**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF ILLINOIS**

**EASTERN DIVISION**

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

**LEAD PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL RESPONSES TO FIRST SET OF INTERROGATORIES FROM HOUSEHOLD DEFENDANTS**

Lead plaintiffs respectfully move this Court for an order compelling defendants Household International, Inc. ("Household"), Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar ("defendants") to supplement their responses to Plaintiffs' First Set of Interrogatories ("Interrogatories") with a meaningful explanation of the factual basis for defendants' affirmative defenses or in the alternative for an order striking defendants' affirmative defenses for failure to answer the Interrogatories.

## I. INTRODUCTION

On July 2, 2004, defendants answered the Corrected Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("Complaint"). In their answer, defendants asserted 22 affirmative defenses to the claims alleged in plaintiffs' Complaint. On July 16, 2004, plaintiffs served defendants with the Interrogatories seeking "all facts" upon which defendants based their affirmative defenses, the identity of all persons with knowledge of these facts, and the identity of all documents which support defendants' affirmative defenses. *See* ¶9 of the Declaration of Luke O. Brooks in Support of Plaintiffs' Compliance with Local Rule 37.2 ("Brooks Decl."), filed concurrently herewith. Defendants initially refused to answer the Interrogatories on the grounds that they needed to undertake discovery from plaintiffs. Brooks Decl., ¶4. As a compromise, plaintiffs requested responses to 13 affirmative defenses (1-7, 9-10, 12-14, 18) for which defendants controlled most, if not all, of the information necessary to provide a response to the Interrogatories and agreed, at that time, to defer responses on the nine remaining affirmative defenses (8, 11, 15-17, 19-22). Brooks Decl., ¶5.

Defendants have easy access to the information required to provide sufficient responses to the Interrogatories, yet they have responded by directing plaintiffs to scores of voluminous documents, in essence telling plaintiffs "you figure it out." Brooks Decl., ¶9. Defendants also refuse to provide ***any*** factual basis (through documents or otherwise) for nine of their affirmative

defenses (8, 11, 15-17, 19-22). *Id*. They also refuse to identify all persons with knowledge of these facts and documents supporting these affirmative defenses.

To date – despite the fact that defendants possess the information necessary to respond, the lapse of 13 months since the Interrogatories were propounded, and numerous meet and confers – defendants, without justification – have refused to provide a meaningful explanation of the factual basis for their affirmative defenses in response to plaintiffs' Interrogatories. Brooks Decl., ¶¶3, 7, 9, 17.

Plaintiffs held meet and confers with defendants on August 26, 2004, October 20, 2004, January 31, 2005 and July 18, 2005 to attempt to resolve this issue. Brooks Decl., ¶¶3, 5-6, 11, 14. Still, defendants have refused to provide the factual basis for their affirmative defenses, consistently maintaining (1) it is too early in the discovery process, and (2) that they need discovery from plaintiffs. Brooks Decl., ¶¶4, 7, 9, 12,14-17. Both of defendants' excuses are weak. Discovery is scheduled to end in less than four months and courts require that parties answer with ***whatever*** information they possess at the time affirmative defenses are asserted. *Bellingham v. Woodward Governor Co.*, Case No. 03 C 50190, 2005 U.S. Dist. LEXIS 4451, at *6 (N.D. Ill. Feb. 7, 2005).

The information sought by plaintiffs is essential to understand the basis of the defenses asserted, improve the focus of the parties' discovery, move this case toward trial and equip the Court to more reliably contain discovery excesses. Defendants have refused to provide this information. Brooks Decl., ¶¶9, 17. As with other discovery in this litigation, defendants' dilatory tactics are inappropriate, and should no longer be countenanced at this late stage of discovery. With the fact discovery cut-off only four months away, it is vital that plaintiffs know what factual basis, if any, defendants have for their affirmative defenses.

## II. ARGUMENT

### A. Discovery Standard

"The Federal Rules of Civil Procedure contemplate liberal discovery, and 'relevancy' under Rule 26 is extremely broad." *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 02 C 7345, 2003 U.S. Dist. LEXIS 20267, at *4 (N.D. Ill. Nov. 10, 2003).[1] The Court is expressly authorized to take steps to manage the litigation before it in an efficient and expeditious manner. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 662 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 877 (2005).

