

**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' STATUS REPORT TO MAGISTRATE JUDGE NAN R. NOLAN IN
ADVANCE OF THE JANUARY 24, 2007 STATUS CONFERENCE**

The Class submits the following status report in advance of the January 24, 2007 Status Conference:

A. The Class' Proposed Expert Discovery and Summary Judgment Schedule

During the January 10, 2007 Status Conference, Judge Guzman confirmed that Magistrate Judge Nolan will preside over expert discovery. Notwithstanding the fact that there are some depositions that will occur outside the January 31, 2007 fact discovery cut-off, the Class would like to move expeditiously to expert discovery, summary judgment and then trial.¹ Accordingly, the Class proposes the following schedule:

Class Designates Experts & Files Expert Reports	By March 30, 2007
Defendants Designate Experts & File Expert Reports	By April 13, 2007
Class Designates Rebuttal Experts & Reports	By April 27, 2007
Expert Discovery & Depositions to be completed	May 4-31, 2007
Defendants File Motions for Summary Judgment	June 15, 2007
Class Oppositions to Motions for Summary Judgment	July 13, 2007
Reply In Support of Summary Judgment	July 27, 2007
Proposed Trial Date	November 1, 2007

B. Discovery from Defendants

1. Depositions

The following deposition dates were offered by defendants after the January 17, 2007 conference call with the Court:

- (a) Robin Allcock: February 14 and 15 in Charlotte, NC;
- (b) Craig Streem: February 21, in New York, NY;

¹ Outstanding fact depositions will be completed by March 1, 2007.

(c) David Schoenholz: According to defendants, Mr. Schoenholz is not available outside of Tomahawk, Wisconsin until February 28 and March 1, 2007; and

(d) Tom Detelich: Defendants still have not provided dates for the continuation of Tom Detelich's deposition. They were ordered to do so at the January 10, 2007 hearing and should do so immediately.

2. "Skip Sheets" & Defendants' Sixteenth Privilege Log

With respect to the "skip sheet" issue, defendants were ordered on January 10, 2007 to (1) produce non-privileged responsive documents by January 19, 2007; (2) produce a privilege log by January 12, 2007; and (3) file a short response by January 16, 2007.

As defendants concede in their January 16 response, Household withheld more than 700 documents without listing them on any log until the Class compiled the "Withheld" and "Redacted" lists, and forced defendants to address this issue by bringing it to the Court's attention. Defendants produced their sixteenth privilege log on January 12, 2007, which lists most of the documents defendants now claim are privileged from the Class' "Withheld" and "Redacted" lists.² Absent the Class' persistent demand for answers, defendants would have continued to withhold these documents without ever listing them on a log. This fact alone adequately supports a finding of waiver.

Defendants' response, moreover, contains no explanation as to why these documents were not contained in the original logs. The volume of production is no excuse in this instance. This is not a case where defendants can claim (as they so often have) that the privileged documents simply were overlooked during the review process. These documents were reviewed, determined by counsel to be privileged, removed from the production and replaced with slip sheets at the time of

² An additional 148 entries were listed on the fourteenth and fifteenth privilege logs, also produced after the Class raised this issue.

production. Counsel was, thus, well aware of these documents and their assertion of privilege, they simply omitted them from their privilege logs apparently hoping the Class would not catch on. Given these facts, defendants cannot now claim privilege.

Even more egregious, defendants' sixteenth privilege log contains numerous documents related to the Ernst & Young ("E&Y") compliance project. These documents were not previously identified by defendants as privileged and, thus, were not included in the Class' motion to compel production of E&Y documents which the Court granted on December 6, 2006. This conduct violates the Court's Order on October 19, 2006 pursuant to which defendants were to identify *all* withheld E&Y documents. *See* Ex. 1 at 100-102, 110-112.³ Despite this, defendants have brazenly listed numerous new E&Y documents on their latest privilege log. That Household is only now asserting privilege over these documents despite two complete rounds of briefing on this subject before this Court and Judge Guzman, further supports the Class' arguments for waiver. Defendants' attempt to slip these documents onto the sixteenth privilege log without alerting the Class or the Court is inexcusable. Defendants should be ordered to produce these documents immediately.

Defendants' sixteenth privilege log also includes documents that are identical to documents already produced by defendants (with different Bates numbers) and used at deposition. For example, certain entries reflect e-mails from Household executive, Margaret Sprude, to various other individuals at Household. In these e-mails, Ms. Sprude summarized comments from an OCC meeting for the recipients. Defendants now claim that Ms. Sprude provided the summaries for the purpose of seeking legal advice from some of the recipients, who were attorneys. However, not only have defendants previously produced exact copies of these documents in their entirety, the OCC did

³ All exhibits attached hereto unless otherwise noted.

not find these documents to be privileged and agreed to their production in their entirety. Defendants' assertion of privilege is thus unfounded and untimely.

