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, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

LEAD PLAINTIFFS' OPPOSITION TO HOUSEHOLD DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S SEPTEMBER 28, 2005 ORDER

Reconsideration is not appropriate here. District court opinions "are not intended as mere first drafts, subject to revisions and reconsideration as a litigant's pleasure." *Mountain Funding, Inc. v. Frontier Ins. Co.*, No. 01 C 2785, 2003 U.S. Dist. LEXIS 11274, at **3-4 (N.D. Ill. 2003) (Guzman, J.), quoting *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988).

The Household defendants cite the "misunderstood litigant" theory as a basis for asking the Court to reconsider the portion of the Court's September 28, 2005 order ("Order") directing defendants to "review and redesignate, if necessary, the documents produced." Defs' Mem. at 1, 3.[1] Yet, they present no evidence or argument to show how or why they were patently misunderstood. The absence of any explanation by defendants demonstrates that this is not one of those rare cases in which reconsideration should be entertained. *See Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1192 (7th Cir. 1990) (rejecting the argument that reconsideration was appropriate where litigant was not "misunderstood" just irresolute and where litigant offered no explanation regarding its prior conduct). Indeed, there is absolutely no citation to any part of this Court's Order to justify defendants' assertion that they were misunderstood. Defendants offer no explanation why Krispy Kreme doughnuts order forms, frequent flier emails or library notices, among other things, are confidential, much less relevant to this litigation. *See Sunstar, Inc. v. Alberto-Culver Co.*, No. 01 C 736, No. 01 C 5825, 2005 U.S. Dist. LEXIS 23098 (N.D. Ill. 2005) (Guzman, J.) (affirming order of this Court denying a request for reconsideration where movant offered no basis for reconsidering the decision). Rather, defendants' October 12, 2005 re-production of these mostly irrelevant documents without the "Confidential" designations, including blank pages, doughnut order forms,

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[1] "Defs' Mem." refers to the Memorandum of Law in Support of the Household Defendants' Motion for Partial Reconsideration of the Court's September 28, 2005 Order.

frequent flier emails, party celebration invites and library notices, not only demonstrates complete disregard for this Court's instructions, but also improperly burdens plaintiffs' and the Class's resources. Defs' Mem. at 5, n.6. It further demonstrates that defendants' mantra that they have produced millions of pages already when a large portion of such production contains irrelevant documents, is meaningless.[2]

The reasons presented by defendants for "reconsideration" are arguments that can and should have been addressed previously. Defendants cannot move to reconsider an opinion simply because they do not like it. *Neal v. Honeywell, Inc.*, No. 93 C 1143, 1996 U.S. Dist. LEXIS 15954, at **14-15 (N.D. Ill. Oct. 24, 1996) (where defendants were simply unhappy with the Court's conclusion and failed to satisfy the standard for reconsideration, motion was denied). More importantly, defendants' reasons for reconsideration are meritless. Defendants claim that plaintiffs misled the Court to believe that the non-compliant examples listed in plaintiffs' brief were from a series of productions, when in fact they were part of an initial production subject to the Interim Stipulation and Order Governing the Confidential Treatment of Discovery Material ("Interim Order") where all documents were deemed confidential. Defs' Mem. at 3-4. Plaintiffs made no such representation to the Court. Defendants have in the past and continue to produce documents improperly designated "Confidential." For example, in the September 30, 2005 production, defendants marked "Confidential" a Submission Notification of Form 8-K SEC filing, a 230-page publicly filed document. Declaration of Azra Z. Mehdi in Support of Lead Plaintiffs' Opposition to Household

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[2] As outlined in plaintiffs' Motion to Compel the Household Defendants to Produce Electronic Evidence in Native Electronic Format ("Plfs' Mem.") filed on June 6, 2005, defendants have produced hundreds of thousands of spreadsheets and other electronic documents in PDF and TIFF format that are incomplete, illegible and completely unusuable. Plfs' Mem. at 11. As the Court recognized during the August 24, 2005 production, providing plaintiffs with a bunch of unusable spreadsheets is tantamount to not producing anything.

Defendants' Motion for Partial Reconsideration of the Court's September 28, 2005 Order ("Mehdi Decl."), Exhibit 1.[3] In a June 23, 2005 production, defendants designated as "Confidential" Martindale.com Lawyer Locater searches for Household defendants' first set of lawyers in this litigation – Wachtell, Lipton, Rosen & Katz. Mehdi Decl., Ex. 2. Plaintiffs have attached numerous other examples of documents produced after the November 5, 2004 Protective Order was entered that demonstrate defendants' continued abuse of the "Confidential" designation. Mehdi Decl., Exs. 3-13. Examples include SEC filings (Exs. 3-5), press releases, news clippings, news transcripts (Ex. 6), brochures provided to customers (Ex. 7), print-outs of publicly available websites (Ex. 8), a restated certificate of incorporation (Ex. 9), blank loan forms (Ex. 10), analyst reports (Ex. 11), the Washington DFI Report (Ex. 12), and art auction photographs in which Finance Committee minutes are buried (Ex. 13). Again, as a result of the improper designations, plaintiffs are further burdened by having to file this current set of exhibits under seal, when in fact they contain no such confidential information.

