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.	

THE HOUSEHOLD DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM ANDREW KAHR

CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Ave.
Suite 1100
Chicago, IL 60604

Attorneys for the
Household Defendants

Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (collectively the "Household Defendants" or "Defendants") respectfully submit this response to Plaintiffs' belated Motion for Authorization Pursuant to the Walsh Act for Issuance of a Subpoena for Andrew Kahr.

PRELIMINARY STATEMENT

Defendants' position on this subject remains what it has been from the time Plaintiffs first mentioned the possibility of a Walsh Act motion several weeks ago — namely, that any eleventh-hour ploy that will delay the prompt conclusion of Plaintiffs' abusive fact discovery program is prejudicial to Defendants and to the proper administration of justice. At this late stage of the case, the "interests of justice" require a near-term day of reckoning on Plaintiffs' frivolous claims — which continue to focus obsessively on alleged consumer abuses rather than the essential elements of a securities fraud claim. Even if Plaintiffs could establish a "compelling reason" (as the drafters of the Walsh Act envisioned) to learn whether Mr. Kahr suggested any of the real or imagined lending practices they challenge, Plaintiffs have no excuse for waiting to pursue that discovery until eight weeks before the close of a three year discovery program — especially since they started to receive copies of Defendants' Kahr-related documents as early as ***June 2004***. (It goes without saying that the fact that Household has produced hundreds of pages of Kahr memos and related documents also belies Plaintiffs' reckless accusation that Household destroyed its files regarding Mr. Kahr.)

If Mr. Kahr is in fact "a key witness," as they now assert, Plaintiffs could have (and should have) figured that out no later than the spring of 2005, by which time they were in possession of virtually all of the Household documents they include as exhibits to their motion and hundreds of additional pages of Kahr-related documents from Household's files. Even accepting their excuses that they did not review Household's Kahr-related production until ten months later (in February 2006), and that they did not comprehend their significance for another "several weeks" thereafter, Plaintiffs provide no explanation for their failure to make this motion in July 2006, when their representative actually spoke to Mr. Kahr and confirmed his address and presence in Paris. It cannot be that they were too busy, because as the Court knows, Plaintiffs took only 7 depositions between July and October, 2006 and did not begin their deposition program in earnest until the Court imposed a firm cut-off date. Indeed, even Plaintiffs' supposed attempts to locate

Mr. Kahr before July 2006 were dilatory, as the very article they say awakened them to Mr. Kahr's importance (or at least his potential prejudicial value) disclosed *in 2002* that Mr. Kahr had moved to France some years earlier.[1]

For the Court's information, the balance of this Memorandum will provide the key dates that demonstrate that Plaintiffs have been dilatory in filing the instant motion, and summarize the standards that warrant denial of their belated demand. It will also set the record straight on Plaintiffs' irresponsible and false accusations of illegal conduct and document destruction on the part of Defendants. Although this Court is not asked to resolve any substantive issues on this motion, the utter lack of reliability of Plaintiffs' "factual" showing provides another strong reason to deny their motion.

PROCEDURAL BACKGROUND

Plaintiffs' lack of diligence in pursuing supposedly crucial evidence from Mr. Kahr belies their supposed need for this discovery and defeats their argument that the interests of justice necessitate opening another side door in these waning days of a discovery. As the following chronology shows, if Mr. Kahr's testimony were in fact "key" to Plaintiffs' claims, and if the documents they now cite were the smoking guns they imply, they could have and should have pursued this discovery when they first received Defendants' records on this consultant beginning two and a half years ago.

Discovery Chronology as to Andrew Kahr

May 2002	An article that Plaintiffs attach to their motion reports that Mr. Kahr had moved to France more than a decade earlier.
June 2004	Plaintiffs received some documents referring to Mr. Kahr as part of Defendants' production of documents previously produced to the SEC. This production included a copy of the document annexed as Exhibit 5 to Mr. Brooks' Declaration. (Farren Decl. ¶ 2) That document, a January 1, 2002 memorandum from Mr. Kahr to a Household employee, was produced to Plaintiffs on June 23, 2004. It states, *inter alia,* "As Sandy has probably told you, for the past three years I have had a relationship with HI [Household International] which basically involves my providing new ideas and helping them to get implemented."

