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

THE HOUSEHOLD DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION REGARDING STATE AGENCY DOCUMENTS

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TABLE OF CONTENTS

Page

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"), in opposition to Plaintiffs' needless Motion Regarding State Agency Documents.

THE FACTS

The best antidote for the baseless and irresponsible accusations in Plaintiffs' amended motion and its predecessor is the truth. We will therefore start with a simple list of facts regarding the state agency non-issue, which on their own demonstrate the frivolity of Plaintiffs' motion.

1. Some aspects of Household's lending business are regulated or supervised by state agencies.

2. Some, but not all, states have regulations that designate as confidential documents that contain or disclose an agency's supervisory or regulatory work product. These regulations are openly accessible to the public on the internet and other readily available sources.

3. Regulations in some of those states are silent about the implications of such confidentiality designations. Regulations in other states require notification to and/or permission from the relevant agency before disclosing such material. Many states apparently have no regulations as to the level of protection (if any) afforded to an agency's work product.

4. To Defendants' knowledge, until now — two years into discovery, and shortly before its close — Plaintiffs have made no effort to obtain from relevant agencies, or to seek permission to use, materials that reflect supervisory or regulatory work product designated as confidential in particular states.[1]

5. In July 2006, in the course of reviewing additional documents pertaining to the upcoming deponent Robin Allcock (a former Household employee), defense counsel located approximately 300 documents (from a base of over 16,000 pages) that appeared to be

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[1] Plaintiffs have made *ex parte* Freedom of Information Act requests to various states for consumer complaints or inquiries regarding Household's consumer lending business. Defendants have obtained the original inquiry letters and the fruits of those requests through discovery, but Plaintiffs have refused to disclose follow up correspondence.

confidential pursuant to the terms of various state regulations. Many said so on their face. In an attempt to flag and resolve any possible issues before the Allcock deposition, and to avoid violating any governing regulation, we immediately embarked on the following course:

(a) We conducted legal research to determine whether and to what extent any of these documents may be subject to restrictions against their unauthorized use in this action.

(b) We obtained from the public record the address of what we believed to be the relevant agency in each implicated state (27 states in all).

(c) We promptly sent to each such agency (to the attention of the person shown on the public record to be its senior official) a neutral form letter, enclosing representative samples of that agency's confidential documents responsive to Plaintiffs' requests for documents and (without expressing any position) requesting guidance as to the proper disposition of such documents. We provided a copy of that form letter to Plaintiffs.[2]

(d) We temporarily withheld approximately 300 documents from our production of Allcock documents pending instructions from the relevant agencies. We explained the reason for the omissions to Plaintiffs, and produced to Plaintiffs the entire balance of the approximately 16,000 pages of responsive documents from Ms. Allcock's files.[3]

(e) As our letters yielded answers from particular state agencies, we immediately notified Plaintiffs of each determination and took appropriate actions, depending on an agency's answer.

- When particular agencies consented to production of their material to Plaintiffs (as did agencies in Michigan, Pennsylvania, Texas,

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2 A representative sample of the form letters is annexed as Exhibit A to the accompanying Declaration of Laura Fraher, Esq. ("Fraher Decl.")

3 *See* Fraher Decl. Ex. B.

Florida and Virginia), in certain instances subject to the terms of this Court's Protective Order, we obtained Plaintiffs' written agreement to that condition and promptly processed the documents for production.[4]

- When a handful of states (namely Arizona, Delaware, Kansas, West Virginia and Wisconsin) declined to allow production and instructed us to recall any similar documents that were inadvertently included in Household's massive document production, we immediately provided Plaintiffs with copies of each such letter and followed the steps outlined in Paragraph 28 of the Protective Order to recall the documents the state agencies asked us to recall (a total of only 65 documents to date).[5]

(f) Throughout, we provided complete and accurate answers to Plaintiffs' incessant and increasingly shrill inquiries about the process and to their false accusations about Defendants' supposed motives. A set of the relevant correspondence is annexed to the accompanying Fraher Declaration as Exhibit E. It confirms Defendants' cooperation and proactive efforts to resolve this minor detour as quickly and efficiently as possible — the very antithesis of stonewalling — and that Plaintiffs were determined from the outset to spin this as a major roadblock and supposed source of delay, as well as another opportunity to discredit Defendants unfairly in the Court's eyes.

