IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated, Plaintiff, v. HOUSEHOLD INTERNATIONAL, INC., et al. Defendants.	Lead Case No. 02-C-5893 (Consolidated) Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

NOTICE OF FILING

PLEASE TAKE NOTICE that, on August 19, 2004, we caused to be filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois, the ***Joint Submission Regarding Protective Order***, a copy of which is served upon you.

Dated: August 19, 2004

Respectfully submitted,

By: _____

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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) Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

JOINT SUBMISSION REGARDING PROTECTIVE ORDER

Pursuant to the Court's Minute Order dated August 4, 2004, lead plaintiffs, the Glickenhaus Institutional Group,[1] by their attorneys; defendants Household International, Inc., Household Finance Corporation (together, "Household"), William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, the "Household Defendants"), by their attorneys; and defendant Arthur Andersen LLP, by its attorneys; make this submission setting forth their respective views regarding the proposed text of an order governing the treatment of discovery material, including confidential discovery material, in this action. The parties state as follows:

1. The Court's Minute Order dated August 4, 2004 states, in pertinent part, "[i]n order to make this Court's review easier, Lead Plaintiffs' counsel and defendants' counsel are directed to file a joint pleading outlining the areas of disagreement and providing the grounds

[1] The Glickenhaus Institutional Group comprising three institutional plaintiffs, Glickenhaus & Company, Pace Industry Union Management Pension Fund, and the International Union of Operating Engineers Local No. 132 Pension Plan, was appointed as lead plaintiff by this Court on December 18, 2002.

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supporting each side's version of the disputed provisions."

2. The parties have agreed that the following headings describe the areas of disagreement with regard to disputed provisions of a protective order.

DISPUTED PROVISIONS OF THE PROPOSED PROTECTIVE ORDER

I. SCOPE OF THE PROTECTIVE ORDER

A. Plaintiffs' Position

3. A court may not issue a "blanket" or "umbrella" protective order that gives the parties carte blanche to decide which information to protect, but it also need not determine good cause on a document-by-document basis.[2] To obtain a protective order under Fed. R. Civ. P. 26(c)(7), the movant must demonstrate that "(1) the interest for which protection is sought is an ***actual trade secret or other confidential business information*** protected under the Rule, and that (2) there is good cause for the protective order."[3] "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings."[4] Thus, even if litigants agree that a protective order should be entered, they still have the burden of demonstrating to the court that good cause exists for the entry of the order.[5] Courts generally require "specific examples of articulated reasoning" to

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2 *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945-946 (7th Cir. 1999).

3 *Andrew Corp. v. Rossi*, 180 F.R.D. 338, 340 (N.D. Ill. 1998) (emphasis added); *see also Zahran v. Trans Union Corp.*, No. 01 C 1700, 2002 U.S. Dist. LEXIS 16791, at *4 (N.D. Ill. Sept. 5, 2002) (attached hereto as Plaintiffs' Exhibit ("Pls' Ex.") C).

4 *Andrew*, 180 F.R.D. at 340 (quoting *American Tel. and Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978)); *see also Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (also quoting *American Tel. and Tel. Co. v. Grady*); *Citizens First Nat'l*, 178 F.3d at 946 ("The weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials ....").

5 *Jepson*, 30 F.3d at 858.

establish good cause under Rule 26(c), rather than "stereotyped and conclusory statements."[6] With respect to alleged confidential business information, courts demand that the movant "prove that disclosure will result in a clearly defined and very serious injury to its business."[7]

4. Defendants' motion and proposed order, filed without supporting affidavits, falls far short of these stringent standards. In fact, it epitomizes the "stereotyped and conclusory statements" held to be insufficient by courts in this jurisdiction.[8] The only information identified by defendants that even comes close to being a "specific example" is "Household's proprietary software."[9] Even then, defendants' motion lacks the "articulated reasoning" required under Rule 26(c). Moreover, it is unlikely that any of the information sought by lead plaintiffs related to Household's software is trade secret or other confidential business information – lead plaintiffs do not seek the code or information that would allow it to reproduce the functions of the software. Significantly, lead plaintiffs are not competitors of Household. It is impossible to know whether any of Household's information warrants protection with the trivial amount of information provided in defendants' motion.

