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-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN OPPOSITION TO CLASS' MOTION TO COMPEL RE RULE 30(B)(6) DEPOSITION ON HOUSEMAIL TOPIC

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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 opposition to Lead Plaintiffs' ("Plaintiffs") Class' Motion to Compel Re Rule 30(b)(6) Deposition on Housemail Topic. ("P. Mot.")

PRELIMINARY STATEMENT

Plaintiffs' latest motion to Your Honor illustrates Plaintiffs' abuse of the meet and confer process and their willingness to burden this Court with frivolous applications. The dispute is as follows: Plaintiffs request an order requiring Household "to provide narrative responses in suitable evidentiary form" to three technical legal questions and granting Plaintiffs, at their option, the right to depose a **third** "Housemail" witness on the very same questions to which they seek a narrative response. Although Defendants do not believe that the Court's November 30, 2005 "Housemail" deposition Order contemplated requiring answers to these questions, Defendants have repeatedly attempted to work with Plaintiffs to provide narrative answers to questions in order to spare the Court the burden of yet another unnecessary motion by Plaintiffs. When Plaintiffs' questions (and their own formulations of the "answers" to which they demanded Defendants subscribe) kept changing, however, Defendants urged them to pose simple interrogatories to which Defendants would respond. Thus, the current state of play is that Plaintiffs want a narrative response to questions to which Defendants said they would respond if posed in the form contemplated by the Federal Rules of Civil Procedure — simple written interrogatories. That, in a nutshell, is what this dispute is all about.

FACTS

A. *Defendants Attempted to Save the Parties the Time and Expense of Yet Another Housemail Deposition but Plaintiffs Rejected Defendants' Offer*

By their October 27, 2005 Rule 30(b)(6) Notice ("30(b)(6) Notice"), Plaintiffs sought information from Household, *inter alia*, as to "the preservation of Housemail files and hardware . . . as the result of pending litigation, including, but not limited to, the policy(ies) regarding such preser-

vation and the steps, if any, taken to preserve Housemail files and hardware as the result of pending litigation . . . ." (30(b)(6) Notice, 1(k)) This Court's Order, entered on November 30, 2005, set forth the proper parameters for Plaintiffs' deposition as follows: "[T]he court agrees with defendants that the proper subjects for the 30(b)(6) deposition regarding Housemail are the Housemail email system, the preservation of Housemails as a result of this pending litigation and the related SEC investigation, and Household's general policy regarding preservation of Housemails in the face of litigation and formal governmental investigations." (November 30, 2005 Order of Judge Nan R. Nolan, attached hereto as Exhibit A to the January 30, 2005 Declaration of Josh Greenblatt ("Greenblatt Decl.")).[1]

In accordance with the 30(b)(6) Notice and this Court's Order, Defendants made Chris Cunningham available for deposition on December 2, 2005. Ms. Cunningham was the individual in charge of the Housemail system during the relevant time period. During her deposition, Ms. Cunningham testified extensively as to Household's general policy regarding preservation of Housemails in the face of litigation and Household's preservation of Housemails as a result of this case. *(See e.g.*, December 2, 2005 deposition of Chris Cunningham at 70:14-72:10; 73:24-77:2; 102:8-103:3; 107:14-109:20) ("Cunningham dep.") (Greenblatt Decl., Ex. C). In responding to a small number of highly technical questions regarding Housemail, however, at various instances during her deposition Ms. Cunningham referred to Carol Werner, another Household employee.[2]

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1 By its Order, this Court essentially accommodated Plaintiffs' wishes with respect to the scope of the Housemail deposition, expressed during proceedings before this Court October 26, 2005 where Plaintiffs' counsel stated: "We also would like the person who the Household defendants produce to be knowledgeable about Household's policies for preservation of documents and policies for preservation when there are lawsuits pending, what Household as a company did to preserve documents when there was pending litigation." (See October 26, 2005 Report of Proceedings Before the Honorable Magistrate Judge Nan R. Nolan at p. 27) (Greenblatt Decl., Ex. B)

