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 SUPPORT OF DEFENDANTS' (I) RENEWED MOTION TO QUASH PLAINTIFFS' MARCH 1, 2006 DEPOSITION NOTICE AND (II) MOTION TO QUASH ALL 13 OF THE NON-PARTY DEPOSITIONS NOTICED AND/OR SUBPOENAED BY PLAINTIFFS

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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 (i) Renewed Motion to Quash Plaintiffs' March 1, 2006 Deposition Notice; and (ii) Motion to Quash All 13 of the Non-Party Depositions Noticed and/or Subpoenaed by Plaintiffs.

PRELIMINARY STATEMENT

Plaintiffs have seemingly abandoned any effort to comply with the Federal Rules or the Orders of this Court and discovery in this case is spinning out of control. Most troubling is Plaintiffs' outright refusal to comply with this Court's October 26, 2005 and March 9, 2006 Orders regarding the number and prioritization of depositions and, indeed, their affirmative and ongoing actions in contravention of those Orders. Since this Court's March 9 directive reaffirming its October 26 Order that Plaintiffs limit their initial deposition notice to 35 people and that the parties "sit down and prioritize" (March 9, 2006 Transcript of Proceedings Before The Hon. Nan R. Nolan at p. 77) (Declaration of Joshua M. Greenblatt dated April 13, 2006 ("Greenblatt Decl.") Ex. A), Plaintiffs have noticed eight *more* depositions (to reach a total of **89** noticed depositions) while simultaneously refusing to enter into a productive meet and confer process with Defendants as to the prioritization of their permitted 35 depositions. As a result of Plaintiffs' refusal to abide by the Court-ordered limit of 35 depositions, Defendants are compelled, by this motion, to (i) renew their previous motion to quash Plaintiffs' March 1, 2006 Notice of

Depositions which seeks 54 additional depositions[1], and (ii) to move to quash the 13 non-party depositions noticed by Plaintiffs.

The core dispute here — whether Plaintiffs have violated and continue to violate this Court's Order requiring the parties to seek leave of Court before exceeding 35 depositions — can be effectively and efficiently resolved by the Court's consideration of a single question:

- Is each side limited at this point in time to a maximum of 35 depositions?

For the reasons set forth below, Defendants believe that the answer to this question has to be "**Yes**." As a result, Plaintiffs' March 1 deposition notice seeking to depose 54 present and former Household employees and their March 7, March 24 and March 29 notices seeking to depose 13 non-parties should be quashed.

FACTUAL BACKGROUND

Because Plaintiffs continue to ignore and contravene the Orders of this Court by serving a never-ending series of deposition notices, a brief chronology of the relevant orders, motions and deposition notices may be useful to the Court.

- October 26, 2005 — Hearing before Judge Nolan at which each side was authorized to take a maximum of 35 depositions absent a further Court Order.

- February 13, 2006 — Plaintiffs' Notice of Depositions for 15 current and former Household employees.

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[1] Plaintiffs' actions in contravention of this Court's Order and intransigence during the parties' meet and confers resulted in Defendants' March 8, 2006 Motion for a Protective Order seeking to quash Plaintiffs' March 1, 2006 omnibus deposition notice. The Court denied Defendants' motion "at this time without prejudice" in its March 9, 2006 Order (Greenblatt Decl. Ex. G) and Defendants renew that motion herein.

- March 1, 2006 — Plaintiffs' Notice of Depositions for 54 present and former Household employees.

- March 7, 2006 — Plaintiffs' deposition subpoenas for five non parties: Moody's Corp., Standard & Poor's Corp., Fitch, Inc., William Ryan and Morgan Stanley & Co., Inc.

- March 8, 2006 — 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 Violated that Order.

- March 9, 2006 — Hearing before Judge Nolan confirming the 35-deposition limit and directing the parties to work together to "prioritize" Plaintiffs' depositions.

- March 9, 2006 — Order denying Defendants' March 8 Motion "at this time without prejudice."

- March 24, 2006 — Plaintiffs' deposition notices for two (now post-settlement) non- parties: Christopher Bianucci and John Keller (both of whom are current or former Arthur Andersen employees).

- March 29, 2006 — Plaintiffs' deposition subpoenas for six non-parties: Brian K. Gordon, Robert J. Glyn, Scott W. Carnahan, Todd R. Burny, Jeffrey E. Brown and William S. Long (all of whom are current or former KPMG employees).