"Under Rule 33(b), interrogatories must be answered fully and include all information within the party's control or known by the party's agents." *Bell*, 2005 U.S. Dist. LEXIS 4451, at *6. When a party relies on Rule 33(d), instead of answering interrogatories, it is the moving party's burden of persuasion to show that Rule 33(d) disclosures are "somehow inadequate to the task of answering the discovery, whether because the information is not fully contained in the documents, is too difficult to extract, or other such reasons." *SEC v. Elfindepan, S.A.,* 206 F.R.D. 574, 576 (M.D.N.C. 2002). If the moving party persuades the court, the burden shifts to the producing party to justify the use of business records in lieu of answers. *Bell*, 2005 U.S. Dist. LEXIS 4451, at *7.

Here, plaintiffs meet their burden of persuasion because defendants' Interrogatory responses are inadequate, the designated documents do not fully contain the information sought by the Interrogatories and the burden of deriving the answers from the documents is ***not*** substantially the same for both parties. Plaintiffs cannot elicit the factual basis for defendants' affirmative defenses from the scores of documents designated for each response. Plaintiffs' motion should, therefore, be granted.

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[1] Here, as elsewhere, citations and footnotes have been omitted and any emphasis added, unless otherwise indicated.

**B. Defendants Must Provide the Factual Basis for Their Affirmative Defenses**

Plaintiffs are entitled to know the factual basis for the affirmative defenses asserted by defendants. *See, e.g.*, *United States EEOC v. Sedita*, No. 87 C 2790, 1988 U.S. Dist. LEXIS 2024, at **1-2 (N.D. Ill. Mar. 2, 1988) ("order[ing] the defendants to provide the plaintiff with the facts upon which they base their affirmative defenses"). Such information is properly sought and obtained through interrogatories. *Id.* Yet defendants have flatly refused to provide any factual basis for their affirmative defenses in responding to plaintiffs' Interrogatories.

Presumably, defendants had some facts in order to support a good faith assertion of their affirmative defenses as required under Fed. R. Civ. P. 11. *Profile Publ'g & Mgmt. Corp. APS v. Musicmaker.com, Inc.*, 242 F. Supp. 2d 363, 367 (S.D.N.Y. 2003) (Rule 11 violated where music company's affirmative defenses were asserted without reasonable inquiry). As such, defendants have a duty to respond to the Interrogatories, either in whole or in part with whatever information is currently in their possession. *Audiotext Commc'ns Network v. US Telecom, Inc.*, Civil Action No: 94-2395-GTV, 1995 U.S. Dist. LEXIS 15396, at *5 (D. Kan. Oct. 5, 1995).

Defendants have refused to supplement their responses to the Interrogatories on the grounds that defendants must perform additional discovery on plaintiffs before the factual basis for their affirmative defenses can be provided. Brooks Decl., ¶¶11-12, 15, 17. First, defendants' adamant refusal to answer the Interrogatories without additional discovery from plaintiffs, is baseless. *Audiotext*, 1995 U.S. Dist. LEXIS 15396, at *5 (holding that defendant could not refuse to answer interrogatories regarding its affirmative defenses "solely because it has not obtained to its satisfaction other discovery"). Moreover, defendants' argument completely ignores the fact that most of the affirmative defenses are completely unrelated to any information that might be gleaned from future discovery of plaintiffs, but instead are based on information exclusively in the possession, control and custody of defendants. Brooks Decl., ¶¶5, 7. For example, responses to

affirmative defenses 1-7, 9, 10, 12-14, 18 could be made without discovery from plaintiffs. The patently obvious ones include defendants' affirmative defenses 2 (statute of limitations),[2] 3 (no knowledge of falsity), 4 (acts done in good faith), 5 (no duty to disclose), 6 (intervening causes), 10 (individual defendants acted in good faith), and 13 (safe harbor/bespeaks caution). Brooks Decl., ¶9.

