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

HOUSEHOLD DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' OBJECTION TO THE MAGISTRATE JUDGE'S SEPTEMBER 20, 2006 ORDER

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This Memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household"), Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Defendants") in opposition to Plaintiffs' Objection to Magistrate Judge Nolan's "September 20, 2006 Order" which, as explained below, actually is a September 19, 2006 Order overruling Plaintiffs' objection that Defendants have exceeded their Court-authorized number of interrogatories.

PRELIMINARY STATEMENT

To describe Plaintiffs' October 4, 2006 Objection and their October 11, 2006 Supplement to the Objection as frivolous is a considerable understatement. Plaintiffs seek to overturn a routine and sound discovery ruling by Magistrate Judge Nolan on a matter that is uniquely within the domain of a magistrate judge — whether a party has exceeded a court-imposed limit on the number of interrogatories it could serve. Plaintiffs did not even make a timely filing. Indeed, to create the appearance of complying with the 10-day period provided in the Rules, Plaintiffs have mischaracterized the Order at issue, dated by Judge Nolan and entered by the Court on September 19, 2006, as a "September 20, 2006 Order."

Plaintiffs' discussion of their disagreement with Judge Nolan's ruling is also fatally flawed. Plaintiffs do not even pretend to claim that Judge Nolan's September 19 ruling was "clearly erroneous," the standard that must be met to overturn a magistrate judge's non-dispositive ruling. Rather, their Supplement proposes a bizarre method of counting interrogatories that they did not even present to Judge Nolan. *See* Exhibit A to Plaintiffs' October 11 "Supplement." Plaintiffs' Exhibit A should be stricken by this Court and not considered on Plaintiffs' Objection because it was not presented to Judge Nolan when she considered and ruled on Plain-

tiffs' Objection, and therefore is not properly before this Court. Exhibit A also deserves to be ignored because the lack of merit of Plaintiffs' newly minted argument is evident on its face. For these reasons, discussed more fully below, Plaintiffs' Objection should be summarily overruled.

MAGISTRATE JUDGE NOLAN'S SEPTEMBER 19 ORDER

On August 18, 2006, Defendants filed a motion to compel seeking proper answers from Plaintiffs to Defendants' Third Set of Interrogatories. In their September 1, 2006 Opposition to that motion, Plaintiffs argued, with no supporting rationale (for none was possible), that Defendants had exceeded the Court's limit of 85 interrogatories for each side. Judge Nolan's September 19, 2006 decision on the motion to compel (which Plaintiffs persist in calling a September 20 Order), succinctly stated: "Plaintiffs' objection that Defendants have exceeded their interrogatory limit is overruled." (Baker Decl. Ex. B, p. 2) Based on Plaintiffs' submission to her, Judge Nolan could have reached no other conclusion.

ARGUMENT

A. Plaintiffs' Objection is Untimely and Should Not Be Considered By the Court

Plaintiffs refer to the Order at issue as having been entered on September 20 (Baker Decl. Ex. B). However, the Order, on its face, clearly states that it was signed by Judge Nolan on September 19 and entered by the Court that same day, September 19. Given the clarity of the record, Plaintiffs' misstatement of the date cannot be an inadvertent mistake. Rather it appears to be a deliberate attempt to create the false impression that their Objection is timely, when it plainly is not. Pursuant to Rules 72(a) and 6(a) of the Federal Rules of Civil Procedure, an objection to a magistrate judge's order has to be filed with the district court 10 days after service of the order on the parties and, as Saturdays, Sundays and holidays are not counted if a time period

is less than 11 days, the ten days of Rule 72(a) are ten business days. For an order entered on September 19, ten business days expired on October 3. Plaintiffs' Objection, filed on October 4, is untimely.

Instead of explaining why their Objection was one day late, *see Espinoza* v. *Northwestern University,* No. 02 C 7563, 2004 WL 416471, at *3 (N.D. Ill. Jan. 30, 2004) (a party whose objections are not timely filed "must demonstrate sufficient cause for failure to timely object"), Plaintiffs simply changed the date of the underlying Order. Although this Court may certainly overlook non-egregious delays in filing, *see, e.g., Hunger* v. *Leininger,* 15 F.3d 664, 668 (7th Cir.), *cert. denied*, 513 U.S. 839 (1994), a deliberate mischaracterization of the record to create the appearance of timeliness should not be tolerated. Rather, the Court should strike and refuse to consider the October 4 Objection filed by Plaintiffs (together with its October 11 Supplement).

