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-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR AN ORDER ENFORCING THE PROTECTIVE ORDER AND FOR APPROPRIATE SANCTIONS

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Household" or "Defendants") pursuant to Fed. R. Civ. P. 37(b).

INTRODUCTION

Although Defendants regret having to burden the Court with this motion, they have become increasingly alarmed about Plaintiffs' recurring and threatened violations of the Protective Order in this action, based on their asserted right to overrule Defendants' designations of Confidentiality and privilege without first obtaining Defendants' consent or a ruling from this Court.[1] This unauthorized self-help directly violates the Protective Order and is an open affront to the authority of this Court.[2]

Plaintiffs should be required under the plain terms of the Protective Order to withdraw from the public record portions of recently-filed briefs that quote or otherwise disclose the substance of Confidential documents, and admonished to respect the Protective Order in the future. Given the willfulness of Plaintiffs' violations, Plaintiffs and their counsel should be sanctioned in a more tangible manner, including, *inter alia*, by requiring them to defray Defendants' costs on this motion.

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1 References to "Plaintiffs" in this memorandum are intended to refer to both Plaintiffs and their lead counsel, the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins LLP ("Lerach Coughlin").

2 Plaintiffs may argue (as they did in response to our written complaints to them) that their misconduct is simply a response to overdesignation of Confidential documents in Defendants' four-million-plus page document production. Such arguments are a distraction. This motion would not have been necessary if the documents Plaintiffs had misused were random hotel reservations or spa bills that slipped through as part of much larger documents — or if Plaintiffs had asked Defendants to revisit particular designations before unilaterally acting on their disagreement. Besides being inevitable in a production of this magnitude, many accidental misdesignations are of no consequence here because the extreme examples Plaintiffs ordinarily cite will play no possible role in this action, and Defendants routinely comply with Plaintiffs' requests for appropriate redesignations (even when their requests seem motivated primarily by a wish to expose errors). More to the point, Plaintiffs' disagreement with designations of genuinely material documents does not justify their willful public disclosure of Confidential business records or their written threats to disregard privilege designations.

FACTUAL BACKGROUND

At the outset of discovery in this action, Plaintiffs and Defendants agreed upon, and this Court entered, a Protective Order outlining clear, specific procedures to be followed when materials subject to the attorney-client privilege and/or the work product doctrine were inadvertently disclosed — an inevitable occurrence in a document production now consisting of over four million pages of documents, including tens of thousands of emails, several thousand native format electronic spreadsheets, and hundreds of thousands of pages of other electronic documents. (For the Court's convenience, a copy of the Protective Order is annexed as Exhibit A to the accompanying Declaration of David Owen, dated August 7, 2006 ("Owen Decl.").) The Protective Order also protects material designated as "Confidential" from disclosure in publicly-filed documents pending the Court's resolution of disputes over the validity of Confidential designations or assertions of privilege.

Of particular relevance here is Paragraph 21 of the Order, which provides:

> Discovery Material claimed to contain Confidential Information that is subject to a dispute as to whether it does in fact contain Confidential Information **shall, until further order of the Court**, **be treated as Confidential Information** in accordance with the provisions of this Order notwithstanding the existence of such dispute. (emphasis added)

See also Paragraph 30 of the Protective Order, which prohibits a party's unauthorized use of an opponent's privileged documents pending the Court's resolution of any dispute as to the validity of a claim of privilege or other protection. Paragraph 30 states:

> If a Receiving Party disputes in good faith the Producing Party's claim of privilege or protection, (a) the Receiving Party and Producing Party shall promptly meet and confer to attempt to resolve the claim of privilege or protection, and (b**) the Receiving Party shall refrain from further using or otherwise disclosing the document or its contents or part(s) of the document claimed to be privileged or protected until the dispute is resolved.** (emphasis added)

From time to time, Plaintiffs have called Defendants' attention to documents that in their view were mistakenly designated as Confidential and/or privileged. As the Protective Order contemplates, Defendants have promptly reviewed such material and withdrawn questioned desig-

nations where appropriate, and met and conferred with Plaintiffs to seek an informal resolution of any dispute. *See* Owen Decl. ¶ 3; Ex. I.

In recent weeks, however, Plaintiffs have resorted to self-help by quoting or otherwise disclosing Confidential and even privileged material in their publicly filed briefs. They did so after Defendants had expressly alerted them that doing so violates the Protective Order — and in one instance they disclosed information that this Court found to be protected from disclosure as attorney work product. Plaintiffs also notified Defendants in writing that based on their unilateral disagreement with Defendants' privilege designations or their own opinions about waiver, they intend to use certain privileged documents without restriction in any way they see fit. A chronological account of this escalating repudiation of the Protective Order appears below.

