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, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY IN SUPPORT OF THE CLASS' MOTION TO COMPEL HOUSEHOLD DEFENDANTS TO PRODUCE DOCUMENTS RESPONSIVE TO THE FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS

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I. INTRODUCTION

In substance, defendants ask the Court to overlook the fact that they have failed to respond properly to the Class' First, Second and Third Document Requests (propounded months or years ago); reject the Class' prudent "belt and suspenders" requests in the Fourth Request; and ignore the fact that their "certification" that document production is completed as to the first three requests is inaccurate. The Fourth Request contains 23 different document requests. Defendants initially stated they would produce no documents in response to any of these requests. Following the parties' meet and confer discussions, the Class chose compromise by focusing on only nine of those requests. The Class narrowed or clarified all of those nine requests to satisfy defendants' concerns. Despite these compromises, defendants would not agree to produce any documents,[1] asserting relevance, burdensomeness, a belated privilege claim, and timeliness as the bases for their refusal. Defendants' arguments have no merit. The Class respectfully urges the Court to see through defendants' rhetoric and grant the Class' motion in full. Given the imminent fact discovery cut-off in four weeks, as well as the fact that defendants have been on notice since at least October 3, 2006 as to these specific requests, the Court should require defendants to produce responsive documents by January 5, 2007 before the depositions of William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (the "Individual Defendants") commence.

II. ARGUMENT

A. Documents Relating to Compensation Paid to Andrew Kahr (Request No. 1)

Despite the Court's finding that Mr. Kahr is relevant to this litigation (December 13, 2006 Order, Dkt. No. 824), defendants argue information relating to compensation paid to Mr. Kahr is irrelevant because (i) the Complaint "asserts no consumer lending claims" and (ii) even if predatory lending claims were asserted, the requested documents would be irrelevant. *See* Def. Br. at 4-5.[2] To the contrary, the Complaint extensively details Household's predatory lending practices and the

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[1] Defendants' production of "Over-NIM" related materials on December 27, 2006 (well after the Class' motion was filed) is the only potential "response" to those requests. *See infra*, §II.B. Since this production was received only two days ago, the Class reserves the right to re-institute its objections upon review of the documents produced.

[2] "Def. Br." refers to Defendants' Memorandum of Law in Opposition to Lead Plaintiffs' Motion to Compel Household Defendants to Produce Documents Responsive to Plaintiffs' Fourth Demand for Production of Documents, filed on December 22, 2006 (Dkt. No. 860).

reasons why such practices support this securities fraud class action. Ironically, in their own motions to compel, defendants are demanding the kind of detailed responses to interrogatories as if this were a consumer fraud case rather than a securities fraud case, going so far as to demand sanctions. *See* Dkt. No. 858 (Memorandum of Law in Support of the Household Defendants' Motion for Sanctions including a Recommendation for Dismissal for Failure to Respond and to Compel Responses to Defendants' Court Authorized Supplement to Defendants' Second Set of Interrogatories). Defendants cannot have it both ways. *See, e.g.*, ¶¶55-101[3]; *see also* Pl. Br.[4], Ex. A at 8.

Next, defendants argue without support that "[e]ven in" the predatory lending context, Mr. Kahr's compensation is irrelevant. *See* Def. Br. at 4. That assertion fails as well. Such arguments revolving around "relevance" are specious at this point. The Class is preparing for the depositions of the Individual Defendants to occur in just a few weeks. As noted below, Mr. Kahr was an important advisor to the Individual Defendants with respect to matters falling squarely within the allegations in this case. Defendants' dilatory tactics simply cannot withstand scrutiny.

Mr. Kahr's compensation is highly relevant and discoverable under the liberal standards of Fed. R. Civ. P. 26. Such information is probative of the value Household placed on his advice. Mr. Kahr advised Household on a number of predatory lending practices, such as hiding prepayment penalties in dense loan documents, and using bi-weekly payment plans to mislead borrowers about their true interest rates, among others. *See* Ex. 1 at 1.[5] Payments authorized or made by the Individual Defendants themselves bear directly on their state of mind: the payments show the Individual Defendants were aware of, and in fact authorizing the predatory lending proposals Mr. Kahr provided to Household. Defendants are well aware of these facts, and the Class demonstrated their relevance in The Class' Motion for Authorization pursuant to the Walsh Act for Issuance of Subpoena for Andrew Kahr. *Id.* Moreover, as the Court noted in its December 13, 2006 Order, defendants did not dispute the relevance of Kahr's testimony. *See* Ex. 2 at 3.