5. With respect to information that defendants allege is "confidential and proprietary" to defendant Arthur Andersen LLP ("Andersen"), defendants do not even make a conclusory statement that disclosure will result in a clearly defined and very serious injury to

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6 *Andrew*, 180 F.R.D. at 341 (citations omitted).

7 *Id.* (internal quotations and citations omitted).

8 *See, e.g., Andrew*, 180 F.R.D. at 341 (finding the affidavit of plaintiff's vice-president inadequate); *compare John Does I-IV v. Yogi*, 110 F.R.D. 629, 631 (D.D.C. 1986) (cited with approval by *Andrew Corp.*) (movant demonstrated the likelihood that a specific named competitor would gain access to its confidential information because of the association between the non-movant and the competitor).

9 *See* (Defendants' Motion for a Protective Order and Opposition to Lead Plaintiff's Motion for Protective Order ("Defs' Mot."), ¶11.

Andersen's business.[10] Defendants would be hard pressed to do so given the fact that Andersen's counsel has previously advised lead plaintiffs that "***Andersen no longer engages in the practice of public accounting.***"[11] The ***single*** paragraph of defendants' motion that discusses materials that may be produced by Andersen states only that a protective order is necessary because lead plaintiffs' discovery seeks information that is confidential and proprietary to Andersen.[12] Even absent Andersen's admission that it no longer engages in the business of public accounting, this fails to satisfy Andersen's burden of showing good cause under Rule 26(c).

6. Defendants also seek protection beyond the scope of that provided by Rule 26(c) when none is warranted.[13] Defendants' claim that the Fair Credit Reporting Act ("FCRA") (15 U.S.C. §§1681, *et seq.*) and the Gramm-Leach-Bliley Act ("GLBA") (15 U.S.C. §§6801, *et seq.*) impose upon Household statutory obligations not to reveal certain customer information is a red herring.[14] Indeed, defendants do not argue that the FCRA or the GLBA require entry of a protective order.[15] Moreover, contrary to defendants' assertions, neither act prohibits Household from producing information in response to lead plaintiffs' discovery requests. The GLBA specifically ***permits*** disclosure of non-public personal information to comply with a discovery

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10 *Id.* at ¶14.

11 *See* July 9, 2004 letter from Mark D. Brookstein to Azra Z. Mehdi attached hereto as Pls' Ex. A (emphasis added).

12 *See* Defs' Mot., ¶14.

13 *See id.* at ¶¶11-12.

14 Although lead plaintiffs do not believe protection under FCRA and GLBA is necessary here, lead plaintiffs included a provision in Plaintiffs' [Proposed] Order ("Pls' Proposed Order") to accommodate defendants. *See* Pls' Proposed Order, ¶27.

15 Defs' Mot., ¶12.

request,[16] and §1681b(a)(1)-(5) of the FCRA relied upon by the defendants ***regulates the conduct of consumer reporting agencies, not a financial institution like Household.***[17]

7. Defendants' objections to ¶¶10 and 11 of Plaintiffs' Proposed Order lack merit.[18] Instead of adding superfluous language as alleged by defendants, ¶10 provides guidance to prevent the haphazard designation of material or portions of material as confidential. Paragraph 11 provides that if the producing party becomes aware that items it designated as confidential do not qualify for protection, the producing party must notify other parties and withdraw the designation. The receiving party should not be required to waste its own and the Court's time challenging wholesale designations – which appears to be a distinct possibility here in light of the fact that virtually every document produced by defendants that lead plaintiffs have reviewed to date has been marked confidential. This burden is where it belongs – on the party with the most knowledge regarding the contents of the produced material, the producing party. Defendants offer no explanation or support for their argument to the contrary.[19] Instead, Defendants' Proposed Order ("Defs' Proposed Order") merely "sets forth a reasonable procedure should Lead Plaintiffs disagree with any designations."[20] Defendants fail to mention that Plaintiffs' Proposed Order also includes a provision for disputes concerning confidential