2 For example, Ms. Cunningham deferred to Ms. Werner's depth of knowledge on the following subjects: in-house improvements to the Office Vision/Virtual Machine software (Cunningham dep. at 29:4-30:3)(Greenblatt Decl., Ex. C); what an "RDR file" is (34:3-35-1); what the terms "Q Files," "RSCS" and "SFS percentage" refer to (35:21-36-17); how much disk space an individual at Household was allocated as "A disk space" during 2001 and 2002 (59:24-60:6); "what portions, if any, of the Mailbox Manager were used by Housemail during the period 2001, 2002" (85:1-5); whether Housemail data on the "MVS set" is "organized by mail user" (101:14-22); and specifics regarding the licensing of software from Computer Associates in connection with the transfer of Housemail backup tapes to CD. (150:14-20)

Following Ms. Cunningham's deposition, Plaintiffs' counsel informed Defendants that they intended to depose Ms. Werner based on the references made to her by Ms. Cunningham. (Greenblatt Decl., Ex. D) In an effort to save both parties the unnecessary expense of an additional deposition on such technical questions, Defendants offered to "work with Ms. Werner or whoever else might know this and attempt to get you answers in a format which would have the same evidentiary value as a deposition and would save everyone time and expense." (Greenblatt Decl., Ex. E) Plaintiffs' counsel, however, rejected Defendants' offer and insisted on the deposition of Ms. Werner. (Greenblatt Decl., Ex. F) To accommodate Plaintiffs, Defendants agreed to make Ms. Werner available on February 16, 2005 for what will be a *third* deposition on Housemail subjects.[3] Defendants made clear to Plaintiffs that Ms. Werner is being offered to answer those questions to which Ms. Cunningham indicated she would likely know the answer. (Greenblatt Decl. Exs. E and G)

Chief among the numerous misstatements contained in Plaintiffs' motion, therefore, is their claim that Defendants have "gone back on [their] offer" to provide "narrative responses in suitable evidentiary form *instead of* proceeding via deposition." (P. Mot. at 1) (*emphasis added*) As is clear from the correspondence, Plaintiffs repeatedly rejected this offer and insisted on deposing Ms. Werner, making Defendants' efforts at accommodation and economy both useless and moot.[4]

B. *Defendants' Attempts to Answer Plaintiffs' Technical Legal Questions and Plaintiffs' Refusal to Propound Interrogatories*

After Defendants agreed to produce Ms. Werner, Plaintiffs embarked on a "discovery-by-correspondence" device of their own invention. They repeatedly formulated answers — which

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3 In addition to her testimony on December 2, Ms. Cunningham previously testified on Housemail subjects during her November 11, 2004 deposition.

4 In agreeing to make Ms. Werner available for deposition, Defendants explained: "We will also endeavor to provide additional information on . . . [technical] questions in advance of any such deposition which may obviate your 'need' for the deposition altogether." (Greenblatt Decl., Ex. G) Plaintiffs' counsel responded, however, that "Plaintiffs do not believe that Household's provision of information will completely obviate the need for the deposition . . . ." (Greenblatt Decl., Ex. H) This response only served to confirm Defendants' belief that any attempt to provide information in lieu of a deposition would be fruitless.

were factually incorrect — to complicated and technical legal questions while simultaneously refusing to propound interrogatories as contemplated by the Federal Rules. *See* Fed. R. Civ. P. 33.

Plaintiffs' efforts — culminating in this motion — have primarily focused on the question of "whether the service of a summons under the general policy for retaining documents triggers a directive to retain documents?" (Cunningham dep. at 78:3-6) While prepared to testify, in accordance with this Court's Order, as to "the preservation of Housemails as a result of this pending litigation . . . and Household's general policy regarding preservation of Housemails in the face of litigation . . . ." (November 30, 2005 Order), Ms. Cunningham is not a lawyer and did not know the answer to this technical legal question when posed by Plaintiffs' counsel during her deposition.