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[3] All "¶__" references are to the [Corrected] Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws, filed March 13, 2003.

[4] "Pl. Br." refers to The Class' Memorandum in Support of The Class' Motion To Compel Household Defendants to Produce Documents Responsive to the Class' Fourth Request for Production of Documents [Redacted Version], filed on December 12, 2006 (Dkt. No. 820).

[5] All numbered exhibits cited herein refer to exhibits attached to this Reply.

Defendants concede that such information is relevant. *See* Def. Br. at 4. But they claim Mr. Kahr was just one of "many outside contactors" hired by Household and so his compensation is only "marginally relevant." Def. Br. at 4. Ironically, defendants' efforts to minimize and obfuscate Mr. Kahr's role at the company provide additional support for the Class' request. Moreover, Mr. Kahr was hired directly by CEO William Aldinger, an Individual Defendant in this case. Not many of Household's consultants occupied such a privileged role. Mr. Kahr interacted directly with the Individual Defendants and top senior management, a fact not to be taken lightly. *See* Ex. 1 at 4-7. In addition, the Class has good reason to believe that Mr. Kahr was paid at a level commensurate with the top executives of Household, earning millions of dollars for his proposed lending practices. Given these facts, defendants' argument that Mr. Kahr was an insignificant consultant is not credible.[6]

Defendants' assertion that Request No. 1 is "too burdensome" at this stage is likewise unpersuasive. First, the request is extremely narrow. Second, this specific request was made nearly three months ago. Third, prior requests sought the same information. For example, as defendants note, the Class sought all documents relating to EZ Pay and discount point policy and practices in the First Request. *See* Def. Br. at 3. Household documents show that Mr. Kahr was an important proponent of these and other predatory lending practices implemented by Household. *See* Ex. 1 at 1. Mr. Kahr's compensation should have been produced in response to such requests. Fourth, the fact that the Court has given the Class leave to issue a subpoena to Mr. Kahr does not preclude the Class from obtaining relevant documents from defendants.[7] To the extent defendants imply that the Class could just as easily obtain the requested documents from Mr. Kahr, their suggestion is not well received as defendants are certainly aware that the Class has been trying to ascertain Mr. Kahr's whereabouts and subpoena him for over six months.

In addition, defendants' make the following unsubstantiated statement to support their assertion that the request is overly burdensome:

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[6] Incredibly, defendants have resorted to raising the specter of admissibility every time the Class seeks documents that are not only relevant, but also highly damaging to their positions. Setting aside these considerations, discovery is not limited just to admissible evidence, but also to evidence that is reasonably calculated to lead to admissible evidence. *See* Fed. R. Civ. P. 26(b).

[7] Defendants have cited no cases to support that proposition and the Class is aware of none.

> [T]here is no central file to search for an easy answer to this demand. Rather ***to find out what Mr. Kahr was paid***, Household employees would have to consult all of the former employees who did or may have used his services, identify all projects on which he might have received compensation, figure out which budgets may have been implicated, track down related records of uncertain date from warehouses and electronic archives, coordinate payment information with particular projects to see which may be relevant here, etc.

Def. Br. at 4-5. (emphasis added.) The request at issue does not seek the cost of all of the projects in which Mr. Kahr participated. It seeks how much he was paid individually. Household was in fact required to maintain this information. Defendants claim Mr. Kahr was an outside contractor. Def. Br. at 4. Under the U.S. Internal Revenue Code, Household was required to file with the Internal Revenue Service Forms 1099 and 1096 showing income paid to its independent contractors, such as Mr. Kahr, if such payments exceeded $600 for the taxable year. *See* 26 C.F.R. § 1.6041-1(a)(1)(i)(A). It is safe to assume Mr. Kahr earned over $600. The income tax regulations require Household to retain such records. *See Higbee v. Commissioner of Internal Revenue*, 116 T.C. 438, 440 (T.C. 2001) (noting Section 1.60001-1(a) of the Income Tax Regulations (26 C.F.R. 1.6001-1) requires taxpayers to maintain records sufficient to enable the IRS to determine their correct tax liability). In light of these obligations, the fact that Mr. Kahr was hired by the CEO of the company in person, likely paid millions of dollars for his services, and the practical reality that Household had to coordinate payroll for thousands of employees (necessitating centralized processing), it strains credulity to think there is no central location where Mr. Kahr's compensation data is stored. Defendants' unsupported statements to the contrary should be rejected. The Court should order defendants to produce all documents responsive to Request No. 1 by January 5, 2007.

