

**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. )	
_____ )	

**REPLY IN SUPPORT OF THE CLASS' MOTION FOR A REPORT AND  
RECOMMENDATION FOR EVIDENTIARY SANCTIONS AGAINST THE  
HOUSEHOLD DEFENDANTS**

## **I. INTRODUCTION**

Pending before the Court is the motion filed by the Class on two narrow discovery issues. The first concerns the deposition of Douglas Friedrich where defense counsel notwithstanding this Court's prior orders instructed the witness not to answer certain questions regarding Exhibits 98 and 117. The second concerns defendants' failure to produce summary documents in response to the Class' document request aimed at determining the number of Quality Assurance & Compliance ("QAC") employees in the Consumer Lending business unit at specific junctures during the Class Period. As shown below, the Court should grant this motion and award the relief sought by the Class.

### **A. Defense Counsel Improperly Instructed Witness Friedrich Not to Answer Questions at His Deposition**

As this Court is aware, defense counsel has repeatedly hindered the Class' deposition discovery through coaching and instructing witnesses not to answer questions. As a result of these tactics, the Class sought and received this Court's assistance to curb these tactics, including several Court directives to defendants to cease instructing witnesses not to answer on any grounds other than privilege. Notwithstanding these directives, on January 25, 2007 at the deposition of Douglas Friedrich, the former head of Household Mortgage Services (HMS), defense counsel once again instructed the witness not to answer questions on the grounds that the question pertained to events outside the Class Period, an objection that the Court specifically held defense counsel were not to use as a basis for instructing the witness not to answer.

Defendants do not deny these instructions not to answer. Defs' Opp. at 4-5 (Dkt. No. 961). Indeed, with respect to Exhibit 117, they admit that "defense counsel initially instructed the witness not to answer a question unless Plaintiffs' counsel confirmed that it had something to do with Class Period events." *Id.* at 4. As to Exhibit 98, defendants state that "[i]nstructing the witness not to answer questions about a document that is facially irrelevant and likely inadmissible in order to urge

Plaintiffs' counsel to cease the ongoing pattern of abusive questioning is entirely consistent with the guidelines provided by this Court." Defs' Opp. at 6. Defendants do not and cannot reconcile their conduct with the Court's unequivocal directive in its January 10, 2007 Order that "[a]bsent a claim of privilege, it is improper for counsel at a deposition to instruct a client not to answer." Dkt. No. 910 at 3; *see also* Class' Mot. at 3 (Dkt. No. 938) (discussing Court directives on this issue).

Significantly, defendants' instructions not to answer were strategic as both Exhibits 98 and 117 are damaging documents as to which defendants want to suppress testimony. Exhibit 98 is a November 11, 2002 memorandum authored by Mr. Friedrich that describes HMS' purported approach to restructures as well as prior changes made during the Class Period to the HMS restructure policies. In a typical display of misrepresenting facts to this Court, defendants misdescribe this document as "facially irrelevant and likely inadmissible." Defs' Opp. at 6. Exhibit 117 is a set of e-mail correspondence between Ms. Markell and Mr. Friedrich in which Ms. Markell asserts that HMS was falsely describing its restructure policies to one of the rating agencies, Fitch, and Mr. Friedrich rejects her assertions. The assertions made by Ms. Markell resulted in the Wilmer, Cutler & Pickering report that has been the subject of prior motion practice before this Court.

To minimize the impact of their conduct, defendants grossly mischaracterize the importance of this deposition and HMS to this litigation. Defendants assert in a footnote that HMS was a "unit whose business practices are not central to the issues in this litigation." Defs' Opp. at 2 n.2. This assertion is palpably false as defendants well know. HMS's restructure and other charge-off policies are central to the Class' allegations. Indeed, the Securities and Exchange Commission in its March 18, 2003 Order finding Household to have violated the federal securities laws discussed HMS and its accounting policies as support for its finding of security laws violations. *See* Ex. A at 2-5 attached hereto. Frankly, it is sanctionable for defendants to so misrepresent the importance of HMS and its business practices respecting its restructure policies to this case.