Plaintiffs' Public Disclosure of Privileged and Other Confidential Information

On June 23, 2006, Plaintiffs filed their Reply in Support of their Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants ("June 23 brief"), in which they disclosed the substance of documents that Defendants had designated Confidential pursuant to paragraph 12 of the Protective Order and that were privileged by virtue of the attorney work product doctrine. This brief included liberal quotes and paraphrases from Arthur Andersen LLP's 2001 Litigation Review (Bates numbered AA 059988-93) and disclosed-Household attorneys' assessments of potential liability in connection with particular litigation matters in Household's January 14, 2002 audit letter (Bates numbered AA 060008-47). *See* June 23 brief at pages 5-6, 12.

Although Plaintiffs' supposed disagreement with Defendants' designations did not justify these or other outright violations of the Protective Order (which precludes disclosure absent a court ruling on such disputes), as a matter of fact Defendants' designations were later vindicated by this Court's Order sustaining Defendants' assertion of work product protection for these documents. *See* Memorandum Opinion and Order dated July 6, 2006 at 7-10. Defendants' counsel complained

about these violations in a letter to Plaintiffs' counsel dated June 28, 2006 (Owen Decl., Ex. C), and on June 30 Plaintiffs agreed to withdraw their June 23 brief and file a new public record version containing appropriate redactions. *See id.*, Ex. D.

On July 5, 2006, Plaintiffs filed a motion to unseal the June 23 brief on the ground that Defendants' confidentiality designations were unfounded. That motion was rendered moot by the Court's July 6 ruling that the subject documents are protected from disclosure as attorney work product. Plaintiffs' submission of that motion is nevertheless relevant to the instant motion because it demonstrates Plaintiffs' awareness and understanding that they may not publicly disclose information designated as privileged and/or Confidential without first obtaining a judicial resolution of any disputes they may have.

On July 21, 2006 — after being put on express notice by Defendants that their previous violation of the Protective Order was unacceptable — Plaintiffs again violated the Protective Order by disclosing the substance of Confidential documents in each of two reply briefs they filed in only partially redacted form on the public record. In their Reply in Support of their Motion to Compel Household Defendants to Produce Responsive Documents to their Third [Corrected] Request for Production of Documents, Plaintiffs liberally quoted and paraphrased Confidential Information from documents prepared in connection with Household's Responsible Lending Summit, bearing Bates numbers HHS 02868135, HHS 02868141, and HHS 03208099, which had previously been designated Confidential pursuant to paragraph 3(5) of the Protective Order. *Id.* at 5-6. In their Reply in Support of their Motion to Compel Household Defendants' Responses to the Third Set of Interrogatories [Redacted Version], Plaintiffs disclosed data derived from Household's non-public financial information contained in documents that had both been designated Confidential pursuant to paragraph 3(7) of the Protective Order. On page 6 of that brief, Plaintiffs disclosed a figure (characterized by them as a "project[ion of] restitution based on the Multistate AG Group's allega-

tions") that aggregated amounts shown in a Confidential document (Bates numbered HHS 03070933-38) that estimated the impact of refunding past revenues in certain categories.[3] *See id.* at 6. On page 10, Plaintiffs publicized what they claim is Household's "estimate [of] changing to bank-like policies" by disclosing figures contained in a confidential Audit Committee presentation, Bates numbered HHS 03150529-45. *See id.* at 10. The latter example is especially egregious because it appears on the same page as redacted references to confidential documents produced by the Office of Thrift Supervision. Considering that Plaintiffs made the effort to respect the confidentiality of a non-party's material, their disclosure of Defendants' Confidential information on the same page can only be seen as willful. Defendants promptly issued demands for withdrawal of these briefs and substitution of properly redacted versions, *see* Owen Decl. Exs. G, H, but their concerns were ignored. In the course of a meet and confer on August 1, 2006, Plaintiffs refused to discuss Defendants' concerns. *Id.* ¶ 10.

Plaintiffs' Threats to Disregard Privilege Designations With Which They Disagree

On June 23, 2006, Azra Mehdi, Esq. of Lerach Coughlin wrote to Defendants' counsel that in future depositions, "**Class counsel considers any privilege raised for the first time at depositions to be waived and will continue questioning witnesses on the documents**." Owen Decl., Ex. B (emphasis added).[4]

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[3] Defendants note that Plaintiffs' characterization of this figure is incorrect and irrelevant for a host of reasons, including that the document was created almost 3 months prior to the AG Settlement announcement, and the practices contained therein were not the same as those in the final AG Settlement.