During a January 9, 2006 telephone conference, counsel for Defendants reiterated that because of Plaintiffs' repeated rejections of Defendants' offer to provide technical information *in lieu of* a deposition of Ms. Werner, Defendants did not intend to provide *an affidavit* on this subject in advance of Ms. Werner's deposition. (Greenblatt Decl., ¶ 10) When Plaintiffs' counsel mischaracterized this statement in his letter of January 9 (Greenblatt Decl., Ex. I), Defendants' counsel responded on January 10, 2006, stating, in relevant part:

> "As I informed you yesterday, Household will not provide *any affidavit* in advance of the Werner deposition . . . Yesterday, you asked me to provide an answer to the question of 'whether the service of a summons on Household generally triggered a document retention hold.' You also acknowledged that this question concerned a legal matter and that it was unlikely that a witness on technical issues such as Ms. Werner would know the answer. *Household's position is not, and has never been, to refuse to answer this question. Indeed, Plaintiffs are welcome to propound an interrogatory seeking such information.*"
>
> (Greenblatt Decl., Ex. J) (*emphasis added*).

Plaintiffs responded to this explanation by alleging that Defendants were "willful[ly] refus[ing] to provide a response to a topic within the Housemail Rule 30(b)(6) deposition notice" by declining to provide an affidavit on the technical legal question regarding service of a "summons." (Greenblatt Decl., Ex. K) While acknowledging Defendants' prior proposal "that Plaintiffs identify issues where Household could produce a written response *instead of proceeding via deposition*," Plaintiffs nonetheless accused Household of "reneg[ing] on its offer." (Greenblatt Decl., Ex. K) (*em-*

phasis added) Moreover, Plaintiffs' January 10 letter dismissed Defendants' suggestion that Plaintiffs propound an interrogatory on the "summons" issue as "ludicrous". (Greenblatt Decl., Ex. K)

Although Defendants continue to believe that neither this Court's November 30 Order nor the 30(b)(6) Notice called for a witness on the sort of technical legal issues embodied by Plaintiffs' "summons" question, Defendants attempted to forestall the unnecessary motion being threatened by Plaintiffs. To that end, by letter of January 13, Defendants stated as follows:

> "As to the issue of 'whether the service of a summons on Household generally triggered a document retention hold,' in the interest of avoiding yet another frivolous motion by Plaintiffs, we respond as follows. *There was no specific policy at Household that distinguished the service of a summons from the service of a complaint or other notification of pending litigation for purposes of document retention.* As you are already aware, Ms. Cunningham testified extensively during her December 2 deposition as to the steps taken by Household to preserve documents in the face of pending litigation in accordance with your 30(b)(6) notice." (Greenblatt Decl., Ex. L) (*emphasis added*)

Plaintiffs responded by calling this answer "non-responsive garbage," demanding a "yes or no" answer to their question and again threatening a motion. (Greenblatt Decl., Ex. M) This attack was particularly unwarranted given Defendants' attempts to respond to a complicated technical legal question in the simplest manner possible with an answer that was factually accurate. Because *there was no policy* at Household specific to a summons, Plaintiffs' question was not susceptible to a "yes or no" answer — a fact Plaintiffs refused to accept. Defendants subsequently reiterated their answer and offered to provide it in 'acceptable evidentiary form, i.e. under oath'" (Greenblatt Decl., Ex. N) but Plaintiffs refused to accept this proposal. (Greenblatt Decl., Ex. O)

On January 17, having threatened a motion earlier that day, Plaintiffs wrote another letter to Defendants in which they again demanded a "yes or no" answer and also provided a "response acceptable to Plaintiffs" to which they asked Defendants to subscribe under oath. (Greenblatt Decl., Ex. P) This "answer", crafted by Plaintiffs themselves, stated:

> "Service of a summons upon Household triggers the document retention policy and thus, a hold on the relevant documents. Additionally, under Household's document retention policy, a summons is treated no differently than service of a complaint or other form of notification of pending litigation, which under that policy likewise trigger a retention hold on the relevant documents." (Greenblatt Decl., Ex. P)

Plaintiffs' letter also raised, for the first time, yet another substantive legal question: "whether under the policy for retaining documents as it pertained to Housemail there was any time frame in which a directive was to be issued upon receipt of a summons." (Greenblatt Decl., Ex. P)

Despite their growing discomfort with Plaintiffs' "discovery-by-correspondence" tactic, Defendants attempted *once more* to answer Plaintiffs' questions. (Greenblatt Decl., Ex.U) By letter of January 19, Defendants reiterated their previous answer and explained the substantive and fundamental difference between this answer and the one crafted by Plaintiffs. Specifically, Defendants explained that Plaintiffs' "answer" would incorrectly state that service of a summons triggers a document hold, whereas the correct answer under the facts states that there *was no specific policy* which dealt separately or uniquely with service of a summons. Defendants explained the logic of their prior answer in that summonses are generally served with a complaint, do not themselves generally contain allegations and do not provide adequate notice of potential claims in a litigation sufficient to institute a document hold. (Greenblatt Decl., Ex. U) With respect to Plaintiffs' new question, Defendants explained that Household's policy did not recite a specific time frame but required that directives be issued within a reasonable time. (Greenblatt Decl., Ex. U)

Having rejected Defendants' answer to the "summons" question on three occasions and threatened a motion at least as many times, Plaintiffs responded to Defendants' January 19 explanation by stating that the ***same*** answer now "**represent[ed] progress towards resolution of this issue**" (but without, of course, accepting Defendants' answer). Plaintiffs, however, then asked Defendants to subscribe to an entirely ***new*** statement of Plaintiffs' own creation referring to a complaint — rather than summons — and to the "trigger[ing] [of Household's document retention policy] by the service of a complaint." (Greenblatt Decl., Ex. V) (emphasis supplied) By letter dated January 23, Defendants explained that Plaintiffs' third question improperly applied temporal qualifications to Defendants' prior answer and shifted the focus from a "summons" to a "complaint." (Greenblatt Decl., Ex. W)

As Plaintiffs' letter evinced a clear intent to continue their improper "discovery-by-correspondence" tactic without accepting Defendants' efforts at accommodation, Defendants again

"respectfully suggest[ed] that for any new inquiries into technical procedural legal matters at Household, [Plaintiffs] propound interrogatories as contemplated under the Federal Rules of Civil Procedure." (Greenblatt Decl., Ex. W) After a brief round of additional correspondence (Greenblatt Decl., Exs. X, Y and Z), Plaintiffs filed this frivolous application.[5]

ARGUMENT

The issue on this motion boils down to this: Plaintiffs asked three separate technical legal questions not within the scope of this Court's November 30 Order or the 30(b)(6) Notice. Defendants attempted numerous times to answer Plaintiffs' questions in an effort to avoid burdening the parties and the Court with a motion. Plaintiffs, however, repeatedly rejected Defendants' answers and instead sought to substitute different statements of their own creation to which they demanded that Defendants subscribe. As Plaintiffs were unwilling to accept the truth of Defendants' answer and continued to demand that Defendants subscribe to their crafted language, Defendants asked that Plaintiffs comply with the Federal Rules and propound interrogatories. Because of their inexplicable unwillingness to do so, Plaintiffs have instead asked this Court to order Household "to provide narrative responses in suitable evidentiary form" and to grant Plaintiffs, at their option, the right to depose a **third** "Housemail" witness on the very same questions to which they seek a narrative response.

