UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFFS' MOTION TO COMPEL HOUSEHOLD DEFENDANTS TO PRODUCE RESPONSIVE DOCUMENTS TO PLAINTIFFS' THIRD [CORRECTED] REQUEST FOR PRODUCTION OF DOCUMENTS

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INTRODUCTION

Plaintiffs continue their game of avoiding the merits by raising endless complaints about supposed discovery lapses by Defendants. This round is especially abusive, because Plaintiffs complain about an alleged failure to produce documents that they have been told do not even exist, and they demand searches for broad categories of documents that have already been produced. Plaintiffs even seek an order compelling production in categories as to which Defendants agreed to undertake an additional file review. It thus could not be more evident that their point in making this motion is simply to make the motion — not to serve any legitimate need for more facts, but rather to perpetuate a false impression of stonewalling by Defendants, even as Plaintiffs resist complying with discovery demands seeking some coherent link between their excessive discovery demands and any plausible theory of securities fraud.

Plaintiffs accompany this frivolous motion with one to compel answers to interrogatories already answered[1] and with an incorrectly styled motion to Judge Guzman to allow expansive post-Class Period discovery.[2] In the meantime they have refused on spurious grounds to answer Defendants' basic contention interrogatories,[3] and have informed the Court that they are too busy to answer six straightforward interrogatories that go to the heart of their burden of proving loss causation.[4] Defendants urge the Court to put an end to this game-playing and direct Plaintiffs to

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1 *See* The Class' Motion to Compel Responses to Third Set of Interrogatories From Household Defendants, dated June 29, 2006.

2 *See* Motion Regarding the Class' Objection to Magistrate Judge's June 15, 2006 Order On Post-Class Period Discovery, dated June 29, 2006. By Order Dated July 5, the Court struck the motion as such, and indicated that it would treat Plaintiffs' submission as Objections to this Court's June 15, 2006 Order.

3 Plaintiffs assert that the Court's November 10, 2005 Order requiring answers to contention interrogatories does not govern their duty to comply because the Order was addressed to Defendants. *See* Household Plaintiffs' Motion to Compel Responses to Household Defendants' Second Set of Interrogatories to Lead Plaintiffs, dated June 29, 2006. There can be no good faith basis for this position.

4 *See* Lead Plaintiffs' Motion for Extension of Time to Respond to Household Defendants' [Fifth] Set of Interrogatories, dated June 28, 2006.

tend to their own compliance obligations so that Defendants can finally seek a resolution on the merits.

ARGUMENT

In considering this motion, the Court should not be deceived by Plaintiffs' assertions that Defendants are deliberately withholding "critical" documents that "go to the heart of this securities fraud action". (Pl. Br. At 1) Plaintiffs fail to inform the Court that Household has provided much, if not all, of the requested information in response to previous waves of document demands and that, at their insistence, Household has agreed to widen its search in numerous categories, despite their cumulative nature and/or apparent lack of relevance. Nor should the Court be gulled by Plaintiffs' insistence that they have identified with "precision" new categories of documents they seek (*id.* at 15), because the requested documents simply do not exist and, as demonstrated below, Plaintiffs were told this before they served their Third Demand.

1. Plaintiffs Short-Circuited the Meet and Confer Process to Precipitate this Artificial Dispute.

During the 30(b)(6) deposition of Household employee Pete Sesterhenn, taken on February 2, 2006, Plaintiffs asked the witness to agree that certain types of documents and information *might* exist at Household or *could* be compiled by Household given available information.[5]

Following that deposition, Plaintiffs asserted in a letter that Mr. Sesterhenn had "identified several types of reports which should have been produced by defendants in response to Plaintiffs' First Request . . . and/or Plaintiffs' Second Request . . . ." (February 10, 2006 letter from B. Ryan to D. Owen, attached as Exhibit 6 to Ryan Declaration). Defendants responded, for the first of many times, that "while Defendants are willing to investigate the matter," it was "difficult to tell from the brief descriptions provided . . . exactly what documents [Plaintiffs were] referring to and, *inter alia*, for what periods." (February 13, 2006 letter from D. Owen to

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5 The transcript of Mr. Sesterhenn's deposition is attached as Exhibit 5 to the June 29, 2006 Declaration of Bing Ryan ("Sesterhenn Dep.").