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16 *See* 15 U.S.C. §6802(e)(8) (creating an exception "to respond to judicial process"); *Marks v. Global Mortgage Group, Inc.*, 218 F.R.D. 492, 496 (S.D.W. Va. 2003) (finding that 15 U.S.C. §6802(e)(8) permits a financial institution to disclose the non-public personal financial information of its customers to comply with a discovery request in a class action lawsuit).

17 *See* 15 U.S.C. §1681b(a) ("any ***consumer reporting agency*** may furnish a consumer report under the following circumstances and no other") (emphasis added) *and* 15 U.S.C. §1681a (f) (defining a consumer reporting agency as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports").

18 *See* Defs.' Mot., ¶22.

19 *See id.*

20 *Id.*

materials.[21]

B. **Defendants' Position**

8. The Defendants' Proposed Order is narrowly drawn. It contains adequate safeguards to protect the public's interest in open access to court proceedings.[22] *First*, the Defendants' Proposed Order defines "Confidential Information" as disclosure or discovery in this litigation that may contain "confidential, proprietary or private information for which special protection from public disclosure may be warranted under applicable law."[23] This definition of "Confidential Information" is appropriately tailored to safeguard the type of information involved in this case.[24] The Defendants seek to protect information that fits clearly within the *Andrew* parameters.

Second, the Defendants' Proposed Order gives the Court the power, *sua sponte*, to determine that any material produced during discovery does not contain Confidential Information and should not be designated Confidential.[25] The Defendants' Proposed Order also

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21 *See* Pls' Proposed Order, ¶¶21-22.

22 Lead Plaintiffs' submission suffers from a fundamental flaw because it conflates the question of public access to documents which have been filed in a court with public access to discovery materials that have been exchanged by parties but not filed with a court. Except in extraordinary circumstances not present here, the public has *no* right to review discovery materials exchanged by the parties but not filed with a court. *See* Fed. R. Civ. P. 5(d); *see generally In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (common law right of public access does not extend to discovery that is not part of the public record); *Okla. Hosp. Ass'n Okla. Publ'g Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984) (parties cannot be compelled to distribute unfiled discovery to public), *cert. denied*, 473 U.S. 905 (1985). Because the Defendants' Proposed Order adequately addresses the public's interest in documents that are filed with the Court and the defendants' confidentiality interests with respect to materials that are not filed with the Court, it is proper.

23 Defendants' Proposed Order at 1.

24 *See Andrew Corp. v. Rossi*, 180 F.R.D. 338, 341 (N.D. Ill. 1998) (relevant factors in determining what is confidential material include "the extent to which it is known outside of the business; the measures taken to guard the information's secrecy; the value of the information to the business or its competitors; the amount of time, money and effort expended in the development of the information; and the ease or difficulty of duplicating or properly acquiring the information").

25 *See* Defendants' Proposed Order ¶ 13.

gives either party the power to object to the restriction of public access to any document proposed to be filed under seal.[26]

Plaintiffs' Proposed Order contains a recital that is contradictory and prejudicial.[27] Plaintiffs' Proposed Order recites that "this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as confidential."[28] That is wrong — both competing draft protective orders provide that no material exchanged in this litigation will be used for any purpose other than this litigation. Moreover, this Court will determine the protections that any protective order will provide and the parties will be bound by that determination. This recital should be eliminated in its entirety.[29]

For similar reasons, paragraphs 10 and 11 of Plaintiffs' Proposed Order are unnecessary. Defendants' Proposed Order provides that a party may designate material as "CONFIDENTIAL" if that party believes ***in good faith*** that such material contains Confidential Information.[30] In addition, Defendants' Proposed Order provides a procedure for resolving disputes as to confidentiality designations. Paragraphs 10 and 11 of Plaintiffs' Proposed Order would add superfluous language and create confusing standards for compliance with the Order.[31]

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26 *See* Defendants' Proposed Order ¶ 14; *see also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999).

