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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION AND CLARIFICATION OF THE COURT'S APRIL 27, 2007 ORDER

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Defendants"), in support of their motion for (i) reconsideration of Part Five of the Court's April 27, 2007 Order requiring production or logging of all documents in Defendants' files regarding the privileged Compliance Engagement performed by Ernst & Young ("E&Y") during the period July 2002 through early 2004; and (ii) clarification that the Court did not intend to overrule its prior directives with respect to the one seven-hour day duration of the depositions of Messrs. Keller and Bianucci of Ernst and Young.

INTRODUCTION

Part Five of this Court's April 27 Order requires Defendants to produce and/or log all documents relating to the Ernst & Young ("E&Y") Compliance Engagement, even though the Court found that Plaintiffs had never requested documents relating to E&Y from Defendants and had failed to pursue the document subpoena they served on E&Y during the fact discovery period. Because Defendants were not afforded the opportunity to respond in writing to Plaintiffs' latest motion on this subject, and Plaintiffs' motion was addressed only briefly at the April 27 status conference, the Court was left with misimpressions conveyed by Plaintiffs and could not have considered the substantial burden, cost, and delay compliance would entail.[1] Part Five of the April 27 Order should be reconsidered and the Court should reject Plaintiffs' motion for further document discovery and logging regarding the E&Y Compliance Engagement given: (i) the

[1] As Plaintiffs did not file their motion until 10:30 pm ET on April 24, Defendants had only two business days prior to the Court's discussion of the motion at the April 27 status conference, whereas the Court's rules require three business days notice.

lack of any document request during discovery for such documents from Household; (ii) the failure of Plaintiffs to enforce the E&Y document subpoena during the discovery period; (iii) the unfairness in treating the lapsed document subpoena to E&Y as a *de facto* document request to Household; (iv) Plaintiffs' failure to follow their meet and confer obligations prior to filing their motion to compel in October 2006; (v) the fact that the overwhelming amount of documents relating to the engagement are post-Class Period; (vi) the fact that the overwhelming majority of the documents will be privileged and not within the *Garner* exception; (vii) the fact that the documents are likely to be cumulative of other discovery in this action, including the documents from the files of nine key E&Y custodians, and tangential to the E&Y work papers, which are the core documents implementing the engagement and over which substantial time and effort has been and is being spent resolving privilege issues; (viii) the burden and expense on the Household Defendants in interviewing Household employees who may have worked on the two year project, collecting any potentially relevant documents, including electronic documents that are not readily accessible, and copying, bates labeling, reviewing and producing any responsive, non-privileged documents and logging privileged documents; (ix) the lengthy delay that will result from beginning an onerous new document search and Plaintiffs' inevitable new rounds of related motion practice this late in the post-fact discovery phase of this case; and (x) the likelihood that this predominantly post-Class Period material, to the extent not privileged, will have too little probative value to justify such burden (on the Court and Defendants), cost, and delay.

STANDARD FOR RECONSIDERATION

Although this Court has broad discretion as to the adjudication of discovery-related issues, it is proper to entertain motions to reconsider non-dispositive orders for certain purposes. *See Douglas Press, Inc.* v. *Tabco, Inc*., 2003 WL 1395073 (N.D. Ill. Mar. 19, 2003).

Significantly, the Court need not find an error in its own reasoning or judgment to grant a motion for reconsideration. Rather, the Court of Appeals has confirmed that a court may reconsider a ruling based on "an error not of reasoning but of apprehension." *Bank of Waunakee* v. *Rochester Cheese Sales, Inc*., 906 F.2d 1185, 1191 (7th Cir. 1990) (*quoting Above the Belt, Inc*. v. *Mel Bohannan Roofing, Inc*., 99 F.R.D. 99, 101 (E.D. Va. 1983)). Because we believe that the Court did not apprehend (due to the Plaintiffs' misleading papers and Defendants' inability to put in responsive papers and fully address the issues at the April 27 status conference) the full impact of its ruling in terms of cost, timing, and burden, as well as other equitable considerations, we respectfully urge this Court to reconsider Part V of its April 27 Order.