Excluding the invalid deposition notices and subpoenas served in March that are the subject of this Motion, Plaintiffs have taken or noticed 22 depositions. In addition to the 15-deponent February 13, 2006 Notice, there have been: (i) a lengthy series of Rule 30(b)(6) depositions, which, accepting Plaintiffs' position for purposes of this submission and this submission only, can be counted as a single deposition; (ii) two Household Directors, Lou Levy and John Nichols, who were noticed last Fall but never deposed; (iii) non-party Elaine Markell (who was deposed on April, 6 2005); and (iv) three current Household employees, Walt Rybak, Curt Cunningham and Lew Walter, who had been noticed prior to February 13, 2006 (and were deposed on February 24, March 8, and March 16, 2006, respectively). The above depositions taken or noticed through February 13 account for 22 of the Plaintiffs' allotted 35 depositions and leave

Plaintiffs with 13 depositions still to be taken. In a March 13, 2006 e-mail, Plaintiffs listed eight individuals from their invalid March 1 Notice that they wanted to depose but were temporarily holding in abeyance because they believed those individuals had involvement with the various federal regulatory agencies and wished to await the outcome of the agency-related proceedings before proceeding with their depositions. (Greenblatt Decl. Ex. B) (Defendants subsequently confirmed to Plaintiffs that the eight individuals at issue did have some degree of "agency" involvement.) (Greenblatt Decl. Ex. F) Including these eight depositions on the taken or noticed list, Plaintiffs would be left with only five more depositions that they can take without leave of Court (or agreement from Household).

Whether they have five or 13 depositions remaining apparently is of no concern to Plaintiffs because, as noted in the above chronology, from March 1 through March 29, 2006 Plaintiffs served depositions notices for **67** additional witnesses (54 current or former Household employees and 13 third parties), to reach an astounding total of **89** taken or noticed depositions, or nearly **two and one-half times the number authorized by the Court**. And there is no indication that Plaintiffs have concluded their deposition program or their continuing defiance of the Court's Order. Unless this Court resolves this issue now with another explicit Order (because Plaintiffs have chosen to ignore the October 26, 2005 Order), there will never be an end to discovery (which, of course, may be Plaintiffs' motive in all of this).

ARGUMENT

PLAINTIFFS HAVE IGNORED AND DISOBEYED THE LIMIT OF 35 DEPOSITIONS FOR EACH PARTY SET FORTH BY THE COURT

A. *Plaintiffs Refuse to Acknowledge That They Cannot Take More Than 35 Depositions Without Leave of Court*

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). The rationale behind this rule is simple: counsel and courts are directed to proceed in an orderly, expeditious and, above all, efficient manner in conducting the deposition phase of discovery. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 202 F.R.D. 480, 483 (N.D. Tex. 2001) ("Rule 30(a)(2)(A) is intended to control discovery, with its attendant costs and potential for delay, by establishing a default limit on the number of depositions."); *Eisenach* v. *Miller-Dwan Medical Center*, 1995 W.L. 422646, *2 (D. Minn. 1995) (Rules 30(a)(2) and 26(b)(2) "were promulgated to enable courts to maintain a 'tighter rein' on the extent of discovery and to minimize the potential cost of 'wide-ranging discovery' and the potential for discovery to he used as an 'instrument for delay or suppression.'") (internal citations omitted); *Boyer* v. *Gildea*, No. 1:05-129, 2005 U.S. Dist. LEXIS 10726 (S.D. Ind. June 2, 2005) (Rule 30(a)(2) was "promulgated to enable the courts to maintain a 'tighter rein' on the discovery process.") (citation omitted); Fed. R. Civ. P. 30 *Advisory Committee's Notes* regarding 1993 Amendments (The "objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case.").

Of course, courts can grant additional depositions where deemed necessary and, in fact, at the October 26, 2005 status conference, this Court granted each party a total of 35 depositions.

> "There is no motion pending but I want to continue to move this discovery forward . . . [U]nder Rule 30 of the Federal Rules of Civil Procedure, each party limited to 10 unless they obtain leave of court. Because this is a very large class action I find it reasonable to extent 10 depositions. Accordingly — And nobody has to justify anything. Each side is given 25. If you need to go beyond - No, to take an additional 25, so plaintiffs and defendants may each have a total of 35. **If you need more than 35, leave of Court is required.**" (Emphasis added) (Transcript of October 26, 2005 status conference before Judge Nolan at 24).

The Court's ruling could not have been any clearer. Plaintiffs and Defendants each have a total of 35 depositions and, in accordance with Rule 30, the Court explicitly stated that if a party be-

lieves additional depositions are necessary, it **must** request leave of Court before noticing any additional depositions.