27 *See* Plaintiffs' Proposed Order at 1.

28 *Id.*

29 Indeed, Plaintiffs' Proposed Order is rife with superfluous language. *See, e.g.*, Plaintiffs' Proposed Order ¶ 18 ("The heightened protection outlined in this Order, however, applies only to the limited information or items that are subject to treatment as confidential under applicable legal principles."); ¶ 21 ("burden of persuasion"); ¶ 12 ("Any other party may object to such proposal, in writing or on the record.")

30 Defendants' Proposed Order ¶ 4.

31 Defendants' Proposed Order provides that confidentiality designations must be made in good faith. Defendants' Proposed Order ¶ 4.

Moreover, paragraph 11 of Plaintiffs' Proposed Order places an unreasonable burden on a designating party to withdraw designations.[32] Lead Plaintiffs have requested millions of pages of documents. Defendants' Proposed Order sets forth a reasonable procedure should Lead Plaintiffs disagree with any designations.

II. THE PARTIES' DIFFERING VIEWS WITH REGARD TO THE PERMISSIBLE DISSEMINATION OF CONFIDENTIAL INFORMATION PURSUANT TO THE PROTECTIVE ORDER

A. Plaintiffs' Position

9. If a protective order were warranted in this case, Plaintiffs' Proposed Order adequately and succinctly protects confidential information.[33] Plaintiffs' Proposed Order defines as confidential information only that which qualifies under the standards developed pursuant to Rule 26(c). Defendants' Proposed Order is not pursuant to Rule 26(c), but instead vaguely provides for "special protection from public disclosure under applicable law."[34]

10. Defendants challenge the portion of ¶18(a) of Plaintiffs' Proposed Order that allows confidential information to be disseminated to "the authors of the documents or the original source of the information, and/or the recipient of any such document, including all addressees and person listed as receiving copies or blind copies."[35] There is no rational reason why confidential information could not be shown to such persons, particularly where they will be subject to the Confidentiality Agreement and subject themselves to the jurisdiction of this Court. Not surprisingly, defendants offer no argument or authority to support this nonsensical challenge.

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32 *See* Defendants' Proposed Order ¶¶ 10-11.

33 Throughout defendants' motion, defendants describe various sections of Plaintiffs' Proposed Order as superfluous; in reality, Defendants' Proposed Order is nine pages long (excluding cover and signatures) and Plaintiffs' Proposed Order is seven pages long.

34 Defs' Proposed Order at 2.

35 *See* Defs' Mot., ¶17.

11. With respect to witnesses, ¶18(c) of Plaintiffs' Proposed Order that provides for dissemination of confidential information to "[w]itnesses in the action to whom disclosure is reasonably necessary for purposes of this litigation and who have signed the Confidentiality Agreement" effectively protects confidential information. The provision limits disclosure to that for "purposes of this litigation" just as Defendants' Proposed Order does,[36] and it requires any person to whom information is shown, other than counsel, parties and this Court, to sign the Confidentiality Agreement and subject themselves to the jurisdiction of this Court. Indeed, this Court has previously entered an agreed protective order with a similar provision.[37]

12. Defendants' condemnation of ¶18(c) and their overly restrictive dissemination provisions are no more than a thinly veiled attempt to exercise control over the litigation and gain insight into the work product of lead plaintiffs' counsel. Defendants offer no legal authority for this argument; instead they set forth pure conjecture.[38] Defendants' speculation that lead plaintiffs "could show Household's proprietary information to Household's competitors under the guise of 'reasonable necessity'" is offensive and unwarranted.[39] Moreover, given the "for purposes of this litigation" limitation in Plaintiffs' Proposed Order and the fact that all non-party witnesses to whom confidential information is shown will be required to sign the Confidentiality Agreement and thus be bound by this Court's order, the remainder of defendants' issues can be boiled down to the simple fact that defendants want the unfair

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36 *See* Defs' Proposed Order, ¶2.