Separately, however, defendants' position that their misuse of the "Confidential" designation was somehow endorsed by the Interim Order is similarly wrong. Defs' Mem. at 1-4. The responding party always has the obligation to be discriminating when designating documents confidential. As defendants implicitly concede, their predecessor counsel went overboard in designating documents as "Confidential." Defs' Mem. at 1. Given that defendants created this problem, they and not plaintiffs should bear the costs and burdens associated with correcting this defect. On this point, plaintiffs do not understand why defendants' current counsel blame the

[3] Rather than burden the Court with voluminous documents, plaintiffs have only provided excerpts of the examples noted.

problem on their predecessors. Whether it is current counsel or prior counsel is irrelevant – it is still defendants' fault and thus, their obligation to correct.

Finally, defendants' proposed solution of having plaintiffs raise individual documents as a prelude to a meet and confer discussion both ignores the magnitude of the problem and places the burden on plaintiffs to correct what is clearly defendants' error. If it were only a handful of documents at issue, perhaps the proposed solution would be appropriate. Here the documents at issue number in the thousands of pages. It is more efficient for defendants to go through these documents and redesignate them since this will avoid the Class incurring the unnecessary expense and effort. Defendants have an independent obligation to ensure that their "Confidential" designations are in good faith and comply with the terms of the Protective Order. There is simply no reason for plaintiffs and the Class to incur any further expenses on this issue until such time as defendants can assert that all "Confidential" designations are in compliance with the present Protective Order.

This is not the type of rare circumstance where "[a] grievous wrong may be committed by some misapprehension or inadvertence by the judge for which there would be no redress." *Bank of Waunakee*, 906 F.2d at 1192. Accordingly, for the reasons noted above, defendants' motion for partial reconsideration of the September 28, 2005 Order should be denied.

DATED: October 17, 2005

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
MONIQUE C. WINKLER (90786006)
SYLVIA SUM (90785892)
LUKE O. BROOKS (90785469)

/S/ Azra Z. Mehdi
AZRA Z. MEHDI

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER FAUCHER AND CAFFERTY LLP
MARVIN A. MILLER
30 North LaSalle Street, Suite 3200
Chicago, IL 60602
Telephone: 312/782-4880
312/782-4485 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.
SOICHER
LAWRENCE G. SOICHER
305 Madison Avenue, 46th Floor
New York, NY 10165
Telephone: 212/883-8000
212/697-0877 (fax)

Attorneys for Plaintiff

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DECLARATION OF SERVICE BY UPS OVERNIGHT AND BY EMAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on October 17, 2005, declarant served by UPS Overnight and by email **LEAD PLAINTIFFS' OPPOSITION TO HOUSEHOLD DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S SEPTEMBER 28, 2005 ORDER** to the parties listed on the attached Service List. The parties' email addresses are as follows:

TKavaler@cahill.com
PSloane@cahill.com
LBest@cahill.com
NEimer@EimerStahl.com
ADeutsch@EimerStahl.com
sparzen@mayerbrownrowe.com
mmiller@millerfaucher.com
lfanning@millerfaucher.com

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of October, 2005, at San Francisco, California.

/S/ Monina O. Gamboa
MONINA O. GAMBOA

HOUSEHOLD INTERNATIONAL (LEAD)
Service List - 10/14/2005 (02-0377)
Page 1 of 2

Counsel for Defendant(s)

Thomas J. Kavaler
Peter Sloane
Landis Best
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005-1702
212/701-3000
212/269-5420(Fax)

Nathan P. Eimer
Adam B. Deutsch
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
312/660-7600
312/692-1718(Fax)

Stanley J. Parzen
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
312/782-0600
312/701-7711(Fax)

Counsel for Plaintiff(s)

Lawrence G. Soicher
Law Offices of Lawrence G. Soicher
305 Madison Avenue, 46th Floor
New York, NY 10165
212/883-8000
212/697-0877(Fax)

William S. Lerach
Lerach Coughlin Stoia Geller Rudman & Robbins LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
619/231-1058
619/231-7423(Fax)

Patrick J. Coughlin
Azra Z. Mehdi
Monique C. Winkler
Lerach Coughlin Stoia Geller Rudman & Robbins LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111-5238
415/288-4545
415/288-4534(Fax)

Marvin A. Miller
Jennifer Winter Sprengel
Lori A. Fanning
Miller Faucher and Cafferty LLP
30 N. LaSalle Street, Suite 3200
Chicago, IL 60602
312/782-4880
312/782-4485(Fax)

HOUSEHOLD INTERNATIONAL (LEAD)

Service List - 10/14/2005 (02-0377)

David R. Scott
Scott + Scott, LLC
108 Norwich Avenue
Colchester, CT 06415
860/537-5537
860/537-4432 (Fax)