**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

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| LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,<br><br>Plaintiff,<br><br>*- against -*<br><br>HOUSEHOLD INTERNATIONAL, INC., ET. AL.,<br><br>Defendants. | Lead Case No. 02-C-5893 (Consolidated)<br><br>CLASS ACTION<br><br>Judge Ronald A. Guzman<br>Magistrate Judge Nan R. Nolan |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR (1) A DIRECTION THAT PLAINTIFFS COMPLY WITH THIS COURT'S OCTOBER 26, 2005 DISCOVERY ORDER; AND (2) A PROTECTIVE ORDER QUASHING PLAINTIFFS' MARCH 1, 2006 DEPOSITION NOTICE BECAUSE IT ADMITTEDLY VIOLATES THAT ORDER**

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TABLE OF CONTENTS

Page

Preliminary Statement ........ 1

Argument ........ 2

*A.* *Plaintiffs have failed to comply with the procedures mandated by the Court* ........ 2

B. *Having needlessly delayed the discovery process Plaintiffs can make no showing that additional depositions are warranted* ........ 5

Conclusion ........ 9

This memorandum is submitted on behalf of Household International, Inc. and Household Finance Corp. and its former officers and directors William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (referred to collectively herein as "Household" or "Defendants") in support of their motion (i) for Plaintiffs to comply with this Court's October 26, 2005 discovery Order; and (ii) for a Protective Order quashing Plaintiffs' March 1, 2006 deposition notice ("the March 1 Notice") pursuant to Rule 26(c) of the Federal Rules of Civil Procedure because it does not comply with that Order.

**Preliminary Statement**

Under Rule 30 of the Federal Rules of Civil Procedure each party in a litigation is entitled to take 10 depositions and must request leave of court for any additional depositions. Fed R. Civ. P. 30(a)(2)(A). At the October 26, 2005 status conference, this Court granted each side the right to take up to a total of 35 depositions. In doing so, the Court stated that if a party believed additional depositions were necessary, it must request leave of Court. Transcript of October 26, 2005 status conference before Judge Nolan ("Tr") at 24, relevant excerpt attached hereto as Exhibit A to Declaration of Landis C. Best ("Best Decl.").

Plaintiffs have ignored this Court's Order. Specifically, without having yet taken even a fraction of their allotted 35 depositions, Plaintiffs served an omnibus Notice of Deposition on March 1, 2006 identifying an *additional 54* fact witnesses they seek to depose by the May 12 discovery deadline. Best Decl. Ex. B. Even counting the way Plaintiffs count, which Defendants dispute, compliance with this blunderbuss notice would amount to an astonishing 76 depositions by Plaintiffs in this matter — more than double what the Court permitted. Despite the fact that Plaintiffs ignored both the Court's Order and the meet and confer process before sending the March 1 Notice, Defendants proposed that the parties meet and confer on Defendants'

common sense suggestion that both parties reserve their rights with respect to any depositions beyond the current Court-mandated limit; that Plaintiffs prioritize and take the 35 depositions permitted by the Court; and that the parties meet and confer further regarding the need for any additional depositions beyond 35, and only then to present any resulting disagreement to this Court for resolution. Best Decl. Ex. C. During the meet and confer teleconference, Plaintiffs rejected this proposal out of hand (Best Decl. ¶ 2-3; Ex. D) and have once again precipitated an unnecessary and premature discovery dispute.

Moreover, after Judge Guzman issued his most recent opinion granting Defendants' motion to dismiss with prejudice the Class' claims arising prior to July 30, 1999, effectively reducing the Class Period and the Class to approximately 60 percent of its original scope and size, Defendants again invited Plaintiffs to re-consider their notice (which predated notice of Judge Guzman's ruling). *See* Letter of Landis C. Best, Esq. to Azra Z. Mehdi, Esq. and Cameron Baker, Esq. dated March 7, 2006 (Best Decl. Ex. E). Characteristic of Plaintiffs' "if you say the light is green we say it is red" approach, they instead filed a status conference report on March 8 in which they stood by their position. Because Plaintiffs' March 1 Notice plainly violates the Court's October 26 Order, Defendants hereby move for (i) a direction that Plaintiffs comply with this Court's October 26 Order and (ii) a Protective Order quashing the March 1 Notice because it is in flagrant contradiction of that Order.