ARGUMENT

A. Plaintiffs' Abandoned Subpoena to Ernst & Young Should Not Be Treated as a *Post Hoc* Document Demand to Defendants.

As the Court is aware, Defendants have expended enormous time and expense complying with Plaintiffs' six sets of document demands consisting of more than 100 requests. The Court has expressly found that these document demands to did *not* "suffice to place Defendants on notice that Plaintiffs wanted documents from E&Y . . . ." April 27 Order at 3.[2] At no time during the parties' numerous meet and confers regarding Plaintiffs' document demands did Plaintiffs ever request E&Y Compliance Engagement documents or any other documents relat-

[2] *See also* this Court's February 27, 2007 Order: "At the same time, it is also not clear that Plaintiffs tendered a document request specifically asking for E&Y documents."; Judge Guzman's April 9, 2007 affirmance of this Court's February 27 Order: "[Plaintiffs] never previously requested Household to produce E&Y documents or challenged E&Y's objections to the May 2006 subpoena for production of E&Y documents relating to the Compliance Engagement."

ing to E&Y from Defendants. Plaintiffs were admittedly aware for years of the existence of such documents, as references to the E&Y Compliance Engagement appeared in documents produced or logged in response to one or more of Plaintiffs' myriad requests. For example, Plaintiffs' first document demand included a request for all documents that Household produced to the Securities and Exchange Commission. In response, Household produced some 2.1 million pages, representing its entire SEC document production, including documents referring to the E&Y Compliance Engagement. That documents with such references found their way into the vast body of material Defendants produced in response to this and other blunderbuss demands lends no support to Plaintiffs' already rejected argument that Plaintiffs must have requested the E&Y Compliance Engagement documents. Household should not be punished for producing and logging documents in good faith, especially when Plaintiffs failed to follow up with a specific document demand to Household even mentioning E&Y.

Plaintiffs' first and only discovery period demand for E&Y Compliance Engagement documents took the form of a subpoena to E&Y in May 2006. After E&Y objected to the subpoena in June 2006 based on undue burden and privilege concerns, Plaintiffs insisted that Defendants explain E&Y's assertion of privilege on Household's behalf. After conducting appropriate investigations, Defendants answered that question on July 13, 2006, in a letter from defense counsel Susan Buckley to Cameron Baker of Lerach. A copy of that letter is annexed as Exhibit 1 to the accompanying Declaration of Landis C. Best, Esq. ("Best Decl."). It provided Plaintiffs with redacted copies of certain engagement letters (including the July 2, 2002 letter initiating the Compliance Engagement), highlighted portions showing that E&Y had been retained by Household's General Counsel to assist him in rendering legal advice, and explained that the work undertaken by E&Y pursuant to that engagement was intended to be and was sub-

ject to attorney-client privilege and attorney work product protection. Following receipt of that showing of privilege, Plaintiffs refused Defendants' offers to meet and confer and soon dropped their inquiry, made no effort to challenge E&Y's objections to the subpoena, and thereafter made no E&Y-related document demands on Household at any time. Thus, far from implicitly notifying Defendants of a special interest in E&Y documents, Plaintiffs appeared to have abandoned the subject.

Against this background, it came as a surprise when Plaintiffs filed a motion against *Defendants* on October 8, 2006 (instead of moving against E&Y) — with no prior meet and confer and no predicate document demand to Defendants — for an order compelling Defendants to produce E&Y documents. In their October 8 motion, Plaintiffs confirmed that they had learned of the existence of the E&Y engagements no later than May 2005, and that their only prior effort to seek related documents took the form of a subpoena addressed to E&Y a full year later. In their words:

> "In the course of document production, Household produced documents identifying the E&Y studies, including as part of the earlier SEC production in late 2004 and a May 6, 2005 production. Based on these documents, [Plaintiffs] subpoena'd E&Y on May 23, 2006."

