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) <u>CLASS ACTION</u> Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

<u>THE CLASS' MOTION FOR A PROTECTIVE ORDER QUASHING DEFENDANTS' INTERROGATORIES SERVED ON THE LAST DAY OF THE CLOSE OF FACT DISCOVERY</u>

I. INTRODUCTION

Lead Plaintiffs, on behalf of the Class, hereby respectfully move this Court pursuant to Fed. R. Civ. P. 26(c) and Local Rule 37-2 and the Court's February 12, 2007 Order, for a protective order quashing the Household Defendants' [Ninth] Set of Interrogatories to Lead Plaintiffs[1] (attached hereto as Exhibit A) on the grounds that such discovery is improper and untimely as having been served on January 31, 2007, the day fact discovery closed. In support of this motion, the Class states as follows:

Upon the lifting of the mandatory discovery stay under the Private Securities Litigation Reform Act in March 2004, discovery began in earnest in July 2004. On August 10, 2006, after about two years of discovery, at Lead Plaintiffs' proposal, this Court set January 31, 2007 as the firm deadline for close of fact-discovery. August 10, 2006 Hearing Tr. at 5 ("So we will adopt your January 31st date...but with every intention of it being a real cutoff for fact discovery").

On January 31, 2007, the Household Defendants served their latest set of interrogatories.[2] Defendants have no excuse for their tardy discovery request. They have been well aware for months of the Court's January 31, 2007 discovery deadline and the Court's continued warnings that the discovery cut-off date was firm. *See e.g.*, August 10, 2006 Minute Order ("***fact discovery will close on January 31, 2007. This is a firm date and will not be extended except for good cause shown***") (emphasis added); September 19, 2006 Hearing Tr. at 25 ("[T]his is your one shot on this because January 31st is the end of this fact discovery") and 40-41 ("because we are going to finish January

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[1] Lead Plaintiffs maintain and preserve for appeal their objection to the counting of the Interrogatories as well as defendants' failure to include two sets comprising ten interrogatories served on July 30, 2004. Defendants have served in total eight prior sets of interrogatories, making this the ninth set.

[2] In addition to being untimely, defendants' interrogatories are also defective for failure to observe proper service requirements pursuant to Fed. R. Civ. P. 5 and Civil L.R. 5.5(a)-(b); defendants have failed to attach a proof of service to their interrogatories, which defects in service render this discovery null and void.

31st, if you have a do or die, two of you call us up on the phone, we'll give you an answer."). *See also*, October 4, 2006 Hearing Tr. at 70, October 19, 2006 Hearing Tr. at 98-99, October 30, 2006 Hearing Tr. at 6, January 10, 2007 Hearing Tr. at 16 (references to the January 31, 2007 discovery cut-off).

Defendants' interrogatories should also be quashed because they cannot demonstrate good cause for their delay. Indeed, there is no reason why defendants could not have served these interrogatories earlier in order to obtain timely responses. Setting aside for now the Class' other objections, including objections as to vagueness and compoundness, at least eight of the interrogatories are based on the Complaint, which was filed almost four years ago, on March 7, 2003, and seven of the interrogatories are derived from the Class' supplemental responses to the [Fourth] Set, served on December 1, 2006.

Defendants' objective in propounding these interrogatories on the last day of the close of discovery is transparent. Their only goal is to unduly burden and harass Lead Plaintiffs, and delay the progress of expert discovery. Accordingly, defendants' interrogatories should be quashed.

II. STATEMENT OF COMPLIANCE WITH LOCAL RULE 37.2

On February 9, 2007, the parties had a meet and confer on other discovery. During the meet and confer, Lead Plaintiffs explained their position that discovery served on the last day of discovery was improper and that defendants should withdraw their untimely interrogatories. *See* Exhibit B attached hereto. Defendants refused to do so. *Id.* In the Class' status report filed on February 11, 2007, the Class raised this issue with the Court indicating its readiness to file a motion for a protective order, if necessary. During the February 12, 2007 status hearing, the Court permitted the Class to file this motion.

III. ARGUMENT

A. Legal Standard

Trial courts "have broad discretion in matters relating to discovery" and the Court is expressly authorized to take steps to manage the litigation before it in an efficient and expeditious manner. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004). Pursuant to Fed. R. Civ. P. 26(b)(2), the Court may limit discovery if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. . . .

Fed. R. Civ. P. 26(b)(2). Further, under Rule 26(c), "for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the disclosure or discovery not be had." Fed. R. Civ. P. 26(c)(1). Here, the most appropriate relief is that defendants' interrogatories be quashed and the Class be permitted to focus on expert discovery.

B. Courts Within This Circuit Routinely Grant Protective Orders Barring Discovery Served at Close of Discovery

Courts within the Seventh Circuit do not tolerate the gamesmanship inherent in serving discovery on the last day of close of discovery. *See Northern Indiana Pub. Serv. Co. v. Colorado Westmoreland, Inc.*, 112 F.R.D. 423, 424 (N.D. Ind. 1986), cited favorably in *Miksis v. Howard*, 106 F.3d 754, 759 (7th Cir. 1997). In the *Colorado Westmoreland* case, the court granted a protective order to plaintiffs on substantially identical facts. In that case, the court ruled that plaintiffs need not respond to defendants' interrogatories that were served on the date discovery was to close. *Id.* The