6. On August 10, 2006, Plaintiffs' counsel raised their version of this issue at the status conference before this Court. (The relevant transcript pages are annexed to the Fraher

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4 *See* Fraher Decl. Ex. C.

5 The relevant agency letters and correspondence with Plaintiffs regarding the agencies' communications are collected as Exhibit D to the Fraher Declaration.

Declaration as Exhibit F.) The Court asked counsel for Defendants: "[D]o you know how many documents you have withheld?" (Tr. at 15:17-18) Defense counsel responded with an accurate estimate that approximately 300 documents had been withheld from the Allcock production in connection with our follow up under state statutes and regulations. The Court instructed Defendants to provide Plaintiffs with a log of those documents, and we promptly complied.

7. Late in the day on Sunday, August 13, 2006, Plaintiffs cancelled the August 15 deposition of another former Household employee, Dennis Hueman, on the insupportable ground that the deposition might entail reference to state agency documents. (Our review of Hueman documents had given us no reason to believe that this was so.) Plaintiffs rejected our proposal to proceed with the deposition subject to possibly holding the deposition open if, at the end of the deposition, it appeared necessary to do so.[6] Plaintiffs announced the cancellation while one of Household's attorneys was already en route to California, the site of the deposition, at considerable expense.

8. On the night of Monday, August 14, 2006, without meeting and conferring with defense counsel in advance, Plaintiffs filed their initial "Motion Regarding State Agency Documents and Sanctions" ("Initial Motion").

9. Plaintiffs' Initial Motion accused defense counsel of attempting to deceive the Court. *See id.* at 5 ("Defendants were negligent (if not intentional) with respect to their misleading remarks to the Class and the Court at the August 10, 2006 status conference"), and sought sanctions. The accusation of deceit related to Defendants' representation that approximately 300 pages of agency documents had been withheld — which was completely accurate.

10. Plaintiffs subsequently amended that motion on the evening of Wednesday, August 16, 2006, after Defendants had incurred the expense of preparing a response to the Initial Motion, and without previously conferring with us. Although the Amended Motion

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[6] Fraher Decl Ex. G.

omits the accusation that defense counsel lied to the Court, Defendants are not aware of any effort by Plaintiffs to withdraw their false Initial Motion from the public record. The Amended Motion adds the new assertion that Defendants are working behind the scenes to influence state agencies to restrict Plaintiffs' access to their documents. This is categorically false.

ARGUMENT

There was no valid reason for plaintiffs to make this motion or its predecessor, and the Court should summarily deny it because (a) Plaintiffs failed to participate in a good faith conferral process, as required by Local Rule 37.2; (b) no Court action is needed to provide Plaintiffs with state agency contact information because such information is freely available on the internet and has already been provided to them by Defendants; and (c) the complete list that Plaintiffs seek of state agency documents that may be restricted from disclosure does not exist and cannot exist until the relevant agencies that have not already done so respond to Defendants' inquiries (or to the separate inquiries that Plaintiffs have always been free to pursue). It is not Defendants' fault that some state regulations impose restrictions that must be dealt with by private litigants wishing to use agency work product, and it is certainly not Defendants' fault that Plaintiffs overlooked this burden until Defendants notified them about possibly restricted material in Ms. Allcock's requested files. Plaintiffs' efforts to convert Defendants' perfectly appropriate inquiries into a supposed pattern of obstruction are not worthy of this Court's time. It is obvious that Plaintiffs made this frivolous and abusive motion only to try to discredit Defendants in the Court's eyes while shifting the blame for any delay in concluding discovery (including Plaintiffs' needless adjournments of depositions) away from themselves.[7]

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[7] The Court has of course seen Plaintiffs' unsavory tactics before. For example, earlier this year, *Plaintiffs* served expansive subpoenas to federal agencies for production of "all documents" in their possession relating to Household, thus triggering several months of required administrative proceedings, followed by another month of delay when Plaintiffs sought reconsideration of the agencies' rulings (during which Plaintiffs elected to defer many depositions). During the course of those proceedings Defendants were required to recall certain inadvertently-produced documents until the federal agencies had spoken, and even though (with this Court's assistance) that process was accomplished fully within the period needed by the federal agencies to deal with *Plaintiffs'* expansive demands, Plaintiffs continue to characterize the federal agency proceedings as a source of delay somehow fomented by Defendants.