[1] An interesting question is when Plaintiffs first uncovered the 2002 article that is attached to the Declaration of Mr. Brooks as Exhibit 2. If they found it while doing their "independent investigation" of Mr. Kahr in March and April 2006, *see* Brooks Decl. ¶ 2, then they knew some eight months ago that after Mr. Kahr sold his interest in Providian, he took up residence in France. *See id.,* Ex. 2 at 3. If their "investigation" last Spring failed to uncover this publicly available fact, Defendants should not be prejudiced by that oversight.

April 2005	Plaintiffs received approximately 400 additional pages of documents from Household's files regarding Mr. Kahr's consultancy, including extensive memoranda and emails from Mr. Kahr and all of the additional Kahr memoranda that Plaintiffs annex to their motion papers. In particular, Exhibit 1 to Mr. Brooks' Declaration was produced to Plaintiffs on April 6, 2005, Exhibit 4 was produced to Plaintiffs on April 22, 2005, and Exhibit 6 was produced to Plaintiffs on April 28, 2005. (Farren Decl. ¶ 3.)
February 2006	Twenty months after receiving Brooks Exhibit 5 (which discloses the fact and duration of Mr. Kahr's consultancy and summarizes some of his ideas), Plaintiffs say they discovered for the first time "that Mr. Kahr had served as a consultant to Household during the Class Period". (Brooks Decl. ¶ 2a)
March-April 2006	Plaintiffs say they learned, as a result of an "independent investigation" of Mr. Kahr, that he had not only been a consultant to Household but also a founder of Providian Bank, which in 2002 settled charges of unfair business practices. (*Id.*¶ 2c) Plaintiffs say that based on that insight they decided to depose Mr. Kahr and drafted a subpoena. (*Id.* ¶ 2d)
May 25, 2006	Plaintiffs reportedly learned that an attempted service on Mr. Kahr in California had been unsuccessful, *and* that the gate guard had informed the process server that Mr. Kahr treated the California property as a vacation home and that he had not seen Mr. Kahr in months. (Schneider Decl. ¶ 4)
June 1-July 18, 2006	Despite the gate guard's confirmation that the California property was not Mr. Kahr's primary residence, Plaintiffs reportedly made repeated attempts to serve Mr. Kahr there. (*Id.* ¶ 5)
July 18, 2006	Nearly five months before they filed the instant motion, Plaintiffs reportedly learned, through unspecified "media information" and confirmation from its investigator, that Mr. Kahr lived at a certain address in Paris, and could be reached at a certain telephone number there. On July 18, Plaintiffs' representative called that phone number and spoke with Mr. Kahr, who confirmed his Parisian address. (*Id.* ¶ 7)
October 26, 2006	In a letter to Plaintiffs' Deposition Coordinator, Defendants' interim Deposition Coordinator asked for the third or fourth time whether Mr. Kahr had been served yet. At a meet and confer session later that day, Plaintiffs' counsel stated that they were planning to make a motion under the Walsh Act. (Farren Decl. ¶ 4)
November 3, 2006	Defendants' Deposition Coordinator asked his counterpart when Plaintiffs intended to file their Walsh Act motion. (*Id.* ¶5)
November 27, 2006	Defendants flagged the proposed Walsh Act motion (and Plaintiffs' failure to act) in their Status Report as an open item for discussion at the November 30 status conference.
December 4, 2006	Twenty months after receiving the first wave of Household's Kahr-related documents, nearly five months after confirming Mr. Kahr's address in Paris and confirming that he was physically there, and only eight weeks before the close of discovery, Plaintiffs moved to compel Kahr's return to the United States.

The only fair interpretation of this chronology is that Plaintiffs had no real interest in deposing Mr. Kahr until they perceived the possibility of tarring the Household Defendants with inadmissible anecdotes about Mr. Kahr's supposed exploits at Providian. Even then (and even after they confirmed Mr. Kahr's precise whereabouts), they took no effective steps to pursue such

discovery for several months. Allowing this untimely distraction — particularly when there is still so much work do be done in completing scheduled depositions and obtaining good-faith answers to Defendants' interrogatories — would not serve the interests of justice.

