

**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' PROPOSAL REGARDING STATE AGENCY DOCUMENTS

At the October 19, 2006 status conference, the Court directed the Class to make a proposal regarding the state agency documents. Since the status conference, the Class has reviewed those documents at issue within its possession and has developed the following proposal to resolve the issue.

A. The Class' Proposal:

1. The Court orders Household International, Inc. ("Household") immediately to produce the following categories of documents:

(a) documents relating to any state agency that has not submitted an objection to this Court, which includes Arizona, Iowa, Minnesota, and West Virginia;

(b) all internal documents relating to the state agencies;

(c) reports of examination and correspondence with the Kansas, Hawaii and Ohio state agencies;

(d) three documents relating to the North Carolina state agency; and

(e) reserve issues relating to the New York state agency until it provides its response on November 1, 2006.

2. Pursuant to the agreement of the Wisconsin state agency, the Class will review the relevant documents, including those withheld to date, and prepare a stipulation based upon that review. *See* Exhibit ("Ex.") A¹ (letter from Wisconsin Department of Justice). The Class proposes that it be permitted to do the same with those pertaining to the New Mexico agency as it currently has no documents relating to that agency to review and assess.

3. Except as outlined in point 1, the Class will not seek further production of reports of examination or correspondence with respect to the Delaware, North Carolina, or Vermont state

¹ All exhibits are attached hereto, unless otherwise noted.

agencies. Further, neither party may use state agency documents not within the categories outlined above.

The Court should adopt this proposal now.² Absent adoption of this proposal, the Class believes that the Court order the production of all documents at issue. We discuss the proposal and related issues below.

B. Explanation of the Class' Proposal

The Court has requested that the Class compromise by narrowing the documents at issue. Accordingly, the Class has done so in its proposal, which outlines the documents for which the Class seeks a Court order compelling production.

There are two categories of documents for which production should be undisputed:

i) documents relating to those state agencies that have not yet objected to this Court; and
ii) Household internal documents. As to the first, this Court has previously given the state agencies two separate opportunities to raise objections with respect to their documents: October 3 and October 16. Despite this, several agencies, including Arizona, Iowa, Minnesota, and West Virginia, have not done so. There being no objection from these state agencies before the Court despite repeated invitations, the Court should order Household to immediately produce any withheld or redacted documents relating to these agencies.

Second, Household's internal documents, which discuss Household's responses to the reports and/or analyze the amount of refunds, are not subject to any privilege. Indeed, the relevant statutes and correspondence from the state agencies confirm this point. For example, the Kansas

² In light of the Court's comments respecting the Arizona state agency documents, the Class does not believe that this issue will impact the upcoming depositions of Ms. Sodeika and Mr. Hueman set respectively for November 2 and 7. *See* Ex. B at 43 (October 19, 2006 hearing transcript) (Arizona is not objecting "[s]o you can do anything you want with Arizona."). However, to ensure clarity on this issue, the Court should at a minimum resolve promptly any issues pertaining to non-objecting state agencies and Household internal documents.

state agency letter to the Court identifies only the reports and correspondence between the agency and Household as being subject to the privilege. *See* Ex. C. Similarly, the North Carolina state agency notified Household that its internal documents were not confidential. *See* Ex. D at 3-4 (response of North Carolina state agency authorizing Household to release internal Household documents). The filing by the Vermont state agency is consistent. *See* Memorandum Regarding Request for Privileged and Confidential Vermont Investigations and Examination Reports at 2 (Docket No. 702) (quoting 8 V.S.A. §23(b) (“records and reports of examination by the commissioner” are confidential)). Any withheld or redacted internal Household documents should be produced immediately.