In an instance of what has become a disturbing trend, Plaintiffs ignored this Court's October 26 Order. Without even denting their allotted 35 depositions and without requesting, let alone obtaining, leave of Court, Plaintiffs served an omnibus Notice of Deposition on March 1, 2006 identifying an additional **54** present and former Household employees they seek to depose, arguably by the May 12, 2006 discovery deadline. This was followed by (i) Plaintiffs' March 7, 2006 service of subpoenas for five non-party ratings agency depositions; (ii) their March 24, 2006 service of deposition notices for two Arthur Andersen employees; and (iii) their March 29, 2006 service of subpoenas for six more non-party KPMG employees.[2] In short, Plaintiffs have simply treated the October 26 Order as if it did not exist. This is abundantly clear from Plaintiffs' April 3, 2006 Motion to Enforce which contains statements like: "unless the Class first agrees to limit the number of depositions to 35" (Pls. Mot. to Enf. at 3); Defendants "have been ordered to cooperate with the Class in determining the appropriate number of depositions" (Pl. Mot. to Enf. at 6); the "appropriate number of depositions remains an open question" (Pl. Mot. to Enf. at 5-6); and "[g]iven that the dispute over the appropriate number of depositions is unresolved." (*Id.*)

The number of depositions in this action is simply not an "unresolved" or open issue with which Plaintiffs can agree or disagree. On the contrary, there is an existing Order by

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2 Non-party depositions, of course, are included within the 35 permitted without further leave of court. *See Finova Capital Corporation* v. *Lawrence*, 2000 WL 1808276, *3 n.4 (N.D. Tex. Dec. 8, 2000) ("[T]he limitation on the number of depositions to be taken without leave of Court applies to *all* depositions, regardless of whether the deponent is a party or non-party."), *citing* Fed. R. Civ. P. 30(2)(A) (emphasis original).

this Court as to the maximum number of depositions that a party can take at this time: 35. That is and must be the starting point for any matter which pertains to depositions.

Plaintiffs have not even attempted the requisite showing of necessity for additional depositions under Rule 30. *See Barrow*, 202 F.R.D. at 483-84. And with good reason. Plaintiffs can neither assess this "need" or make this showing until they have taken all of their allotted 35 depositions. Only then will they be in a position to justify, as they must, their need for additional depositions. Plaintiffs should be directed to take all of the 35 depositions that they have been granted by the Court before noticing any additional depositions. If they still believe that additional depositions beyond 35 are necessary at that point, they can meet and confer with Defendants and, if necessary, present any resulting disagreement to the Court. This is both the most logical approach to this issue and also one that parties to a litigation routinely follow. How can Plaintiffs know that they have no testimony on certain relevant subjects unless and until they have taken all 35 of the depositions they currently are authorized?

Moreover, Plaintiffs must proceed in this fashion as a matter of law. *See Bell* v. *Fowler*, 99 F.3d 262, 271 (8th Cir. 1996) (No abuse of discretion where party "presented no good reason why the additional depositions were necessary . . . [and] the additional depositions simply would have been cumulative and would have served no proper purpose."); *Sigala* v. *Spikouris*, No. 00-0983, 2002 U.S. Dist. LEXIS 10743, at *13 (E.D.N.Y. Mar. 7, 2002) (No abuse of discretion in limiting deposition number where defendant "failed to come forward with any evidence beyond pure speculation that the additional persons he sought to depose would provide any evidence that was not cumulative of that he could obtain (or had obtained) from persons he was permitted to depose.").

Accordingly, Defendants urge the Court to again reaffirm its October 26, 2005 Order that each side has a maximum of 35 depositions, to direct Plaintiffs to take their allotted 35

depositions first and to remind Plaintiffs of their obligation to meet and confer with Defendants and then, if necessary, seek leave of Court for additional depositions if and when such additional depositions become necessary.

B. *Nowhere is Plaintiffs' Blatant Disregard for This Court's Order Limiting the Number of Depositions More Pronounced Than in Their Manipulation of the Court's Order on the Prioritization of Their 35 Permitted Depositions*