3. Defendants Have Waived any Privilege As to the Newly Identified KPMG Documents

On January 12, 2007 defendants submitted to this Court a list of documents produced by KPMG in December 2004. No privilege was asserted over these documents until the December 7, 2006 deposition of Ken Robin when defendants suddenly objected to their use. Contrary to their representations during the January 10, 2007 Status Conference, the vast majority of these documents (29 out of 36) are completely different than the Arthur Andersen documents previously before the Court, and none of the 356 are subject to the Court's July 6, 2006 Order regarding Arthur Andersen documents. *See Ex. 2.* As is their habit, defendants have not even attempted to explain why, if they are privileged, these documents were produced in the first instance nor why, despite the Court's instructions to the contrary, they waited until Mr. Robin's deposition to assert inadvertent production.

Indeed, defendants reviewed KPMG's production for privilege in 2004 and explicitly instructed KPMG to withhold numerous documents which are listed on KPMG's privilege log. The documents defendants now claim are privileged were reviewed and produced at that time. In some instances, multiple copies of the same document were reviewed and produced. Defendants, however, waited until two years later when the Class attempted to use certain of these documents at deposition before asserting privilege.

Importantly, like the E&Y documents discussed above, defendants offer no explanation as to why these documents were not identified and recalled during the briefing regarding the Andersen documents, which also included an objection to Judge Guzman. Defendants have no excuse for failing to assert privilege at that time. Further, as noted during the January 10, 2007 Status Conference, Household defendants referenced KPMG having similar documents in their reply papers

but did not make any motion before this Court. Indeed, the decision not to raise the KPMG documents was apparently strategic since to include them would have required Household to abandon its argument that the recall was timely. Whereas the last Andersen document at issue in that motion was produced four months before Household sought their return – a fact relied on by the Court in rejecting the Class’ waiver argument – the KPMG documents were produced *two years* before defendants sought to recall them. By excluding the KPMG documents from the earlier briefing, defendants avoided addressing this inconvenient fact.

Even now, defendants refuse to bring a motion supporting their recall of the documents. Accordingly, the Class intends to file a motion seeking permission to use these documents.

4. Defendants’ Continued Improper Conduct at Depositions

In its status report filed on January 8, 2007, the Class brought to the Court’s attention defendants’ improper deposition conduct, including lengthy speaking objections, witness coaching, and wasting time on the record. At the January 10, 2007 Status Conference, the Court instructed all parties to observe the Federal Rules of Civil Procedure and limit objections on the record to a short statement as to the basis for the objection, *e.g.*, “Objection. Vague and ambiguous.”

Despite the Court’s instructions, one day later, during the deposition of individual defendant Gary Gilmer, counsel for defendants, David Owen, repeatedly impeded Class counsel’s examination of the witness. *See* Ex. 3. After several warnings, Class counsel called the Court for assistance. Although the Court was in session, parties were informed by Ms. Engel, the Court’s law clerk, that Magistrate Judge Nolan had reiterated her instructions from the status conference. In flagrant disregard for the Court’s instructions, Mr. Owen continued to disrupt the deposition and coach the witness. Listed below are some excerpts from the transcript *after* Ms. Fanning communicated the Court’s reiteration of the January 10, 2007 instructions (through Ms. Engel) to counsel for defendants:

Mr. Baker: I'm wondering if this figure, the two million figure under the 2000 bonus award, whether that would represent compensation under any program other than the MBO program?

Mr. Owen: I object to the form of the question. He already testified he didn't have any recollection of this document. If you have any, you can answer the question.

Mr. Gilmer: No, I don't have any recollection, because I don't remember – I don't remember this document or what was included in this bonus award on the second line here.

* * *

Mr. Baker: And was that another one of your MBO goals – ROE for Household International?

Mr. Owen: I object to the form of the question. Are we talking about this goal being his goal. We haven't established that. He said he doesn't know whether this document represents that or not. Are you talking in the abstract –

Mr. Baker: We are talking in the abstract. Again I ask you not to coach the witness.

Mr. Owen: I'm not coaching the witness. I'm trying to establish what your question is asking, so that the witness can answer it with a clear understanding of what it is that you are talking about. I don't have it. I don't believe the witness has it. If you understand what he's talking about, feel free to provide a response. But I am going to make the record clear.

