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

THE CLASS' SUBMISSION REGARDING DISCOVERY OF DISPUTED REGULATORY DOCUMENTS

I. INTRODUCTION

The Class hereby responds to the Court's request for a factual overview regarding over 14,200 pages (approximately six boxes) containing over 830 documents mistakenly produced by the Household Defendants,[1] defendant Arthur Anderson LLP ("AA") and Household's consultant/auditor KPMG, LLP ("KPMG") relating to four federal agencies, the Office of the Comptroller of the Currency ("OCC"), the Office of Thrift Supervision ("OTS"), the Federal Deposit Insurance Corporation ("FDIC") and the Federal Financial Institutions Examination Council ("FFIEC") (collectively, the "Regulatory Agencies") so that the Court can resolve these issues in the Class' favor on March 9, 2006. According to Household, AA and KPMG, although these documents are responsive to the Class' discovery requests, these documents are privileged under the bank examination privilege and thus, should be returned to the producing party or destroyed.

In this statement, the Class will provide factual background of the allegations of their securities fraud complaint, the role of the Regulatory Agencies and their supervision of Household and its bank subsidiaries as well as a brief outline of the procedural and substantive law that the Court should apply in resolving this dispute.

II. BACKGROUND OF THE CLASS' FACTUAL ALLEGATIONS

Lead plaintiffs' Corrected Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("Complaint") details the Household Defendants' multi-pronged fraud scheme designed to falsify Household's financial statements for the period October 23, 1997 through October 11, 2002 (the "Class Period") and conceal Household's true financial condition from the

[1] The Household Defendants include Household International, Inc. ("Household"), Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar.

market. Defendants' scheme allowed Household to report "record" financial results during the Class Period by:

- Engaging in illegal and deceptive lending practices designed to maximize amounts earned from subprime borrowers – without proper disclosure or any regard to benefits to the borrowers – at unconscionable interest rates while publicly asserting that Household adhered to all applicable lending laws and regulations and followed the highest ethical standards;

- Arbitrarily "reaging or restructuring" delinquent accounts (*i.e.*, resetting them as current) to conceal true levels of defaults and delinquencies in order to manipulate and delay charging them off, thereby allowing Household to maintain inadequate loan loss reserves in violation of Generally Accepted Accounting Principles ("GAAP"); and

- Manipulating the accounting associated with various credit card partnership agreements in violation of GAAP without which Household would not have met or exceeded analysts' earnings per share estimates.

See ¶¶51-106 (predatory lending allegations), ¶¶107-133 (reaging or restructuring allegations), and ¶¶134-153 (credit card allegations).[2]

Each prong of the Household Defendants' scheme has unraveled: (1) Household took a $525 million charge to pre-tax income in 3Q02 to settle various lawsuits and regulatory actions relating to its predatory lending practices; (2) Household agreed to a cease and desist order by the Securities and Exchange Commission ("SEC") for its improper reaging or restructuring practices conceding that such practices constituted violations of federal securities laws; and (3) Household issued a $600 million (pre-tax) restatement due to the improper accounting related to its credit card agreements. ¶¶5, 25, 50, 97-102, 105; Exhibit A to the Declaration of D. Cameron Baker in Support of the Class' Submission Regarding Discovery of Disputed Regulatory Documents ("Baker Decl."), filed concurrently herewith.

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[2] All paragraph ("¶") references are to the Complaint.

III. REGULATORY BACKGROUND

In 1997, at the commencement of the Class Period, Household had three bank subsidiaries, Household Bank, f.s.b., Household Bank (Nevada), N.A. and Household Bank (SB), N.A. (collectively, the "Banks"). Household Bank, f.s.b. engaged in the origination of real estate loans and personal home loans and was regulated by the OTS. By contrast, both Household Bank (Nevada), N.A. and Household Bank (SB), N.A. engaged in credit card operations and were regulated by the OCC. All three Banks were regulated by the FDIC and the FFIEC.

Sometime in late 2002 to early 2003, Household Bank, f.s.b. ceased operations. Consequently, the OTS does not currently regulate any Household entity. The OCC currently has regulatory oversight over HSBC Bank (Nevada), N.A., which the Class understands to be the successor to the entity formerly entitled Household Bank (Nevada), N.A.