## **Argument**

### *A. Plaintiffs have failed to comply with the procedures mandated by the Court*

At the October 26, 2005 status conference, the Court mandated clearly the number of depositions each side is permitted: "[S]o plaintiffs and defendants may each have a total of

35. *If you need more than 35, leave of Court is required.*" Tr. at 24 (emphasis added) (Best Decl. Ex. A.)

Ignoring both the "leave of court" directive and the meet and confer process, Plaintiffs noticed *54 depositions* on March 1, 2006. The March 1 Notice is in addition to the 25 depositions Plaintiffs have already noticed. As Plaintiffs themselves have explicitly admitted, the March 1 Notice violates the Court's October 26 Order permitting each side 35 depositions. *See* Best Decl. Ex. B ("We are aware that with this Notice the number of depositions exceeds the 35 depositions currently permitted by the Court.").

During a telephonic meet and confer on March 3, 2006, Defendants asked Plaintiffs to prioritize among the 54 names on the notice those deponents that are most important and thus need to be included among Plaintiffs' allotted 35. Best Decl. at ¶ 2. Defendants also proposed the common sense solution — that would have obviated the need for the Court to decide this dispute now and perhaps ever — that once Plaintiffs have taken 35 depositions, if they believe that additional depositions are still necessary, the parties would then meet and confer in an attempt to reach agreement on what more might be needed. Absent agreement, then and only then would the parties submit any dispute to this Court for a ruling. *Id.* at ¶ 2 and Ex. C. Plaintiffs rejected that offer. *Id.* at ¶ 3 and Ex. D.

It is simply unreasonable for Plaintiffs to refuse Defendants' common sense suggestion that they take the 35 depositions permitted by the Court before confronting the parties and the Court with yet another discovery dispute — especially where the dispute may never occur if the Plaintiffs follow this proposed procedure. Plaintiffs have thus far taken a total of only

*five* depositions — two of which were Company depositions that have involved multiple deponents — and have noticed only an additional *18* fact deponents. In total, prior to the disputed March 1 Notice, Plaintiffs have taken, scheduled and/or noticed 23 depositions. Thus they have 12 depositions remaining and should be ordered to proceed with that number in the first instance consistent with this Court's October 26 ruling.[1]

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[1] There is a dispute among the parties as to the exact number of depositions taken, although the difference is not material to this motion. During the March 3 meet and confer, Plaintiffs expressed their belief that under the Federal Rules, all of the Rule 30(b)(6) deponents together count as only one deposition for the purpose of the Court-ordered limit. While there is some support for Plaintiffs' general position that a Rule 30(b)(6) notice only counts as one deposition regardless of the number of witnesses, *See In re Sulfuric Acid Antitrust Litigation*, 2005 WL 1994105 at * 3 (N.D. Ill. Aug. 19, 2005) (attached hereto as Exhibit 1) this general rule could not have been intended to protect the type of conduct Plaintiffs have engaged in here. Specifically, Plaintiffs' initial Rule 30(b)(6) Notice, served on June 7, 2004, requested testimony from Household on eight discrete topics, including the Vision System, for which the Company designated Steve Matasek, and Household's email systems, for which it designated Christine Cunningham. Moreover, Plaintiffs served an additional Rule 30(b)(6) notice on December 15, 2005, requesting testimony with respect to the internal financial data generated by Household and its processes and procedures for compiling and reporting data for its publicly reported financial statements. These topics were not included in the initial June 7, 2004 Notice. Surely a second 30(b)(6) notice must be counted separately for the purpose of the Court-ordered limit, particularly since courts have made clear that a second 30(b)(6) notice is to be treated no differently than a second notice of an individual, such that leave of court is required. *See In re Sulfuric Acid*, 2005 WL 1994105 at 4-5. Otherwise a party could subject a company to harassment by continuing to serve an unlimited number of 30(b)(6) notices.