37 *See Meyers v. Commonwealth Edison Co.*, No. 96 C 8486, 1998 U.S. Dist. LEXIS 19867, at *2 (N.D. Ill. Dec. 3, 1998) ("The protective order further provided the following regarding the disclosure of 'confidential' information: Only attorneys for the parties may disclose 'Confidential' materials, and those disclosures may be made ... to ... prospective witnesses who may be required to testify or be cross-examined at trial on facts contained in the 'Confidential' materials, including expert witnesses.").

38 *See* Defs.' Mot., ¶17.

39 *Id.*

advantage of having insight into and control over lead plaintiffs' litigation strategy. For example, under Defendants' Proposed Order, lead plaintiffs cannot even show a confidential document produced by Household to the non-party author of that document prior to his or her deposition unless Household's counsel essentially gives lead plaintiffs' counsel written permission to do so.[40] This is unreasonable. Defendants' wild predictions of the demise of the protections afforded by the protective order do not provide a sound basis for such a restriction.

B. **Defendants' Position**

13. Defendants request that the Court order that Defendants' discovery material is not used for any purpose other than this litigation and that Defendants' Confidential documents and information are not disclosed to non-parties outside of a select group of identified persons essential to this litigation. Many of the documents requested by Plaintiffs contain personal financial information of Household employees, Household's internal business strategies and other proprietary Household information, and personal financial information of non-parties, including Household's customers. This information is statutorily protected from disclosure and subject to protection under Fed. R. Civ. P. 26(c).

With respect to witnesses, Defendants' Proposed Order allows Confidential Information to be shown to witnesses "called to testify under oath in the context of a deposition."[41] Plaintiffs' Proposed Order contains a provision allowing parties to disclose Confidential Information to "witnesses in the action to whom disclosure is reasonably necessary for purposes of this litigation" and who have agreed to abide by the Order and purported authors, recipients or "original sources" of the Confidential Information.[42] Plaintiffs' provision would

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40 *See* Defendants' Proposed Order, ¶2 (iv) and (vi).

41 *See* Defendants' Proposed Order ¶ 2(iv).

42 *See* Plaintiffs' Proposed Order ¶ 19 (a), (c).

vitiate the protections a protective order is intended to provide. Under such a provision, outside the context of a deposition, Lead Plaintiffs could show Household's proprietary information (including sensitive personal financial information of Household customers or employees) to Household's competitors.[43] The Household Defendants would have no control over the dissemination of their sensitive information and would not know to whom such sensitive information was shown. Lead Plaintiffs' proposal is particularly troubling in this case, because Lead Plaintiffs have identified approximately ***260*** potential witnesses in their Initial Disclosures without addresses or business affiliation. Many of Lead Plaintiffs' alleged potential witnesses are media organizations and regulatory agencies. Thus, inclusion of such a provision would destroy any protection the protective order was intended to provide by allowing Lead Plaintiffs to unilaterally determine who should have access to unfiled discovery and permitting dissemination of Confidential Information to the press and regulators. Lead Plaintiffs have cited no precedent for such a provision.

III. CONFIDENTIALITY OF SUMMARIES, REPORTS AND OTHER MATERIALS

A. Plaintiffs' Position

14. Defendants further improperly and unnecessarily attempt to assert control over and gain premature insight into lead plaintiffs' counsel's work product through ¶9 of Defendants' Proposed Order. Paragraph 9 deems confidential "all summaries, studies, reports, illustrations, or other materials or ***communications of any kind***, created by experts, consultants or others, based upon, referring to, revealing, including, or incorporating in any way, in whole or in part, such Confidential Information to the extent such materials are based upon, refer to,