Despite defendants' contentions, they possess the factual information underlying their affirmative defenses, or can easily access this information by reviewing Household's documents and interviewing Household's employees. Defendants concede as much in a letter dated October 29, 2004, stating, "[m]any of the answers to the interrogatories you seek can be derived from documents that Household will be gathering and producing in the coming weeks and months." Brooks Decl., ¶7. Yet defendants continue to maintain their position that the Interrogatories are premature and that responses are not possible without receiving discovery from plaintiffs. Brooks Decl., ¶15. Clearly defendants possess the information necessary to provide meaningful responses to the Interrogatories, but refuse to do so. Brooks Decl., ¶7. Fundamental fairness, along with legal authority in this district, dictates that defendants flesh out the contentions associated with these affirmative defenses in sufficient detail to allow plaintiffs to conduct meaningful discovery. *Bell*, 2005 U.S. Dist. LEXIS 4451, at *6. At the very minimum, defendants must have possessed ***some*** facts to support their affirmative defenses at the time they asserted them on July 2, 2004, or not. Plaintiffs are entitled to responses outlining that factual basis.

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[2] Ironically, although defendants claim not to have information to state all facts supporting this defense, they moved to dismiss a portion of plaintiffs' case on statute of limitations grounds. Brooks Decl., ¶18. Thus, defendants' failure to provide responses when they have the information can only mean that defendants are improperly withholding this information from plaintiffs to continue delaying the discovery process.

**C. Plaintiffs' Interrogatories Are Not Premature**

The stage of discovery does not prevent defendants from responding to the Interrogatories by actually stating all facts supporting their affirmative defenses (as opposed to simply referencing documents). *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985). Plaintiffs seek information about defendants' own defenses. As discussed above, defendants can easily access the information needed to respond to the Interrogatories by reviewing Household's records and interviewing Household's employees. Brooks Decl., ¶7. Because there is no impediment for defendants to provide a proper response, defendants should be required to set forth, in textual form, the factual basis underlying their affirmative defenses.

Responses to the Interrogatories will help clarify the issues in the case, improve the focus of the parties' discovery and equip the Court to more reliably contain discovery excesses. *In re Convergent*, 108 F.R.D. at 336. The discovery cut-off in this case is four months away. Substantive depositions – which have been delayed due to defendants' failure to produce electronic documents and other documents relevant to the witnesses – will commence shortly. In a case such as this, the factors which courts employ to justify compelling responses to interrogatories before the end of discovery include the complexity of the case, the subtlety of the theories, as well as the dearth of information regarding the claim provided in the pleading. *Id.* at 337.

Here, these factors all weigh in favor of a meaningful explanation of the factual basis for defendants' affirmative defenses. This securities class action suit is a complex case involving a myriad of issues, including numerous public disclosures relating to Household's financial statements necessary under federal securities laws, lending practices, accounting treatment, loan reaging, and investigations by governmental agencies over a five-year class period. Similarly, defendants' affirmative defenses involve such subtlety as the timing and level of knowledge regarding these issues. Brooks Decl., ¶9. Receiving the factual basis for these affirmative defenses will help clarify

the issues in the case and improve the focus of the parties' discovery as they begin substantive depositions.

**D. Defendants' Reliance on Rule 33(d) Is Not Appropriate**

Defendants' reliance upon the business records option of Rule 33(d) in lieu of providing a response is improper because the documents designated contain a multitude of different facts giving rise to a slew of possible answers, improperly shifting the burden of ascertaining the factual basis for affirmative defenses onto plaintiffs. Brooks Decl., ¶9. Requests for statements of fact are not the type of interrogatories that lend themselves to answer by use of the business records option. *Elfindepan*, 206 F.R.D. at 577-78. Rule 33(d) was intended to be used where interrogatories make broad inquiries and numerous documents must be consulted to ascertain facts such as identities, quantities, data, action, tests, and results. *Id.* at 577. Use of Rule 33(d) is simply not appropriate here.

