

**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' MOTION TO ENFORCE THE JANUARY 31, 2008 ORDER
AND TO COMPEL PRODUCTION OF DOCUMENTS BY DEFENDANTS' EXPERTS
PURSUANT TO PLAINTIFFS' SUBPOENAS**

The Class hereby moves this Court to enforce its January 31, 2008 Order respecting defendants' non-expert "expert" testimony and to order the production of documents from three of defendants' five experts pursuant to plaintiffs' subpoenas. We discuss each issue below.

A. Defendants' Lay Opinion Testimony

At the February 7, 2008 status conference, defendants requested that the Court reconsider the January 31, 2008 Order, which directed defendants to "(1) submit a revised expert disclosure notice identifying only individuals who may provide expert testimony at trial; and (2) provide a detailed statement of the specific opinions any non-retained experts may offer at trial, and the bases for those opinions." January 31, 2008 Order. Defendants' principal issue with the Court's Order was that the proposed testimony was not "classic" expert testimony. Defendants' Status Report for the February 7, 2008 Telephone Status Conference with Magistrate Judge Nolan at 4. During the colloquy, the Court suggested the parties enter a stipulation that both sides agree that "it is not expert testimony" with the stipulation applicable to witnesses and testimony for both sides. *See* February 7, 2008 Hearing Tr. at 6-8.

Defendants subsequently provided plaintiffs with a stipulation applicable only to defendants' 23 listed witnesses. Plaintiffs revised the stipulation to apply to both parties' witnesses and testimony.¹ Defendants rejected the revised stipulation on the basis that their original stipulation was in fact "reciprocal" because it allowed plaintiffs to elicit opinions from defendants' listed individuals. This is not reciprocal and unacceptable to plaintiffs. Based on this issue and defendants' unwillingness to commit to a fair and reciprocal stipulation, the parties' meet and confer discussions were unsuccessful.

¹ Plaintiffs attach copies of defendants' proposed stipulation, plaintiffs' proposed stipulation, and a redline comparison of the two stipulations as respectively Exhibits 1 through 3.

As defendants have rejected a fair resolution of this issue consistent with the Court's proposed compromise, the Court should order them to comply with the January 31, 2008 Order, including striking witnesses from their expert list and providing a detailed statement of the specific opinions any non-retained experts may offer at trial, and the bases for those opinions by March 7, 2008. With respect to individuals for whom defendants wish to "hedge" their bets by identifying the witness as an expert, they must be prepared to accept the consequences, including providing the information required in the January 31, 2008 Order. A further consequence is that defendants must reveal all bases of such opinions regarding "why they believed it was the right thing to do" including hitherto privileged communications. For example, there was a prior dispute over Lead Plaintiffs' Interrogatory No. 36, which sought the explanation of why defendants settled with the AGs, as to which defendants successfully posed an attorney-client privilege objection. August 30, 2006 Minute Entry (Dkt. No. 658). Should any of defendants' witnesses identify this subject as a potential opinion, defendants must provide a full response to that Interrogatory and similar questions at trial.

As a final point, should defendants continue to object to the January 31, 2008 Order, their remedy is to file an objection with Judge Guzman and not to seek reconsideration by this Court. This issue was fully briefed and defendants have had an adequate opportunity to explain their position.

B. Plaintiffs' Subpoenas

Plaintiffs served subpoenas on three of defendants' four experts, Messrs. Robert E. Litan ("Litan"), Carl A. LaSusa and John L. Bley ("Bley"). These subpoenas were narrowly tailored to obtain information useful for these expert's depositions, including information regarding their prior publications. Plaintiffs received objections to the Litan and Bley subpoenas from Cahill, Gordon & Reindel LLP, defendants' counsel, that rely principally on the parties' expert stipulation as a basis for not producing any documents. On February 22, 2008, the parties met and conferred, but were

unable to reach an agreement. Subsequently, plaintiffs received an objection from Mr. LaSusa identical on all material respects to those from Mssrs. Litan and Bley.² Plaintiffs are entitled to these experts' documents as the parties' stipulation does not preclude the issuance of the subpoenas on defendants' experts.

The parties' Stipulation Regarding Expert Discovery precludes discovery only with respect to certain narrow specified categories, principally attorney-expert communications and draft reports. We attach a copy of the stipulation hereto as Exhibit 7. Paragraph 1 of the stipulation provides that the stipulation is "to limit the scope of discoverable information relating to [retained] experts' opinions *as follows*: . . ." Ex. 7 (emphasis added). None of the specific prohibitions and limitations on expert discovery that follow preclude the documents sought by plaintiffs from these experts. For example, paragraph 4 lists "the following categories of data, information, and documents [that] need not be disclosed by any party . . . (1) the content of communications between counsel and experts (including non-testifying experts) and (2) notes, drafts or other types of preliminary work created by, or for, or at the direction of experts (including non-testifying experts)." *Id.*

During the meet and confer, defendants took a contrary position arguing that the language in paragraph 1 barred the subpoenas. However, that interpretation ignores the "as follows" language of paragraph 1, which limits the scope of that initial preamble paragraph to the specific limitations identified in following paragraphs. Defendants' interpretation is particularly strained in light of paragraph 4's specific enumeration of subjects that are "non-discoverable," such as expert draft reports. If it was in fact defendants' intent to exclude the materials now sought by plaintiffs, they should have expanded the list of "non-discoverable" items. Additionally, defendants' interpretation of paragraph 1's language means that the stipulation would prohibit anything not specifically

² Plaintiffs attach as Exhibits 4 through 6 the relevant objections by the experts.

mentioned. That makes no sense since the stipulation does not expressly authorize most of what is typical in expert discovery, including the use of a subpoena or asking the expert about their prior publications/testimony.

Defendants also make the spurious objection that these subpoenas are untimely “fact” discovery. These subpoenas clearly are not as they go to the experts’ knowledge, bias and prior opinions. For example, Mr. Litan worked with a Washington, D.C. banking lobby, the American Bankers Association, and plaintiffs seek narrowly tailored, specific discovery of such lobbying and public relations activities. *See* Ex. 4. Further, plaintiffs would have no need of the requested documents but for the fact that these individuals have been retained as experts by defendants.

The Court should direct defendants and their experts to produce the requested documents immediately. Plaintiffs intend to proceed with the depositions as scheduled (Mr. Litan on February 2, 2008, Mr. LaSusa on March 6, 2008, and Mr. Bley on March 14, 2008) and will recall these experts to address any untimely produced documents or to reserve such documents for use at trial as appropriate.

DATED: February 25, 2008

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DECLARATION OF SERVICE BY E-MAIL 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 25, 2008, declarant served by electronic mail and by U.S. Mail to the parties: **THE CLASS' MOTION TO ENFORCE THE JANUARY 31, 2008 ORDER AND TO COMPEL PRODUCTION OF DOCUMENTS BY DEFENDANTS' EXPERTS PURSUANT TO PLAINTIFFS' SUBPOENAS.** 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 9th day of February 25, 2008, at San Francisco, California.

/s/ Monina O. Gamboa

MONINA O. GAMBOA