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[43] This is not mere speculation: Plaintiffs' Initial Disclosures list specific competitors of Houschold, including Associates First Capital, MBNA Consumer Services, Inc., and Providian Financial Corp., to name three. *See* Plaintiffs' Initial Disclosures, Part II, C (*See* Ex. H)

reveal, include or incorporate in any way such Confidential Information."[44] This paragraph is inappropriate and superfluous. First, defendants are not entitled to make the determination of how to treat plaintiffs' work product. Second, thus far, defendants have marked virtually every document "Confidential," essentially ensuring that every brief or document filed in this action falls under "Confidential Information." And finally, when read in conjunction with ¶12 of Defendants' Proposed Order, ¶9 in effect requires lead plaintiffs' counsel to "consult and cooperate" with defendants' counsel prior to filing a legal brief with this Court.[45] In other words, defendants would be entitled to review lead plaintiffs' legal briefs and thus lead plaintiffs' legal arguments prior to filing under the terms of Defendants' Proposed Order. Rule 26(c) does not envision this kind of protection. Plaintiffs' Proposed Order adequately protects all confidential information through the definition, limitations on use and dissemination, and provision for filing under seal.[46]

B. **Defendants' Position**

15. Lead Plaintiffs refuse to include a provision making "Confidential" any portions of summaries, reports, including expert reports, or other materials that incorporate "Confidential Information."[47] Without such a provision, Lead Plaintiffs could release Confidential Information by quoting or summarizing such Confidential Information in other materials without designating "Confidential" the particular portions or pages of such materials that incorporate such information. Without such a provision, the protections of the protective order would be eliminated.

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44 Defs.' Mot. at ¶9 (emphasis added).

45 *See* Defendants' Proposed Order, ¶¶9 and 12. Lead Plaintiffs' additional objections to ¶12 of Defendants' Proposed Order are addressed in §VI.

46 *See* Pls' Proposed Order, ¶¶3, 18-20, and 23.

47 Defendants' Proposed Order ¶ 9.

IV. THE PARTIES' DIFFERING VIEWS ON WHETHER THE PROTECTIVE ORDER SHOULD INCLUDE A PROVISION FOR TREATMENT OF INADVERTENT PRODUCTION

A. Plaintiffs' Position

16. The seven-paragraph provision for the inadvertent production of privileged information contained in Defendants' Proposed Order is also superfluous.[48] First, Fed. R. Civ. P. 26(c) does not contain a provision addressing this issue. Second, ¶¶17-23 improperly attempt to circumvent case law from this district that addresses the inadvertent production of privileged material, whether the issue of privilege is disputed or not.[49] Reliance on the voluminous production of documents does not relieve defendants of their burden regarding privileged materials.[50] For these reasons, ¶¶17-23 in Defendants' Proposed Order should not be included in the protective order.

B. Defendants' Position

17. Plaintiffs' Proposed Order does not provide any procedure for handling

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48 *See* Defs' Proposed Order, ¶¶17-23.

49 *E.g., Mattenson v. Baxter Healthcare Corp.*, No. 02 C 3283, 2003 U.S. Dist. LEXIS 21373, at *7-*8 (N.D. Ill. Nov. 25, 2003 (setting forth factors for determination of whether production was inadvertent) (Pls' Ex. E); *Harmony Gold U.S.A., Inc. v. Playmates Toys, Inc.*, 169 F.R.D. 113, 115 (N.D. Ill. 1996) (setting forth three-part inquiry for ruling on motions involving the inadvertent production of claimed privileged documents); *Graco Children's Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.*, No. 95 C 1303, 1995 U.S. Dist. LEXIS 8157, at *17-*20, (N.D. Ill. June 13, 1995) (setting forth factors for determination of whether production was inadvertent) (Pls' Ex. F); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1995 U.S. Dist LEXIS 17110, at *6-*8 (N.D. Ill. Nov. 14, 1995) (setting forth factors for determination of whether production was inadvertent and considering whether material produced did in fact contain privileged material) (Pls' Ex. G); *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2001 WL 1571447, at *2-*3 (N.D. Ill. Dec. 7, 2001) (setting forth factors for determination of whether production was inadvertent and considering whether material produced did in fact contain privileged material).