B. Ryan, attached as Exhibit A to Declaration of Ira Dembrow, dated June 13, 2006 ("Dembrow Declaration")). In their disingenuous response, Plaintiffs cited supposed transcript references to certain "financial reports", although the cited excerpts did not actually identify any particular document or set of documents. (February 15, 2006 letter from B. Ryan to D. Owen, attached as Exhibit B to Dembrow Declaration).

Defendants' February 28, 2006 response repeated Defendants' intention to make a good faith investigation of Plaintiffs' demands and also provided a detailed explanation of Plaintiffs' misreading of Mr. Sesterhenn's testimony. That letter (sent well before Plaintiffs served their Third Demand) cited numerous examples of Plaintiffs' misstatements and demonstrated the unreasonableness of their demands as follows:

> "For example, your letter claims that Mr. Sesterhenn identified 'Monthly analyses of prepayment penalties assessed on revolving loans.' (115:23-116:5) *Mr. Sesterhenn did not identify any specific reports that existed of this type.* Instead, he merely stated that prepayment penalties on revolving loans would typically be assessed when an account is closed. (116:13-20). Even more problematic is your assertion with respect to 'Monthly reports tracking the amount of finance charges that are reversed on restructured loans.' (234:9-12) *In that respect, all Mr. Sesterhenn testified to was that it was possible to track the amount of finance charges that are reversed on restructured loans. He did not state that such information was actually extracted and distributed, let alone in a monthly report.* Further, Mr. Sesterhenn did not testify to the existence of 'Project reports distinguishing points between origination and discount' but instead stated that he was probably copied on reports *like the one he was shown during his deposition.* (118:3-6)[6]
>
> In sum, contrary to your claim that Mr. Sesterhenn provided 'detailed information regarding the above-mentioned reports, such as the name and content, how often it was prepared, who prepared it, where it can be found, and the purpose,' *the transcript makes clear that this is not the case.* (*see, e.g.*, 83:23-88:10) In any event, Defendants will continue to investigate your various inquiries, and request that Plaintiffs provide any additional information as soon as possible so as to facilitate same.

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6 Defendants' February 28 letter also noted that "[b]esides the one shown to Mr. Sesterhenn during his deposition (Sesterhenn Exh. 11), Defendants have produced many reports of this type (*i.e.*, Technology & Services Consumer Lending Systems Monthly Status Reports of reports). (*See, e.g.*, HHS 00652073, HHS 00656348)".

> *Further, the fact that much of what you say 'should have been produced' has, in fact, already been produced raises a serious and legitimate concern that Plaintiffs are seeking to use these letters and Defendants' responses thereto as a substitute for Plaintiffs' own review of the many millions of pages that Plaintiffs have demanded.* To note only a few examples of this in your most recent letter, the following types of reports mentioned have been produced: 'Monthly analyses of all finance charges including prepayment penalties' (*see, e.g.*, HHS 02919003-16); "BPRs (Branch Profitability Reports)' (*see, e.g.*, HHS 02891498-545), 'Special reports assessing financial impact of the AG settlement relating to discount points, single premium credit insurance, and prepayment penalties' (*see, e.g.*, HHS 02915397-453), and various types of 'Monthly net interest margin reports' (*see, e.g.*, HHS 02915839-58; HHS 02863325-45; HHS 02933290-92)."

(February 28, 2006 letter from D. Owen to R. Bing, attached as Exhibit 7 to Ryan Declaration) (emphasis added).

Faced with this accurate explanation of their misreading of Mr. Sesterhenn's testimony, Plaintiffs abandoned the meet and confer process and incorporated their demands for non-existent or previously-produced documents in a formal Third Demand. By the time Ms. Ryan responded to Mr. Owen's February 28 letter on March 10, 2006, the Third Demand had already been served, and Ms. Ryan cited its pendency as an excuse not to address Defendants' comments. (March 10, 2006 letter from B. Ryan to D. Owen, attached as Exhibit 6 to Ryan Declaration). By deliberately disregarding the facts derived from Defendants' good faith investigation and thereby escalating a needless dispute, Plaintiffs violated their obligation to meet and confer in good faith on discovery issues. This provides an independent basis to reject their motion. *See Ridge Chrysler Jeep L.L.C.* v. *Daimler Chrysler Services North America L.L.C.*, No. 03-C-760, 2004 WL 3021842, at *4 (N.D. Ill. Dec. 30, 2004) (denying a plaintiff's motion to compel where the plaintiff failed "to meet and confer, in a good faith effort to resolve discovery disputes before filing a motion to compel with the court."); *Williams* v. *Schueler*, No. 04-C-65, 2006 U.S. Dist. LEXIS 43007, at *4 (E.D. Wis. June 23, 2006) ("Although Rule 37 of the Federal Rules of Civil Procedure permits the court to compel discovery, the rule provides that the party seeking such discovery first must confer in good faith with the opposing party in an effort to resolve the discovery issue without court action.").