B. In the Alternative, Plaintiffs' Insubstantial Objection to the September 19 Order Should Be Overruled on the Merits

1. A Magistrate Judge's Ruling on Discovery Matters is Entitled to Considerable Deference

Fed. R. Civ. P. Rule 72(a) establishes the standard that governs a district court's review of a magistrate judge's decision on a nondispositive motion such as the discovery dispute at issue. "Routine discovery motions are considered to be 'nondispositive' within the meaning of Rule 72(a)." *Ocean Atlantic Woodland Corp*. v. *DRH Cambridge Homes, Inc*., No. 02 C 2523, 2004 WL 609326, at *3 (N.D. Ill. Mar. 23, 2004) (Guzman, J.); *see also For Your Ease Only, Inc*. v. *Calgon Carbon Corp*., No. 02 C 7345, 2003 WL 21475905, at *4 (N.D. Ill. June 20, 2003). Plaintiffs' contention that Judge Nolan mistakenly applied her own expanded interroga-

tory limit is a classic example of a "routine discovery motion" and, therefore, nondispositive within the meaning of Rule 72(a). Plaintiffs seek nothing less than to have this Court count interrogatories instead of Judge Nolan ─ based on a bizarre formula they did not even share with the Magistrate Judge.

Determinations of a magistrate judge in the discovery context are entitled to considerable deference because "[t]he Federal Rules of Civil Procedure grant magistrate judges broad discretion in resolving discovery disputes," *Ocean Atlantic Woodland Corp*., 2004 WL 609326, at *3; and "[t]he magistrate judge has a much higher familiarity with the parties and the conduct of discovery than does this Court." *Whittaker* v. *NIU Board of* Trustees, No. 00 C 50447, 2004 WL 524949, at *1 (N.D. Ill. Mar. 12, 2004). Magistrate Judge Nolan has been supervising discovery matters in this action for more than two years and has a detailed understanding of the context of this dispute and Plaintiffs' asserted discovery needs. Judge Nolan has made rulings on numerous interrogatories served by both parties in this case. For example, in a November 10, 2005 Order, she focused on counting interrogatories and subparts of interrogatories. (*See* Baker Decl. Ex. C) Indeed, in their October 11 Supplement to their Objection, Plaintiffs acknowledged Judge Nolan's "greater familiarity with the issues." Judge Nolan's September 19 Order as to the number of available interrogatories reflected this familiarity with the parties' discovery and her efforts to allow both parties to fully develop their cases consistent with the January 31, 2007 fact discovery deadline. Plaintiffs' disagreement with the outcome as to this particular discovery issue provides no basis to override Judge Nolan's ruling.

2. Magistrate Judge Nolan Correctly Overruled Plaintiffs' Contention that Defendants Had Exceeded their Interrogatory Limit

Rule 72(a) provides that the district judge "shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be *clearly erroneous or contrary to law"* (emphasis added). *See also For Your Ease Only, Inc*., 2003 WL 21475905, at *3; 12 Charles Alan Wright, *et al.,* Federal Practice and Procedure 2d § 3069 (2006). Factual determinations are reviewed under the "clearly erroneous" standard, which "means that the district court can overturn the magistrate judge's ruling only if the district court is left with *the definite and firm conviction that a mistake has been made." Weeks v. Samsung Heavy Industries Co*., 126 F.3d 926, 943 (7th Cir. 1997).

Yet Plaintiffs do not claim that Judge Nolan's overruling of their objection (that Defendants exceeded their interrogatory limit) was "clearly erroneous." Rather they argue only that Judge Nolan's ruling as to the counting of interrogatories "resulted in substantial prejudice" (Objection, p. 1), and "has been inconsistent at best and has had an extremely prejudicial and unequitable affect." (*Id.* at 4)[1]

That Plaintiffs evade the proper standard is understandable as they did not present any argument to Judge Nolan that could have resulted in any other ruling or in a clear error by the Magistrate Judge. Plaintiffs devoted only one page of their 14-page brief in opposition to

[1] Plaintiffs' arguments about supposed inequity merit no serious consideration in a case where Plaintiffs have been allowed to take 55 depositions (to Defendants' one, so far), have served hundreds of requests for admissions, and have received in excess of 4 million documents, in contrast to approximately 37,000 provided by them to date. Through no fault of the Magistrate Judge, there is a vast disparity between the parties' respective discovery obligations, but as in most securities fraud class actions, it certainly does not tilt in Defendants' direction.

Defendants' motion to compel to the argument that "Defendants Have Exceeded Their Interrogatory Limit." Plaintiffs asserted, *without any explanation*, that "defendants had served, by lead plaintiffs' count, a total of 101 interrogatories in four previous sets" (Pls. Opposition, p. 4). Plaintiffs provided no explanation as to how their "101" figure was calculated or why it so greatly exceeded their earlier proposed counts. Instead, without providing any evidentiary support, they insisted that "the Court should accept lead plaintiffs' count that defendants have served over 100 interrogatories" (*Id.*) Plaintiffs concluded their brief argument on the number of Defendants' interrogatories the way it began by reciting that "defendants already served more than 100 interrogatories. . . ." (*Id.* at 5) Because Judge Nolan was asked to rule solely on the basis of these unsubstantiated (and indefensible) conclusions, Plaintiffs cannot point to any error that would support a "definite and firm conviction that a mistake has been made" as required to overturn a magistrate judge's ruling. *Weeks* v. *Samsung Heavy Industries Co., supra.*

3. Exhibit A to Plaintiffs' Supplement Should Not Be Considered By the Court Because It Was Not Submitted Below

Realizing that they failed to submit any explanation or evidentiary support to Judge Nolan, Plaintiffs belatedly seek to substantiate their arguments before this Court by "supplementing" their already untimely Objection one week after its filing in order to provide a first-time explanation of their unorthodox counting method. *See* Exhibit A to Plaintiffs' October 11 "Supplement." Plaintiffs' Exhibit A is a chart that purports to explain how 24 interrogatories propounded by Defendants, in Plaintiffs' view, really amount to over 100 questions.

