejudicing the Class as already 4 of the 27 state agencies have indicated that they wish or may wish to recall these documents. Accordingly, the Class requests a Court Order 1) that directs Household a) to produce requested information, b) to identify all potential deponents who have had access to any of the state documents, and c) to urge the state agencies to authorize release of the previously produced documents, and 2) that sets a briefing schedule to avoid the disruption that this issue threatens to the newly adopted January 31, 2007 discovery cut-off.

There is no justification for Household’s refusal to provide the information requested save to cause the Class further prejudice. As to the list of documents by Bates number, Household has that

¹ The relevant communications between the parties are attached as Exhibits to the accompanying Declaration of D. Cameron Baker.

list and could produce it. Indeed, at the August 10, 2006 status conference, counsel for Household admitted the information is available when he stated that the issue affected 300 documents. Further, Household is required to identify the inadvertently produced documents under the Protective Order within ten days of discovery of the inadvertent production. Over ten days have passed since this discovery and thus, Household is in violation of the Protective Order. Household's communications with the agencies commenced no later than August 2, 2006. The Court should therefore direct immediate production of this list and sanction Household for its failure to abide by the Protective Order.

As to the list of relevant state officials and their contact information, Household has this information and should provide it immediately so that the Class can contact the relevant state agencies.² Significantly, in Household's letters to the agencies, Household did not request release of these documents, but only "guidance" on how to address the situation. Moreover, in seeking this guidance, Household informed these officials only that the documents at issue "may be responsive" to some discovery requests without mentioning that this case involves allegations of predatory lending practices by Household and that their documents, which detail the agencies' examination of Household's lending practices, are highly probative of scienter and falsity. Perhaps not coincidentally, based on the misleading picture presented by Household's request for "guidance," states have already indicated that they would like the documents recalled and one is currently leaning towards this position. Further, Household has told the Class that it must be the one to request release

² Four days after the Class' initial request, Household provided a list of the relevant agencies without the names of the relevant officials. This list, thus, cannot be used as a meaningful tool to contact the agencies. After the Class again requested the names of the relevant officials, Household added the names of those officials it wrote to, but acknowledged this addition had "limited utility" because the subsequent communications have been with different officials. The Class is still awaiting the contact information for the relevant state officials.

of these state documents. However, at the same time, Household refuses to provide the contact information necessary to request release. In this situation, each day that passes without the Class' ability to influence these officials will likely result in further decisions to request recall of these documents and thus, more prejudice to the Class. Thus, it is imperative that the Court order Household to provide the full contact information for each state agency, including the name, telephone and fax numbers for the relevant state officials.

Additionally, as this problem, like the prior federal regulatory agency problem, is one of Household's making, Household should be directed to cooperate with the Class in terms of ensuring use of the previously produced documents in this litigation. Household's production of these documents is an indication that Household acknowledges the relevance of these documents. Further, Household has delayed informing the Class and the Court of this situation; indeed Household has concealed as long as possible this situation despite the fact that the passage of time has only made matters worse. Having caused the situation in the first place and having aggravated the situation by failing to notify either the Class or the Court, Household must now be forced to cooperate in the solution. Accordingly, the Court should direct Household to affirmatively urge the state agencies to release the documents.

The Class also requests a briefing schedule on this issue in order to provide prompt resolution. Given the late juncture of this alleged discovery by Household, the Class does not intend to request each and every state agency to release its documents. In this case, the time associated with requesting each state to release its documents and awaiting a decision is time that cannot be spared, particularly given the newly established January 31, 2007 fact discovery cut-off. Also, one deposition has been postponed because of this issue and the Class believes that many other depositions, including those of Ms. Allcock and Lisa Sodeika, will be impacted. Accordingly, as the documents at issue are in Household's possession, the Class intends to move to compel production

from Household with notification to each state agency of its opportunity to submit a brief in opposition to the motion or a statement of non-opposition as it so desires.

The Class proposes the following schedule:

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|-----------------------------|--------------------|
| 1. The Class' Opening Brief | August 25, 2006 |
| 2. State Agency Responses | September 8, 2006 |
| 3. The Class Reply | September 15, 2006 |

The Class will provide notice to the state agencies of this briefing schedule within 24 hours of receiving the relevant contact information from Household. As part of that notice, the Class will apprise the state agencies of the nature of this case and the probative value of their documents to this litigation. Household as a mere holder of the documents has no privilege to assert and therefore, no basis on which to oppose this motion. *See In re Bank One Sec. Litig.*, 209 F.R.D 418, 426-27 (N.D. Ill. 2002) (government agency basis burden of proof in establishing privilege).

To better assess the impact of this issue on the deposition schedule, the Court also should direct Household to provide a list of all potential deponents who had access to the state agency documents. Household should provide this list within a week. This list will allow the Class to effectively prioritize depositions while this issue is being resolved.

Finally, the Class requests that the Court impose sanctions upon Household for its conduct here. Sanctions are proper if noncompliance is willful, done in bad faith, or by fault of the noncomplying litigant. *See Melendez v. Illinois Bell Tel. Co.*, 79 F.3d 661, 670-71 (7th Cir. 1996). A party acts in bad faith when, as here, it knew that disclosure of materials (*i.e.*, the list of inadvertently produced documents) was required by the court's Order and despite this the party failed to disclose. *Id.* Here, Household's refusal to provide plaintiffs with crucial information violates a standing court order and is part of a purposeful effort to prejudice the Class. *See Chambers v. NASCO*, 501 U.S. 32, 46 (1991). Courts have awarded attorney's fees where the party

negligently violated discovery proceedings. *See Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 474 (7th Cir. 1984). Here, defendants were negligent (if not intentional) with respect to their misleading remarks to the Class and the Court at the August 10, 2006 status conference since (as the correspondence cited herein indicates) at least four of the defense attorneys were aware of the extent of the state agency problem prior to that date.

For these reasons, in addition to attorney's fees, the Class requests entry of an Order:

(i) Compelling Household to provide immediately to the Class a complete list of each state regulatory agency contacted, the name of each individual representing such agency with whom Household has communicated, and all corresponding contact information, including address, telephone, facsimile and emails;

(ii) Compelling Household to cooperate with the Class to engage the state agencies and urge their consent to release the documents;

(iii) Requiring Household to produce a complete list of all documents previously "inadvertently produced" to the Class;

(iv) Requiring Household to complete the actions set forth in clauses (i)-(iii) above by the close of business on the day of the Court's Order granting this Motion and (b) imposing a fine in the amount of \$20,000 for each business day in which defendants fail to comply with the actions set forth in clauses (i)-(iii) above; and

(v) Adopting the briefing schedule set forth above.

DATED: August 14, 2006

Respectfully submitted,

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