Plaintiffs' October 8 Motion at 3. Without the benefit of any meet and confer discussions with Plaintiffs to understand the basis for their motion, Defendants fairly read Plaintiffs' motion to encompass only the E&Y Compliance Engagement documents that were otherwise responsive to Plaintiffs' general document demands and listed or to be listed on Defendants' privilege log.[3]

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[3] Plaintiffs' citation (Pl. Br. at 2) to the Court's instruction at the October 19, 2006 status confer-

Footnote continued on next page.

If it is ever fair to treat a subpoena on a third-party as a *de facto* document demand to a party (and we submit it is not), it is surely not fair in this case, for numerous reasons: (i) Plaintiffs failed to pursue their subpoena against E&Y during the fact discovery period, leading the Household Defendants to believe that Plaintiffs had abandoned that subpoena; (ii) Plaintiffs failed to specifically request E&Y documents from Household, even after being on notice since at least 2005 of the existence of the E&Y engagement; (iii) Plaintiffs were silent for months after being informed in July 2006 by Household counsel of the privileged nature of the E&Y engagement; and (iv) Plaintiffs failed to meet and confer over their October 8 motion to compel. Plaintiffs should not be rewarded for these failures by granting them a new onerous document demand after the close of fact discovery.

B. In Fairness and in the Interest of Limiting Additional Burden, Cost, and Delay, the Court Should Protect Defendants from Having to Undertake a New Search for Documents That Are Cumulative, Privileged, and Will Not Meaningfully Advance Plaintiffs' Case

If Plaintiffs *had* requested documents relating to the E&Y Compliance Engagement from Defendants during fact discovery, Defendants would have asserted numerous objections to such a demand that this Court has had no opportunity to consider.

There are two important threshold matters to consider. First, Plaintiffs' motion seeks production of documents that are highly likely to be privileged, in view of this Court's

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Footnote continued from previous page.

> ence for a privilege from Household is taken entirely out of context. That instruction only applied to those documents responsive to Plaintiffs' discovery demands. As the Court has recognized, there was no such demand for E&Y Compliance Engagement documents. Moreover, the Court issued that instruction in response to Plaintiffs' complaint that Defendants' rolling privilege log, which followed the rolling document production, was too slow. *See* Transcript excerpt of October 19, 2006 status conference, attached as Exhibit A to Pl. Br.

previous findings that the Compliance Engagement was undertaken by E&Y as agent of Household's General Council to facilitate the rendering of legal advice to Household. *See* Dec. 6, 2006 Order at 7-10. *See generally*, Memorandum of Law of the Household Defendants in Support of The Privileged Nature of the Ernst & Young Compliance Engagement Work Papers dated May 4, 2007 at 5-12 and cases cited therein. This is not to say that the instant motion calls upon the Court to make a privilege ruling on as-yet undiscovered documents, but only that if Plaintiffs had made a timely demand for this material, and followed the prescribed meet and confer process for identifying and narrowing discovery disputes, such issues could have been addressed and resolved well within the fact discovery period. The onus for this failure should fall squarely on Plaintiffs, and not Defendants or the Court.

As a second threshold matter, the requested material largely if not entirely post-dates the end of the Class Period, some by as much as 18 months, and therefore cannot possibly be critical to Plaintiffs' case. Plaintiffs have brought a securities fraud action challenging allegedly deliberate false disclosures *between 1999 and 2002*, and they have already received literally millions of pages of documents related to each of the practices they allege constituted an illegal predatory lending scheme that was the supposed predicate of investor fraud. This production includes a substantial body of materials that Defendants shared with the multi-state group of Attorneys General in advance of the settlement reached with that group during the Class Period. The documents at issue on this motion primarily concern work performed and information learned by Household/HSBC management months or years *after* the allegedly false disclosures were made, which by definition cannot have informed the state of mind or been included in the information base of Household executives when allegedly fraudulent disclosures were made. *See Pommer* v. *Medtest Corp.,* 961 F.2d 620, 625 (7th Cir. 1992) ("The truth (or falsity) of de-

fendants' statements and their materiality, must be assessed *at the time the statements are made*, and not in the light of hindsight") (emphasis added).

