UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION FOR COSTS, EXPENSES AND FEES

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Household" or "Defendants"), in support of their motion for fees and expenses pursuant to Federal Rule of Civil Procedure 30(g)(1) and 28 U.S.C. § 1927.[1]

INTRODUCTION

Although there are many reasons why Plaintiffs' latest instance of wanton gamesmanship in groundlessly cancelling depositions they noticed and subpoenaed for Chicago after Household's New York counsel had left for Chicago to prepare for and attend those depositions is sanctionable, at bottom lies the failure of Plaintiff's lead discovery counsel — Azra Mehdi, Esq. — to pay attention. She took the deposition of Household's Rule 30(b)(6) witness Christine Cunningham, during which she asked numerous questions about the status of Household's various e-mail systems. Ms. Cunningham testified that during the relevant time there were two: Housemail and Lotus Notes. (Cunningham Dep. at 18:7-11).[2] As Ms. Cunningham explained to Ms. Mehdi, Lotus Notes emails are readily available but Housemail, a system Household phased out and has not used since October 2002, no longer exists. (Cunningham Dep. at 18:12-13). Moreover, Ms. Cunningham testified that the Lotus Notes backup tapes were retained initially for six months and later indefinitely (Cunningham Dep. at 55:9-14; 74:13-24), while the Housemail backup tapes were only retained for twenty-one days. (Cunningham Dep. at 55:18-20; 75:22-24).

Ms. Mehdi took the deposition of Ms. Cunningham on November 11, 2004 and presumably got the transcript shortly thereafter. If Ms. Mehdi had either paid attention to

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1 Defendants will submit a schedule detailing the fees and costs incurred when and if so directed by the Court.

2 The relevant portions of Ms. Cunningham's deposition transcript are attached to the Affidavit of Landis C. Best sworn to October 13, 2005 ("Best Aff.") at Exhibit Q.

Ms. Cunningham's answers when they were given or read the transcript after she received it, she would have known these facts. In any event, her failure to know them, appreciate them, understand them, or honestly recount them should in no respect be Household's problem.

In an October 3, 2004 letter to this Court, Ms. Mehdi announced that Plaintiffs were unilaterally cancelling the depositions that they had noticed. (Best Aff., Ex. J). Ms. Mehdi did so without waiting to hear back from Household's counsel regarding an ongoing dialogue regarding the native format production in general and Housemail in particular. (*See* Best Aff. ¶ 14, 16). Ms. Mehdi did so knowing that Household's counsel was already in Chicago to prepare for the depositions. Pretermitting the other issues of Plaintiffs' gamesmanship set forth below, Ms. Mehdi decided to make her stand on Household's alleged non-production of Housemails under the native format agreement. Her colleague Monique Winkler told defense counsel Ms. Best on Monday afternoon, October 3, at approximately 5:25 p.m. (CST), that Plaintiffs would not take the depositions of Messrs. Rybak and Cunningham until Household produced all responsive Housemails from the class period. If that is in fact a true statement, Plaintiffs will *never* take the depositions of Messrs. Rybak and Cunningham, because *there are no active Housemails to search electronically and produce* — a simple fact that Plaintiffs' counsel should have learned from Ms. Cunningham's deposition.

More importantly, even if there were some ambiguity in Ms. Cunningham's testimony, Ms. Best explained to Ms. Winkler on Monday afternoon (three days prior to the first scheduled deposition) that there are no active Housemails and that, as to Housemail backup tapes (a subject that has not been addressed by the parties), *there are none prior to August 31, 2002.* (Best Aff. ¶ 16). Instead of accepting Ms. Best's representation or continuing a constructive dialogue on the topic, Plaintiffs' counsel — as is their wont — accused Ms. Best of making a misrepresentation. (Best Aff., Ex. K).