* * *

Mr. Owen: Objection to the form of the question. I have no idea what you are talking about.

Mr. Gilmer: Which Q3 presentation are you talking about:

* * *

Mr. Baker: While you were the head of the Consumer Lending Business Unit, was that one of your goals to insure that the compensation plan for the sales force – branch sales forces drove appropriate behaviors and performance?

Mr. Owen: Object to the form of the question, vague, lack of foundation. I don't understand exactly what it means. If you understand –

Mr. Gilmer: Related to this document? Help me if you would please understand.

* * *

Mr. Baker: Do you recall if the components of the incentive compensation for the branch sales offices changed during – at any time during the time period from 1999 to 2002?

Mr. Owen: Objection to the form of the question You use the word “incentive compensation.” That’s vague and ambiguous and not referring to anything in particular.

Mr. Baker: You can answer the question, if you recall.

A: I’m a little unclear.

* * *

Mr. Baker: Okay. And in the preparation of the annual plan – well, let me ask you, who else – well, let’s take a step back Do you recognize who else’s handwriting was on this document? And I will direct your attention to page two, for instance.

Mr. Gilmer: No, I don’t know who that is.

Mr. Owen: I also want to note for the record this is also a pre class period document. So any of the questions he asked you about this document do not relate to the 99 to 2002 time period.

Mr. Baker: Focusing on the preparation of the annual operating plan, and in the calendar years 1999 to 2000, who else was involved besides yourself in the preparation of these operating plans for the Consumer Lending Business Unit?

Mr. Owen: I’m going to object to the form of that question. You said you are focusing on a time period that’s not covered by the document. You can’t ask him to talk about this document and then talk about a completely different time period –

Mr. Baker: I did not ask. him –

Mr. Owen: That’s exactly what you asked him.

Mr. Baker: You don’t listen to the question –

Mr. Owen: You were pointing to that document when you asked him this question. I think the witness saw it, I saw it. You are not talking about the time period the document refers to. I think it’s improper to put this document in front of him and then start asking him questions about an operating plan from a completely different period. It’s not

proper and I'm not going to allow you to do it without calling it to the witness' attention so he understands what we are talking about and what we are trying to do.

Mr. Baker: The question I'm asking you is, for the preparation of the annual operating plans –

Mr. Owen: When?

Mr. Baker: Can you let me finish my question. You might get an answer. Are you going to let me finish?

* * *

Mr. Owen: Hang on. Can I just point out that that is in fact not the case with at least a couple of the numbers here. For example, next to the efficiency rating –

Mr. Baker: Again Mr. Owen, if you want to testify, your opportunity will come later, but you are not testifying, and I am going to seek all the time you have wasted in this deposition with your speaking. I will go to Magistrate Judge Nolan and asked her for additional time. It's up to you if you want Mr. Gilmer to come back for an additional time, you keep it up.

Mr. Owen: As I said, you are free to do that any time you like. . .

Mr. Baker: I said one line. That's all I said. You don't listen to my and then you make objections that aren't based on my question. So please stop. You can make your objections. It's on the record. You don't need to say anything more than that.

Mr. Owen: I do need to –

Mr. Baker: If you want to coach the witness, yes.

Mr. Owen: No, so the witness understands that some of the things you tell him are in fact not the case, and that is vital. I will not stop doing that and you should stop misrepresenting facts about these documents to him and asking him to respond to questions about misrepresented facts.

See Ex. 3 at 72, 75, 96, 101, 105-109, 112-113.

Defense counsel's coaching and instructions to the witness on how to testify result in altered testimony and forever displace the possibility of uninstructed testimony. As a result of this coaching, the Class will never obtain unclouded deposition testimony from Mr. Gilmer. Merely

providing the Class with additional time cannot correct this prejudice. Defendants should not be permitted to continue this behavior during depositions of the remaining individual defendants. If this conduct continues, the Class will file a motion seeking appropriate sanctions.

5. Document Production

(a) Friedrich Calendars: During the January 17, 2007 conference call with the Court defendants requested an extension of time to produce, among other things, the calendars of Mr. Friedrich who will be deposed on January 24, 2007. After business hours on January 22, 2007, defendants e-mailed to the Class two single-page calendar entries from the last day of the Class Period. *See* Ex. 4. There is no reason why defendants could possibly have needed an extension of time for this two-page production. Furthermore, defendants still have not produced a number of the documents they were ordered to turn over in response to the Class' motion to compel.