At the March 9, 2006 hearing, the Court directed the parties to "help each other out" and work together in prioritizing Plaintiffs' depositions. (Tr. at 76) While Defendants have attempted to do so in good faith within the context of the Court-imposed limit of 35 depositions — *i.e.*, to help Plaintiffs choose which depositions they should take to reach their limit of 35 — Plaintiffs have treated the Court's directive as if it does not exist. Plaintiffs have indicated their intention to continue with their program of subpoenas and deposition notices in excess of the 35 permitted by the Court's Order. Plaintiffs' position is in complete contravention of the Court's 35 deposition limit and this situation has gone on for weeks. While Defendants have consistently attempted to "meet and confer on the issue of prioritizing Plaintiffs' noticed depositions within the 35 deposition limit" (3/16 letter of L. Best to A. Mehdi; Greenblatt Decl. Ex. C), Plaintiffs have behaved as if — despite this Court's October 26 Order — they still have the option of "agree[ing] to limit the number of depositions to 35 . . . ." (3/16 letter of A. Mehdi to L. Best; Greenblatt Decl. Ex. D). Even more troubling, however, is Plaintiffs' use of the Court's March 9 prioritization directive as a means to continue their conduct in violation of the Court's Order by refusing to recognize the 35 deposition limit until Defendants agree to a course of conduct that *cannot logically be done* and, even if it could, would present serious concerns with respect to the

sanctity of attorney-client communications and attorney work product which impact a party's due process rights in litigation.[3]

At the March 9 hearing, the Court reaffirmed the 35 deposition limit.[4] The Court then clearly described what is meant by "prioritize" in the context of the 35 deposition limit. The Court stated that Defendants should give Plaintiffs "an idea of **in a certain area** who you think would be the most — the person with most knowledge." (Tr. 3/9/06 at 77) (Greenblatt Decl. Ex. A). The logical interpretation of this directive is that *Plaintiffs* should *first* provide Defendants

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3 As an initial matter, it bears noting that Plaintiffs do not really need any additional assistance in prioritizing or determining which current or former Household employees they should depose. At the outset of discovery, Defendants identified 30 individuals in their Initial Disclosures likely to have knowledge related to this case. (*See* Initial Disclosures of Defendants dated June 25, 2004). Moreover, Plaintiffs have acknowledged to the Court and Defendants, during the proceeding regarding the regulatory agency documents, that they possess fully searchable databases of all the approximately four million pages produced by Defendants. Thus, Plaintiffs can easily enter various terms or phrases in their databases to view documents on that particular subject and to learn which individuals (by virtue of their sending, receiving or being discussed in such documents) have information about that subject. In other words, Plaintiffs can prioritize their depositions without any input from Defendants.

4 "MS. BEST: And I agree, your Honor. I am agreeing a hundred percent with you, and we're happy to talk with them further, **but they just need to limit their initial notice to 35 people**, and then we will take it in the next step.

THE COURT: **Well, I think that's correct**. I think that's what — where it is right now. I think you [Plaintiffs] need to take a few more. You know over the four years you're not shy about coming back and asking me to reconsider rulings, so you will come back. I think this is premature at this time, but I am ordering you to sit down and prioritize. But what I mean by prioritize is Ms. Farren or Ms. Best, you give Ms. Mehdi, you know, an idea of in a certain area who you think would be the most — the person with most knowledge. And the same thing, Ms. Mehdi, when they get to your witnesses, too.

MS. MEHDI: Absolutely. I would prefer to take fewer depositions. I agree."

March 9, 2006 Transcript of Proceedings before The Honorable Nan R. Nolan at 76-77 (emphasis added) (Greenblatt Decl. Ex. A).

with the "certain area[s]" in which they are interested so that Defendants can *then* indicate which witness or witnesses are most knowledgeable in such areas. Plaintiffs, however, have flatly refused to proceed in this fashion. Instead, Plaintiffs have insisted that, without any guidance from Plaintiffs, Defendants should *both* develop a list of all possible areas in which Plaintiffs might be interested and then match these areas with knowledgeable witnesses, all the while refusing to recognize that any prioritization must necessarily be done in accordance with the Court's Order limiting the current number of permissible depositions to 35.

As but one example of this tack, Plaintiffs' counsel Cameron Baker, in a March 31, 2006 letter to Landis Best, counsel for Defendants, stated both that "the Court placed the burden on Household to provide assistance in identifying the most knowledgeable witness **without imposing any precondition on the Class of identifying the issues in question** . . . " (emphasis added) and also that "the Court made it clear that Household, which already knows the issues in dispute, had the burden of identifying witnesses in order to assist the Class in prioritizing depositions" (3/31/06 letter from D. Cameron Baker to Landis Best; Greenblatt Decl. Ex. E). Plaintiffs' bizarre interpretation of the March 9 directive defies comprehension and would turn the normal litigation adversary process on its head. The following dialogue, although fanciful, captures the absurdity of Plaintiffs' position:

Plaintiffs: "We're thinking of some issues in this case. Please produce the most knowledgeable witness on those issues."