Defendants' responses to the Interrogatories do not attempt to explain the factual basis of their defenses, but rather point to documents from which the answers purportedly could be derived by plaintiffs. The documents designated by defendants were comprised of press releases, media articles, Securities and Exchange Commission ("SEC") filings, analyst reports, correspondence, presentations, reports, memos, policies, meeting minutes, and roadshow materials – none of which readily reveals the factual basis for defendants' affirmative defenses. For example, defendants designated 699 pages of essentially "First Call Analyst Reports" as a response to each interrogatory seeking "all facts" defendants rely upon for affirmative defenses 2, 3, 5, and 7. Brooks Decl., ¶9. These 699 pages of "First Call Analyst Reports" contain an enormous amount of facts relating to practically every aspect of Household's business operations and financials. There is no way for plaintiffs to know what facts are relevant or which facts go to which defense.

Moreover, Rule 33(d) provides defendants the option to produce business records in response to interrogatories ***only*** where the burden of deriving the answers is substantially the same for both parties. *Bell*, 2005 U.S. Dist. LEXIS 4451, at **7-8. That is not the case here as defendants are far more familiar with Household's internal policies and reports which comprise its business records as well as the witnesses and occurrences which underlie the theories of their affirmative defenses. In addition, defendants already have culled the documents for answers to the Interrogatories and have information outside the documents which are responsive to the Interrogatories. The burden on plaintiffs to obtain the information is infinitely greater. *Elfindepan*, 206 F.R.D. at 577 (holding that requests for statements of facts "do not lend themselves to answer by use of Rule 33(d)"). Where an answer is readily available in a more convenient form, the business records option should not be used to avoid giving the information to the party seeking discovery. *ITT Life Ins. Co. v. Thomas Nastoff, Inc.*, 108 F.R.D. 664, 666 (N.D. Ind. 1985). Indeed, what has become apparent from the repeated meet and confers is that defendants' goal is to hide the ball, and stall discovery.

Plaintiffs' Interrogatories seek "all facts" upon which defendants based their affirmative defenses. Merely designating documents from which an answer can be derived does not "state all facts." *Elfindepan*, 206 F.R.D. at 577; *Cornell Research Found. v. Hewlett Packard Co.*, 223 F.R.D. 55, 66-67 (N.D.N.Y. 2003); *Natural Resources Defense Council, Inc. v. Fox*, 94 Civ. 8424 (PKL) (HBP),1996 U.S. Dist. LEXIS 12810, at **10-11 (S.D.N.Y. Aug. 30, 1996). A search of documents such as press releases, media articles, SEC filings, analyst reports, correspondence and roadshow materials is unlikely to reveal the contentions underlying the affirmative defense or the statements of fact underlying those contentions. *See, e.g., Elfindepan*, 206 F.R.D. at 577 (holding that reliance on Rule 33(d) to respond to interrogatories seeking contentions and statements of fact is improper). It is not possible for plaintiffs to derive answers regarding defendants' affirmative defenses from

voluminous documents such as Household's 156-page SEC Form 10-K.[3] *See In re Savitt/Adler Litig.*, 176 F.R.D 44, 49-50 (N.D.N.Y. 1997) (documents normally reveal evidence, not a party's contentions or statement of facts). Indeed, two people could sit down with the documents and come up with two entirely different interrogatory answers. This is not the point of discovery. Plaintiffs are not required to jump through hoops and undertake such a burden to discover why defendants believe their defenses are valid. *Daiflon, Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 226 (10th Cir. 1976). The information required to respond to these Interrogatories is in the possession or control of defendants and plaintiffs have the right to receive it in a more convenient form. *Id.* Defendants' gamesmanship should not be countenanced at this late stage of discovery.

## III. CONCLUSION

Defendants are required to set forth, in textual form, their contentions regarding their affirmative defenses and the factual support for them. Anything less is an attempt to "hide the ball" and does nothing to narrow or sharpen the issues as the parties progress through discovery.

[3] Consistent with their disregard for discovery rules and procedures, defendants have marked this publicly-filed SEC Form 10-K as "Confidential" under the Protective Order.

Therefore, defendants should be compelled to completely answer plaintiffs' Interrogatories and provide a meaningful explanation of the factual basis for their affirmative defenses, or in the alternative, defendants' affirmative defenses should be stricken in their entirety.

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Respectfully submitted,

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