With respect to the actual documents at issue, the Class has restricted its proposal to three state agencies, Hawaii,³ Kansas and Ohio⁴ with the addition of three documents from North Carolina. The reports and correspondence from Hawaii, Kansas, and Ohio are particularly probative based on the Class’ review of previously produced documents. The three selected documents from the North Carolina state agency are likewise particularly probative, consisting of two letters between the North Carolina Department of Justice (as opposed to the Commissioner of Banks, the regulating agency) and Household, and one state agency report containing the handwriting of Tom Detelich, who then was responsible for all Beneficial branch offices in the

³ The Hawaii state agency has not submitted an objection to the Court but has via letter provided the Court with its correspondence with the parties. *See* Ex. E. This fails to comply with the Court’s prior directives and thus, the Hawaii state agency documents should be produced based on a failure to object to production.

⁴ The Ohio state agency apparently provided an oral response to the Court, which the Class believes is an insufficient response, and thus, does not know if in fact the Ohio state agency has objected to production by Household. In this proposal, the Class assumes that the Ohio state agency has properly objected.

Consumer Lending business unit.⁵ The Class intends to use this North Carolina state agency report to establish that Mr. Detelich regularly reviewed these types of reports and thus, is willing to redact the portions of the document that reference findings by the North Carolina state agency.

As stated in prior filings by the Class, there is no basis to withhold production of these documents. In the letters to this Court, the Kansas, North Carolina and Hawaii state agencies assert state law as a basis for non-production. Exs. C, E and F (Memorandum Regarding Confidentiality of Agency Records Under North Carolina Law (“N. Carolina Mem.”)). State law protections do not apply in this case where jurisdiction is predicated upon a federal question. As this Court noted in its December 9, 2005 Order, “[i]n federal question cases like the case at bar, ‘the contours and exceptions of ... privileges are clearly a matter of federal common law; state-created principles of privilege do not control.’” December 9, 2005 Order at 5 (Docket No. 375) (omission in Order, citing *In Re Pebsworth*, 705 F.2d 261, 262 (7th Cir. 1983)). Because the Hawaii and Kansas state agencies assert only a privilege predicated upon state law, the Court should order production of these documents.

The North Carolina agency also asserts a deliberative process privilege, citing federal case law relating to the bank examination privilege. *See* N. Carolina Mem. at 7-8. However, the North Carolina state agency, as with the other objecting state agencies, does not provide any evidence to establish the foundation for an assertion of this privilege. *See, e.g., Schreiber v. Society for Sav. Bancorp. Inc.*, 11 F.3d 217, 220-21 (D.C. Cir. 1993) (burden on agency to establish privilege and to show materials are not primarily factual, which burden cannot be met by a conclusory declaration).

⁵ The North Carolina state agency documents are bates numbered HHS02857953-54, HHS02857973-74 and HHS02857987. Should the Court request, the Class is prepared to submit these documents for an *in camera* review.

Moreover, as the North Carolina state agency recognizes, this privilege is a qualified one and can be overcome upon a showing of good cause for production of these documents. N. Carolina Mem. at 8; *see also Schreiber*, 11 F.3d at 220-21 (discussing factors). The Class has already made such a showing with respect to the relevant factors in its prior submissions. *See* the Class' Status Report for September 19, 2006 Status Conference (Docket No. 667). First, these documents contain relevant, probative information relating to predatory lending by Household. Indeed, the Court has previously stated this. *See, e.g.*, Ex. G at 63 (October 4, 2006 hearing transcript) (statement of Court regarding the relevance of the documents). Second, the Class has no other source for the information contained in the documents. The arguments made by Household as to alternative sources are not persuasive.⁶ *Schreiber*, 11 F.3d at 222. Third, this litigation is serious and involves a multi-billion dollar fraud on the investing public. Fourth, the state governments have an issue in this litigation. Indeed, as the Court is aware, the Attorneys General of all states entered into a settlement with Household regarding its predatory lending activities. Fifth, the chilling factor, if applicable, has been mitigated by the issuance of a modification to the protective order specifically applying to these documents.