The Regulatory Agencies generally monitor a bank (and its parent) through periodic examinations of the internal controls of a bank's operations, financial well-being and the information technology systems used by banks to ensure compliance with applicable laws and regulations. Since at least 1998, the Regulatory Agencies have been concerned about the greater risks posed by "subprime" lending, *i.e.* lending to individuals who have limited or troubled credit histories, modest incomes or high debt-to-income ratios.[3] These risks included the potential financial losses associated with lending to subprime customers as well as the potential risks associated with possible violations of the consumer protection laws and regulations.

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[3] Commencing in 1998, "the OCC responded to the rapid growth in subprime lending with a series of examinations [of banks] designed to evaluate the planning, loan production, loan servicing, securitization, and risk management practices employed by national banks that participate in this market. These examinations uncovered a number of serious weaknesses in the business and control processes used to manage the risks associated with subprime lending activities." Baker Decl., Ex. B at 3.

In March 1999, the Regulatory Agencies issued Interagency Guidelines on Subprime Lending that address both re-aging and consumer protection, including statutory and regulatory consumer protections. *See* Baker Decl., Ex. C at 5-6.

In April 1999, the OCC followed up with interim examination procedures for subprime lending. These procedures included checking the presence of company "[c]ontrols to ensure compliance with fair lending and other consumer protection laws." Baker Decl., Ex. D at 1-2. Indeed, under the interim procedures, the examiner was required to provide "conclusions regarding "[c]ompliance with applicable laws, rulings and regulations." Baker Decl., Ex. E at A-16. As to the reaging account management policies, the OCC provided specific guidance as to what was acceptable and what was not. In a cover memo to bank chief executive officers, the OCC stated "[c]ure programs [such as re-ages] should be used only when the bank has substantiated the customer's renewed willingness and ability to pay, and evaluated the probability of future payments sufficient to satisfy the debt." Baker Decl., Ex. B at 9. Conversely, under "Inappropriate Practices," the OCC cited "[r]ecurring re-agings, extensions, or renewals, for accounts with no supportable or demonstrated improvement in ongoing repayment ability." *Id.* at 11. And in the interim examination procedures, the OCC directed examiners to make factual findings regarding the re-aging policies and their impact on loss reserves. Baker Decl., Ex. E at A-8 (examiner to "[d]etermine the extent of strategies and criteria for various account management functions, including . . . [c]ustomer service re-ages, extensions and renewals") and A-9 (examiner to "[e]valuate various cure programs used, such as re-aging . . . [to] [a]ssess the current and potential impact on such programs on reported performance and profitability, including allowance implications").

In mid-2000, concerns about abusive lending practices led the OCC to send a memo to the Chief Executive Officers of all banks, including Household, where the OCC detailed practices that "may involve violations of fair lending statutes and other consumer protection provisions." Baker

Decl., Ex. F at 1. The OCC warned that such practices "may also lead to increased credit, legal, and reputation risk." *Id*. The practices listed by the OCC as abusive are some of the very same practices that the Class alleges Household was engaged in during the Class Period, including sales of single-premium credit insurance, misrepresenting the pricing and terms of loans, inadequate disclosure, high loan-to-value loans that strip the equity in a consumer's home. *Compare* Ex. F at 1-2 *to* ¶¶51-106.

In January 2001, the Regulatory Agencies issued expanded guidance on supervision of subprime lending. As explained in the accompanying press release, the expanded guidance covered five major issues, including "Cure programs – Documentation requirements for re-aging, renewing, or extending delinquent subprime accounts" and "Predatory Lending – Identification of potentially abusive lending practices subject to examiner criticism." Baker Decl., Ex. G at 1-2. These two major issues are addressed in detail in the Expanded Guidance for Subprime Lending Programs. *See* Baker Decl., Ex. H at 10-11. As made clear in this document, the Regulatory Agencies recognized that the "risks inherent in subprime lending programs call for frequent reviews" and that such reviews should be done at both the portfolio level (*i.e.* all loans) and the transaction level (sampling of specific loans). *Id*. at 7.