In view of the marginal (if any) utility of this belatedly-requested material and the immense burden that compliance would entail, the resulting delay in finally getting this case ready for summary judgment ought to be of paramount concern. If Plaintiffs' April 24 motion papers led the Court to believe that Household's burden of compliance would be minimal, they were mistaken. The Compliance Engagement was a multi-year engagement that involved the participation of many individuals in various departments of the Company, including the Office of the General Counsel and several departments within Household's Consumer Lending business unit. Searching for all documents in Household's files relating to this engagement would require Defendants to re-do almost their entire document collection process, an extremely burdensome and disruptive task especially at this late date. Essentially, Defendants would need to identify each present or former employee who may have participated in or received information about the engagement (currently believed to be not less than 30 individuals) and determine whether they have any potential relevant documents or electronic correspondence, following which those documents would have to be located, collected, copied, bates numbered, reviewed for privilege and, in most cases, added to Household's privilege log, a process that Defendants currently believe would take two months to complete. *See* Best Decl. ¶ 3.

Such an exercise would be extremely time-consuming and costly under the best of circumstances, but considering that Defendants have already borne the burden of interviewing hundreds of people over the past several years in order to locate and produce millions of pages of documents in response to six different document demands, it is the definition of undue burden to require these tasks be repeated well after the fact discovery cut-off. The unreasonableness of that

burden is even more pronounced where, as here, most or all of the newly-requested documents are likely to be privileged and therefore would not even be seen by Plaintiffs, reducing this entire process to nothing more than another expensive and burdensome logging exercise.

As Judge Guzman emphasized in his November 22, 2006 Memorandum and Opinion affirming this Court's denial of excessive post Class Period discovery, the interests of justice require the Court to place reasonable limits on fact discovery — especially in view of the cumulative nature of Plaintiffs' demands, and their unwillingness to let any issue rest. *See, e.g.*, *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc., et al*., 2006 WL 3445742, at *4 (N.D. Ill. Nov. 22, 2006):

> "Relevance is [not] the only factor to be considered in determining whether to compel discovery. [Rather], it is well-settled that the district courts have broad discretion in deciding discovery matters, to both ensure that a party is not burdened with producing insufficiently probative information and to ensure that the court's resources are allocated in a manner most conducive to producing justice. Discovery may be limited if it is 'unreasonably cumulative or duplicative . . . [or if] the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case."

These proportionality considerations are especially compelling here and weigh strongly against granting Plaintiffs' motion for more discovery. The belatedly-requested material cannot possibly speak to Household's scienter or knowledge base before the end of the Class Period and will undoubtedly prove to be privileged. Moreover, the additional material Plaintiffs seek is cumulative of and/or tangential to other discovery. First, it is cumulative of the millions of pages of loan-related documents and voluminous deposition transcripts already in Plaintiffs' possession. Second, it is tangential at best to the boxes of E&Y work papers (which are the critical universe of substantive work performed by E&Y), which Plaintiffs are still trying to obtain despite this Court's ruling that the engagement was privileged. Third, it is cumulative of the

soon to be produced non-privileged documents from the files of the nine "core" E&Y individuals involved in the engagement. Thus, it is difficult to fathom that any additional documents would not be cumulative and/or tangential at best. In Judge Guzman's words, it is clear that "the burden [and] expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case." *Id.*

Defendants respectfully submit that consideration of these factors, independently and in the aggregate, compels but one conclusion: that Defendants should not be required, long after fact discovery has closed, to undertake a broad, new, burdensome document search.

In the alternative, in the event the Court concludes that complete reconsideration of Part Five of its April 27 Order is unwarranted, Defendants respectfully request that they be required to do only that which the Court required of E&Y — that is, search the files of the "core" individuals involved in the Compliance Engagement and produce only those documents dated before October 12, 2002 (the end of the Class Period). While Defendants believe that even this is unnecessary, such a limitation will alleviate some of the burden, cost and delay issues attendant to the current Order.