[4] Plaintiffs base this position on their mischaracterization of the Court's suggestion at the May 11, 2006 status conference that the parties inform each other "if they notice [privileged documents] when they are preparing for depositions" (May 11 Hearing Tr. at 47-48). Although Defendants have continued to employ this sound practice, and will continue to inform Plaintiffs of any inadvertently produced privileged documents identified while preparing for depositions, Plaintiffs have taken the Court's statement to mean that Defendants must review every single document that could possibly arise at the deposition of every witness, under pain of waiving privilege as to any document they may miss. But, as the Court has recognized, it is impossible for Defendants to predict every single document that Plaintiffs may choose to introduce (a fact reinforced by Plaintiffs' selection of exhibits neither created nor received by a given deponent). It is therefore not possible to safeguard against the possibility of having to recall a privileged document during a deposition. It also bears noting that the Court's suggestion that Plaintiffs inform Defendants which documents they intend to introduce at

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Similarly, in a letter from Luke Brooks of Lerach Coughlin to Defendants' counsel dated July 14, 2006, Plaintiffs stated:

> As it appears we are unable to reach an agreement [with respect to Plaintiffs' disagreement with certain privilege designations], we will give defendants until Monday, July 31, 2006, to move the Court regarding these disputes of privilege. If defendants fail to make a motion to the Court by that time, **we will consider your assertions of privilege withdrawn and reincorporate these documents into our database and continue to use them in our discovery process.**

Owen Decl., Ex. E at 3 (emphasis added).

Plaintiffs again threatened to violate the Protective Order in a July 25, 2006 letter from Ms. Mehdi to Defendants' counsel. Ms. Mehdi stated that "plaintiffs dispute the assertion of privilege as to [certain] documents **and will continue to use the documents** in compliance with the Protective Order." *See id.*, Ex. F. That threat reflects either an inexplicable misreading or deliberate disregard of the Protective Order, given that paragraph 30 of the Order explicitly provides that Plaintiffs "shall refrain from further using" recalled documents that are subject to a dispute over privilege.

In view of Defendants' growing concern about these actual and threatened violations of the Protective Order, defense counsel David Owen wrote to Ms. Mehdi on July 27, demanding that Plaintiffs give Defendants immediate assurances that Plaintiffs' recitation of protected material in their recent briefs will be withdrawn from the public record without delay, and that Plaintiffs will not use recalled documents unless and until any dispute regarding the privileged nature of these documents is resolved pursuant to paragraph 30 of the Protective Order. *See* Owen Decl., Ex. G. Plaintiffs refused to provide such assurances during a meet and confer session on August 1, 2006, instead promising to send a letter responding to Defendants' concerns.

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> depositions (*see* June 15 Hearing Tr. at 26) — which would provide an obvious solution to this "problem" — has been soundly rejected by Plaintiffs.

Plaintiffs' promised response resolved nothing and gave no serious consideration to Defendants' about Plaintiffs' past and threatened violations of the Protective Order. *See* August 2, 2006 Letter of Azra Mehdi to David Owen, Owen Decl. Ex. J. Rather Plaintiffs stridently criticized Defendants for alleged designation errors, having nothing to do with the privileged and/or Confidential material Plaintiffs unilaterally declassified their recent briefs and written ultimata. Ms. Mehdi's letter did not acknowledge that disputes about inadvertent misdesignations have been efficiently resolved in the past under the terms and conditions set forth in the Protective Order. Nor did Ms. Mehdi's letter provide any support for Plaintiffs' contention that designations of irrelevant pages of larger confidential documents justify their generalized defiance of the Order. The fact that this Court later sustained Household's work-product designation of documents that Plaintiffs publicized in their June 23 brief confirms the perils of Plaintiffs' unauthorized self-help.

Plaintiffs are plainly spoiling for a fight on this issue, but whatever the merits (or lack of merit) of their unilateral views on particular designations by Defendants, their open repudiation of the dispute-resolution mechanisms embodied in the Protective Order is an affront to the authority of this Court.

ARGUMENT

Plaintiffs' unauthorized disclosures violated the plain, unambiguous terms of the Protective Order. Their use of Confidential information in their July 21 briefs was especially egregious because defense counsel had previously put Plaintiffs on notice by insisting that Plaintiffs withdraw and redact a previous brief containing privileged and Confidential information. Plaintiffs' repetition of the same offense allows no conclusion other than that Plaintiffs are knowingly and deliberately violating the Order.

Additionally, on at least three occasions, Plaintiffs have threatened to violate paragraph 30 of the Protective Order by refusing to cooperate with Defendants' efforts to recall specific documents due to their inadvertent disclosure of privileged attorney-client communications and/or

attorney work product. As Plaintiffs have shown their contempt for the Protective Order by quoting protected information in their public-record briefs, Defendants have good reason to take these threats seriously and seek appropriate protection from the Court.