It is Household's position that Plaintiffs' broad Rule 30(b)(6) deposition notices must be counted as, at a minimum, two separate depositions (since two notices were served), and any additional Rule 30(b)(6) notice must likewise be counted separately (and leave of court required). In any event, even if *all* of the 30(b)(6) witnesses somehow counted as only one deposition, Plaintiffs will have taken and/or noticed 22 of their allotted 35 depositions as of their February 13, 2006, deposition notice. *See* February 13, 2006 Notice of Deposition (Best Decl. Ex. F) Thus, even under Plaintiffs' counting, they have 13 depositions remaining.

Defendants' proposal made sense even *before* Judge Guzman ruled that almost a full two years of Plaintiffs' claims are no longer in the case. It makes even greater sense now that approximately 40 percent of Plaintiffs' case has been eviscerated. Judge Guzman's decision (Best Decl. Ex. G) dramatically narrows the scope of discovery in this matter. There are countless references in Plaintiffs' Complaint to times and events before July 30, 1999 that no longer have any bearing on the claims at issue because they cover the period 1997 through most of 1999 (July 30, 1999 now being the new start of the class period). Plaintiffs' response has been to simply ignore Judge Guzman's ruling.

There is yet another prudential concern for taking discovery in sensible increments: Defendants' motion to dismiss the Complaint in its entirety for failure to plead loss causation under the Supreme Court's decision in *Dura Pharmaceuticals v. Broudo*, 125 S. Ct. 1627 (2005) remains pending before Judge Guzman. Obviously, any ruling on this motion may have a dramatic affect on the scope of discovery.

B. *Having needlessly delayed the discovery process Plaintiffs can make no showing that additional depositions are warranted*

Plaintiffs' sole basis for refusing to prioritize deponents and insisting on the expansion of the number of depositions appears to be the fact that the May 12 discovery deadline is fast approaching. *See* Best Decl. Ex. B. Undoubtedly that is why Plaintiffs initiated the ambitious and impractical "schedule" set forth in the March 1 Notice,[2] in the hopes of making the

[2] The March 1 Notice provides for three depositions per day, every other business day during that time frame.

Court believe that Plaintiffs are actually prepared to meet the May 12 discovery deadline or securing an extension of the discovery cut-off. In reality, however, Plaintiffs' refusal and/or inability to prioritize deponents at this late date in discovery is largely a product of their own doing, as they have failed to move the process along and studiously avoided litigating the merits of their case.

Specifically, while merits discovery has been ongoing since the Fall of 2004, Plaintiffs have taken only the following depositions:

- Christine Cunningham (30(b)(6) on the Housemail System) — November 11, 2004
- Steve Matasek (30(b)(6) on the Vision System) — November 12, 2004
- Elaine Markell — April 6, 2005
- Christine Cunningham (30(b)(6) on the Housemail System) — December 2, 2005
- Pete Sesterhenn (30(b)(6) on Consumer Lending Financial Data) — February 2, 2006
- Carol Werner (to answer additional questions Ms. Cunningham could not answer) — February 16, 2006
- Walt Rybak — February 24, 2006 (rescheduled from October 2005)
- Curt Cunningham — March 8, 2006 (rescheduled from October 2005)

Three of those depositions — the two depositions of Christine Cunningham and that of Carol Werner — had nothing to do with the merits of the case at all, but rather were part of lengthy but futile attempts by Plaintiffs to build a meritless spoliation claim due to changes in Household's email system. Indeed, the Court itself, in denying Plaintiffs' motion regarding the second Cunningham deposition, made it clear that it was only permitting Plaintiffs to take another deposition in this narrow area. *See* November 30, 2005 Order of Judge Nolan ("Plaintiffs

may not inquire about Household's preservation of Housemail files as the result of other pending litigation or governmental investigations."). Plaintiffs drove the proverbial truck through that directive and insisted on yet a third deposition on this issue (Werner), which Defendants provided only to spare the Court yet another frivolous motion by Plaintiffs.