Not content simply to call Ms. Best a liar, Plaintiffs' counsel escalated (as they usually do), bringing about a deposition mini-Armageddon. Firmly ensconced on their high

horse, Plaintiffs' counsel reiterated their announcement that the depositions of Rybak and Cunningham would be cancelled. (Best Aff., Ex. M). Their stated reason was that Plaintiffs would wait for all electronic discovery, including Housemails. Through their letter to the Court on October 4, 2005, the Household Defendants suggested that, as the developing dispute about the Housemail backup tapes was minor (in that Housemail backup tapes did not even exist prior to August 31, 2002), Plaintiffs should proceed with the depositions of Rybak and Cunningham as scheduled, especially as Household's counsel were already in Chicago preparing for those depositions. (Best Aff., Ex. L). The Household Defendants also apprised that they would produce the witnesses as scheduled and would not produce them again absent an Order from this Court. (*Id.*) The Household Defendants reiterated their position in an email to Ms. Mehdi on October 4, 2005. (Best Aff., Ex. N).

Although there are numerous other reasons why sanctions should be imposed against Plaintiffs and their counsel, all set forth below, the nub of the instant controversy is this: Plaintiffs noticed depositions which Plaintiffs' counsel was apparently unprepared to take, perhaps hoping that Household would refuse to produce the witnesses or otherwise object. When Household proffered the witnesses Plaintiffs purported to seek, Plaintiffs' counsel — apparently and unprepared — panicked. Instead of calling defense counsel at a reasonable time and seeking to negotiate an agreed-upon adjourned date, Plaintiffs' counsel simply decided to cancel the depositions. Needing an excuse, they came up with the Housemail excuse. The only problem with this excuse is that it is not true — *there were no live Housemails to search electronically and produce.* Moreover, Plaintiffs' counsel knew or should have known it was not true. If Plaintiffs' counsel fairly read Ms. Cunningham's deposition testimony, they would have avoided costing Household thousands upon thousands of dollars of wasted time of its counsel. Even if there were some ambiguity in Ms. Cunningham's testimony (which there is not), Plaintiffs' counsel was clearly apprised on Monday, October 3 of the facts regarding Housemail and the limited number of backup tapes during the class period.

In short, sanctions need to be awarded here to drive home to Plaintiffs' counsel the concept that they have to act in a professional manner, pay attention to the materials and information that are made available to them, and plan their discovery in a reasonable and cost effective manner as required by Rule 1 of the Federal Rules of Civil Procedure. When they fail to do so, it should be at their peril, and not that of their adversary. Under Rule 30(g)(1) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927, Defendants are entitled to recover their expenses, including attorneys' fees, from Plaintiffs and Plaintiffs' counsel as a result of the last-minute pretextual cancellation of the depositions of Messrs. Cunningham and Rybak.

FACTUAL BACKGROUND

During the week of October 3, 2005, Defendants were forced needlessly to incur substantial costs, including attorneys' fees, to prepare for two depositions noticed and later cancelled by Plaintiffs. Plaintiffs' last-minute decision to cancel these depositions, after defense counsel had traveled from New York to Chicago to prepare for and attend the depositions, ostensibly because of an incomplete production of documents, is the latest example of a continuing pattern of vexatious and unreasonable conduct perpetrated by Plaintiffs during the course of discovery in this case.

On August 29, 2005, Plaintiffs issued subpoenas commanding Household employee Curt Cunningham to attend a deposition on October 4, 2005 and former Household employee Walter Rybak to attend a deposition on October 6, 2005. (Best Aff., Ex. A). Plaintiffs also gave notice to Defendants on August 29, 2005 that depositions of Messrs. Rybak and Cunningham were scheduled on those dates. (Best Aff., Ex. B). Plaintiffs did not attempt to coordinate schedules with defense counsel and the witnesses prior to subpoenaing and noticing the depositions. On or about September 8, after defense counsel and the witnesses had cleared their schedules for the noticed dates, Plaintiffs' counsel informed Defendants that the October 4 date for Mr. Cunningham's deposition no longer suited them. Plaintiffs requested that the Cunning-

ham deposition be moved to Friday, October 7. On September 12, Defendants informed Plaintiffs that October 7 was acceptable. (Best Aff., Ex. C).