B. "Over-NIM Reports" (Request No. 2)

On December 27, 2006, defendants made available documents responsive to this request. It is simply not true that the Class brought this matter to the Court's attention in order to "prejudice" defendants. *See* Def. Br. at 5. The Class' request for an order to compel production was certainly not "moot" when defendants filed their Response on December 22, 2006. The Class respectfully requests the Court order defendants to certify their production is complete by January 5, 2007. *See* FN 1, *supra*.

C. HSBC Merger-Related Documents (Request Nos. 3, 5, 8 and 20)

As defendants know, the Class will take HSBC Holdings, plc's ("HSBC") deposition on January 8, 2007. Defendants should not be permitted to delay production of these documents in

order to handicap the Class' ability to undertake a thorough examination. By pursuing the Letter of Request through completion, engaging both a solicitor and barrister in London to assist in completing this process, and traveling to London for the deposition itself, the Class has demonstrated its good faith efforts to obtain all of the evidence pertaining to the HSBC merger while simultaneously cooperating with all of the affected parties. Still, defendants refuse to produce documents specifically identified (and previously requested) by the Class, including: (i) merger-related communications; (ii) valuation materials; (iii) due diligence materials generated in connection with the transaction; and (iv) missing items from the "Disclosure Schedule" to the Merger Agreement.

As noted in the Class' opening brief, the foregoing requests have been made a number of times in prior formal requests and in meet and confer discussions. In their Response, defendants neither commit to producing the documents nor deny the Class' observation that these documents have not been produced. As a consequence, it is clear that their "certification" that document production has been completed is fatally flawed. Defendants cite case law in support of the proposition that document requests should be denied where they seek the same information that prior requests sought and where the responding party certified production had been completed in respect of those prior productions. *See* Def. Br. at 6. The large difference in this case is that defendants' certification is simply not accurate.

The Class' request for a complete set of Disclosure Schedules is emblematic of the problems that have plagued the Class' good faith efforts to obtain important documents. That request (Request No. 20) is in fact another "duplicative request," a point that defendants do not challenge. First Request No. 27 was served on May 17, 2004 and specifically sought: "Household's merger or sale agreement with HSBC and all documents concerning any disclosures made to HSBC in connection with the sale." *See* Pl. Br., Ex. B at 12. That request was repeated in the Second and Third Requests, and pinpointed in Fourth Request No. 20. Still defendants refused to produce the documents on the ground that the request was "overbroad." *See* Pl. Br., Ex. A at 20. Defendants then expressed confusion as to what was requested, prompting the Class to direct defendants to an ***incomplete*** copy of the document and a suggestion as to where they could find complete copies. *Id.*, Ex. G at 1-2. At no point in this multi-year process did defendants assert "privilege," or list the documents at issue on any of their 15 privilege logs.

Suddenly, on December 4, 2006, defendants stated: "it is our understanding that anything [in the Disclosure Schedule] not already in Plaintiffs' possession has been properly withheld on the grounds of privilege." *See* Pl. Br., Ex. H. The Class sought clarification:

> We disagree with your privilege assertion with respect to the "Disclosure Schedule" and its attachments, etc. (Request No. 20). But I do not believe I am likely to dissuade you from that position at this point. I would like to understand, however, what you mean when you write "it is our understanding that anything not already in Plaintiffs' possession has been properly withheld on the basis of privilege." Specifically, please confirm that Household is asserting this privilege. Please identify the documents withheld and explain why you think they are privileged.