As a subprime lender, Household was subject to this special scrutiny during the Class Period. The Regulatory Agencies' concerns with subprime lending parallel the factual allegations made by the Class that Household's public statements regarding its reaging policies and its compliance with consumer protection laws were false and misleading. ¶¶51-133.

In addition to the focus on subprime lending, the Regulatory Agencies would also examine the financial accounting of the Banks to ensure that they were in compliance with GAAP and accurately provided a reliable portrait of the bank's financial health. *See, e.g.*, 12 C.F.R. §563c.1(b)(1). In the Class' factual allegations, the Class has asserted that Household violated the

federal securities laws with respect to the accounting of its credit card contracts. ¶¶134-153. The Regulatory Agencies' examinations addressed this issue. *See, e.g.*, Baker Decl., Ex. E at A-3 (directing examiner to compile list of bank's cobranding partners, affinity affiliations and any other strategic partnerships as well as copies of associated contracts).

IV. THE COURT HAS THE AUTHORITY AND INFORMATION SUFFICIENT TO RESOLVE THIS DISPUTE AT THE MARCH 9, 2006 HEARING

Procedurally, this dispute concerns the discoverability of documents produced by Household, AA and KPMG in response to formal document requests under Fed. R. Civ. P. 34 and a subpoena under Fed. R. Civ. P. 45.[4] Consequently, in addressing this dispute, the Court is guided by the Federal Rules of Civil Procedure. *See In re Bankers Trust Co.*, 61 F.3d 465, 469-471 (6th Cir. 1995) (finding Rule 34 applicable to the situation where a party seeks an agency document from a party opponent rather than procedure set for the agency's regulations regarding request for disclosure of confidential records). Further, the Court has provided the Regulatory Agencies as holders of the applicable privilege with the opportunity to participate in the proceedings relating to this dispute.

As discussed in *Bankers Trust*, the Class may properly obtain such documents, even if privileged, via these formal discovery requests on Household, AA and KPMG without requesting the documents from the Regulatory Agencies themselves pursuant to those agencies' regulations. 61 F.3d at 469-71 (rejecting argument that plaintiff had to obtain FDIC documents through the FDIC regulatory process where the defendant had possession and custody of such documents). Further,

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[4] *See, e.g.*, Plaintiffs' First Request for Production of Documents to Household Defendants, Request Nos. 1-4; Plaintiffs' Second Request for Production of Documents to Household Defendants, Request Nos. 12-14; Plaintiffs' First Request for Production of Documents to Defendant Arthur Andersen LLP, Request Nos. 1-3; Subpoena to KPMG LLP, Request No. 8. Because this point cannot be reasonably disputed, the Class has not submitted copies of these formal discovery requests in order to avoid burdening the Court with unnecessary paper. If the Court desires a copy of these discovery requests, the Class would be pleased to provide them.

while the Class has separately requested documents from the OCC and the OTS pursuant to their regulatory processes, the Court need not and should not await the agencies' rulings on those requests, which might not occur until April 2006 or later.

The Court's resolution of this dispute generally follows the traditional motion to compel/protective order analysis where the party opposing discovery on the basis of privilege bears the burden of establishing the privilege. The slight twist to the traditional analysis is that here the party holding the privilege, if such exists with respect to disputed documents, is the Regulatory Agencies, rather than Household, AA or KPMG. *See In re Bank One Sec. Litig.*, 209 F.R.D. 418, 426 (N.D. Ill. 2002) ("The bank examination privilege only protects agency opinions and recommendations and can therefore only be asserted by a regulatory agency."). This means that it is the federal agencies' burden to assert the privilege and to establish it. *Schreiber v. Society for Savings Bancorp., Inc.*, 11 F.3d 217, 220 (D.C. Cir. 1993). The Court has clearly addressed this issue by affirmatively seeking those agencies' input in resolving this dispute and providing the agencies with the opportunity to assert the privilege, if applicable, and to defend it at the March 9, 2006 hearing. *Bankers Trust*, 61 F.3d at 472 (Court must allow regulatory agency opportunity to assert the privilege and to defend that assertion).