At the time that Plaintiffs noticed the depositions — August 29, 2005 — Plaintiffs were fully aware that document production would not be completed until well after October 4, 2005. Moreover, Plaintiffs were fully aware at that time that it was extremely unlikely that Plaintiffs would receive *any* native format emails as the parties had reached an impasse on the search term protocol and had briefed the matter before this Court.

Although the issue regarding the search term protocol was not resolved and in fact is still pending before the Court, on September 2, 2005 — after the Plaintiffs noticed the Rybak and Cunningham depositions — Defendants voluntarily agreed to produce native format emails pursuant to the native format agreement subject to Household's proposed custodian/search term protocol. (*See* Best Aff., Ex. D). On Thursday, September 29, 2005, seven days prior to the Rybak deposition, Defendants produced hundreds of native format Lotus Notes emails and native format attachments retrieved from the files of, among others, Messrs. Cunningham and Rybak. (*See* Best Aff., Ex. E).

Ms. Mehdi sent Ms. Best two emails on Thursday evening, September 29, 2005, raising questions regarding the electronic documents that had been produced. (Best Aff., Exs. F & G). Ms. Mehdi made no mention in her emails of any potential cancellation of the depositions that were scheduled for the subsequent Thursday and Friday. Nor did Ms. Mehdi copy any other defense counsel on her emails or, apparently, attempt to contact any other defense counsel. Ms. Best was out of town on Thursday and Friday. (Best Aff. ¶ 9) On Friday afternoon, Ms. Best received a voice message from Ms. Mehdi following up on her prior email messages. (Best Aff. ¶ 10). Ms. Best, who was traveling, responded via email that defense counsel would contact Plaintiffs on Monday to discuss. (Best Aff., Ex. H).

On Monday, October 3, 2005, defense counsel traveled to Chicago to prepare Messrs. Cunningham and Rybak for their upcoming depositions. (Best Aff ¶ 12). Defense coun-

sel planned to call Ms. Mehdi during the lunch hour given the time difference to the West Coast. (*Id.*). Prior to that time, Ms. Mehdi sent another email message to Ms. Best. (Best Aff., Ex. I).

During lunch on Monday, Ms. Best telephoned Ms. Mehdi. During this telephone call, Ms. Mehdi told defense counsel *for the first time* that Plaintiffs' questions about the native format document production might affect the scheduled depositions of Messrs. Cunningham and Rybak. Ms. Mehdi advised that Plaintiffs disputed that the Defendants had properly produced native format emails for Messrs. Cunningham and Rybak pursuant to the native format agreement because the Plaintiffs had not received any Housemail emails as opposed to Lotus Notes emails. Counsel for both parties discussed the native format agreement and Ms. Best realized that Ms. Mehdi appeared to have misunderstood its terms regarding the Housemail emails. Ms. Best explained that Housemails were only produced in paper form pursuant to the native format agreement. Ms. Best also explained that, as Housemail was a legacy email system phased out at Household by October 2002, there were no active Housemails. When Ms. Mehdi asked whether any Housemail backup tapes had been searched, defense counsel answered no and explained that the parties had not addressed the subject of restoration and search of backup tapes as part of the native format agreement — which by its terms applied to "active" and "archived" Lotus Notes emails. Ms. Best further explained that the parties had never once discussed the subject of backup tapes as part of the negotiations leading to the native format agreement. Ms. Best also stated that, regardless of the apparent misunderstanding, defense counsel was unsure whether any Housemail backup tapes existed for any period prior to August 2002. Defense counsel stated that they would look into the matter and contact Plaintiffs later in the day. Defense counsel also reminded Ms. Mehdi that she had taken a Rule 30(b)(6) deposition of Household employee Christine Cunningham regarding Household's email system. (Best Aff. ¶ 14).