I. Plaintiffs' Violations of the Protective Order Warrant a Determination of Contempt and the Imposition of Sanctions

The Federal Rules of Civil Procedure authorize this Court to enter just orders to punish any failure to abide by the Court's discovery orders. *See* Fed. R. Civ. P. 37(b)(2)(D) ("[T]he court in which the action is pending may make such orders in regard to the failure as are just . . . [including] an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination . . . ."). Plaintiffs' open violations of the Protective Order expose them to a determination of contempt and other sanctions under Rule 37(b). *See Whitehead* v. *Gateway Chevrolet*, No. 03 C 5684, 2004 U.S. Dist. LEXIS 11979, at *10 (N.D. Ill. June 28, 2004) (striking pleadings and ordering plaintiffs' counsel to pay defendants' costs for violating a protective order by using protected information as the basis of a subsequent complaint); *Nevil* v. *Ford Motor Co.*, No. CV 294-015, 1999 U.S. Dist. LEXIS 23222, at *3 (S.D. Ga. Dec. 23, 1999) (recognizing that "Rule 37(b) applies to protective orders entered under Rule 26(c)"). A showing of willfulness is not a prerequisite for a finding of contempt of a protective order. *See Marrocco* v. *General Motors Corp.*, No. 86 C 7531, 1989 U.S. Dist. LEXIS 8102, at *4 (N.D. Ill. July 11, 1989).

Moreover, "[i]t is well-settled that a court has inherent authority to sanction for an attorney's bad-faith conduct." *Whitehead*, 2004 U.S. Dist. LEXIS 11979, at *16, citing *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 42 (1991). In exercising its wide discretion to penalize civil contempt, a court should take into account: (1) the character and magnitude of the harm from continued contumacy; (2) the probable effectiveness of the sanction in coercing compliance with the court's order; and (3) the financial resources of the contemnor and the consequent seriousness of burden the sanctions may impose. *United States* v. *United Mine Workers*, 330 U.S. 258, 303-04 (1947). *See also, e.g.*, *South Suburban Housing Center* v. *Berry*, 186 F.3d 851, 854-55 (7th Cir. 1999) (same).

Application of these criteria warrants significant sanctions against Plaintiffs and/or their counsel here. The actions of Plaintiffs' counsel in this action were more egregious than the violation penalized in *Whitehead* because they continued even *after* Plaintiffs had been pressured to withdraw and redact protected information from an earlier brief. Written notifications by Plaintiffs' counsel that they will freely use documents that they deem unworthy of protection are also open affronts to this Court's authority. The harm from allowing such violations to continue unchecked goes beyond the breakdown of the orderly conduct of this case, and threatens the proper administration of justice. *See United Mine Workers*, 330 U.S. at 290 n.56 ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.") (citation omitted). As Lerach Coughlin is known to have considerable financial resources, any monetary sanctions for contempt should be sufficiently tangible to prompt its immediate compliance with this Court's Orders.

II. Plaintiffs and/or Their Counsel Should Pay the Fees and Expenses Incurred by Defendants in Bringing This Motion

Despite receiving repeated warnings from Defendants that their conduct violates the Protective Order, Plaintiffs have refused to cure their standing violations or provide assurances that they will not follow through with their threatened unrestricted use of certain privileged documents. *See* Owen Decl. Exs. B, E, F. Further, Plaintiffs have refused to meet and confer on this subject, instead issuing a hostile letter declining even to consider a cure. *See* Owen Decl. ¶ 10, Ex. J. Plaintiffs thus have left Defendants with no choice but to seek a further order of this Court to protect their interests in protecting their privileged material and other confidential information entitled to protection under the Protective Order. Plaintiffs and/or their counsel should therefore be required to pay the fees and expenses incurred by Defendants in bringing this issue to the Court for resolution. *See Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 763 (1980) ("Both parties and counsel may be held personally liable for expenses, 'including attorney's fees,' caused by the failure to comply with discovery orders") (internal citation omitted); *American National Bank and Trust Co.* v. *AXA Client*

Solutions, LLC, No. 00 C 6786, 2002 U.S. Dist. LEXIS 9511, at *15 (N.D. Ill. May 24, 2002) (requiring the party that violated the protective order in that case to pay "an amount equal to the attorney's fees and expenses that [the other party had] incurred as a result of the investigation into this dispute").

CONCLUSION AND PRAYER

For the foregoing reasons Defendants respectfully request the entry of an Order (i) requiring Plaintiffs and their counsel to cure their standing violations of the Protective Order by withdrawing from the public record briefs that disclose the subject of Defendants' Confidential information, (ii) holding Plaintiffs and/or their counsel in contempt for willfully defying the Protective Order, (iii) admonishing Plaintiffs and their counsel against carrying out their threatened further violations of the Protective Order, and (iv) imposing appropriate sanctions on Plaintiffs and their counsel, including payment of the costs and fees Defendants were required to incur in seeking this essential relief.

Dated: August 7, 2006
Chicago, Illinois

Respectfully submitted,

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