2. Many of the Third Demands are Duplicative of Plaintiffs' First and Second Demands For Production

Plaintiffs are able to imply that Defendants have withheld "Documents Detailing Household's Accounting Structure and System" (Pl. Br. at 5), "Documents Related to Household's [Alleged] Predatory Lending Practices" (*id.* at 6), and "Documents Regarding Household's Reaging or Restructure Policies and Practices" (*id.* at 9) only by ignoring (i) the millions of pages of documents produced by Defendants in response to Plaintiffs' First and Second Demands, including in the same categories covered by their motion, and (ii) Defendants' good faith efforts to conduct additional searches in connection with the Third Demand. The sheer volume of Defendants' document productions confirms that Defendants have not evaded discovery in these categories (on relevance grounds or any other basis), as Plaintiffs' misleading headings suggest. Defendants should not be made to replicate that massive effort because Plaintiffs have used slightly different phrasing to request exactly the same material.

At least seven of the thirteen individual requests addressed by Plaintiffs' motion (Third Demand Nos. 1-2, 6, 9, 11-12 and 35) call for documents that Defendants already produced in those earlier waves of compliance, to the extent responsive documents exist. For example, Third Demand Nos. 1 and 2 seek documents "supporting Household's credit loss reserves calculation", even though Defendants have fully complied with Second Demand No. 10, which called for documents concerning the setting of reserves for delinquent or defaulting loans. As the Court is aware, the First and Second Demands cast extremely broad nets for sample loan documents secured by real property (First Demand No. 6), documents concerning Household's lending practices and policies (First Demand No. 7), policies and practices relating to loan delinquencies, charge-off and reaging of loans (First Demand No. 10), and the implementation of policies relating to discount points (Second Demand No. 6). By complying with those demands (notwithstanding the questionable relevance of much of the operational detail Plaintiffs demanded), Defendants necessarily produced the subsets of these categories encompassed in Third Demand No. 6 (gains or loss, credit loss reserves, etc. on securitized loans), Third Demand No. 9 (prepayment penalties), Third Demand no. 11 (discount points), Third Demand No 12 (EZ Pay loan accounts) and Third Demand No. 35 (samples or indices of discontinued lending

material). As Defendants explained in their General Objection No. 1 to Plaintiffs' Third Document Demand:[7]

> "Due to the extreme overbreadth of the First and Second Demands, the Household Defendants have so far devoted thousands of hours to tasks in connection with responding to them, including but not limited to scheduling and conducting interviews of more than 200 individuals, collecting and reviewing hard copy and/or electronic documents from approximately 150 individuals and producing millions of pages of documents from more than 125 individuals and more than 10 departments. Defendants also collected, reviewed and produced native format e-mails and attachments for nearly 300 custodians. The nature of the Third Demand would require the Household Defendants to needlessly duplicate much of the time and effort already expended in connection with responding to the First and Second Demands insofar as it would cause the Household Defendants to interview many if not all of these same individuals again and collect many of the same documents. Thus, the Household Defendants object to any demand that would require them to interview more than a limited number of individuals and/or otherwise collect documents from a discrete source." (Objections and Responses at 2)

Despite the validity of this objection, Defendants agreed, both in General Objection No. 1 and in their Specific Objections and Responses, to make a reasonable additional search and to produce additional documents that could be located without undue burden.[8] Plaintiffs may well prefer to have Defendants comb through the millions of documents already produced to sort them into the subcategories specified in the redundant Third Demand, but when newly-framed categories are subsumed in one or more previous requests, the Federal Rules obviously do not require a party to redo or repackage its previous productions to serve an opponent's convenience. Plaintiffs can and should do their own review of the massive productions they demanded in their blunderbuss opening requests.[9]

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[7] The Household Defendants' Objections and Responses To Plaintiffs' [Corrected] Third Request For Production Of Documents, dated April 12, 2006, and attached as Exhibit 2 to the Ryan Declaration.

