

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

<b>LAWRENCE E. JAFFE PENSION PLAN,</b>	)	
<b>On Behalf of Itself and All Others Similarly</b>	)	
<b>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 a Report and Recommendation for Evidentiary Sanctions Against the Household Defendants. For the reasons set forth here, the motion is denied.

**DISCUSSION**

Courts have "broad discretion over discovery matters such as discovery sanctions so long as they exercise that discretion reasonably." *Ropak Corp. v. Plastikan, Inc.*, No. 04 C 5422, 2006 WL 2385297, at \*2 (N.D. Ill. Aug. 15, 2006) (citing *Spiegla v. Hull*, 371 F.3d 928, 944 (7th Cir. 2004)). Significantly, a court does not possess "unfettered discretion to impose sanctions upon a recalcitrant party" and "the method for arriving at the sanction must be fair." *American Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc.*, 406 F.3d 867, 878 (7th Cir. 2005).

Plaintiffs seek a report and recommendation from this court that (1) Defendants may not introduce any evidence relating to Exhibits 98 and 117 of the Douglas Friedrich deposition due to improper objections; and (2) the district court deem admitted the fact that there were no Quality

Assurance and Compliance (“QAC”) employees during the period 1999 to 2000. The court addresses each in turn.

**A. Deposition Objections**

On January 25, 2007, Plaintiffs deposed Douglas Friedrich, who served as Managing Director of the Household Mortgage Services Group throughout the Class Period. Plaintiffs claim that Defendants’ counsel obstructed questioning on numerous occasions, including making unfounded objections to questions regarding Exhibits 98 and 117. Specifically, Plaintiffs contend that defense counsel improperly instructed the witness not to answer any questions about Exhibits 98 and 117 because they were dated November 11 and 12, 2002, respectively, which is outside the Class Period. Plaintiffs note that this court has already instructed the parties that “[a]bsent a claim of privilege, it is improper for counsel at a deposition to instruct a client not to answer.” (Minute Order of 1/10/07, Doc. 910.) Plaintiffs now ask the court to recommend that all evidence relating to Exhibits 98 and 117 be excluded.

Defendants respond that they did nothing to impede the questioning of Mr. Friedrich, “notwithstanding the fact that Plaintiffs’ counsel conducted the deposition in a manner designed to badger and fatigue the witness.” (Def. Resp., at 2.) According to Defendants, Plaintiffs’ counsel repeatedly asked Mr. Friedrich vague and redundant questions on topics as to which he had no knowledge or recollection. (*Id.*) By Defendants’ estimation, Mr. Friedrich “gave testimony in response to at least 50 questions that specifically called for testimony regarding events that occurred outside of the class period, over 100 questions that specified no time period at all, and in relation to at least 12 marked exhibits that were created outside the class period.” (*Id.* at 3.) Only at the end of a long day filled with such questioning, Defendants argue, did their counsel instruct Mr. Friedrich not to answer questions relating to Exhibit 98. (*Id.* at 3-4.)

As for Exhibit 117, Defendants claim that their attorney reconsidered the objection and that the witness did answer questions about the document, confirming his lack of recollection of its subject matter. (*Id.* at 4-5.)

Mr. Baker: In calendar year 2002, do you recall receiving an e-mail from Ms. Markell – actually, do you remember being forwarded an e-mail from Ms. Markell indicating that the slides being prepared for the Fitch servicer presentation should be changed?

Mr. Sloane: Is this – is this within the class period?

Mr. Baker: It's dated November 11 – sorry, November 12, 2002.

Mr. Sloane: Is that inside the class period or outside?

Mr. Baker: Outside.

Mr. Sloane: I just want to see whether you know.

Mr. Baker: It's outside.

Mr. Sloane: Good. Does this have to do with something that occurred during the class period?

. . . . .

Mr. Baker: It has to do with policies being presented that were in place since September 27th.

Mr. Sloane: I instruct the witness not to answer that question. You won't answer my question, that's fine. Next document please.

Mr. Baker: I thought I did. I said the answer is yes.

Mr. Sloane: No, no. I asked you whether it was – it related to a meeting that occurred during the class period.