court noted that the logical import of the court's chosen date for the termination of discovery was that "the parties should complete discovery on or before that date" and thus, "[c]ommon sense dictates that any requests for discovery must be made in sufficient time to allow the opposing party to respond before the termination of discovery." *Id.* "Fed. R. Civ. P. Rule 33(a) allows a party 30 days after service of interrogatories to serve answers of objections. If the defendant were permitted to serve interrogatories on the discovery cut-off date . . . , the plaintiffs would not be required to answer the interrogatories until [thirty days later.]" Based on this rationale, the court granted plaintiffs' motion for a protective order. *See also Coram Health Care Corp. of Ill. v. MCI Worldcom Commc'ns., Inc.*, Case No. 01 C 1096, 2001, U.S. Dist. LEXIS 18909, at *8-*9 (N.D. Ill. Nov. 13, 2001) (party was not required to respond to request for admissions that were served on the day discovery closed); *Fahey v. Creo Products, Inc.*, No. 96 C 5709, 1998 U.S. Dist. LEXIS 12214, at *6 (N.D. Ill. July 30, 1998) (discovery served one day before the deadline requires no response from the opposing party); *Lastre v. Leonard*, No. 89 C 1784, 1990 U.S. Dist. LEXIS 3191, at *3 (N.D. Ill. Mar. 20, 1990) (interrogatories filed five days before discovery cut-off were untimely).

A discovery cut-off is just that. The last day of discovery is "'the last date for the completion of all discovery,' not the last date to initiate it." *Shroyer v. Vaughn*, No. 1:00 CV 256, 2002 WL 32144316 , at *1 (N.D. Ind. July 10, 2002) (granting protective order from untimely discovery) *See e.g., Strong v. Clark*, No. 89 C 1483, 1990 U.S. Dist. LEXIS 5482, at *7 (N.D. Ill. May 3, 1990) (finding that defendants had no duty to respond to interrogatories served where the answers were not due until after the close of discovery); *Chaffee v. A & P Tea Co.*, No. 79 C 2735, 1987 U.S. Dist. LEXIS 2640, at *1-*2 (N.D. Ill. Apr. 1, 1987) (finding plaintiffs' interrogatories served on April 4, 1986 untimely because defendants' answers under Fed. R. Civ. P. 33 would not be due until May 4, 1986, two days after the discovery closing date). Indeed, this Court has previously rejected as untimely interrogatories in light of the pending discovery cut-off date. *Canal Barge Co. v.*

Commonwealth Edison Co., Case No. 98 C 0509 2001 U.S. Dist. LEXIS 10097 (N.D. Ill. July 18, 2001). By propounding the untimely interrogatories, defendants ignored the Court's intent in setting the date for the termination of discovery and risked precisely the situation they are faced with here.[3]

Based purely on the timing of defendants' interrogatories, the Class has no duty to respond, and thus, a protective order should be granted.

C. Defendants Cannot Demonstrate Good Cause for Serving Interrogatories on the Last Day of Fact Discovery

No special circumstances exist here and defendants simply cannot show good cause for failing to serve these interrogatories earlier. During the February 12, 2007 status hearing, defendants represented that these interrogatories were follow-up interrogatories based upon responses provided by the Class in January 2007. This is simply untrue. Eight of the interrogatories are based upon the Complaint filed almost four years ago, on March 7, 2003. Ex. A at 1, 3-4. Seven of them are based on the Class' responses served on December 1, 2006 – two months before the close of discovery. *Id.* at 2-3.[4] The Court set the discovery close date of January 31, 2007, providing exceptions only for depositions to accommodate witnesses' schedules. The Court made no provision for the defendants

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[3] Courts in this jurisdiction have sketched "a line of sorts" as to the timeliness of motions to compel and by implication the timeliness of interrogatories. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000) (Posner, J.) (granting the motion to compel would result in "protracted discovery, the bane of modern litigation"). For example, Magistrate Coles denied a motion to compel that was filed on the day discovery terminated as untimely stating that "lawyers who do not pay heed to [time limits] do so at substantial peril to their and their clients' interests." *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 331, 332 (N.D. Ill. 2005) (citing *Brosted v. Unum Life Ins. Co. of Am.,* 421 F.3d 459 (7th Cir. 2005)). A motion to compel filed four days before the close of discovery was too late. *Ridge Chrysler Jeep, LLC v. Daimler Chrysler Servs. N. America*, LLC, Case No. 03 C 760, 2004 U.S. Dist. LEXIS 26861, at *13 (N.D. Ill. Dec. 29, 2004). Motions to compel filed after the close of discovery are almost always deemed untimely. *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7th Cir. 2001). If a motion to compel filed on the last day of discovery is rejected as untimely, it follows that interrogatories propounded on that day are untimely.

[4] The remaining interrogatories, again in addition to being impossibly compound and vague, are questions subject to expert opinion and analysis. Ex. A at 1-2. Rather than wasting Lead Plaintiffs' time drafting these responses, defendants would be better served in receiving the information sought through the Class' expert reports currently due on March 30, 2007.

to propound additional interrogatories and defendants made no prior request for relief. In fact, by setting the expert discovery schedule, the Court made clear at the status hearing on January 24, 2007 – seven days before defendants served the untimely interrogatories – that the next stage of this litigation was expert discovery. Fairness mandates that defendants' interrogatories be quashed because they have not and cannot demonstrate good cause for their tardiness.

IV. CONCLUSION

For all the foregoing reasons, the Class' motion for a protective order quashing defendants' interrogatories improperly and untimely served on January 31, 2007 should be granted.

DATED: February 13, 2007

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 February 13, 2007, declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' MOTION FOR A PROTECTIVE ORDER QUASHING DEFENDANTS' INTERROGATORIES SERVED ON THE LAST DAY OF THE CLOSE OF FACT DISCOVERY**. 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 13th day of February, 2007, at San Francisco, California.

s/ Pamela Jackson
PAMELA JACKSON