[8] Indeed, Defendants have already done so. *See* Letter from Craig S. Kesch, Esq. to Azra Z. Mehdi, Esq. dated June 14, 2006, attached as Exhibit C to the Dembrow Declaration.

[9] Plaintiffs are able to cull the redundant information they now seek from the millions of pages at hand because they maintain Defendants' document production in searchable form on their

3. Defendants Agreed to and Did Undertake a Diligent, Reasonable and Good Faith Search For Documents Responsive to Third Demand Nos. 1, 2, 6, 9-10, 12, 24, 27 and 30 and 35 and Have Produced or Agreed to Produce Documents Responsive Thereto

Plaintiffs' motion to compel additional compliance under their Third Demand is directed to only thirteen of the thirty-five items in that Demand. Plaintiffs neglect to mention that for *ten of the thirteen* contested Demands, Defendants agreed that, based on a good faith interpretation of the demands, they would "produce non-privileged, responsive documents created during the Class Period, if any, that can be located after a reasonable search". (*See, e.g.*, Response to Third Demand at 7-8, 10-15, 22, 24-26, 29.)[10]

Plaintiffs decision to burden the Court with a motion to enforce document demands as to which Defendants had already *agreed* to undertake a reasonable and good faith additional search should be rejected out of hand as an abuse of the discovery process. *See Ocean Atlantic Woodland Corp.* v. *DRH Cambridge Homes, Inc.*, 262 F. Supp. 2d 923, 926-27 (N.D. Ill. 2003) (J. Guzman). ("Discovery under Fed. R. Civ. P. 26(b) is not without limits; the manner and scope of discovery must be tailored to some extent to avoid harassment or being oppressive.").

4. Plaintiffs' Motion Seeks to Compel Production of Documents That Do Not Exist

Plaintiffs would have the Court order Defendants to produce documents that simply do not exist. Their unequivocal assertion that "Household Has the Documents the Class Seeks" (Pl. Br. at 2) is, in many instances, simply untrue. For example, Third Demand No. 35 seeks production of materials destroyed when Household required discontinuance of an unauthorized

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network and seven databases. *See* Declaration of Christine Sanders in Support of The Class' Motion For Reconsideration of the Court's February 17, 2006 Order. Plaintiffs may regroup this data by topic in any configuration they wish, but they may not properly insist that Defendants do that job for them or that Defendants start from scratch to retrieve the same documents in different subsets.

[10] Defendants did not agree to investigate and produce any documents responsive to Third Demand Nos. 11, 13 and 16 (regarding "discount points", "second loans with an interest rate in excess of 20%" and "the accounts and subaccounts in any general ledger", respectively) due to their complete lack of relevance to the issues in this action and the extreme burden they sought to impose on Defendants.

selling approach. Plaintiffs' mistaken assumption that Household "kept samples of the documents destroyed" (Pl. Br. at 12), based only on a document that mentioned "Examples Collected" and says nothing about retaining a completed set of the discontinued material. (*See* HHS 02868137-02868147) In fact, since the documents "collected" consisted of discontinued sales materials not authorized by the Company for use, it is unlikely that any would have been retained. Nonetheless, Defendants agreed to look into this matter and to produce documents responsive to the request if any are found to exist. (*See* Response to Third Demand at 29).

Plaintiffs' blanket demands for "entire sets" of other documents likewise rest on the unfounded and unjustified premise that Household produced only part of hypothetical full sets of certain documents. (Pl. Br. at 13-14). Plaintiffs mistakenly assume that because certain "reports" exist, a fact they trumpet on page 4 of their brief (*id.* at 4) they must be part of a series. This assumption cannot be squared with the actual facts investigated by Defendants and explained to Plaintiffs before they burdened the Court with this non-issue.