Mr. Baker: No. It relates to policies that were in place during the class period.

Mr. Sloane: That is a very large category. If you have something specific you want to ask him about this document that relates to the class period, tell me what it is, and I'll be glad to reconsider.

Mr. Baker: Okay. Do you recall any investigation undertaken by Household, or any attorneys, with respect to allegations made by Ms. Markell that Household had not – at this – when I say Household, Household International – had not properly disclosed its restructure policies?

Mr. Sloane: Object to the question. I instruct the witness not to answer the question based on privilege. If you want to make it more general, then – without specifying that level of detail, then I'll allow him to answer.

Mr. Baker: Were you ever interviewed by Mr. Davis with respect to allegations made by Ms. Markell?

Witness: It's possible, but I don't remember.

Mr. Baker: Okay. Were you ever interviewed by an outside law firm such as Wachtel – sorry, by Willcut [sic] & Pickering with respect to allegations made by Ms. Markell?

Witness: I know they did an investigation. I don't remember specifically being interviewed.

Mr. Baker: Okay. Were you interviewed by or deposed by the SEC?

Witness: No.

(Friedrich Dep., at 264-67.) In Defendants' view, "[t]he fact that Plaintiffs' counsel chose not to ask any further questions about this document does not support the bald assertion that the witness was instructed not to answer any questions relating to its subject matter." (Def. Resp., at 5.)

Defendants have conceded that they instructed Mr. Friedrich not to answer questions about Exhibit 98 based on lack of relevance and Plaintiffs' counsel's alleged "pattern of abusive questioning." (Def. Resp., at 6.) The relevancy objection is certainly improper, and Defendants have not established that Plaintiffs' counsel questioned Mr. Friedrich in an abusive manner. Even assuming the questioning was abusive, moreover, the proper course of action was to "halt the deposition and apply for a protective order, see Rule 30(d)(4), . . . not [to] instruct the witness to remain silent." *Redwood v. Dobson*, \_\_\_ F.3d \_\_\_, 2007 WL 397499, at \*3 (7th Cir. Feb. 7, 2007). "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." FED. R. CIV. P. 30(d)(1). Defendants also asserted an improper objection to Exhibit 117. Contrary to Defendants' assertion, there is no evidence that their counsel agreed to allow questions outside the Class Period. The mere fact that Plaintiffs chose to spend their limited deposition time questioning

a witness about events Defendants deem irrelevant does not establish that the questioning was abusive.

As for the proper remedy, the court is aware that it was forced to address this exact same issue in its January 10, 2007 Order due to Defendants' failure to allow Tom Detelich to answer certain deposition questions on relevance grounds. (Minute Order of 1/10/07, Doc. 910.) That said, it appears that Mr. Friedrich did answer most questions posed to him during his seven-hour deposition. Discovery in this case closed on January 31, 2007, but the parties are still in the process of completing some additional depositions and continue to file other discovery motions. Thus, Defendants are ordered to produce Mr. Friedrich (either in person or by telephone) for a supplemental deposition regarding Exhibits 98 and 117 by March 2, 2007. The deposition may cover only questions relating to Exhibits 98 and 117, and Defendants will bear all associated costs. *See Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 888 (7th Cir. 2004) ("A district court enjoys broad discretion in declining to impose discovery sanctions and exclude evidence."); *Talbert v. City of Chicago*, 236 F.R.D. 415, 419 (N.D. Ill. 2006) ("There is a preference in the federal system that trials be determined on the merits . . . .") Plaintiffs' request for a recommendation for further sanctions relating to Exhibits 98 and 117 is denied.

**B. QAC Employees**

The QAC group was responsible for monitoring compliance in Household's branch sales offices. Plaintiffs submitted discovery requests asking Defendants to produce documents reflecting the number of QAC employees working at Household during the Class Period. Plaintiffs claim that despite repeated requests, Defendants have not produced any documents reflecting the number of QAC employees for calendar years 1999 and 2000. Plaintiffs claim that this is significant because there has been deposition testimony and documentary evidence in this case that Household disbanded the QAC group in 1999 and then reinstated it sometime in 2000. The witnesses have been unable to recall, however, exactly when the group was reinstated. (Pl. Mem.,

at 5.) As a sanction, Plaintiffs ask this court to recommend that the district court deem admitted the fact that there were no QAC employees at Household at any time in 1999 and 2000. Alternatively, Plaintiffs ask that the court order Household to produce quarterly records for 1999 and 2000 that show the full time employees in the QAC group during that period. (*Id.* at 6.)