50 Defendants' argument that lead plaintiffs seek documents from 1300 branches of a Household business unit is irrelevant and incorrect. First, while the volume of discovery may be a factor in determining inadvertence, it does not warrant a protective order provision circumventing case law. Second, lead plaintiffs are trying to work with defendants in limiting the requests and have offered as a compromise that defendants' response to certain discovery regarding documents derive from a sample of 100 or 150 branches instead of from all 1300.

the inadvertent production of privileged documents. Such a procedure is essential in an action as large as this one, particularly where Lead Plaintiffs have sought millions of pages of documents through extremely broad discovery. For example, Lead Plaintiffs have indicated that they intend to seek documents from 1300 branches of a Household business unit.

The Defendants will review and produce documents with due care. However, in the event that privileged material is inadvertently produced, the Defendants cannot risk Lead Plaintiffs' use of such material before the parties or the Court addresses any privilege claims regarding such material. Until the parties or the Court can resolve such an issue, Lead Plaintiffs should refrain from using or otherwise disclosing that material. The Defendants' Proposed Order provides a reasonable procedure for resolving claims of inadvertent production of privileged documents.[51]

V. NOTICE REQUIREMENTS REGARDING MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

A. Plaintiffs' Position

18. Plaintiffs' Proposed Order provides for prompt notice of subpoenas to the producing party and for a reasonable period of time subject to applicable law, for the producing party to seek to quash the subpoena or otherwise move to protect confidential information.[52] Nothing more is necessary. Defendants' only objection to this paragraph is that it does not include a provision for notifying the entity serving or issuing the subpoena that the information

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[51] *See* Defendants' Proposed Order ¶¶ 17-23. This procedure includes written notice and a requirement that the parties meet and confer in an attempt to resolve any dispute regarding the claim of privilege or protection before approaching the Court. *See id.* This is consistent with the Federal Rules' and the Local Rules' requirements that parties meet and confer with regard to discovery disputes.

[52] *See* Pls' Proposed Order, ¶ 25.

sought is subject to the provisions of a protective order.[53] Defendants' argument that this omission "eliminates an important means of protection" for confidential information is without merit.[54] Whether the subpoenaing party is aware of the existence of the protective order is irrelevant because the subpoenaing party has no obligations under a protective order to which it is not a party.

19. Defendants' Proposed Order also includes the unfeasible condition that the party receiving the subpoena gives the producing party notice within 48 hours.[55] To provide a more definite time and as a compromise, lead plaintiffs proposed one week in a meet and confer. Defendants did not agree. It is easy to imagine a scenario where a party would inadvertently violate such a stringent time frame. For example, a subpoena contemplated by this provision would be served upon plaintiffs' counsel under a caption different from the caption of this case and would likely be served only upon the lead partner not necessarily running the case. Defendants' 48-hour notice period neither takes this into account nor allows for the distribution method, Friday afternoon service, or holidays.

B. **Defendants' Position**

20. The Defendants' Proposed Order provides that, in the event that Confidential Information is subpoenaed or ordered produced, notice should be given to the entity serving or issuing the subpoena or order that the information sought is subject to the provisions of a protective order.[56] Plaintiffs' Proposed Order does not provide for any such notice and thus eliminates an important means for protecting Confidential Information. In addition, Defendants'

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53 *See* Defs' Mot., ¶20.

54 *See id.*

55 *See* Defs' Proposed Order, ¶15.

56 *See* Defendants' Proposed Order ¶ 15.

Proposed Order originally provided that the person or entity receiving the subpoena provide written notice within 48 hours to the party who originally produced the material. Lead Plaintiffs proposed that written notice be given within one week rather than 48 hours.