Thus, the Court has taken the procedural steps necessary to resolve this dispute on March 9, 2006. As indicated by Class Counsel on February 15, 2006, the Court should resolve this dispute as quickly as possible because the Class affirmatively wishes to depose a number of Household witnesses on the issues arising from the Regulatory Agencies' investigations into Household and its activities.

V. THE COURT SHOULD COMPEL HOUSEHOLD, AA AND KPMG TO TURN OVER THE DOCUMENTS AT ISSUE

A. Bank Examination Privilege Does Not Apply to Factual Material

The privilege at issue, the bank examination privilege, "is a qualified one. Purely factual material falls outside the privilege, and if relevant, must be produced." *Bankers Trust*, 61 F.3d at 471-72; *see also Bank One*, 209 F.R.D. at 426-27.[5]

Because the bank examination privilege does not cover factual material, all factual material to the extent not inextricably intertwined with deliberative material must be produced. *Bank One*, 209 F.R.D. at 426. "The first task of the district court, therefore, is to determine whether the banking agency has shown that the requested documents are not primarily factual in nature." *Schreiber*, 11 F.3d at 220. In making this showing, the regulatory agency cannot rely upon a conclusory declaration. *Id*. at 221. If the Court finds that one or more of the Regulatory Agencies have failed to meet their burden of establishing the application of the privilege, the Court should order Household, AA and KPMG to produce the documents relating to that agency or agencies immediately.

If the Court finds that one or more of the agencies has met the burden of establishing the privilege may apply to a document, "the court must then determine whether the documents can be redacted so that the factual portions may be produced." *Id*. at 220. To make this determination, the Court conducts an *in camera* inspection of the documents. *Id*. at 221 ("[C]ourts commonly do examine such documents *in camera* before determining whether they fall within the claimed [bank

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[5] In response to the Court's oral request on February 28, 2006 that the Class identify other cases addressing this issue, the Class provides the following: *Merchants Bank v. Vescio*, 205 B.R. 37 (D. Vt. 1997) (discovery permitted upon remand in 210 B.R. 913 (D. Vt. 1997)); *Continental Illinois Nat'l Bank & Trust Co. v. Indemnity Ins. Co.*, No. 87 C 8439, 1989 U.S. Dist. LEXIS 13004 (N.D. Ill. Oct. 30, 1989); *In re: Subpoena Served upon the Comptroller of Currency*, 967 F.2d 630 (D.D.C. 1992); *Dimon Int'l, Inc. v. Arab Am. Bank*, No. 4:94-CV-87-BO(1), 1995 U.S. Dist. LEXIS 18839 (E.D.N.C. Dec. 1, 1995); *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160 (W.D. Wa. 1986); and *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577 (E.D.N.Y. 1979).

examination] privilege.") (citing *inter alia*, *Delozier v. First Nat'l Bank*, 113 F.R.D. 522, 525-26 (E.D. Tenn. 1986)).

As far as the Class was able to tell, Household, AA and KPMG have not purported to separate factual from non-factual material as to these documents, but simply redacted them based on the appearance of the terms "OTS," "OCC" or "FDIC." Accordingly, the Court may not simply rely upon the lists previously provided by these parties.

B. There Is Good Cause to Override the Bank Examination Privilege Even if Applicable

Even if the bank examination privilege applies to a particular document, the privilege is a qualified one and will be overridden where good cause is shown through application of a five-part test. The relevant factors are 1) the relevance of the evidence sought to be protected; 2) the availability of other evidence; 3) the "seriousness" of the litigation and the issues involved; 4) the role of the government in the litigation; and 5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Bankers Trust*, 63 F.3d at 472. Consideration of these factors demonstrates that the Class does have good cause for overriding the bank examination privilege, even if applicable.

The first factor, relevance, is judged based upon the discovery standard of relevance. As discussed at length above in the sections on the Class' factual allegations (*see supra* §II) and the Regulatory Agencies' supervision of Household (*see supra* §III), the Regulatory Agencies did examine Household and its banks on these issues. Thus, there should be no dispute that the Regulatory Agencies' documents are relevant to the issues in this case under the liberal discovery standard set out in the Federal Rules of Civil Procedure. Indeed, the mere fact that Household, AA and KPMG have previously produced these documents in response to formal discovery requests establishes this point. Accordingly, the first factor is met.