See Pl. Br., Ex. M. Defendants did not respond to this reasonable request as required under Fed. R. Civ. P. 26(b)(5)(A). *See also, Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 74 (7th Cir. 1992) (finding untimely objection to production on basis of privilege grounds for waiver); *accord Ritacca v. Abbot Labs.*, 203 F.R.D. 332, 335 (N.D. Ill. 2001) (finding failure to comply with Fed. R. Civ. P. 26(b)(5) may result in waiver). In their briefing, defendants are silent as to whether Household is asserting the privilege.[8]

Defendants have failed to satisfy ***their*** burden of proving the documents at issue warrant such protection. *See, e.g., United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003) (finding "[t]he mere assertion of a privilege is not enough; instead, a party that seeks to invoke the attorney-client privilege has the burden of establishing all of its essential elements"). Defendants have not even attempted to establish the privilege is warranted, and make no argument at all that the requested documents are communications made in confidence with an attorney "for the purpose of obtaining legal advice." *Id.* at 808. Instead, defendants make the vague and conclusory statement that "as is evident from the Disclosure Schedule itself, the attachments are properly privileged in that they address litigation-related matters." Def. Br. at 9. It is indeed evident from the Disclosure Schedule that the "litigation-related matters" were not prepared for the purpose of obtaining legal advice but

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[8] Consistent with their prior equivocations defendants claim "[i]t is Defendants' understanding that the privileged attachments to the Disclosure Schedules were not produced to the SEC." Def. Br. at 10 (emphasis in original). Household cannot assert the privilege of a third party, *see, e.g. United States v. Chen*, 99 F.3d 1495, 1502 (holding an ex-employee of a company cannot waive the attorney-client privilege because the company, not the individual, was the "client" with regard to the communications at issue), and therefore must immediately turn over any documents it has that are purportedly subject to some third party's privilege since production to Household by such third party waives any privilege. *See In re Qwest Communs. Int'l*, 450 F.3d 1179, 1187 (10th Cir. 2006) (holding disclosure to third party waives any claim to privilege).

rather for the business purpose of entering into the Merger Agreement. *See, e.g.*, Pl. Br. Ex. L at HHS 02071122. The Court should reject defendants' efforts to create a new standard based on the fact that such documents may "relate" to litigation.

Further, even if an argument could be made that the Disclosure Schedule is privileged, the Court should find that Household has waived it. *See Ritacca v. Abbot Labs.*, 203 F.R.D. 332, 335 (N.D. Ill. 2001). In *Ritacca*, as in this case, plaintiff aggressively pursued the document at issue. *Id.* In that case plaintiff sought the specific document at issue for only four months, whereas in this case the Class has sought the Disclosure Schedule for two years and seven months (since the First Request was served on May 17, 2004). *See id.*; *see also*, Pl. Br., Ex. B at 13. At no point prior to their filings did defendants assert the document was privileged. *See Ritacca*, 203 F.R.D at 335 (defendants' belated privilege assertion deemed waived). Defendants' delay warrants a finding of waiver. Indeed, there is no reference to any attachment or any component of the Disclosure Schedule in any of defendants' 15 different privilege logs comprising almost 7,000 entries. The fact that defendants have failed to list the Disclosure Schedule on any privilege log is yet another basis for finding Household has waived the privilege as to such documents. *See, e.g., Burlington N. & Santa Fe Ry. v. U.S. Dist. Court*, 408 F.3d 1142, 1148-49 (9th Cir. 2005) (filing a privilege log five months late is sufficient to support waiver); *accord, Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc.* 230 F.R.D. 688, 696 (M.D. Fla. 2005) (waiver where no privilege log provided after document disclosed).

Similarly, defendants admit that they produced both the Merger Agreement and the Disclosure Schedule to the SEC. *See* Def. Br. at 9-10. But then they say "privileged" elements of that document were not produced. *Id.* Again, the "privileged" documents were either produced to the SEC or they were not. Assuming *arguendo* (i) it is true that a copy of the Disclosure Schedule provided to the Court (*See* Pl. Br., Ex. L) was produced to the SEC by Household and (ii) defendants are correct in observing that the face of the Disclosure Schedule provided to the Court shows such materials are "privileged," then the Court must find defendants have effected subject matter waiver as to the rest of the Disclosure Schedule. *See In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 17110, at *8 (N.D. Ill. Nov. 14, 1995) (finding subject matter waiver where a party disclosed only a portion of privileged materials).