C. The Court Should Clarify that the Depositions of Messrs. Keller and Bianucci Shall Take Place on One Day Each as to All Issues

Defendants also respectfully ask the Court to clarify whether it intended to allow two consecutive seven-hour days of deposition *each* for both Messrs. Keller and Bianucci (*see* April 27 Order at 2), insofar as Plaintiffs never requested two days for each witness and the Court had already expressly limited these depositions to one seven-hour day each.

Plaintiffs' request during the April 27 status conference was for bifurcation of each of the Keller and Bianucci depositions, to allow for an immediate half day with each witness on issues concerning their one-time work at Arthur Andersen, to be followed after the resolution of all E&Y issues of another half day for each witness on issues concerning E&Y. Plaintiffs never requested — nor could they in view of the Court's previous rulings and their own representations on this subject — that either of these depositions be extended beyond seven hours, whether bifurcated or not. Indeed, in agreeing to count the depositions of Messrs. Keller and Bianucci as only two of Plaintiffs' allotment of 55 (rather than as two Arthur Andersen depositions and two E&Y depositions), the Court relied on Plaintiffs' unequivocal representations that these depositions would in fact be limited to one seven-hour day each. *See, e.g.*, Transcript of February 12 status conference at 56:15-16: "[Mr. Brooks:] We're taking the depositions of these two people [Keller and Bianucci] over two days."; *id.* at 59:4-6 "[Mr. Brooks:] Mr. Keller's deposition will be over a single day, both in his capacity as the 30(b)(6) witness for Ernst & Young and in his personal capacity."; *id.* at 59:19-20 "[Mr. Brooks:] I think we all agree, Judge, that Bianucci is just one single deposition.", attached as Exhibit 2 to the Best Decl. *See also* February 12 Order: "The deposition of John Keller, which will take place over one day, will count as one deposition. . . . The deposition of Chris Bianucci will proceed on 3/8 in Chicago."

Defendants therefore request that the Court clarify that the depositions of Messrs. Bianucci and Keller are limited to one seven-hour day each.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court (i) to reconsider Part Five of its April 27 Order granting Plaintiffs' Motion to Compel Production of Ernst &

Young Compliance Engagement Documents Not Listed on Defendants' Privilege Log Or In the Alternative Preparation of a Privilege Log As To Such Documents and to deny Plaintiffs' motion; and (ii) to clarify that it did not intend to overrule its prior directives with respect to the duration of the Keller and Bianucci depositions.

Dated: May 9, 2007
Chicago, Illinois

Respectfully submitted,

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EXHIBIT A

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, *- against -* HOUSEHOLD INTERNATIONAL, INC., ET. AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

DECLARATION OF LANDIS C. BEST IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION AND CLARIFICATION OF THE COURT'S APRIL 27, 2007 ORDER

I, LANDIS C. BEST, declare as follows:

1. I am a member of the bar of the State of New York, admitted to this Court *pro hac vice* in connection with the above captioned matter, and a member of the firm Cahill Gordon & Reindel LLP, co-counsel for defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar in this action. I submit this declaration to place before the Court certain documents and information in support of the Household Defendants' Motion for Partial Reconsideration and Clarification of the Court's April 27, 2007 Order.

2. Attached hereto as Exhibit 1 is a true and correct copy of the July 13, 2006 letter (without exhibits) from Susan Buckley, Esq. to D. Cameron Baker, Esq.

3. Attached hereto as Exhibit 2 is a true and correct copy of excerpts from the February 12, 2007 Transcript of Proceedings — Status Conference before Magistrate Judge Nan R. Nolan in this case.

4. Requiring Defendants to search for all documents in Household's files relating to the Ernst & Young Compliance Engagement would be an overbroad, burdensome, time consuming, and expensive task. That engagement began in July 2002 and was not finished until 2004. The Office of the General Counsel and several departments within Household's Consumer Lending business Unit were involved in the engagement. Defendants would need to identify each present or former employee who may have participated in or received information about the engagement (currently believed to be no fewer than 30 individuals) and determine whether any potentially relevant documents (including electronic documents) exist, following which those documents would have to be located, collected, copied, bates numbered, reviewed for privilege and in most cases added to Defendants' privilege logs. Even bringing to bear the maximum resources reasonably available, I believe that it would take 2 months to complete this work given the numerous individuals who worked on the engagement, the time period involved, the passage of time, and the technological constraints in retrieving electronic information.

