

**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. )	
_____ )	

**LEAD PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS' PARTIAL  
OPPOSITION TO LEAD PLAINTIFFS' MOTION TO FILE CERTAIN EXHIBITS AND  
EXCERPTS OF THEIR BRIEF UNDER SEAL**

Plaintiffs respectfully submit this memorandum in support of their reply to Defendants' Partial Opposition to Lead Plaintiffs' Motion to File Certain Exhibits and Excerpts of Their Brief Under Seal. Dkt. No. 1278.

On November 26, 2008, plaintiffs moved for evidentiary sanctions due to defendants' spoliation of relevant evidence. *See* Dkt. No. 1260. Because defendants have arbitrarily designated virtually every document produced in this case as "Confidential," plaintiffs were required, pursuant to Local Rule 26.2, to file their spoliation brief and nearly all supporting exhibits under seal. Dkt. No. 1263. Plaintiffs maintain that none of the exhibits contain the type of truly confidential information subject to protection under the November 5, 2004 Protective Order, this Court's prior rulings or Seventh Circuit precedent.<sup>1</sup> Accordingly, plaintiffs sought permission from the Court to file the spoliation brief and all but three exhibits in unrestricted form, available to the public. *See* Dkt. No. 1263.

Defendants opposed plaintiffs' request to file the spoliation brief and supporting exhibits in unrestricted form, but not based on any good faith support that any of the exhibits should in fact remain confidential. Rather defendants rest their entire argument on the Court's instructions during the June 30, 2008 hearing concerning the procedures for filing motions *in limine*. *See* Dkt. No. 1278 at 2. Defendants have conveniently ignored the Court's admonition to the parties at the same hearing that many of the documents would not continue to be considered confidential at trial, "absent

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<sup>1</sup> Plaintiffs are filing under seal concurrently herewith the Declaration of Azra Z. Mehdi in Support of Plaintiffs' Reply In Further Support of Motion Requesting Evidentiary Sanctions for Household Defendants' Destruction of Evidence ("Reply Decl."). For all the reasons outlined in the opening motion to seal, plaintiffs believe that neither the reply brief, nor any of the exhibits attached to the Reply Decl. should be filed under seal. However, in compliance with L.R. 26.2, plaintiffs will file the materials designated by defendants as "Confidential"—albeit entirely improperly—under seal, but respectfully submit that none of this information deserves continued protection.

*really extraordinary circumstances*” such as “Coca-Cola’s formula”) (emphasis added). *See, e.g.*, June 30, 2008 Hrg. Tr. at 14:13-20.

Defendants have also repeatedly refused, despite plaintiffs’ numerous requests, to reconsider the applicability of the “Confidential” designations on documents contained on both plaintiffs’ and defendants’ trial exhibit lists. Defendants have made absolutely no showing that “good cause” exists to maintain the confidentiality of the spoliation brief and supporting exhibits or any of the documents to be used at trial. *See In re Bank One Sec. Litig.*, 222 F.R.D. 582, 588 (N.D. Ill. 2004) (granting motion to unseal because defendants failed to adequately explain how disclosure of protected information could cause harm).

The trial in this case is now a little less than two months away. If defendants’ confidentiality designations are not removed, the Court will be forced to close the trial from the public – a drastic measure that does not properly balance the public’s interest in the current judicial proceedings against defendants’ interest in protecting only truly confidential information. The public’s right of access to court proceedings and documents is well-established. *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Jessup v. Luther*, 277 F.3d 926, 927 (7th Cir. 2002) (“The general rule is that the record of a judicial proceeding is public.”); *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (“Judicial proceedings are public rather than private property.”).

Accordingly, defendants should be required to “justify the confidentiality of each protected document.” *Bank One*, 222 F.R.D. at 586 (“Once a protective order is entered, a party must *continue* to show good cause for confidentiality when challenged.”) (emphasis added). Because defendants have failed to carry this burden, defendants’ confidentiality designations should be removed – both plaintiffs’ opening spoliation brief (Dkt. No. 1260) as well as the reply brief (Dkt

No. 1385) and all exhibits in support of both briefs (Dkt. Nos. 1261 and 1385-4) should be filed in unrestricted form and the trial in this case should be open to the public.

DATED: February 6, 2009

Respectfully submitted,

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/s/ Azra Z. Mehdi

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DECLARATION OF SERVICE BY ELECTRONIC 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 6, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **LEAD PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS' PARTIAL OPPOSITION TO LEAD PLAINTIFFS' MOTION TO FILE CERTAIN EXHIBITS AND EXCERPTS OF THEIR BRIEF UNDER SEAL:**

The parties' email addresses are as follows:

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and by U.S. Mail to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of February, 2009, at San Francisco, California.

/s/ Marcy Medeiros  
\_\_\_\_\_  
MARCY MEDEIROS