THE GOVERNING STANDARDS

There is very little reported caselaw under the Walsh Act, and much of it provides no guidance here, as it deals with such issues as the Act's application to a non-citizen, and whether a grand jury investigation can be equated with a criminal proceeding. However, the legislative history of the Act is instructive. *See* SR 1580 § 10 (Sept. 15, 1964) (annexed to Farren Decl. as Ex. A). It indicates that the consideration of a Walsh Act motion is entirely within the discretion of the court, which may impose whatever conditions it considers appropriate. It explains that in determining whether the issuance of a subpoena is necessary "in the interest of justice" the court may take into account the nature of the proceedings, the nature of the testimony or the evidence sought, the convenience of the witness, the convenience of the parties, and other facts bearing upon the *reasonableness* of requiring a person abroad to appear as a witness or to produce tangible evidence. It states that the point of these criteria is to allow for a subpoena in a proper case while insuring "that burdens upon United States citizens and residents abroad will not be imposed *without compelling reason.*" *Id.* (emphasis added).

Plaintiffs have not made a persuasive showing on any of these factors. In terms of the nature of the proceedings, they continue to overlook that they represent a class of investors allegedly aggrieved by securities fraud, and not a class of consumers complaining of Household's lending practices. The testimony they seek relates to the uncontested fact that Mr. Kahr served as a consultant who generated marketing ideas for consideration by Household. As shown, Plaintiffs could have pursued this subject months or even years ago had it struck them as even marginally relevant. The fact that they waited so long undermines their current insistence that Mr. Kahr's supposed information is "key" to their claims.

As the Court is well aware, Plaintiffs have already taken exhaustive discovery on what Household's practices actually were during the Class Period (whatever their genesis) and the allegations made about them by certain consumer advocates and regulators. They have also deposed Mr. Paul Creatura (Household's liaison with Mr. Kahr) at length about Mr. Kahr's input during the relevant period, and the nature and disposition of some of his ideas. (*See* Farren Decl. ¶

7 and Transcript excerpts annexed thereto as Ex. B.) Mr. Creatura testified in July 2006 (after Plaintiffs had already confirmed Mr. Kahr's address and presence in Paris) that Mr. Kahr was viewed as someone "with ideas to help accelerate growth of consumer lending" (Creatura Tr. at 30:8-10), that all of the ideas generated by Mr. Kahr's "brainstorming" were subject to review in accordance with Household's legal and compliance standards (*id.* at 32:10-12, 17-18); and that some of what Mr. Kahr suggested was not accepted "because it was felt that it was not consistent with the Compliance and/or Legal guidelines that the company had in place at the time." (*See id.* at 32:20-33: 2.) Plaintiffs remain free to explore with other Household witnesses which of Mr. Kahr's ideas were adopted, modified or rejected, but to suggest eight weeks before the discovery cut-off that they need to depose Mr. Kahr about such matters as the sixty ideas that he proposed and Household rejected months before the start of the Class Period (*see* Plaintiffs Brief at 8-9), or to follow up on his plainly inadmissible dealings with a different lender, is not reasonable in the least.

Although Plaintiffs rely heavily on a Colorado case in which the district court spoke about the expansive standard of relevance under the federal discovery rules, even that opinion recognized that a discovery demand may be out of order where the requested discovery "is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Klesch & Co.* v. *Liberty Media Corp.*, 217 F.R.D. 517, 524 (D. Colo. 2003). At this late stage of discovery, after Plaintiffs have waited so long to pursue a deposition that must be deemed marginal at best, the presumption of broad disclosure must give way to principles of fairness and putting a final and efficient end to Plaintiffs' relentless search for additional consumer lending anecdotes.

In any event, Judge Guzman's instructions in this very case override the generalized observations about the scope of Rule 26 discovery in cases such as *Klesch. See* Memorandum and Order of November 22, 2006 at 7. In ratifying this Court's rejection of certain post Class Period discovery, Judge Guzman stated:

> Plaintiffs' argument assumes that relevance is the only factor to be considered when determining whether to compel discovery. However, it is well-settled that the district courts have broad discretion in deciding discovery matters, to both ensure that a party is not burdened with producing insufficiently probative information and to ensure that the court's resources are allocated in a manner most conducive to producing justice. *See Montgomery* v. *Davis*, 362 F.3d 956, 957 (7th Cir. 2004). Discovery may be limited if it is 'unreasonably cumulative or duplicative . . . [or if] the

> burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case.' Fed.R.Civ.P. 26(b)(2). Thus, contrary to plaintiffs' contention, the mere fact that further discovery might be relevant does not mean that plaintiffs are entitled to that discovery. *Id.*

In the context of the instant motion, the proper administration of justice would best be served by rejecting Plaintiffs' belated attempt to pursue a marginal issue that they have known about (or could have) for more than two years. If Mr. Kahr declined to comply with the proposed subpoena, or initiated motion practice here or abroad to contest Plaintiffs' discovery demand or any related order, the carefully-constructed deposition schedule for the final month of discovery could be ruined, and the attention and resources of the parties and the Court would be diverted from what should be the final round of Plaintiffs' extraordinarily broad and discovery program. If denial of this motion would mean that Plaintiffs did not get every possible item on their expansive wish list, that outcome is necessary to prevent the "further strain on the court's limited resources" caused by the "contentious discovery battles over the marginally probative information that plaintiffs seek." *Id*. at 8.

CORRECTION OF THE RECORD

Plaintiffs' motion papers are fraught with a high number of misstatements and false accusations that should not go unremarked. Although the Court has no need to resolve factual issues to decide Plaintiffs' motion, the fact that the motion was based in large part on false premises has some bearing on whether Plaintiffs' have shown a "compelling reason" for relief.

For example, Plaintiffs assert on page 1 of their brief that "Household implemented many of [Mr. Kahr's] initiatives apparently without regard to their legality or impact on the Company's customers." Plaintiffs cite no evidence for this accusation, and the record is precisely to the contrary. See, for example, their own Brooks Exhibit 1, which shows that all of the suggested initiatives were subject to legal review, and the deposition testimony of Mr. Creatura to the effect that all of the proposals were subject to compliance and legal review, and any that did not meet Household's standards were rejected for that reason. (*See* Farren Decl. Ex. A.) *See also* Brooks Exhibit 6, in which Mr. Kahr confirmed that Household opposed "anything which appears 'unconscionable' (even if legal as to specific terms)."

At page 1 of their brief, Plaintiffs allege that Mr. Kahr had "substantial input in

many of the programs underlying the Class' predatory lending allegations, such as hiding prepayment penalties and using bi-weekly payment to mislead borrowers about their true interest rates." They provide no support apart from paragraph references to their own complaint (*see* page 6 of their brief) and a mangled reading of documents that do not begin to support their conclusion. For example, the supposed source of a scheme to train employees to deceive customers about their effective interest rate is said to be Brooks Ex. 1 (a list of 10 proposals for consideration), which says nothing of the kind, but rather merely suggests (as proposal 8) consideration of a bi-weekly payment loan, tailored to customer needs, to make Household more competitive and reduce effective APR.[2] Plaintiffs' accusation also ignores substantial testimony about Household's recurring efforts to identify and terminate the use of sales materials that could have the effect of misleading or confusing customers about their effective rate. *See generally, e.g.,* the depositions of Mr. Ned Hennigan at 156:18-157:21; Mr. Tom Schneider at 137:1-15, 139:11-39 and 148:24-149:7; and Ms. Lisa Sodeika at 84:7-25 and 85:17-86:23 relevant excerpts of which are annexed to the Farren Declaration as Exhibits C, D and E.

Plaintiffs' further description of Brooks Ex. 1 as the source of a scheme to "hide prepayment interest" is equally insupportable. Although making loans through federally regulated banks was one proposal summarized in that memo, the related commentary merely notes that resulting changes in the detailed terms of loans would not be highly visible to the customer. This accusation is irrelevant in any event, as it is beyond dispute that Mr. Kahr's proposal was not adopted. *See* Creatura Tr. (Farren Decl. Ex. A) at 152:6-7.