Significantly, the Court may recall that the federal regulatory agencies, which asserted this same privilege, agreed to produce their documents relating to predatory lending, conceding that the Class had established good cause for their production. The Office of Thrift Supervision ("OTS")

⁶ For example, on October 19, Ms. Farren suggested that the Class could get these state agency documents via a Freedom of Information Act ("F.O.I.A.") request. Ex. B at 17. Not only is F.O.I.A. inapplicable to the states, but it is implausible to assume that the states would voluntarily produce these documents under a similar state law where state law specifically holds such documents confidential. Similarly, as to depositions, defendants have objected and instructed witnesses not to respond to these types of questions. *See* Ex. H at 185 (deposition of Paul Creatura).

ruling, which authorized release of its predatory lending documents, including reports of examination, is directly on point:

OTS finds that documents addressing predatory lending practices, including the five practices specifically listed in Request No. 2, are highly relevant. . . .

* * *

OTS's analysis of other principal factors in 12 C.F.R. 510.5 confirms that information that is relevant to the issues in the lawsuit, as set forth above, should be produced. First, the unpublished OTS information that plaintiffs seek is not available from other sources. OTS examination reports and supervisory correspondence may be released only if OTS authorizes their use in litigation. Second, although there is a need to maintain the confidentiality of OTS examination reports and other unpublished information, the parties already have a comprehensive protective order in place and have indicated that they are agreeable to using OTS information subject to the terms of a protective order acceptable to OTS. In addition, OTS finds that in this case the public interest supports authorizing the use of OTS information that is highly relevant.

Ex. I at 4-5 (April 6, 2006 OTS Ruling).

In these circumstances, the Class could seek production of all the state agency documents but as a compromise requested by this Court has limited its request to the states and documents identified in this proposal. The Class reserves its right to seek full production if the Court were not to adopt this proposal.

As to Wisconsin and New Mexico, the Wisconsin state agency has agreed to allow the Class to review its documents *in camera* as opposed to a formal production. *See* Ex. A. The Class will then prepare a joint stipulation regarding the contents of the documents to be used for all purposes in this case. The Class proposes the same treatment for the New Mexico state agency. The New Mexico state agency apparently has no issue with this Court issuing an order compelling production of all documents. *See* Ex. J (noting that "court of competent jurisdiction" can order production). Thus, while the Class could seek total production, at this juncture because it has not reviewed any

New Mexico documents,⁷ the Class will not seek full production of the New Mexico state agency documents because it cannot now assert that these state agency documents are particularly probative.

If the Court adopts the points one and two outlined above, the Class commits not to seek the remainder of the state agency documents not yet produced. Further, the Class commits not to use any such state agency reports or correspondence that are already in its database.⁸ (For reasons previously discussed with the Court, it is expensive and time-consuming for the Class to have to remove electronic copies.) Similarly, Household should be precluded from using these documents.

This proposal is reasonable and provides this Court with the ability to rule promptly on this issue without further briefing.

DATED: October 27, 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)
LUKE O. BROOKS (90785469)
MARIA V. MORRIS (223903)
BING Z. RYAN (228641)

/s/ D. Cameron Baker

D. CAMERON BAKER

⁷ Although New Mexico state agency submitted its objection on October 17, to date, Household has not identified any New Mexico state agency documents as part of previous productions and indeed, has said it will not do so until the Court rules on this issue in its totality. *See* Defendants' Supplemental Status Report for the October 19, 2006 Status Conference at 2 n.3 (Docket No. 727). The Class' own search has not revealed any such documents.

⁸ The Class' commitments are predicated upon the understanding that Household has identified all of the documents at issue (save those relating to the New Mexico state agency) in its prior lists and logs. Put differently, if Household were to identify additional "inadvertently produced documents" or documents "inadvertently" not included on prior lists or logs, the Class reserves the right to re-open these issues.

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
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

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 October 27, 2006, declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' PROPOSAL REGARDING STATE AGENCY DOCUMENTS.**

The parties' email addresses are as follows:

TKavaler@cahill.com
PSloane@cahill.com
PFarren@cahill.com
LBest@cahill.com
DOwen@cahill.com
NEimer@EimerStahl.com
ADeutsch@EimerStahl.com
MMiller@millerfaucher.com
LFanning@millerfaucher.com

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

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 27th day of October, 2006, at San Francisco, California.

s/ Monina O. Gamboa

MONINA O. GAMBOA