As Defendants promised in their Objections and Responses to the Third Demand, Household has investigated in good faith whether the documents requested in Demands 10, 24, 27 and 30 (among others) exist and whether they can be obtained without undue burden. Upon determining that the documents called for by these demands do not exist in the form requested, Defendants offered — in every instance — to search for comparable documents from the areas in which Plaintiffs evinced an interest. This goes beyond required compliance and demonstrates Defendants' consistent good faith effort to conclude discovery in order to move on to the merits. Requiring Defendants to take steps beyond these general searches, however, would be an exercise in futility because the documents sought in these Demands do not exist in the manner called for by Plaintiffs. *See Williams*, 2006 U.S. Dist. LEXIS 43007 at *5-*6 (explaining that "defendants cannot be expected to produce documents which do not exist" and denying plaintiffs' motion to compel where "the defendants have responded to the plaintiff's discovery requests. They told the plaintiff that they have no documents."); *Smith* v. *Sternes*, No. 02 C 50178, 2004 U.S. Dist. LEXIS 24921, at *10-*11 (N.D. Ill. Dec. 6, 2004) (new information turned up by Plaintiff did not justify system-wide search for information where court determined that search was unlikely to reveal additional documents relevant to Plaintiff's case).

5. The Court Should Reject Plaintiffs' Continuing Efforts To Expand and Prolong Discovery

Plaintiffs would have the Court put Defendants through the tremendous burden of making a *third* production on the same subjects already covered by Plaintiffs' First and Second Demands, and require Defendants to incur the added expense of searching for cumulative documents that most likely will never be found. Especially at this late stage of the case, when the parties should be working to wrap up discovery and refine issues for summary judgment, such piling on would exceed any reasonable discovery obligation contemplated by the Federal Rules and prevailing authority. This Court should exercise its broad discretion relating to the discovery process to protect Defendants from such further oppression. *See Holloway* v. *Pekay and Pekay P.C.*, No. 94 C 3418, 1996 U.S. Dist. LEXIS 377, 395 (N.D. Ill. Jan. 16, 1996) (It is well established that there is no requirement to turn over information where "Plaintiff[s] . . . [are] actually in possession of the information that they properly request in their motion to compel."); *Tuszkiewicz* v. *Allen-Bradley Co., Inc.*, 172 F.R.D. 393, 395 (E.D. Wis. 1997) ("I am convinced that although the vendor lists requested by the plaintiff are relevant to his case, the lists that Allen-Bradley has *already produced* are sufficient and that the defendant has met its burden of showing that the plaintiff's requests are onerous. Allen-Bradley cannot be expected to create new reports that would be inaccurate unless the report were verified by comparison to approximately 96,000 actual vendor invoices per year.") (emphasis added); *Vakharia* v. *Swedish Covenant Hospital*, No. 90 C 6548, 1994 U.S. Dist. LEXIS 2712, at *15 (N.D. Ill. March 9, 1994) (denying additional document requests because defendant "previously has represented that it has produced all responsive documents that it has been able to locate" and it is unreasonable for plaintiff "to impose upon [defendant] the burden of yet again combing through its files."); *Concord Boat Association* v. *Brunswick Corporation*, No. 96 C 6026, 1996 U.S. Dist. LEXIS 18012 (N.D. Ill. Dec. 4, 1996), at *11 (denying document request because "[m]ere assertions of necessity are insufficient to establish that [the] documents are relevant" where requests were broad and burdensome, and it was unclear that plaintiff could not glean the necessary information from the documents it already received); *In Re Folding Carton Antitrust Litigation*, 83 F.R.D. 260, 265 (N.D. Ill. 1979) (upholding objection to interrogatory because "this interrogatory is repetitious and need not be answered").

As this Court cogently observed in denying Plaintiffs' previous effort to expand Defendants' discovery obligations significantly at this late stage, "the burden imposed on Household in repeating its already extensive document search and production" would "outweigh[] any likely benefit to Plaintiffs." *See* June 15, 2006 Order at 9.

CONCLUSION

Plaintiffs' motion to compel should be denied in its entirety.

Dated: July 14, 2006
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CERTIFICATE OF SERVICE

Adam B. Deutsch, an attorney, certifies that on July 14, 2006, he caused to be served copies of Memorandum of Law in Opposition to Lead Plaintiffs' Motion to Compel Household Defendants to Produce Responsive Documents to Plaintiffs' Third [Corrected] Request for Production of Documents, to the parties listed below via the manner stated.

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