Defendants' default position that the requests seek "largely irrelevant" documents is without merit. *See* Def. Br. 6-7. Defendants cannot sustain this argument in light of the fact that HSBC obviously would not have paid $14.8 billion for a company without investigating its history,

including its lending and accounting practices. So defendants resort to the refrain that these requests seek "post-dated" materials. *See* Def. Br. at 7. It is a matter of record that HSBC and Household announced the execution of definitive agreements governing the merger on November 14, 2002, just one month after Household's $484 million settlement with the attorneys general on October 11, 2002. It is a matter of common sense, supported by documents in this case, that HSBC reviewed Household's policies and practices as they existed during the Class Period. The Class should not be prejudiced for defendants' failure to execute their document production responsibilities in the first instance, thereby necessitating these "belt and suspenders" requests. In all cases defendants must produce documents responsive to Fourth Request Nos. 3, 5, 8 and 20. The Court should order defendants to produce all such documents by January 5, 2007.

D. Consulting Documents and Billing Statements or Retainer Agreements Between Household and Promontory Financial Group ("Promontory") and/or Its Principal Mr. Eugene Ludwig. (Request Nos. 9 and 10)

The Class needs these Promontory documents in connection with upcoming depositions. Household paid Promontory at least $3 million over less than one year to provide certain services (the nature of which has yet to be determined) in connection with the settlement with the attorneys general and other regulatory matters. The Class is just weeks away from deposing the Individual Defendants, all of whom were involved in these high-level corporate events.

Defendants agree that these documents should have been produced in response to prior interrogatories. *See* Pl. Br. at 4; *compare* Def. Br. at 7. Defendants claim the Class "likely" has all responsive documents. Def. Br. at 8. They do not state all such documents have been produced. Moreover, defendants do not affirmatively state that such documents do not exist. If they had, they would have rid the Class of the vexing "idée fixe" that an individual who was paid millions of dollars in consulting fees in connection with some of the largest events in Household's history would have generated documents that would help explain exactly what services Promontory provided. This simple and direct "belt and suspenders" request again meets with defendants' recalcitrance.

Defendants seem to claim (without actually taking any position at all) that if the materials exist, they have likely been produced; if they have not been produced, they likely do not exist; and following the first possibility, even if they exist but have not been produced, then they are irrelevant. The relevance argument is predicated on the same flawed understanding of Fed. R. Civ. P. 26 that affects their view of whether Mr. Kahr's compensation is relevant. *See, infra* at §II.A. Next, Request Nos. 9 and 10 are indeed "duplicative" of requests going back to the Class' First Request,

which was propounded on May 17, 2004 and repeated in subsequent requests. Defendants have had ample time to produce these documents. The need for these documents is heightened by the fact that the Class will forego Promontory's deposition in order to take other depositions having higher priority. Defendants should be ordered to produce responsive documents by January 5, 2007.

E. Calendars of 15 Individuals (Request No. 19)

The Class requested the calendars of 15 individuals. The individuals are Household witnesses in this case whom the Class will depose. Many have not been deposed. The calendars are needed to help refresh the recollections of these upcoming Household deponents. Defendants have failed to respond properly to this and other requests that have been outstanding for years, and now try to shift responsibility for that deficiency to the Class. As to Request No. 19, it is not clear why defendants did not undertake and refuse to undertake this search in connection with the "belt and suspenders" search that they purport to undertake prior to each individual's deposition. Given the Household witnesses' infirm memories and complete lack of recall, their calendars are even more critical here. Defendants do not even raise their standard "relevance" objection to this request. This request is eminently reasonable and has been voluntarily circumscribed by the Class. Defendants should be ordered to produce all responsive documents by January 5, 2007.

III. CONCLUSION

For the reasons set forth herein, the Class respectfully urges the court to grant the Class' Motion to Compel Household Defendants to Produce Documents Responsive to the Class' Fourth Request for Production of Documents in full and require defendants to produce responsive documents by January 5, 2007 so the Class can engage in efficient and comprehensive depositions of the Individual Defendants, as well as other witnesses.

DATED: December 29, 2006

Respectfully submitted,

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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 December 29, 2006, declarant served by electronic mail and by U.S. Mail to the parties the: REPLY IN SUPPORT OF THE CLASS' MOTION TO COMPEL HOUSEHOLD DEFENDANTS TO PRODUCE DOCUMENTS RESPONSIVE TO THE FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of December, 2006, at San Francisco, California.

s/ Deborah R. Dash
DEBORAH R. DASH