Defendants: "Okay, we'll do it. What issues are you thinking of?"

Plaintiffs: "We're not telling you."

This rank gamesmanship is designed to harass, annoy and vex Defendants and to place Defendants in some sort of twilight zone where they must read Plaintiffs' minds before

Plaintiffs will agree to go forward with discovery within the Court ordered 35 deposition limit. Plaintiffs' illogical obstinacy denigrates both the Court's Order and the discovery process and simply must not be tolerated.

Plaintiffs' approach, however, raises even more serious concerns as it violates Household's most fundamental due process rights to the protection of privileged communications with counsel and attorney work-product. Just as every competent litigant does, Household and its attorneys have reviewed, analyzed and evaluated the claims in this matter. With the assistance of counsel, Household has identified what it believes to be the strengths and weaknesses (primarily the latter) in Plaintiffs' complaint and what it believes to be the most critical issues at hand. Of course, no one with even a casual knowledge of our legal system would suggest that Defendants turn these analyses and evaluations over to Plaintiffs. Indeed, "[t]he central purpose of the work product doctrine is to shelter the mental processes of an attorney, protecting from disclosure her analysis and preparation of her client's case." *McNalley Tunneling Corp.* v. *City of Evanston*, 2001 WL 1246630 *4 (N.D.Ill. 2001) (Nolan, J.), *citing United States* v. *Nobles*, 422 U.S. 225, 238 (1975). And yet that is *precisely* what Plaintiffs seek by their interpretation of the Court's prioritization directive and their assertions that Household "knows the issues in dispute" and should share what it knows with Plaintiffs.

Under Plaintiffs' view, the Court's March 9 directive as to prioritization would authorize an unparalleled invasion of the attorney-client and work product privileges and, therefore, of Household's due process rights in this lawsuit. It is a longstanding principle that "[p]roper preparation of a client's case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman* v. *Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 393-94 (1947). Equally well-established is the principle that these legal theories and

analyses are shielded from opposing counsel. *Pave Tech, Inc.* v. *Keolyn Plastics Corp.*, 1992 WL 280396 *3 (N.D.Ill. 1992) ("At its core, the [work product] doctrine 'shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.' Work product has been defined as including subject matter relating to the preparation, strategy and appraisal of the strengths and weaknesses of an action, or the activities of the attorneys involved, rather than the underlying evidence."), *citing In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 519 (N.D.Ill. 1990) (internal citations omitted). Any other view would result in the near-collapse of our legal system. *Hickman*, 329 U.S. at 511, 67 S.Ct. at 393-94 ("Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.").

Plaintiffs' demand that Defendants *first* identify the relevant issues in this case and *then* match witnesses to those areas is tantamount to a demand that Defendants reveal Household's "appraisal of the strengths and weaknesses of [this] action," (*Pave Tech*, 1992 WL 280396 at *3), and flies in the face of basic discovery protections. As such it simply cannot be what the Court intended during the March 9 conference in ordering the parties to "prioritize" the 35 depositions Plaintiffs are permitted to take absent further Court order.[5] *Hickman*, 329 U.S. at

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[5] This is clearly understood by Plaintiffs. During a meet and confer, Plaintiffs' counsel, Ms. Mehdi, provided one area in which they were interested: "reaging of loans" for both Consumer Lending and Mortgage Services. Ms. Mehdi then said that providing a list of other issues would "encroach" on her work product. (Greenblatt Decl. Ex. F) If identifying what one side views as key issues in their case implicates Plaintiffs' work product, it most assuredly must implicate Defendants' work product as well.

510, 67 S.Ct. at 393 ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.").[6]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' (i) renewed motion to quash Plaintiffs' March 1, 2006 Deposition Notice for 54 deponents because it is in violation of the Court's October 26, 2005 Order, and (ii) motion to quash all 13 of the non-party depositions noticed and/or subpoenaed by Plaintiffs because they are also in violation of the Court's October 26, 2005 Order.

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6 Yet another reason why Plaintiffs' position is senseless is that there can be no way of determining whether the issues Defendants "know" are those which Plaintiffs believe necessary to support their claims or those which are subject to proof by Household documents or testimony. Plaintiffs' counsel, because they are long-established and able securities litigation attorneys (as they have told the Court with respect to class certification), who are fully mindful of their Rule 11 obligations, undoubtedly have thoroughly investigated and analyzed their claims in this action and know how *they* plan to prove their claims before a jury.

Dated: April 13, 2006
Chicago, Illinois

Respectfully submitted,

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