As with the federal agency documents, there is and will be no issue ripe for judicial review until the relevant agencies have made their determinations as to requested waivers. As noted above, in response to Defendants' letters several states have already consented to Plaintiffs' use of their documents, and Plaintiffs have been given all the information Defendants have as to the few exceptions to date, the regulations that govern those determinations and any available follow up, and even the name and address of the official to whom they should direct any objections or further requests. No one is stopping Plaintiffs from pursuing their interests as they see fit with that small handful of states, or from proceeding in any way they wish with other states that have not yet responded to Defendants' neutral inquiries. In short, as the old saying goes, if it ain't broke, don't fix it.

I. Plaintiffs' Requests for Relief are Moot or Impossible to Satisfy

A. Defendants Have Provided Contact Information for State Agencies

Plaintiffs seek an order compelling Defendants to provide "full contact information for all state officials that responded to Household." Pls' Amended Br. at 4. There is absolutely no need for such an order (just as there was no need for a motion demanding it). Defendants have already provided Plaintiffs with the names and addresses of the state officials from whom Defendants requested guidance as to the disposition of agency documents. They have also provided Plaintiffs with copies of all correspondence received from state agencies, and they have told Plaintiffs that no further information is available. *See* Fraher Decl. Ex. C, F. When the relevant officials who have not yet responded communicate with Defendants, we will continue to transmit those communications (and the contact information they include) to Plaintiffs. If this is not sufficient to meet Plaintiffs' needs, Plaintiffs remain free to communicate directly with state agencies using the contact information Defendants have already provided.

Plaintiffs argue that "[e]ach day that passes without the Class' contacting these officials will likely result in further decisions to request recall of additional documents and thus, more prejudice to the Class . . . ." Pls' Amended Br. at 4. This begs the question why "the Class" does not simply pick up the phone or write a letter as defense counsel did based on contact information obtained from readily accessible public sources. Plaintiffs' innuendo that Defendants have somehow advocated behind the scenes for restrictions on the use of state

documents is categorically false, as is evident from the neutral form letter that each agency (and Plaintiffs) received, and the number of agencies that willingly waived any restrictions upon receipt of that letter.

B. Defendants Cannot Predict Which State Agency Documents Will Be Restricted or Recalled

Defendants have complied with the Court's instruction at the August 10 status conference to give Plaintiffs a list of the documents provisionally withheld from their production pending clarification of state regulations. (Many of those documents have since been released.) And as Plaintiffs acknowledge in their motion, Defendants have already provided Plaintiffs with a list of recalled documents for the five states that have asked for a recall. (The total number of documents recalled for those five states is only 65.) Plaintiffs nevertheless seek a further order requiring Defendants to list every additional document in Defendants' production that may be recalled at the request of a state agency. That is not a feasible demand.

Defendants will not know which documents a particular state agency may eventually say are not available for use in this litigation until that agency provides its guidance. Thus, as Defendants have repeatedly explained to Plaintiffs, a list of such documents does not exist and cannot yet be created. If Defendants were ordered to predict what guidance the remaining agencies will eventually provide, they would have to be conservative in their guesses — which would serve only to generate more artificial grievances from Plaintiffs and waste an inordinate amount of time and resources of the parties and the Court. Instead of speculating, and in the interest of conserving resources and streamlining this process, Defendants are actively trying to obtain the requested information from the only entities that can answer Plaintiffs' questions, and are promptly identifying affected documents as we learn that they have been released or restricted. That should suffice.