Without waiting for defense counsel to get back to her with the facts, Ms. Mehdi sent a letter in which she informed the Court and Defendants for the first time that she did not intend to go forward with the depositions that Plaintiffs had noticed, and for which they had sub-

poenaed witnesses, "until defendants produce all responsive electronic documents." (Best Aff., Ex. J). Without realizing that Ms. Mehdi had sent her preemptive letter to the Court, defense counsel called Plaintiffs at approximately 5:25 p.m., Chicago time. (Best Aff. ¶ 16). Not able to locate Ms. Mehdi, defense counsel spoke with Ms. Winkler. Ms. Winkler informed defense counsel that Plaintiffs had sent a letter to the Court and had cancelled the depositions. Ms. Best responded that Defendants were dismayed that Plaintiffs had taken such action without waiting to hear from defense counsel. Ms. Best further reported that, to the best of her knowledge, there were no Housemail backup tapes for any period prior to August 31, 2002. Ms. Best asked that Plaintiffs reconsider cancelling the depositions. Ms. Best also informed Ms. Winkler that Defendants reserved all rights with respect to these witnesses. (*Id.*).

The next day, October 4, 2005, Defendants responded to Plaintiffs' letter to the Court. Defendants explained that Plaintiffs appeared to misundertand both the native format agreement and Ms. Cunningham's deposition testimony. As to the native format agreement, Defendants reiterated their position that Housemails were carved out of the agreement, which clearly stated that "Housemail shall be produced in paper form" and which clearly stated that the search term protocol would be applied only to Lotus Notes. (Best Aff. Ex. R). Moreover, Defendants explained that Plaintiffs misunderstood and/or misinterpreted the deposition testimony of Ms. Cunningham regarding Household's email systems.[3] (Best Aff. Ex. Q). Defendants also reiterated that, in any event, they were not aware of any Housemail backup tapes dated prior to August 31, 2002. The Household Defendants stated their intent to "produce the witnesses on the dates noticed" and also indicated that they would not produce Messrs. Rybak and Cunningham again absent a Court Order. (Best Aff., Ex. K).

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[3] That Plaintiffs continue to misread and selectively cite to portions of Ms. Cunningham's deposition testimony is evidenced by their letter to the Court dated October 11, 2005. The Household Defendants will separately responded to Plaintiffs' October 11 letter.

It is clear that Plaintiffs misread or misunderstood Ms. Cunningham's deposition testimony (Best Aff., Ex. Q) regarding Household's email systems in place during the class period. Consider the following:

- Ms. Cunningham testified that Household used two different email systems from 1997 through 2002: Housemail and Lotus Notes. (54:19-55:5).
- Ms. Cunningham further testified that while Lotus Notes retention period was initially 6 months, (55:6-14), and later changed to indefinite (74:13-24), Housemail's retention period was only twenty-one days. (55:15-20). Further, Ms. Cunningham testified that the twenty-one day retention period for Housemail *never* changed. (55:21-23). This can only mean what it says — every twenty-one days, the Housemail backup tapes were recycled in the normal course of Household's document retention policy.
- It appeared that Ms. Mehdi understood this important concept because she asked follow-up questions at the end of the deposition on this very subject:
  "Q: [Ms. Mehdi] Okay. I have a few cleanup questions and I think we can end shortly. You mentioned earlier that the Housemail retention was 21 days?
  A: Yes.
  Q: Do you know why it was different for Housemail than for Lotus Notes?
  A: It was — I don't know why it was different. It was a different system."
  (75:20 - 76:4)
- Ms. Cunningham testified that the company migrated from Housemail to Lotus Notes in October 2002. (18:6-13). She also testified that some employees used Lotus Notes prior to October 2002, with some having Lotus Notes as far back as 1997 based upon managerial approval. (39:12-21).

The portions of Ms. Cunningham's deposition testimony to which Plaintiffs cite for their understanding either do not specify Housemail as compared to Lotus Notes, or specifically refer only to Lotus Notes. In any event, the Household Defendants submit that any ambiguity in Ms. Cunningham's testimony is beside the point. The important factor is that defense counsel represented to plaintiffs' counsel on October 3 that, whatever the misunderstanding, there were *no Housemail backup tapes dated prior to August 31, 2002.* Thus Plaintiffs' counsel had no good reason at that time to continue to cling to the supposed ambiguity of Ms. Cunningham's testimony and should have proceeded with the depositions, leaving to another day any dispute about the limited Housemail backup tapes.