Plaintiffs also cancelled the depositions of Walt Rybak and Curt Cunningham on the eve of their scheduled dates last October. Thus, as indicated above, between April 2005 and January 2006, Plaintiffs did not take a single deposition on the merits.[3] While Plaintiffs will tell the Court about their need to review the over 3 million pages of documents produced (at their demand) by Defendants, surely Plaintiffs could have organized their discovery to allow depositions to take place more efficiently. Plaintiffs have recently served a *third* document request — will they now claim, as they have in the past, that no depositions can take place until responsive documents to this additional request are received? Given Plaintiffs' increasingly overbroad view of this case and their increasingly burdensome and improper discovery tactics, it seems to be Plaintiffs' plan to prolong discovery — and their fishing expedition — as long as possible.

Pursuant to prior deposition notices (including the February 13, 2006 notice of 15 individuals), the following depositions have been scheduled to take place in the coming weeks:[4]

- Lew Walter (March 16)

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3 Christine Cunningham's December 2, 2005 non-merits Housemail deposition was the only deposition taken during that time period.

4 It is worth noting that of the 21 fact depositions Plaintiffs noticed prior to the disputed March 1 Notice, nine of those deponents are ex-employees of Household (and two others are former outside directors) over whom Defendants have no control and whose schedules are therefore not something Defendants can dictate.

- Thomas Schneider — March 21
- Per Ekholdt — March 28
- Cliff Mizialko — April 4 (as Rule 30(b)(6) witness on financial data)
- Cliff Mizialko — April 6 (in his individual capacity)
- Elisa Gargul — April 6
- Celeste Murphy — April 11
- Scott Weintroub — April 12
- Edgar Ancona — April 18
- Lisa Sodeika — April 26

The parties are still in the process of finalizing dates for several other individuals whose depositions have been noticed: Tom Spoden, Rob O'Han, Paul Makowski, Steve McDonald, Doug Friedrich and Robin Allcock (the last four of whom are ex-employees) and additional witnesses pursuant to Plaintiffs' Rule 30(b)(6) Notice on Household's financial data and reporting. However, even as Plaintiffs have noticed this flurry of depositions as the discovery deadline approaches, they have cancelled two depositions and refused to accept proffered dates for another.[5]

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5 Plaintiffs cancelled the depositions of Directors Lou Levy and John Nichols, and refused to accept a proffered date for Dan Pantelis. Despite Plaintiffs' assertions in open court at the February 15, 2006 hearing that it was Defendants who cancelled the Levy and Nichols depositions, that is clearly not the case. *See* Letter of Cameron Baker, Esq. to Landis C. Best, Esq. dated February 2 2006; Letter of Azra Mehdi, Esq. to Patricia Farren, Esq. and David Gordon, Esq. dated February 2, 2006 (Best Decl Exs. H and I.)

In short, Plaintiffs' request to make up for lost time by deposing nearly 75 individuals in a two month span is entirely unreasonable. There is no need to take 75 depositions in this case in the first place — and the two month time frame just makes Plaintiffs' actions more harassing. Plaintiffs' attempt to take such a large number of depositions before even completing the 35 permitted by this Court demonstrates their abusive approach to discovery. Plaintiffs' conduct violates this Court's prior Order and the concerns that animate Rules 26 and 30 of the Federal Rules of Civil Procedure. Plaintiffs should not be permitted to take — at a minimum — an additional 41 depositions merely on the grounds that the May 12 discovery deadline is fast approaching. Plaintiffs have had ample time throughout the discovery process to prioritize their list of potential deponents and take their allotted depositions, but have not made a good faith effort to move the process along. They should not be rewarded for such conduct.

**Conclusion**

For the foregoing reasons, this Court should direct Plaintiffs to comply with this Court's October 26, 2005 Order, and enter a Protective Order pursuant to Federal Rule of Civil Procedure 26(c) quashing the March 1 Notice because it violates that Order.

Dated: March 8, 2006
Chicago, Illinois

Respectfully submitted,

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