

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

<b>LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>No. 02 C 5893</b>
	)	
<b>HOUSEHOLD INTERNATIONAL, INC., et al.,</b>	)	<b>Judge Nan R. Nolan</b>
	)	
<b>Defendants.</b>	)	

**ORDER**

Plaintiffs have filed this securities fraud class action alleging that Defendants Household International, Inc., Household Finance Corporation, and certain individuals (collectively, "Household") engaged in predatory lending practices between July 30, 1999 and October 11, 2002 (the "Class Period"). Currently before the court is Plaintiffs' Motion for Authorization Pursuant to the Walsh Act for Issuance of Subpoena for Andrew Kahr. For the reasons set forth below, the motion is granted.

**BACKGROUND**

Andrew Kahr was a founder of, and consultant for, Providian Financial Corp., a subprime lender that reportedly paid more than \$400 million to settle charges of unfair business practices in 2002. (Ex. 2 to Brooks Decl.) In 1999, Household management retained Mr. Kahr "to introduce opportunistic methods to accelerate the growth of U.S. Consumer Finance." (Ex. 1 to Brooks Decl., at HHS 02861365.) Mr. Kahr apparently provided Household with a list of 60 potential consumer finance initiatives, 10 of which Household selected for "further review and potential immediate implementation." (*Id.*)

Plaintiffs claim that they did not discover that Mr. Kahr had served as a Household consultant until February 2006. At that time, Plaintiffs say, they "did not fully understand Mr. Kahr's

role at Household” and spent the next several weeks investigating his background. (Pl. Mot., at 2.) On May 25 and 26, 2006, Plaintiffs made unsuccessful attempts to serve Mr. Kahr at his Watsonville, CA residence and at another address they found for him in San Francisco. (*Id.*) Plaintiffs next hired a private investigator to locate and serve Mr. Kahr, but multiple attempts at service between June 1 and July 18, 2006 all failed. On July 18, 2006, Plaintiffs located Mr. Kahr in Paris, France and confirmed his address there. Nevertheless, Plaintiffs made eleven attempts to serve Mr. Kahr in California between September 23 and October 4, 2006. (*Id.* at 3.) Finally, on October 26, 2006, Plaintiffs informed Defendants of their intent to seek permission from the court to serve Mr. Kahr with a subpoena pursuant to the Walsh Act. (*Id.*) Plaintiffs claim that Mr. Kahr is “a key witness in this case” and must be deposed in the interest of justice. (*Id.* at 5.)

Defendants deny that Plaintiffs have a real interest in Mr. Kahr, stressing that Plaintiffs had numerous documents relating to Mr. Kahr as early as June 2004, but waited until December 2006 to file their motion. Defendants note, for example, that Plaintiffs first received documents relating to Mr. Kahr on June 23, 2004 as part of Defendants’ production of documents previously produced to the Securities and Exchange Commission. In that production, Plaintiffs received a copy of a January 1, 2002 memo from Mr. Kahr to a Household employee, stating that “for the past three years I have had a relationship with HI [Household International] which basically involves my providing new ideas and helping to get them implemented.” (Def. Resp., at 3; Ex. 5 to Brooks Decl.) In April 2005, moreover, Defendants gave Plaintiffs some 400 additional pages of documents regarding Mr. Kahr’s consultancy, including “extensive memoranda and emails from Mr. Kahr and all of the additional Kahr memoranda that Plaintiffs annex to their motion papers.” (*Id.* at 4.) Defendants argue that “[a]llowing this untimely distraction [to subpoena Mr. Kahr]. . . would not serve the interests of justice.” (*Id.* at 5.)

## DISCUSSION

The Federal Rules permit discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. FED. R. CIV. P. 26(b)(1). Defendants do not dispute that Mr. Kahr's testimony would be relevant in this case. They nonetheless oppose the issuance of a subpoena under the Walsh Act, arguing that "the proper administration of justice would best be served by rejecting Plaintiffs' belated attempt to pursue a marginal issue that they have known about (or could have) for more than two years." (Def. Resp., at 7.)

### **A. The Walsh Act**

The Walsh Act provides a vehicle for issuing a subpoena to a United States national or resident who is in a foreign country:

A court of the United States may order the issuance of a subpoena requiring the appearance of a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country . . . if the court finds that particular testimony . . . is necessary in the interest of justice and, . . . if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance.