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[5] In addition to Plaintiffs' unreasonable refusal to accept Defendants' substantive answer on the "summons" issue, it bears noting that Plaintiffs' have engaged in an increasingly bullying manner throughout the meet and confer process. By way of example, in their second January 17 letter, Plaintiffs demanded a response by 5 p.m. the next day. (Greenblatt Decl., Ex. P) Defendants pointed out that this was an arbitrary deadline and explained that they would respond by the end of the week or sooner if possible. (January 18 e-mail of Josh Greenblatt, Greenblatt Decl., Ex. Q) Plaintiffs' counsel responded by threatening a motion if Defendants did not respond "by 5 p.m. tonight." (January 18 e-mail of Cameron Baker, Greenblatt Decl., Ex. R) Following a conversation between the parties that same day, in which Plaintiffs' counsel refused to accept the explanation by Defendants' counsel that consultation with his client was necessary before agreeing to Plaintiffs' proposed language (Greenblatt Decl., ¶ 21), Defendants transmitted a letter to Plaintiffs urging Plaintiffs to wait for Defendants' response to Plaintiffs' "offer" before burdening the Court with a motion. (Greenblatt Decl., Ex. S) Plaintiffs subsequently "granted" Defendants a one day "extension" which they now tout as an example of their "professional courtesy." (P. Mot. at 4) Less courteous, of course, was Plaintiffs' counsel's letter of January 19. (Greenblatt Decl., Ex. T)

In light of these facts, Plaintiffs' motion is frivolous and mischaracterizes Defendants' position for the following reasons:

- Plaintiffs' assert that the technical legal questions at issue fall "within" the scope of the 30(b)(6) Notice. (P. Mot. at 1) Neither this Court's November 30 Order nor the 30(b)(6) Notice, however, called for a witness on technical legal questions such as those now in dispute. Defendants produced Ms. Cunningham for a second time to testify, *inter alia*, as to "Household's *general policy* regarding preservation of Housemails in the face of litigation . . . ." (November 30, 2005 Order of Judge Nolan) (*emphasis added*) At her December 2 deposition, Ms. Cunningham did, in fact, testify extensively as to both this general policy *and* its specific application to the facts of this case. *(See e.g.*, Cunningham dep. at 70:14-72:10; 73:24-77:2; 102:8-103:3; 107:14-109:20) Thus, even before their recent efforts to answer Plaintiffs' technical legal questions, Defendants more than complied with their discovery obligations. Plaintiffs' continuing efforts to bootstrap technical legal questions to their 30(b)(6) Notice rather than pose interrogatories is unreasonable and unsupported by the Federal Rules. *Cf. Wilson* v. *Lakner*, 228 F.R.D. 524 (D. Md. 2005) (stating that "the *contentions*, *i.e.* theories and legal positions, of an organizational party may be more suitably explored by way of interrogatories and the Court may properly order . . . that contentions may only be inquired into in this manner") (*emphasis original*).

- While their correspondence used stronger language, Plaintiffs' motion characterizes Defendants' answer to the "summons" issue as "evasive" and complains that it "fails to provide the information sought by plaintiffs, namely whether or not service of a summons triggered a document retention hold." (P. Mot. at 3) In fact, however, Defendants answered Plaintiffs' "summons" question numerous times by truthfully describing the lack of a policy at Household on this issue. That this was not the answer Plaintiffs "sought" or "need" (P. Mot. at 3, 6) should not be the basis of a motion to compel. Defendants cannot change the facts to suit Plaintiffs' wishes. That Plaintiffs have brought a motion because the facts do not suit their "needs" is the height of frivolity. *See CSC Holdings, Inc.* v. *Redisi*, 309 F.3d 988 (7th Cir. 2002) (in weighing a motion to compel, a court must consider "good cause").