Moreover, in making blunderbuss allegations regarding the Class' questioning of Mr. Friedrich, defendants fail to apprise the Court that Mr. Friedrich was the head of HMS during the entire relevant time period and that prior depositions established that Mr. Friedrich as head of the unit was personally involved in approving changes made to the HMS policies.

Given the Court's clear instructions and defendants' violations of those instructions, evidentiary sanctions are appropriate. Class' Mot. at 3-4. Defendants' tactics have resulted in delay and increased expense. More importantly, these tactics have precluded forever the Class' ability to get uncoached testimony from Mr. Friedrich on these documents, thus prejudicing the Class in an irreparable manner. Simply authorizing the Class to redepose Mr. Friedrich on these documents and subjects cannot cure that prejudice nor would it stop such practices in the future.<sup>1</sup> To be sure, even in their brief defendants continue to flout and ignore this Court's orders on this subject. Defs' Opp. at 6 (asserting it was okay to instruct the witness not to answer in order to persuade Class counsel to move on to a different topic). Accordingly, the Court should preclude Household from offering any evidence on two subjects: 1) HMS' approach to restructures, and 2) any rebuttal to Ms. Markell's allegations with respect to false reporting of HMS' restructure policies.

We turn now to the QAC portion of the Class' Motion.

**B. Defendants Have Failed to Produce QAC Documents**

To date, defendants have not produced any summary documents regarding the number of employees in the Consumer Lending QAC department during the period 1999-2000 despite their agreement to do so in response to the Class' document request. Such documents should be readily available from the Human Resources department. However, no such documents have been

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<sup>1</sup> If the Court elects to reopen the deposition in lieu of sanctioning defendants, the Court should award the Class its fees and costs associated with reopening the deposition.

produced. Defendants have offered no justification for this failure and accordingly, the Court should direct Household to produce the summary documents or if no such documents are produced, recommend an instruction to the effect that there were no employees in the QAC department during the period 1999-2000.

In opposition, defendants quibble about what a “summary” document is. Defs’ Opp. at 9. However, they do not dispute that there should be a periodic document generated by the Human Resources that reflects the number of employees in this department. This document was likely generated on a monthly basis and used to track full-time employees in the business unit. The Class seeks such documents for the time period 1999-2000, a time period during which Household witnesses have testified the QAC department did not exist. *See, e.g.*, Ex. B at 59 attached hereto. As defendants have not produced such documents to date, they should do so now in time for use at the upcoming deposition of Robin Allcock on March 7-8.

Defendants suggest that they have already provided the Class with documents containing this number of employee information. Defs’ Opp. at 7. That is incorrect. Indeed, the documents cited by defendants as containing this information do not contain any information for 1999 and contain only partial information for late 2000.

To the extent that defendants do not or cannot produce such ordinary business records, the Court should recommend that the trial court impose an evidentiary sanction to the effect that there were no employees in the QAC department during the period 1999-2000. This sanction is consistent with the testimony of the witnesses and the documents cited by defendants.

DATED: February 23, 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 23, 2007, declarant served by electronic mail and by U.S. Mail to the parties the: **REPLY IN SUPPORT OF THE CLASS' MOTION FOR A REPORT AND RECOMMENDATION FOR EVIDENTIARY SANCTIONS AGAINST THE HOUSEHOLD DEFENDANTS**. The parties' email addresses are as follows:

<a href="mailto:TKavaler@cahill.com">TKavaler@cahill.com</a> <a href="mailto:PSloane@cahill.com">PSloane@cahill.com</a> <a href="mailto:PFarren@cahill.com">PFarren@cahill.com</a> <a href="mailto:LBest@cahill.com">LBest@cahill.com</a> <a href="mailto:DOwen@cahill.com">DOwen@cahill.com</a>	<a href="mailto:NEimer@EimerStahl.com">NEimer@EimerStahl.com</a> <a href="mailto:ADeutsch@EimerStahl.com">ADeutsch@EimerStahl.com</a> <a href="mailto:MMiller@MillerLawLLC.com">MMiller@MillerLawLLC.com</a> <a href="mailto:LFanning@MillerLawLLC.com">LFanning@MillerLawLLC.com</a>
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I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of February, 2007, at San Francisco, California.

s/ Juvily P. Catig  
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JUVILY P. CATIG