Landis C. Best

Exhibit 1

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July 13, 2006

Re: Lawrence E. Jaffe Pension Plan v. Household International, Inc., et al. (Case No. 02-CV-5893)

Dear Mr. Baker:

I have your letter of July 10, 2006 and write to respond.

Our inquiries concerning the E&Y engagements are largely complete. Although we do have some follow up to do, I do not anticipate that it will change our conclusions concerning Ernst & Young's work for Household during the relevant period.

We now understand that Ernst & Young was engaged by Household for three separate projects before the termination of the class period. I should stress that most of their work was completed after the conclusion of the class period and that their findings were relayed to Household's General Counsel after the class period as well. In light of those facts and Magistrate Judge Nolan's opinion of June 15, 2006 denying post class period discovery, we seriously question whether the documents concerning those engagements have any relevance to your case, but I will pass that issue if only for the moment.

The engagements were memorialized in three separate engagement letters: two dated July 1, 2002 and the third dated September 25, 2002. You have inquired as to whether we will provide you with copies of those engagement letters and, if not, to point you to case law authority demonstrating that the letters themselves are privileged. We have looked into that issue and have concluded that those portions of engagement letters revealing the identity of the client and the economic terms of employment are not often viewed as privileged but that confidential information concerning the engagement is.

As such, and in a spirit of good faith, I have enclosed redacted copies of the three engagement letters for your consideration. We have redacted only that material that specifically de-

scribes the nature of the confidential work Ernst & Young was to perform. Even as redacted, the letters reveal that Ernst & Young's work was undertaken at the request of and under the direction of Household's General Counsel. Each of the letters also reveals that Ernst & Young's work was specifically intended to be privileged under the attorney-client privilege, the work product doctrine and other cited privileges. You will also see that extraordinary care was to be taken to maintain the privileged nature of the work. And it was.

I hope that when you review the enclosed documents you will conclude that there is little point in wasting the Court's time and resources by our teeing up a motion relating to these engagements, particularly in light of Magistrate Judge Nolan's decision of July 6, 2006 concerning the Arthur Andersen documents. If anything, the issue here is even more clear cut than the issues that were so definitively addressed by the Magistrate Judge in that opinion.

Finally, you had asked for my availabilty for a "meet and confer." Although I view that as somewhat premature at this point, as I tried to make clear in my letter of June 29, 2006, please feel free to call me at any time to discuss this issue.

Sincerely,

Susan Buckley

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[Enclosures]

By FedEx (w/enc.) and By Facsimile (w/o enc.)

cc: Thomas L. Riesenberg, Esq. (By Facsimile)
Adam B. Deutsch, Esq. (By Facsimile)
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Patricia Farren, Esq.

Exhibit 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (Chicago)

LAWRENCE E. JAFFE, etc., et al.,	)	
Plaintiffs,	)	
v.	)	Docket No. 02-CV-5893
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	Chicago, Illinois
Defendants.	)	February 12, 2007

STATUS CONFERENCE
BEFORE THE
HONORABLE MAGISTRATE JUDGE NAN R. NOLAN

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THE COURT: All right, are you counting Ken Posner and Jonathan Pruzan as one or two, Ms. Best?

MR. BROOKS: As of your ruling today, we're counting them as one.

THE COURT: Right.

MR. BROOKS: So we still believe that they're over 55. And the reason for that is we believe that Mr. Keller and Mr. Biannuci should count as three because Mr. Keller is being deposed -- He's the representative for Ernst & Young, the 30(b)(6) witness for Ernst & Young and in addition he's also being deposed in his individual capacity as an individual for Arthur Andersen, so (inaudible) should count as two depositions.