- Plaintiffs' attempt to make it appear as if Defendants have "gone back on [their] offer" to "provide narrative responses in a suitable evidentiary form *instead* of proceeding via deposition." (P. Mot. at 1); (*see also* P. Mot. at 2-4, 6) The very words of Plaintiffs' motion and the parties' correspondence, however, highlight the fact that this is simply not true. Defendants' offered to provide an affidavit or other narrative response in suitable evidentiary form "*instead* of proceeding via deposition." (P. Mot. at 1) (*emphasis added*); (Greenblatt Decl., Ex. K) When Plaintiffs rejected this offer and made apparent their intention to depose Ms. Werner no matter what, Defendants' offer, which was designed to save the parties the time and expense of another deposition, became moot. Even so, Defendants both attempted to answer Plaintiffs' questions and suggested that Plaintiffs' pose their technical legal questions in interrogatories — the answers to which, of course, would be in the "suitable evidentiary form" sought by Plaintiffs.

- To that end, and perhaps central to the frivolity of their motion, Plaintiffs' papers fail to acknowledge Defendants' repeated suggestions that Plaintiffs propound interrogatories seeking information on technical legal questions as contemplated under the Federal Rules. That suggestion, made by Defendants at both the outset of the present dispute (Greenblatt Decl., Ex. J) and at its end (Greenblatt Decl., Ex. Y), was repeatedly rejected by Plaintiffs. Indicative of this approach is the statement by Plaintiffs' counsel in his letter of January 24: "Your proposed solution of an interrogatory make no sense. Why should Plaintiffs propound an interrogatory when Household already knows the questions at issue?" (Greenblatt Decl., Ex. Z) The answer to this question is twofold. First, Defendants do *not*, in fact, know the questions at issue. Indeed, the shifting nature of Plaintiffs' questions and newly crafted statements is well-evidenced by the correspondence in this case. Second, given the highly technical legal nature of the questions at issue, Plaintiffs should propound simple interrogatories. The Federal Rules exist to protect litigants from just the type of harassment Plaintiffs have embraced on this point by establishing an orderly procedure for exchange of information. *See* Fed. R. Civ. P. 33; *see also* C. Wright and A. Miller, 20 Fed. Prac. & Proc. Civ. (2d ed.) § 92 ("Rule 33 provides a procedure by which a party may require another party to give written answers under oath to written questions relevant to the subject matter of the action."); 8A Fed. Prac. &

Proc. Civ. (2d ed.) § 2168 ("Ideally an interrogatory should be a single direct question phrased in a fashion that will inform the other party what is requested.")

Finally, it is worth highlighting Plaintiffs' concession, in their motion, that this entire enterprise is aimed at their pursuit of what are unfounded "spoliation issues." (P. Mot. at 5) While Plaintiffs complain that they are not getting "the information they need" (P. Mot. at 6), this is just another way of saying that they are not getting the information that they *want* to support their baseless spoliation claims. Defendants continue to work with Plaintiffs and their ever-increasing discovery requests regarding Housemail. Indeed, to date, numerous Housemail files have been produced to Plaintiffs in hard copy and Defendants are currently reviewing thousands more for production in electronic format; two depositions on Housemail issues have already occurred and one more is now scheduled; and Defendants are actively engaged in providing data to Plaintiffs regarding Household's migration from Housemail to Lotus Notes. And for what? While Defendants certainly acknowledge Plaintiffs' right to explore "possible spoliation issues" (P. Mot. at 5), this Housemail detour has now virtually subsumed any actual review of the "merits," or lack thereof, of Plaintiffs' underlying claims.

CONCLUSION

Defendants respectfully request:

(a) that Plaintiffs' motion to compel be denied in its entirety;

(b) that to the extent the Court deems such questions appropriate at all, Plaintiffs be required to propound interrogatories as contemplated under the Federal Rules regarding the information at issue on this motion and for other similar technical legal questions.

Dated: January 31, 2006
Chicago, Illinois

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CERTIFICATE OF SERVICE

Adam B. Deutsch, an attorney, certifies that on January 31, 2006, he served copies of Defendants' Memorandum of Law in Opposition to Class' Motion to Compel Re Rule 30 (b)(6) Deposition on Housemail Topic to the parties listed below via the manner stated.

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