Plaintiffs also claim at page 7 of their brief that "on March 20, 1999, Mr. Kahr sent a memorandum . . . detailing his plan for Household to circumvent state laws in order to 'charge higher penalties in a larger number of states.'" But as the cited document (Brooks Ex. 6) shows, Mr. Kahr expressed his understanding that the federal Alternative Mortgage Transaction Parity Act superseded certain state restrictions, and mentioned work underway to examine the validity of that assumption and its implications. Plaintiffs' characterization of a straightforward preemption analysis as a scheme to "circumvent state laws," and their blanket assumption that charging higher

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[2] Elsewhere, Plaintiffs illogically assume that because they found no documents detailing Mr. Kahr's participation in the supposed scheme to defraud customers about their effective rates, Household must have destroyed those hypothetical documents. *See* Plaintiffs' Brief at 5.

penalties where legally allowed is by definition "predatory" are classic illustrations of Plaintiffs' reliance throughout this litigation on prejudicial-sounding slogans in lieu of a clear and rational explanation of the "predatory lending" prong of their securities fraud claims.[3]

At page 7 of their brief Plaintiffs state, contrary to fact, that documents regarding Mr. Kahr's proposals "are no longer available from Household due to defendants' intentional destruction of documents relating to the retention of Mr. Kahr." The lack of foundation for this accusation is evidenced by Household's production of hundred of pages of documents created by Mr. Kahr or discussing his proposals. Plaintiffs' supposed "support" for this accusation is an email chain (Brooks Ex. 7) that says on its face that documents regarding Mr. Kahr had been collected for disposition by Household's General Counsel (months before the start of this lawsuit). Plaintiffs have no basis to assert that the "disposition" was anything other than preservation of these documents, which in fact were later produced to them (or, in a few instances, withheld or redacted in keeping with the attorney-client privilege).

In the same irresponsible vein, Plaintiffs allege at pages 7-8 of their brief that "after Mr. Kahr was publicly linked with predatory lending practices at Providian in May 2002, Household determined to destroy its internal documents relating to its use of Mr. Kahr to develop its own predatory practices." Plaintiffs provide no support whatever for their arguments that Household retained Mr. Kahr to develop "predatory practices", that Household "determined to" destroy its internal documents relating to Mr. Kahr, or that it did so.

CONCLUSION

Plaintiffs cannot have it both ways. If Mr. Kahr's retention and related memoranda really are "key" to their securities fraud claims, this should have been apparent to Plaintiffs in June 2004 and April 2005 when most of these documents were produced, or at the least by February 2006 when Plaintiffs reportedly got around to reviewing them. Conversely, if neither the exhibits

[3] That Plaintiffs' analysis of this issue has not progressed in the least from the rhetoric and conclusory accusations in their complaint demonstrates vividly why Defendants continue to require good-faith, timely, substantive answers to their contention interrogatories. Document dumps (such as the one they provided in "response" to Defendants' Second Set of Interrogories) will not suffice — especially in view of the tortured interpretation of documents Plaintiffs demonstrate in their brief on this motion. The need for good-faith compliance with Plaintiffs' own discovery obligations is a proper focus of this motion because *that* is where Plaintiffs should be instructed to devote their time and resources in the final weeks of discovery, rather than tilting at windmills they have known about for years.

they highlight on this motion nor any other of the hundreds of pages of documents Defendants produced on this subject struck Plaintiffs as remarkable before now, it is difficult to envision a compelling need to explore this subject further in the waning days of discovery, at considerable expense to both sides, inevitable disruption of an already tight deposition schedule, and the risk that Plaintiffs will be diverted from compliance with their own discovery obligations

For the foregoing reasons this Court should reject Plaintiffs' belated effort to subpoena Mr. Kahr, at an address they have known about since mid-summer, about documents they received in 2004 and early 2005. If the Court should be inclined to grant Plaintiffs any relief on their motion, it should impose the express conditions (a) that Plaintiffs may not proceed with this detour until they have complied fully and fairly with all of Defendants' contention interrogatories (many of which remain outstanding), and (b) that Plaintiffs' failure or inability to complete the proposed discovery of Mr. Kahr before the January 31, 2007 cut-off for fact discovery, or to obtain a definitive ruling by then on any objections that Mr. Kahr may interpose, may not be raised or entertained as a basis for extending their time to take fact discovery of Mr. Kahr or any other witness.

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EIMER STAHL KLEVORN & SOLBERG LLP

By: /s/Adam B. Deutsch
Adam Deutsch
224 South Michigan Ave.
Suite 1100
Chicago, IL 60604
(312) 660-7600

CAHILL GORDON & REINDEL LLP
Thomas J. Kavaler
Howard G. Sloane
Patricia Farren
Landis C. Best
David Owen
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for the Household Defendants