MR. BROOKS: Judge, sometimes I feel like we're in Wonderland here. We're taking the depositions of these two people over two days. It so happened Ernst & Young has designated one of them as a 30(b)(6) witness. We will be talking to him about the Ernst & Young information, whether or not that occurred. I don't see how two depositions over two single days counts as three. I don't know if defendants (inaudible) explain it but again, we don't think that it's fair to count that way.

THE COURT: Wait, are you --

MS. BEST: (Inaudible, multiple voices) --

THE COURT: -- counting Mr. Keller as the Ernst &

Young 30(b)(6)? That's counting one. Then you're deposing Mr. Jonathan or John Keller individually and that's two, right?

MR. BROOKS: But your Honor, it's the same deposition.

MS. BEST: But your Honor, all along we have operated, we've expected that if there's two different notices then you count them as two depositions. We haven't been counting every person, you know, a separate deposition. We've accepted your Honor's ruling on that. These are two separate notices and one he's the 30(b)(6) witness for Ernst & Young, and the other is in his individual capacity for Arthur Andersen. It should count as two depositions, your Honor.

MR. BROOKS: There's no reason, Judge. If we take a step back and look at the actual purpose behind a limitation on depositions, is so that in this case defendants don't have to attend, you know, I mean it's going to be one deposition for seven hours. It's going to be a deposition for seven hours. We're going to ask him what he knows about Arthur Andersen. We're going to ask him what he knows about Ernst & Young. We're going to do the same thing with Mr. Keller. It's just that Ernst & Young happened to designate Mr. Biannuci as its witness and he'll be (inaudible) fully prepared to talk about the topics and we'll move forward that way. I just -- It's just -- I got it reversed. I guess Mr. Keller is designated. It doesn't really change the point and the point is that it's

going to be two days of depositions.

MS. BEST: But your Honor, now they're saying because the deposition is seven hours it should just count as one deposition. If that were the rule, then the 30(b)(6) notices that were extremely broad that the plaintiffs served early on, where we had to designate like 10, 5, 6, 7, 8, even seven different people should be counted as seven depositions, and that wasn't the rule. So Mr. Brooks is trying to have his cake and eat it, too, (inaudible).

MR. BROOKS: Judge, they're counting two depositions as three depositions. It's --

MS. BEST: Because there are two different subjects, your Honor, two different notices.

MR. BROOKS: They're not different subjects.

THE COURT: But how is it counting as three?

MR. BROOKS: (Inaudible, multiple voices) -- Mr. Keller -- (inaudible, multiple voices) --

THE COURT: I mean --

MR. BROOKS: -- (inaudible, multiple voices) --

THE COURT: All right.

MR. BROOKS: -- (inaudible, multiple voices) --

THE COURT: All right, just stop one minute. If this is what you go over the fifty -- I'm just confused. All right, are the plaintiffs counting John Keller? Sir, are you counting it as two depositions? You're counting it as a 30(b)(6) for

Ernst & Young and then privately as a person who was connected to Arthur Andersen? And it's over two days and are you counting it, plaintiffs, as two?

MR. BROOKS: Judge, no. Mr. Keller's deposition will be over a single day, both in his capacity as the 30(b)(6) witness for Ernst & Young and in his personal capacity. Mr. Biannuci is being --

THE COURT: All right now, stop --

MR. BROOKS: -- (inaudible, multiple voices) ---

THE COURT: Stop a minute.

MR. BROOKS: -- (inaudible, multiple voices) --

THE COURT: Stop. Defendants, how many do you think John Keller is if it's a one-day deposition, first as Ernst & Young, second as Arthur Andersen? How many are you counting that as?

MS. BEST: Two, your Honor.

THE COURT: Two, okay. All right. So defendants count it as two. Okay, and now go on to Mr. Biannuci.

MR. BROOKS: I think we all agree, Judge, that Biannuci is just one single deposition.

MS. BEST: Correct, your Honor.

THE COURT: Okay. I say Mr. Keller is one deposition, okay? And that's my ruling. So that's the way it is. He's to count as one even though he has got two hats.

Okay. Is there anything else?