Moreover, the Household Defendants' representation to Plaintiffs is further corroborated by correspondence to the SEC dated September 3, 2003, bearing bates number HHS 02764998, which was produced to Plaintiffs on or about March 17, 2005. This document sets forth the facts about Housemail, including the limited time period of the backup tapes and the cost and burden involved in restoration of same. (Best Aff., Ex. S). The document states that the "earliest available Housemail backup tape is dated August 25, 2002."[4]

In emails dated October 4, 2005, counsel for Household again encouraged Plaintiffs to show up for the depositions of Messrs. Rybak and Cunningham and warned that they would not produce these witnesses again absent Court direction. (Best Aff., Ex. N).

Defense counsel and Mr. Rybak arrived at the Chicago offices of Miller Faucher and Cafferty LLP at 9:30 a.m. on Thursday October 6, 2005 in accordance with the subpoena and notice issued by Plaintiffs. At that time, defense counsel and Mr. Rybak were turned away by a receptionist who informed them that the deposition was cancelled. Plaintiffs' counsel was not available to discuss the situation. (Best Aff ¶ 21). Defense counsel recognized that Plaintiffs intended to follow through on their threat not to appear for the second noticed deposition either and asked Plaintiffs to mitigate the amount of fees and expenses Defendants would incur by confirming that Plaintiffs would not attend the noticed deposition of Mr. Cunningham on Friday, October 7, 2005. (Best Aff., Ex. O). Plaintiffs confirmed that they would not attend Mr. Cunningham's deposition. (Best Aff., Ex. P).

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[4] Defense counsel is looking into the descrepency of the August 25 date as compared to August 31, but the gist remains the same — there are only extremely limited Housemail backup tapes available during the very last weeks of the class period.

ARGUMENT

A. The Household Defendants Are Entitled to Costs, Expenses and Fees Under Federal Rule of Civil Procedure 30(g)(1)

Pursuant to Federal Rule of Civil Procedure 30(g)(1), "[i]f the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees."

The noticing party's last-minute cancellation of a deposition, after the opposing party has traveled to the deposition site, constitutes a failure to attend within the meaning of Rule 30(g)(1). *See Real Colors, Inc.* v. *Patel*, No. 96 C 6098, 1998 WL 88879, at *1 (N.D. Ill. Feb. 17, 1998) (awarding fees and expenses under Rule 30(g)(1) where defense counsel had traveled from Chicago to South Carolina to attend a deposition only to be advised, after arriving in South Carolina, that the plaintiff's attorney had cancelled the deposition); *Spalding & Evenflo Cos.* v. *Graco Metal Products, Inc.*, No 5:90 CV 0651, 1992 WL 109092, at *4 (N.D. Ohio Feb. 14, 1992) ("Apparently Graco noticed the deposition and then, when [the witness] was already on his way to Cleveland, cancelled the deposition. Rule 30(g) of the Federal Rules of Civil Procedure permits a court to order payment of costs by a party who gives notice of a deposition and then fails to attend. *Graco, by giving late notice of the cancellation, constructively failed to attend.*") (emphasis added).[5]

In *Pine Lakes International Country Club* v. *Polo Ralph Lauren Corp.*, 127 F.R.D. 471 (D.S.C. 1989), the defendant-noticing party telephoned the plaintiff's attorney on the day before the deposition was to take place and left a phone message asking the plaintiff's attorney to return the call regarding "an important matter." *Id.* at 472. Before returning the call, and

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[5] An appendix of all unreported cases referenced herein has been submitted herewith.

without receiving any further communication from the defendant, the plaintiff's attorney traveled to Boston to attend the deposition. Upon arriving at the noticing party's offices, the plaintiff's attorney was told by a receptionist that the deposition had been cancelled. The court found that "[b]ecause defendant had in fact noticed the deposition . . . , it also retained the burden of cancelling said deposition, and conveying this information to [plaintiff's attorney] in sufficient time to prevent [plaintiff's attorney] from incurring the expense of traveling to the site of the scheduled deposition." *Id.* The court therefore ordered that the noticing party pay the attorney's fees and expenses incurred by the plaintiff's attorney in attending the deposition.