As to the second factor, the availability of the information from other sources, this factor likewise favors the Class. "[T]he documents at issue are relevant not only as proof of mismanagement, but more importantly, as proof of knowledge or recklessness on the part of the defendants." *Principe v. Crossland Sav., FSB*, 149 F.R.D. 444, 449 (E.D.N.Y. 1993). As documents showing the contemporaneous or prior knowledge of the defendants, these documents are unique. Internal documents from the Banks or Household are not an adequate substitute as the Class is entitled to discover any differences between what Household told the Regulatory Agencies and the story told by Household's internal documents. *Schreiber,* 11 F.3d at 222 (noting that documents and information provided by the company to the Regulatory Agencies are subject to the same privilege and thus, are not "available from another source").

The third factor, the seriousness of the litigation, also favors the Class. Every court that has considered the issue has found that class-action securities fraud cases to be serious cases. "Given the current climate of the economy and the heightened need to promote sound, reliable financial data in order to permit the public to make educated investing decisions, there is no question that the issues presented in the instant litigation are of a serious nature fulfilling the third prong of the balancing test." *Bank One,* 209 F.R.D. at 428; *see also Principe*, 149 F.R.D. at 449 (finding same and citing other cases); *In re Midlantic Corp. S'holder Litig.*, Miscellaneous Docket No. 92-99, 1994 U.S. Dist. LEXIS 21514, at *10 (D.D.C. Oct. 24, 1994) ("neither the Court nor the OCC deny the seriousness of plaintiffs' litigation").

Similarly, the fourth factor, the involvement of the government in the litigation, favors the Class. Here, the SEC conducted a parallel investigation of Household into similar issues. As part of its investigation, the SEC has compelled the production of documents and testimony from Household. Indeed, some of the documents at issue here were previously produced to the SEC. On March 18, 2003, the SEC and Household jointly entered into an Order in which the SEC found that

Household violated the federal securities laws with respect to the disclosure of its reaging policies. *See* Baker Decl., Ex. A at 2-5 (violations regarding the restructuring of delinquent loans and the resetting of such loans to "current" and misleading disclosures relating to its restructuring and account management policies). The fact that the SEC investigation is ongoing,[6] demonstrates that the government has a substantial interest in this litigation. *See In re Providian Fin. Corp. Sec. Litig.*, 222 F.R.D. 22, 29 (D.D.C. 2004) (whether the government used its own civil or enforcement powers under the securities law to pursue similar claims is relevant to this factor). Additionally, as to the OTS, that entity no longer regulates Household or any of the Banks. Accordingly, it has a diminished interest, if any, in retaining confidentiality.

As to the fifth factor, the chilling effect upon bank examiners as the result of disclosure, the Class recognizes that this factor tends to disfavor disclosure. However, this factor will always be against disclosure and thus, this factor alone cannot be determinative. Moreover, as the courts have emphasized, the chilling effect "would largely be alleviated if the court could fashion a practical protective order, one that reconciles the agencies' interest in confidentiality with the plaintiff's potential need to introduce some or all of the subpoenaed documents (or information therefrom) into evidence at a public trial." *Schreiber*, 11 F.3d at 222. Here, the Court has already issued such a Protective Order. The Class has also offered to work with the OTS and the OCC to the extent necessary to provide greater protections as part of the Protective Order.

In sum, four of the five factors favor the Class. This is more than sufficient to find good cause to override the bank examination privilege to the extent that it applies.

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[6] Baker Decl., Ex. I at 1.

VI. CONCLUSION

For the foregoing reasons, the Court has taken the procedural steps necessary to rule on March 9, 2006 and should do so in favor of the Class by compelling Household, AA and KPMG to produce the disputed documents.

DATED: March 1, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL AND U.S. MAIL

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 March 1, 2006, declarant served by electronic mail and by U.S. Mail the: **THE CLASS' SUBMISSION REGARDING DISCOVERY OF DISPUTED REGULATORY DOCUMENTS** to the parties listed below. The parties' e-mail addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 1st day of March, 2006, at San Francisco, California.

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