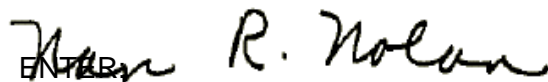
Defendants insist that they have produced “hundreds of documents from throughout 1999 and 2000, including e-mail correspondence, draft bulletin boards and training manuals, that clearly list names, titles, staffing levels and/or functions of QAC employees.” (Def. Resp., at 7.) Defendants point, for example, to (1) internal memos dated January 27, 2000 and April 7, 2000 that were copied to ten individuals identified as “QAC”; (2) an April 10, 2000 memo stating that “[g]oing forward, each division will have 1 QAC Manager and 2 QAC Specialists to support the audit function”; and (3) a June 30, 2000 Internal Audit Executive Summary stating that Household would “[d]eploy[] 30 additional QAC managers and specialists.” (Exs. 2-5 to Beer Decl.) Defendants also note deposition testimony from two senior Household officers that the company retained QAC members after a 1999 “reduction.” Specifically, John Davis, Household’s Vice President of Internal Audit, testified that when the company shifted certain responsibilities from QAC to district sales managers in 1999, “a small QAC group . . . stayed beyond – after that time period.” (Davis Dep., at 43.) Tom Detelich, Household’s Managing Director of U.S. Consumer Lending, similarly testified that there was never a period of time when there were no QAC members. (Detelich Dep., at 29.)

In Defendants’ view, this evidence belies any claim that they have failed to produce the requested QAC materials or that they have engaged in any other sanctionable conduct in that regard. According to Defendants, “[t]he fact that a document has not been produced that provides the particular information Plaintiffs seek, or in the particular format that Plaintiffs wish to find it, does not support a finding that Defendants have improperly withheld production of documents or otherwise failed to comply with their discovery obligations.” (Def. Resp., at 7.)

The court agrees that Plaintiffs have not presented any basis for recommending the requested sanction relating to Defendants' QAC production. First, Defendants did produce documents responsive to Plaintiffs' requests and have certified that their production is complete. In addition, there is evidence in the record that Household retained some number of QAC employees during 1999 and 2000, making a contrary admission inappropriate. The court understands that Defendants do not have any quarterly or summary documents reflecting the exact number of QAC employees during those two years, and will not require them to create such documents now that discovery has closed. (Def. Resp., at 9.) *See, e.g., Cohn v. Taco Bell Corp.*, No. 92 C 5852, 1995 WL 519968, at \*4 (N.D. Ill. Aug. 30, 1995) (declining to impose sanctions where a party "certainly cannot produce documents which do not exist.") Plaintiffs' mere displeasure that documents and information do not exist in their preferred format is not a sufficient basis for recommending sanctions. There is no evidence of willfulness, bad faith, or fault on the part of Defendants, and the court denies Plaintiffs' request for a recommendation for sanctions relating to the QAC employees. *See, e.g., American Nat'l Bank and Trust Co.*, 406 F.3d at 877-78 ("Discovery sanctions may only be imposed where a party displays willfulness, bad faith, or fault.") (internal quotations omitted).

#### **CONCLUSION**

For the reasons stated above, Plaintiffs' Motion for a Report and Recommendation for Evidentiary Sanctions Against the Household Defendants [Doc. 938] is denied. Defendants, however, are ordered to produce Mr. Friedrich (either in person or by telephone) for a supplemental deposition regarding Exhibits 98 and 117 by March 2, 2007. Defendants will bear all costs associated with this supplemental deposition, and are also ordered to pay half of Plaintiffs' attorneys' fees and costs incurred in bringing this motion.

  
James R. Nolan

Dated: March 5, 2007

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NAN R. NOLAN  
United States Magistrate Judge