C. Defendants Cannot Identify Deponents Whom Plaintiffs May Question about State Agency Documents

Plaintiffs ask for a list of "all depositions that may be impacted by this issue." Pls' Amended Br. at 4. Defendants do not know, and cannot be expected to guess, what topics Plaintiffs will choose to explore with any particular deponent (other than the six witnesses for

whom Plaintiffs provided very broad outlines as part of their quest to exceed the seven-hour deposition limit). As explained above, Defendants cannot even identify which state agency documents will ultimately be restricted until the remaining states provide guidance on that subject. Defendants are therefore not in a position to know which potential witnesses might have created, sent or received such documents and whether Plaintiffs might have an interest in questioning such witnesses about restricted documents.[8]

To the extent that any potential witness's connection to a given state agency document could be ascertained by looking at the document itself, Plaintiffs and Defendants are equally capable of conducting such a review, and there is no reason to impose the burden of doing so on Defendants — particularly given Plaintiffs' rejection of the Court's sensible suggestion that they tell Defense counsel in advance which documents may be in play for an upcoming deposition. It goes without saying that a deposition can only be "impacted by this issue" if Plaintiffs intend to inquire about topics covered by agency confidentiality regulations, and only Plaintiffs can make that determination.[9] In the meantime, Defendants should not be pressed into service as Plaintiffs' paralegals to research and inform Plaintiffs of documents that may be of possible interest in upcoming depositions.

Plaintiffs' unique ability to determine whether a deposition may be impacted by state agency issues has already been borne out in the case of former Household employee Dennis Hueman. Having reviewed Mr. Hueman's documents in preparation for his deposition, Defendants did not (and still do not) have any reason to believe that Mr. Hueman's deposition would be impacted by the availability or unavailability of any state agency documents.

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8 Even if Defendants had a universe of documents to consider, it would not be possible to identify every deponent who may have had access to those documents without conducting interviews of all noticed deponents — an expenditure of resources that simply cannot be justified.

9 To date, as Plaintiffs note, this issue has arisen as to only one question in one deposition — a question which the witness, Mr. Creatura, answered. Thus, Plaintiffs' claim that this issue "impeded the deposition of Mr. Creatura" is false.

Nevertheless, Plaintiffs cancelled Mr. Hueman's deposition, after defense counsel had already traveled to the deposition site, and cited state agency document issues as their reason.[10]

D. Defendants Should Not Be Ordered to Urge States to Release Documents

Defendants lack the power to override state regulations or waive any restrictions or protections that may apply to the agency documents in question. Plaintiffs refuse to recognize that no amount of bullying will persuade Defendants that disregarding state law is a viable "solution" to this "problem". Alternatively, Plaintiffs seem to believe that Defendants should have pressed the states for release of these documents on Plaintiffs' behalf, rather than sending them a neutral inquiry. However, this is an adversarial proceeding in which Defendants have no obligation either to guess what documents may be of interest to Plaintiffs or advocate on their behalf for any document's release. Plaintiffs' request that this Court compel Defendants to take a substantive position of Plaintiffs' choosing regarding the release of these documents is, in a word, absurd.

II. Plaintiffs' Counsel Have Needlessly Multiplied These Proceedings and Based Their Motion on False Premises

Although Defendants are not inclined to compound these proceedings by making a cross motion, we note that Plaintiffs' frivolous motion falls squarely in the category of conduct that can subject counsel to sanctions under 28 U.S.C. § 1927, which provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required

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[10] Defendants are entitled to recover fees and expenses under Fed. R. Civ. P. 30(g)(1) for Plaintiffs' strategic cancellation of the Dennis Hueman deposition after counsel was already traveling to California for the deposition. If Plaintiffs fail to honor this obligation when they attempt to reschedule the Hueman deposition, Defendants will seek appropriate relief from the Court. *See Real Colors, Inc.* v. *Patel*, 1998 WL 88879, at *1 (N.D. Ill. 1998) (awarding fees and expenses pursuant to Rule 30(g)(1) where defense counsel had traveled from Illinois to South Carolina to attend a deposition only to be advised, after arriving, that the plaintiff's attorney had canceled the deposition).

by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[11]