28 U.S.C. § 1783. The purpose of the Act is to "provide equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." *CSI Investment Partners II, L.P. v. Cendant Corp.*, 00 Civ. 1422 (DAB), 2006 U.S. Dist. LEXIS 11014, at \*12 (S.D.N.Y. Mar. 17, 2006) (quoting Sen. Rep. 88-1580 at 1964 U.S.C.C.A.N. 3782, 3783 (Sept. 15, 1964)). There is very little case law interpreting the Act, but the legislative history states that in determining whether a subpoena is necessary "in the interest of justice," a court may consider "the nature of the proceedings, the nature of the testimony or the evidence sought, the convenience of the witness . . . , the convenience of the parties, and other facts bearing upon the reasonableness of requiring a person abroad to appear as a witness or to produce tangible evidence." SSR 88-1580 § 10. "The decision to issue a subpoena under this statute is left to the sound discretion of

the court." *Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 523 (D. Colo. 2003) (citing *In re Thompson*, 213 F. Supp. 372, 374 (S.D.N.Y. 1963)).

## **B. Analysis**

There is no dispute that Mr. Kahr is a U.S. resident, so the only question for the court is whether issuing a subpoena for his testimony is in the interest of justice. Plaintiffs argue that the interest of justice test is satisfied here because Mr. Kahr's deposition may present relevant information or, at the least, lead to the discovery of admissible evidence. (Pl. Mot., at 4); *Klesch*, 217 F.R.D. at 523-24 (ordering the issuance of a subpoena under the Walsh Act where the requested deposition was relevant under Rule 26 and the plaintiff made only a "bald assertion" that the subpoena would harass the deponent). Defendants disagree, arguing that the importance of Mr. Kahr's testimony is belied by Plaintiffs' delay in pursuing it. Defendants also note that Plaintiffs have already deposed Paul Creatura, Household's liaison with Mr. Kahr, "at length about Mr. Kahr's input during the relevant period, and the nature and disposition of some of his ideas." (Def. Resp., at 5.) Defendants finally object that a subpoena at this late date would divert the parties' attention and resources from more probative discovery still outstanding in this case. (*Id.* at 7.)

The court shares Defendants' concern that issuing a Walsh Act subpoena for Mr. Kahr's deposition less than two months before the January 31, 2007 close of discovery could serve to generate further disputes while producing testimony that is only marginally relevant.<sup>1</sup> The court is also disappointed that it took Plaintiffs so long to pursue Mr. Kahr's testimony in the first place. That said, the court has repeatedly noted that Defendants have produced more than four million pages of documents in this case and, just as it was "not unexpected that Defendants and their agents would inadvertently produce some privileged materials," it was not unexpected that Plaintiffs

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<sup>1</sup> The court notes that the parties have presented conflicting views regarding Mr. Kahr's role as a Household consultant, his recommendations in that regard, and Household's retention of emails relating to his service. (Pl. Mot., at 5-9; Def. Resp., at 7-9.)

would fail to determine the significance of certain documents until further in the discovery process. See *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006).

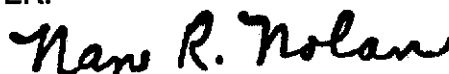
Plaintiffs may issue a subpoena for Mr. Kahr under the Walsh Act, seeking both his testimony and document production. The court cautions, however, that all other depositions and discovery matters must proceed as scheduled, and Plaintiffs must notify Defendants by December 15, 2006 which deposition they will forego, if necessary, in order to depose Mr. Kahr and still comply with the 55 deposition limit. In addition, the court will not extend the discovery cut-off date or reopen any depositions based on information sought or obtained from Mr. Kahr absent a showing of good cause. Given the late date of this motion, Mr. Kahr's unavailability or opposition to the subpoena will not alone suffice as good cause for extending discovery.

**CONCLUSION**

With the limitations stated above, Plaintiffs' Motion for Authorization Pursuant to the Walsh Act for Issuance of Subpoena for Andrew Kahr [Doc. 793] is granted.

Dated: December 13, 2006

ENTER:



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NAN R. NOLAN  
United States Magistrate Judge