The Defendants propose a compromise, whereby the subpoena recipient would have to give written notice of the subpoena to the producing party within three (3) business days after receiving the subpoena and at least one week before the recipient was required or otherwise wished to respond to the subpoena. This compromise fulfills two objectives. *First*, it ensures that notice of such a subpoena is provided to the producing party as early in the process as possible, which facilitates the producing party's ability to determine how to respond to such a subpoena as quickly as possible. *Second*, it ensures that the producing party receives notice of such a subpoena far enough in advance of a planned or required response to the subpoena to take whatever action it deems necessary.

VI. PROTOCOL FOR FILING DOCUMENTS UNDER SEAL PURSUANT TO THE CONFIDENTIALITY ORDER

A. Plaintiffs' Position

21. Lastly, defendants challenge the provisions in Plaintiffs' Proposed Order governing the filing of confidential information.[57] Defendants imply that Plaintiffs' Proposed Order provides for less public access to materials filed in this action than does Defendants' Proposed Order by stating that Plaintiffs' Proposed Order "provides for blanket filing under seal of documents containing Confidential Information."[58] This is far from true. Lead plaintiffs believe that nothing should be filed under seal in this case. Lead plaintiffs included this provision for defendants' protection. Moreover, Plaintiffs' Proposed Order provides for the

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[57] *See id.* at ¶¶23-24.

[58] *See* Defs.' Mot., ¶23.

filing under seal of ***only*** those pages of a document containing or making reference to confidential information and provides for the ***filing of redacted pages in the public record.***[59] Defendants' Proposed Order does not.[60]

22. The provision of Defendants' Proposed Order requiring that the parties "consult and cooperate so as to obtain leave of the Court" prior to filing confidential material[61] is unnecessary and unduly burdens both the parties and the Court. Defendants have designated effectively everything "Confidential" thus far. Plaintiffs' Proposed Order requires that the party designating material as confidential "must take care to limit such designation to specific material that qualifies under the appropriate standards."[62] Accordingly, a conference between the parties to determine whether an item should be filed under seal should not be necessary, nor should the Court be required to be burdened with making such a determination. Moreover, compelling the parties to meet and confer and agree prior to filing confidential material would allow the non-filing party unfair insight into and control over the filing party's work product. For instance, in connection with this filing, lead plaintiffs considered showing this Court several examples of materials marked "confidential" by defendants that lead plaintiffs believe should not be so marked. If defendants had their way, lead plaintiffs would have been required to share this strategy with defendants prior to filing. This meet and confer provision is particularly troublesome given the inherent one-sidedness – materials produced by defendants will be the main subjects of such contemplated meet and confers, and lead plaintiffs will be the party desiring to file such confidential material produced by defendants. Such a provision finds no

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59 *See* Pls' Proposed Order, ¶23.

60 *See* Defs' Proposed Order, ¶¶12-14.

61 *Id.* at ¶12.

62 *See* Pls' Proposed Order, ¶10.

support in the Federal Rules of Civil Procedure.

B. **Defendants' Position**

23. Unlike Plaintiffs' Proposed Order, which provides for blanket filing under seal of documents containing Confidential Information,[63] Defendants' Proposed Order requires that the parties obtain leave of Court to file such documents under seal.[64] Thus, under Defendants' Proposed Order, the Court will be able to make a specific determination at a particular time as to whether a document should be protected from public access.

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[63] *See* Plaintiffs' Proposed Order ¶ 23.

[64] *See* Defendants' Proposed Order ¶¶ 12-14.

Dated: August 19, 2004
Chicago, Illinois

Respectfully submitted,

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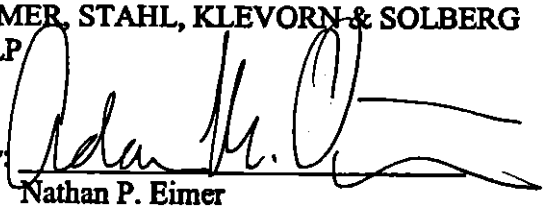
By: 
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