Plaintiffs attempt to justify their last-minute cancellation of the depositions that they noticed by asserting that they did not receive production of "all responsive electronic documents." (Best Aff., Ex. J). Plaintiffs proffered — but pretextual — excuse is unavailing as it is neither supported in law nor in fact. Plaintiffs themselves chose to schedule these depositions knowing that document discovery would not be complete when the depositions were to be taken. When Plaintiffs noticed these depositions (in August), production under Plaintiffs' first and second requests for the production of documents was ongoing. Indeed, the parties were still negotiating the scope of the first and second requests. Native format document production had not yet begun, nor was there any indication that native format production would begin any time soon as the parties had failed to reach an agreement on the search term protocol, had fully briefed the issue and were awaiting a resolution by the Court. Shortly after noticing the depositions, the Plaintiffs advised Defendants and the Court in their September Status Report that they intended to serve *further* document requests. Defendants' later, voluntary production of certain native format documents notwithstanding, Plaintiffs had no basis to expect that document production would be complete prior to the dates they set for these depositions. Plaintiffs made the tactical decision to notice these depositions given those circumstances, and cannot now be heard to say that they were justified in cancelling them because they had not received a complete production of documents.

Plaintiffs' pretextual excuse for cancelling the depositions — that they had not received Housemails pursuant to the native format agreement — evaporated on Monday evening. At that time, defense counsel informed Ms. Winkler that there were no Housemail backup tapes for any period prior to August 31, 2002. (Best Aff ¶ 16). This information was also relayed in Household's October 4 letter to the Court. Thus, even if Household worked out an agreement with Plaintiffs or was required to restore and search the Housemail backup tapes, there would be limited Housemail available. Yet Plaintiffs' counsel still cancelled the depositions armed with this knowledge.

Moreover, Plaintiffs can provide no legal support for the position that the cancellation of depositions, noticed prior to the completion of document production, can be justified by an incomplete production of documents. In fact, courts addressing this issue have reached the opposite conclusion. *See Barrett* v. *Brian Bemis Auto World*, No. 04 C 50149, __ F.R.D. __, 2005 WL 2276888, at *2 (N.D. Ill. Sept. 13, 2005) (imposing sanctions under Rule 30(g)(1) where defense counsel chose not to go forward with a deposition of plaintiff's expert witness because "[w]hile defense counsel may have very well believed she was prejudiced by the late production of . . . documents, at the very least, counsel should have started the deposition on the topics she was prepared for and continued the deposition to reserve the opportunity to question Plaintiff's expert on the new disclosures if it became necessary"); *Magnus Electronics, Inc.* v. *Masco Corp. of Indiana*, No. 85 C 0494, 1986 WL 10061, at *6-7 (N.D. Ill. Sept. 5, 1986) (holding that party noticing deposition prior to the completion of document production had the "burden to plan an appropriate discovery schedule" and that "[e]rrors in scheduling depositions must be borne by [the noticing party]").

Plaintiffs' late cancellation of depositions caused Defendants to incur expenses that would not have been incurred if the depositions had been cancelled before defense counsel traveled to Chicago. Moreover, Plaintiffs have provided no reasonable justification for the eleventh hour cancellations and instead assert an untenable pretextual position which is belied by the

record in this case. Therefore, under Rule 30(g)(1), Defendants are entitled to recover from Plaintiffs the expenses they incurred, including attorneys' fees, in traveling to and appearing for these depositions.

B. The Household Defendants Are Entitled to Costs, Expenses and Fees from Plaintiffs' Counsel Under 28 U.S.C. § 1927

Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. The purpose of section 1927 "is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs also bear them." *Kapco Manufacturing Co., Inc.* v. *C & O Enterprises, Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989) (internal citations omitted). The failure of Plaintiffs' counsel to give timely notice that the depositions of Messrs. Cunningham and Rybak would be cancelled and their advancement of a pretextual justification which is neither factually nor legally sound can only be described as unreasonable and vexatious. Moreover, these actions caused Defendants to incur substantial needless costs. Therefore, under section 1927, Plaintiffs' counsel should be ordered to bear those costs.