Exhibit A should not be considered by the Court because it seeks the Court's *de novo* consideration of arguments that had not been raised before Judge Nolan. Plaintiffs' failure to present these arguments to Judge Nolan amounts to a waiver of such arguments and precludes

them from presenting them to this Court on a Rule 72(a) objection to a magistrate judge's non-dispositive ruling. *See, e.g., Paterson-Leitch Co., Inc*. v. *Mass. Municipal Wholesale Electric Co*., 840 F.2d 985, 990-91 (1st Cir. 1988); *Rubin* v. *The Islamic Republic of Iran*, 2005 WL 783057, at *1 (N.D. Ill. Mar. 18, 2005) ("Efficiency in judicial administration requires that all arguments be presented to the magistrate judge in the first instance"); *Force* v. *Dynamic Force*, 1999 WL 342407, at *5 (N.D. Ill. May 14, 1999) (same); *Vargas* v. *Chicago*, 1997 WL 688879, at *2 (N.D. Ill. 1997); *Anna Ready Mix, Inc.* v. *N.E. Pierson Construction Co., Inc*., 747 F. Supp 1299 (S.D. Ill. 1990).

In *Anna Ready Mix*, the defendant objected to the magistrate's report before the district court on the basis of a new argument it failed to raise below. In striking that argument, the court noted that "Congress intended that the magistrate *be the first* to hear all arguments and take all evidence." *Id.* at 1302-03 (emphasis added). The court's explanation is highly pertinent here:

> "[T]he proper functioning of the magistrate system requires that, absent compelling reasons, the magistrate hear all arguments the parties wish to make. As one commentator has noted, '[c]ommon sense and efficient judicial administration dictate that a party should not be encouraged to make a partial presentation before the magistrate on a major motion, and then make another attempt entirely when the district judge reviews objections to an adverse recommendation issued by a magistrate.'"
>
> "[T]he party aggrieved [by an adverse filing] is entitled to a review of the bidding rather than a new deal. [Federal Rule of Civil Procedure 72(b)] does not permit a litigant to present new initiatives to the district judge. We hold categorically that an unsuccessful party is not entitled as of right to *de novo* review by the judge of an argument never reasonably raised before the magistrate."

Id. at 1303 (citations omitted).

Because Rule 72(b) "does not permit a litigant to present new initiatives to the district judge" *(id.),* the chart attached as Exhibit A to Plaintiffs' Supplement to their Objection should be stricken and not considered by this Court.

4. Exhibit A is Unworthy of Consideration In any Event

Exhibit A reflects Plaintiffs' completely nonsensical methodology for counting the purported number of interrogatories served by Defendants and concludes that Defendants have served over 100 interrogatories. For example, Defendants served an interrogatory that sought "all documents Plaintiffs contend support, refute or otherwise concern" a specific allegation. Plaintiffs argue that "[t]he phrase 'support, refute or otherwise concern' is compound and disjunctive and requests **three** separate inquiries" (emphasis in original). This approach elevates form over substance to a wholly untenable degree. If Defendants had simply said "all documents that concern" an allegation, Plaintiffs presumably would have to concede that such an interrogatory should only be counted as a single interrogatory. Adding the words "support" and "refute" in order to avoid any ambiguity obviously does not expand the scope of the interrogatory or convert one question into three, and it is notable in this regard that Plaintiffs answered no interrogatories of this kind by breaking up their answers into separate subparts that distinguish between documents that support or refute a particular allegation.

Endorsing Plaintiffs' position could have a considerable detrimental effect on the clarity of interrogatories. Parties faced with a numerical limit on interrogatories will eschew specificity and opt instead for the broadest and most vague language they can draft — to avoid the situation raised by Plaintiffs here where two or three or four words of clarification are deemed to create multiple interrogatories. Even if a *de novo* analysis of Plaintiffs' unorthodox

and newly minted arguments were appropriate, the contentions embodied in Plaintiffs' Exhibit A should be flatly rejected on the merits.

Magistrate Judge Nolan's count of Defendants' interrogatories was not clearly erroneous and Plaintiffs have made no serious efforts to show otherwise. As the Magistrate Judge has broad discretion to regulate the timing, scope and format of permissible discovery, her considered opinion about whether Defendants should be allowed to serve additional interrogatories (the main vehicle for defensive discovery in a securities fraud action) should not be disturbed.

CONCLUSION

For the reasons discussed above, the Court should strike or overrule Plaintiffs' Objection to Magistrate Judge Nolan's September 19, 2006 Order (improperly termed by Plaintiffs a September 20, 2006 Order).

Dated: October 18, 2006
Chicago, Illinois

Respectfully submitted,

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