Plaintiffs' Motion Regarding State Agency Documents is a textbook example of an attempt to "multipl[y] proceedings . . . unreasonably and vexatiously." Not only have Plaintiffs trumped up a dispute where no actual issue exists, they suggest that over 20 state agencies be required to submit briefs in response to another proposed frivolous motion. *See* Pls' Amended Br. at 3-4 ("The Class proposes that it move to compel production of all relevant documents from Household with notification to each state agency of its opportunity to submit a brief in opposition to the motion"). Even assuming that this Court had the power and jurisdiction to comply with Plaintiffs' scheme, such proceedings would burden this Court with separate consideration of at least 20 additional briefs, each of which would probably remind the Court that unless and until Plaintiffs have exhausted appropriate administrative process, there will be no issue ripe for this Court's consideration. *See generally Union Planters Bank* v. *Continental Casualty Co.,* No. 02 CV 2321 MA/P, 2003 WL 23142200 (W.D. Tenn. Nov. 26, 2003) (declining to address request to use non-public agency information before the party seeking release had submitted a formal request to the agency, and noting that if the agency should refuse to allow the requesting party to use the information, that party may then seek judicial review); *American Savings Bank* v. *PaineWebber, Inc.*, 210 F.R.D. 721, 722 (D. Haw. 2001) ("Courts, in construing regulations which control the release of official information, have held that such information should not be compelled to be produced in violation of these regulations."); *National Union Fire Insurance Co. of Pittsburgh, PA.* v. *Midland Bancor, Inc.*, 159 F.R.D. 562, 572 (D. Kan. 1994) ("When the party seeking documents has not completed the proper procedures, it is unnecessary for the Court to pursue a balancing test to determine if the information sought is confidential or privileged and whether or not such information should be disclosed."). All of that is entirely unnecessary. If state agencies should withhold permission for use of their documents,

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[11] The purpose of Section 1927 "is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs also bear them." *Kapco Mfg. Co. Inc. v. C & O Enterprises, Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989)

Plaintiffs should, if they deem it necessary, pursue available administrative remedies. If Plaintiffs are still unable to obtain documents they desire, then and only then need they involve the Court.[12] In many cases, as we have already seen, states may allow production of the documents at issue without the need for further proceedings. It makes perfect sense to inquire first, as Defendants have done, as opposed to instigating digressive and burdensome motion practice without even knowing whether there is a need.

The Seventh Circuit has held that "[i]f a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious." *In re TCI Limited*, 769 F.2d 441, 445 (7th Cir. 1985). Plaintiffs' thoughtless proposal to drag numerous states into motion practice in this litigation is nothing if not "unsound" and should be nipped in the bud.

Plaintiffs' use of false predicates to support their motion is also abusive. Although Plaintiffs have amended away the most offensive part of their initial motion (namely, their baseless accusation that Defendants had misrepresented "the extent of the state agency problem" to the Court, *see* Pls' Initial Br. at 5), their amended motion is also based on false premises, such as their assertions that they need information that Defendants have already given them, their statement that their deposition of Paul Creatura was "impeded" by this non-issue (it was not: they asked him one state regulatory question, which he answered), and their assertion that Defendants have "*sub silentio* been engaged in seeking" recalls of documents by the state agencies. Plaintiffs have absolutely no factual support for this accusation, which is categorically false.

The instant motion is consistent with Plaintiffs' demonstrated strategy of demanding everything, yielding nothing, and doing everything they can to avoid a showdown on the merits while seeking to shift the blame to Defendants and making this case unreasonably

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[12] Defendants take no position here on the merits of any requests Plaintiffs may make to the state agencies, but it appears that Plaintiffs leave no room for the possibility that public policy interests might properly take precedence over their desire to obtain discovery of cumulative material.

long, expensive and unpleasant for Defendants and the Court. In other words, we are being "Lerached." *See* Molly Selvin, *Unsettling Days for King of Class Actions; Prosecutors May Want to Indict William Lerach, but His Career and the Shareholder Suits He Pioneered Are Booming*, L.A. Times, July 23, 2006, at C1. Although Plaintiffs' counsel may believe that their patented approach will force Defendants into an improvident settlement, neither their clients nor the proper administration of justice can benefit from heavy-handed, insulting, wasteful motions of this sort.

CONCLUSION

Plaintiffs' needless and baseless motion should be denied in full.

Dated: August 21, 2006

Chicago, Illinois

Respectfully submitted,

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CERTIFICATE OF SERVICE

Adam B. Deutsch, an attorney, certifies that on August 21, 2006, he caused to be served a copy of THE HOUSEHOLD DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION REGARDING STATE AGENCY DOCUMENTS, to the parties listed below via the manner stated.

/s/ Adam B. Deutsch
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