The unreasonable behavior of Plaintiffs' counsel in their late cancellation of scheduled depositions evinces the bad faith required for liability under 28 U.S.C. § 1927. The Court of Appeals has held that:

> If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious. To put this a little differently, a lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law.

In re TCI Limited, 769 F.2d 441, 445 (7th Cir. 1985).

Sanctions under 28 U.S.C. § 1927 are appropriate where, as here, actions by counsel have resulted in the last-minute cancellation of a deposition. *See Voss* v. *USS Great Lakes Fleet, Inc.*, 35 F.3d 567 (table), 1994 WL 443551, at *2 (6th Cir. Aug. 16, 1994) (unpub-

lished opinion) (imposing sanctions against the noticing party's attorney under section 1927 when defendant's lawyers and two witnesses were told upon their arrival that noticing party had called off depositions and affirming district court's finding that noticing attorney's behavior was vexatious in that it was "lacking justification and intended to harass"). Here, Plaintiffs' counsel unreasonably delayed until the eleventh hour in notifying Defendants that Plaintiffs did not intend to take the depositions that they noticed weeks previously, one of which had already been rescheduled.

Moreover, the behavior of Plaintiffs' counsel demonstrates blatant disregard of the legal standards governing discovery. The party noticing a deposition must bear the consequences of bad timing when it chooses to schedule a deposition. *See Magnus Electronics, Inc*, 1986 WL 10061 at *6-7 (party noticing deposition prior to the completion of document production has the "burden to plan an appropriate discovery schedule" and that "[e]rrors in scheduling depositions must be borne by [the noticing party]"). As described above, Plaintiffs' counsel noticed the depositions of Messrs. Cunningham and Rybak before document production could reasonably have been anticipated to be completed and knowing full well that the scope of the email search pursuant to the native format agreement between the parties remained unsettled. Therefore, even if Plaintiffs' interpretation of the native format protocol agreement were correct — which it is not — Plaintiffs could have had no expectation at the time they noticed the depositions that they would receive all documents prior to the deposition dates. Nonetheless, Plaintiffs' counsel chose to notice these depositions and are now legally precluded from arguing that all documents should have been produced prior to that time. The bad faith of Plaintiffs' counsel is further indicated by their failure to notify timely the Defendants that Plaintiffs' counsel intended to cancel the depositions if Plaintiffs did not receive certain non-existent documents.

Furthermore, as discussed in more detail above, Plaintiffs' counsel's pretextual excuse for cancelling the depositions evaporated as of Monday, October 3, 2005 when defense counsel clearly informed Plaintiffs' counsel that only limited backup tapes exist from the

Housemail system. Nevertheless, Plaintiffs' counsel continued to advance the argument that they were unable to take the depositions because of an incomplete production of Housemail even after they were provided with the relevant facts.

Finally, Plaintiffs' counsel's pretext for cancelling the depositions obscures the fact that the Household Defendants have produced many documents, including many email documents (both Housemail and Lotus Notes), to Plaintiffs from the files of Mssrs. Rybak and Cunningham. Plaintiffs clearly had an adequate basis on which to depose these individuals, and their delay in doing so was in bad faith. Therefore, Plaintiffs' counsel is liable under 28 U.S.C. § 1927 to compensate Defendants for the expenses they incurred in traveling to and appearing for the cancelled depositions.

CONCLUSION AND PRAYER

Defendants have been caused needlessly to incur substantial expenses in traveling to and appearing for the noticed depositions. As a result of Plaintiffs' late cancellation of such depositions, which is only the latest in a long series of unreasonable and vexatious actions taken by Plaintiffs throughout the course of discovery, the Defendants should, pursuant to Rule 30(g)(1) and 28 U.S.C. § 1927, be awarded their costs, fees and expenses and all other relief to which they may be justly entitled.

Dated: October 13, 2005
New York, New York

Respectfully submitted,

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