(b) Stock Repurchase Documents (5th Request): Despite defendants' representation that all documents relating to stock repurchases have been produced, defendants still have not produced a list of Household trades, indicating when each trade was made as they were ordered to do by the Court. Defendants provided only a general ledger spreadsheet. That general ledger appears to reflect the sum totals of all trades made throughout the course of an entire month as a single entry. It does not show the dates of purchases or sales; the volume purchased or sold; or the price at which the shares were purchase or sold. Thus, it is impossible to determine the day on which the trade was actually executed. By producing the list of trades in general ledger form, defendants are trying to conceal the actual date on which they made trades. Defendants also failed to produce any documents that describe the "policies" or the "decision on when and whether" any such purchases would be made. These documents should be ordered produced immediately.

(c) Quality Assurance & Compliance Documents (6th Request): Defendants have produced no quality assurance and compliance documents despite agreeing to produce such documents by December 29, 2006.

C. Discovery from Third Parties

Although counsel for defendants was allotted extra time to review the Wells Fargo and Morgan Stanley productions for privilege, the Class has received no privilege log related to these productions and has not been informed whether documents have been withheld. Defendants should be ordered to produce a log of documents withheld from these productions at Household's instruction immediately, or confirm that no documents were withheld. This is particularly important given Household's track record of belatedly asserting privilege on third-party productions.

1. Wells Fargo: Wells Fargo produced some documents on January 4, 2007. Since then, Wells Fargo confirmed that it has further responsive documents, but agreed to produce them only on an "attorneys eyes only" basis. Such an agreement would prevent the Class from using these documents at depositions, summary judgment and trial and is unnecessary given the comprehensive protective order in place in this action. Additionally, after months of negotiations, Wells Fargo has refused to comply with the Class' 30(b)(6) deposition notice. On January 16, 2007, the Class filed in the Northern District of California a motion to compel Wells Fargo's deposition and completion of its document production. (Wells Fargo declined the Class' request to have this motion heard in the Northern District of Illinois.) This Court was served with a courtesy copy of the motion on January 17, 2007. Magistrate Judge Zimmerman of the Northern District of California has scheduled a conference call with all interested parties for January 26, 2007. The Class is hopeful that all disputes will be resolved on this call.

2. Morgan Stanley: The Class was attempting to work out an alternative arrangement with Morgan Stanley in lieu of deposition. Those efforts were unsuccessful. Currently, the

deposition of Morgan Stanley in London is no longer scheduled to go forward. The Class is working with counsel for Morgan Stanley to schedule a deposition in New York.

3. Goldman Sachs: Goldman Sachs produced some documents but has not confirmed if production is complete. The 30(b)(6) deposition of Goldman Sachs is scheduled for January 30, 2007.

4. Ernst & Young: Negotiations on document production and deposition dates are not presently occurring pending a ruling from Judge Guzman on the Household Defendants' objection.

5. Wilmer Cutler: Negotiations on document production and deposition dates are not presently occurring pending a ruling from Judge Guzman on the Class' objection.

6. Arthur Andersen: Deposition dates are still pending from Arthur Andersen counsel for two deponents – Christopher Bianucci and John Keller. However these depositions will likely be deferred pending a ruling from Judge Guzman on defendants' objections regarding the E&Y production.

7. Andrew Kahr: The Class is continuing in its attempts to serve Mr. Kahr.

D. The Class' Motion to Unseal Exhibit Nos. 1-24 and 28-32 (Dkt. No. 898)

By Order of January 10, 2007, the Court entered and continued this motion. However, the Class believes that the Court should address this motion independent of the Class' Motion to Compel Production of Andrew Kahr Documents (Dkt. No. 893). The Class already has followed the procedure outlined in the Protective Order asking Household to de-designate these documents because they do not fall under any category of protected documents. The Household Defendants

have refused to do so. Regardless of how the Court rules on the motion to compel the other Kahr documents, there is no reason why decision on this motion should be deferred indefinitely.

DATED: January 22, 2007

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)
JASON C. DAVIS (4165197)

s/ Luke O. Brooks
LUKE O. BROOKS

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 LAW LLC
MARVIN A. MILLER
LORI A. FANNING
101 North Wacker Drive, Suite 2010
Chicago, IL 60606
Telephone: 312/525-8320
312/525-8231 (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

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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 January 22, 2007, declarant served by electronic mail and by U.S. Mail to the parties the: **STATUS REPORT TO MAGISTRATE JUDGE NAN R. NOLAN IN ADVANCE OF THE JANUARY 24, 2007 STATUS CONFERENCE**. 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@MillerLawLLC.com LFanning@MillerLawLLC.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 22nd day of January, 2007, at San Francisco, California.

s/ Ruth A. Cameron

RUTH A. CAMERON