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 20, 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 ***Defendants' Reply In Further Support of Motion to Compel Lead Plaintiffs to Comply With Their Obligations Under Fed. R. Civ. P. 26(a)(1)***, a copy of which is served upon you.

Dated: August 20, 2004

Respectfully submitted,

By: _____

Nathan P. Eimer
Adam B. Deutsch
Eimer Stahl Klevorn & Solberg LLP
224 S. Michigan Avenue, Suite 1100
Chicago, Illinois 60604
(312) 660-7600

David R. Gelfand
Michael L. Hirschfeld
Douglas W. Henkin
Stacey J. Rappaport
Milbank Tweed Hadley & McCloy LLP
1 Chase Manhattan Plaza
New York, NY 10005
Tel: (212) 530-5000

Attorneys for Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar

174

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT 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. Guzmán Magistrate Judge Nan R. Nolan

DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO COMPEL LEAD PLAINTIFFS TO COMPLY WITH THEIR OBLIGATIONS UNDER FED. R. CIV. P. 26(a)(1)

Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (collectively, the "Household Defendants") and defendant Arthur Andersen LLP ("Andersen") (collectively with the Household Defendants, the "Defendants"), in response to Lead Plaintiffs' Opposition to Defendants' Motion to Compel, dated August 17, 2004 ("Plaintiffs' Opposition") and in further support of Defendants' Motion to Compel Lead Plaintiffs to Comply With Their Initial Discovery Obligations Under Federal Rule of Civil Procedure 26(a)(1) (the "Motion to Compel"), respectfully state as follows:

1. Lead Plaintiffs claim that their initial disclosures — which contain *no* information regarding damages — "were based upon the information available to them at the time, after making a reasonable inquiry" and that the information the Defendants seek is "work product of non-testifying experts" and involves a "complex" computation of damages they need

174

not yet produce.[1] Lead Plaintiffs' cavalier assertions and refusal to comply with Rule 26(a)(1) cannot be squared with the facts or the Federal Rules of Civil Procedure.

2. As an initial matter, Lead Plaintiffs mischaracterize the relief the Defendants seek. All the Defendants want Lead Plaintiffs to disclose is what Congress and the Supreme Court have unequivocally said they *must* disclose.[2] Notwithstanding Lead Plaintiffs' strawman argument, the Defendants have not demanded the production of privileged documents. This makes Lead Plaintiffs' submission entirely irrelevant.

3. Not surprisingly, Lead Plaintiffs strenuously avoid the real issue raised by their refusal to comply with Rule 26(a)(1). Lead Plaintiffs filed a complaint in which they alleged, among other things, that "Glickenhaus purchased Household securities during the Class Period ... and suffered substantial damage as a result thereof."[3] Lead Plaintiffs are not permitted to make such an allegation without a factual basis.[4] Either they had such a factual basis or they did not, and if they did Rule 26(a)(1) required them to disclose it within the time set for initial disclosures unless they objected at the Rule 26(f) conference, which they did not do.[5] And Lead Plaintiffs' argument that there is a difference between "[l]osses" and "the computation of

---

1 *See* Plaintiffs' Opposition ¶¶ 1, 4, 5.

2 *See* Fed. R. Civ. P. 26(a)(1) ("a party must, without awaiting a discovery request, provide to other parties ... a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered").

3 [Corrected] Amended Consolidated Class Action Complaint ("Complaint") ¶ 36(a).

4 *See* Fed. R. Civ. P. 11(b)(3).

5 *See* Fed. R. Civ. P. 26(a)(1); *see also Crouse Cartage Co. v. Nat'l Warehouse Inv. Co.*, Cause No. IP 02-071 C T/K, 2003 U.S. Dist. LEXIS 478, at *3 (S.D. Ind. Jan. 13, 2003) (Unreported Cases Attached as Exhbit A) (noting that Rule 26(a)(1) "clearly requires that the initial disclosures be complete and detailed" and that "[a] major purpose of the [rule] is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information" (internal quotes omitted)), *aff'd*, 2003 U.S. Dist. LEXIS 9066 (S.D. Ind. Apr. 10, 2003) (cited at Plaintiffs' Opposition ¶ 4).

damages for a class"[6] is a red herring. Lead Plaintiffs filed a motion for class certification in which they alleged "Plaintiffs, like all other Class members, suffered losses from their transactions in Household equity and debt securities during the Class Period."[7] Lead Plaintiffs also had to have, and must disclose, a factual basis for those allegations.[8]

4. Lead Plaintiffs' arguments also defy common sense. Lead Plaintiffs admit that they are "sophisticated investors who ... have the ability to keep track of the ***losses*** in their portfolio... ."[9] For example, Lead Plaintiff Glickenhaus & Co. is an SEC-registered investment advisor and is required by federal law to keep careful records of its investments and even make quarterly filings regarding those investments.[10] Lead Plaintiffs also acknowledge that the elements of a damages computation would include data regarding Lead Plaintiffs' purchases and sales of Household securities,[11] data Lead Plaintiffs admit they have.[12] Just because Lead Plaintiffs *might* choose to rely on testimony by a proposed expert *in the future* does not mean

---

6 *See* Plaintiffs' Opposition ¶ 6.

7 *See* Plaintiffs Memorandum of Law in Support of Motion for Class Certification, dated July 7, 2004, p. 14; *see also* Complaint ¶ 349 ("Plaintiffs *and the class* have suffered damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for Household securities." (emphasis added)); *id.* ¶ 350 ("As a direct and proximate result of these defendants' wrongful conduct, plaintiffs *and the other members of the class* suffered damages in connection with their purchases of Household securities during the Class Period." (emphasis added)); *id.* ¶ 392 ("plaintiffs AMS Fund and West Virginia Fund *and the members of the Securities Act subclass* suffered substantial damages in connection with their purchases of the Debt Securities" (emphasis added)).

8 *See* Fed. R. Civ. P. 11(b)(3); Fed. R. Civ. P. 26(a)(1); *Crouse Cartage Co.*, 2003 U.S. Dist. LEXIS 478, at *3.

9 *See* Plaintiffs' Opposition ¶ 6 (emphasis in original).

10 *See, e.g.*, 15 U.S.C. § 78m(f); 15 U.S.C. § 80b-4; 17 C.F.R. § 240.13f-1; 17 CFR § 275.204-2.

11 *See* Plaintiffs' Opposition ¶ 5.

12 In the case of Lead Plaintiffs such as Glickenhaus, they are required by federal law to make and keep such records. *See supra* note [10].

they can escape disclosing factual information they admit they have *now*.[13] If accepted, Lead Plaintiffs' argument would render Rule 26(a)(1) a nullity.[14]

5. Lead Plaintiffs' argument that they should be excused from complying with Rule 26 because "[c]omputation of damages is made even more complicated by the five-year Class Period"[15] is perverse. Lead Plaintiffs chose the definition of the class they have proposed knowing what that choice would mean under the Federal Rules of Civil Procedure. They cannot in one breath ask the Court to certify a five-year, multi-security class and in the next breath complain that they should be excused from providing discovery mandated by the rules relating to the damages they allegedly suffered because the class *they* proposed supposedly makes such discovery "complicated." Lead Plaintiffs' argument is completely contrary to the

---

[13] Lead Plaintiffs' argument is simply a variant of the thoroughly discredited argument that a party can make a document privileged by giving it to his or her attorney. That argument fails because *facts* are not privileged. *See generally Computer Assoc. Int'l v. Quest Software, Inc.*, No. 02 C 4721, 2003 WL 22159022, at *1 (N.D. Ill. Sept. 17, 2003) ("Plaintiffs cannot use the work product privilege protect the underlying facts in the dispute from being discovered."); *Thomas & Betts Corp. v. Panduit Corp.*, No. 93 C 4017, 1997 WL 603880, at *6 (N.D. Ill. Sept. 23, 1997) ("potential distributor sales losses ... are straightforward underlying facts that are not protected from disclosure under the well-settled work product doctrine."). As even Lead Plaintiffs' authority acknowledges, "documents created in the ordinary course of business are not protected work product." *Crouse Cartage Co.*, 2003 U.S. Dist. LEXIS 478, at *5 (internal quotes omitted); *see also In re Bank One Sec. Litig.*, 209 F.R.D. 418, 425 (N.D. Ill. 2002) (similar); *Jumper v. Yellow Corp.*, 176 F.R.D. 282, 287 (N.D. Ill. 1997) (similar).

[14] Also defying common sense is Lead Plaintiffs' assertion that, although Andersen "advised plaintiffs that it had the same issues with plaintiffs' Rule 26(a)(1) disclosures as were raised in Household defendants' July 2, 2004 letter," *see* Plaintiff Opposition at n. 2, Andersen nonetheless is in violation of its meet and confer obligations because Andersen did not schedule a subsequent conference specifically titled "meet and confer" to address those concerns. Andersen raised its concerns to Lead Plaintiffs and Lead Plaintiffs gave no indication that their response to Andersen would be any different than their response to the Household defendants. The idea that Andersen did not adequately meet and confer with Lead Plaintiffs is simply another one of Lead Plaintiffs' multiple red herrings.

[15] *See* Plaintiffs' Opposition ¶ 5.

governing principles of the Federal Rules of Civil Procedure.[16]

6. Finally, Lead Plaintiffs' reliance on *Crouse Cartage* is factually misplaced. The *Crouse Cartage* defendants specifically demanded a "rough market analysis" of damages performed by a non-testifying expert. Not only have the Defendants not demanded anything like that, but in enacting Rule 26(a)(1) Congress and the Supreme Court expressly required that Lead Plaintiffs provide the discovery at issue. Even worse, the *Crouse Cartgage* plaintiff had provided disclosures with respect to damages computations,[17] whereas Lead Plaintiffs have refused to make *any* such disclosure.

7. For all the foregoing reasons, as well as those set forth in the Motion to Compel, this Court should order Lead Plaintiffs to immediately supplement their initial disclosures to state the amount of their claimed damages, provide the computations on which their damages claims are based, and produce all evidence on which their damages computations are based (including all materials bearing on the nature and extent of their alleged injuries).

Dated: August 20, 2004
Chicago, Illinois

Respectfully submitted,

EIMER, STAHL, KLEVORN & SOLBERG LLP

By: _____

Nathan P. Eimer
Adam B. Deutsch
224 South Michigan Avenue
11th Floor
Chicago, Illinois 60604
(312) 660-7600

---

16 *See* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

17 *See Crouse Cartage*, 2003 U.S. Dist. LEXIS 478, at *9 ("Crouse provided two formulas and an estimate of damages in its initial disclosures").

-and-

MILBANK, TWEED, HADLEY & McCLOY LLP
David R. Gelfand
Michael L. Hirschfeld
Douglas W. Henkin
1 Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000
Attorneys for defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar

MAYER, BROWN, ROWE & MAW LLP
LLP

By: _____
Stanley J. Parzen
Lucia Nale
190 South LaSalle Street
Chicago, IL 60603-3441
(312) 782-0600
Attorneys for Arthur Andersen LLP

SEE CASE FILE FOR EXHIBITS