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-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFFS' MOTION TO COMPEL HOUSEHOLD DEFENDANTS TO PRODUCE DOCUMENTS RESPONSIVE TO PLAINTIFFS' FOURTH DEMAND FOR PRODUCTION OF DOCUMENTS

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PRELIMINARY STATEMENT

In the latest manifestation of their ongoing discovery gamesmanship, Plaintiffs have seized on the same subjects covered by their First, Second and Third Demands (to which Defendants' production of responsive documents is now complete) and expanded these subjects to encompass new categories and reopen categories already covered by their previous document demands. Plaintiffs misleadingly claim that the requests "fall within prior, broader requests." (Pl. Br. at 1) This is false. The Fourth Demands are an attempted eleventh-hour expansion of Plaintiffs' prior requests (the proper parameters of which were carefully established through the meet and confer process) and most certainly do not fall "within" the prior requests. While Plaintiffs claim that their "Fourth Request was designed principally to capture any documents missing from prior productions through the use of narrow requests seeking specific documents or categories of documents" (Pl. Br. at 1), the requests themselves plainly belie this assertion. Indeed, the majority are phrased in absolute (rather than narrow or specific) terms, demanding "all documents" in the new or rehashed categories constructed by Plaintiffs.[1]

The net result of these discovery shenanigans is a collection of requests, set forth in Plaintiffs' Fourth Demand, which are either duplicative of other general document demand categories, overly burdensome in light of other discovery requests recently served by Plaintiffs in late stages of discovery, or wholly irrelevant to the issues in this case.[2] Moreover, while Plaintiffs take pains in their motion to prop up the dubious relevance of their Fourth Demand, numerous authorities including Judge Guzman have made clear that relevance, even if

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1 *See, e.g.*, Fourth Demand No. 2 (demanding an entirely new set of documents related to compensation paid to Andrew Kahr); Fourth Demand No. 8 (demanding a litany of new information related to the Household-HSBC merger notwithstanding that documents related to this subject have been extensively negotiated and produced by Defendants).

2 While Plaintiffs will surely point to the fact that they first propounded their Fourth Demand on October 3, 2006 in an attempt to obscure the eleventh-hour nature of their demands, the Court should note that, in their initial form, the Fourth Demand consisted of twenty-three extremely broad and burdensome demands (*see* Exhibit A to Plaintiffs' Brief) which are only marginally more manageable now as a result of the meet and confer process between the parties. Had Plaintiffs truly filed "narrow requests seeking specific documents" (Pl. Br. at 1) at the outset, their attempt to style the Fourth Demand as timely follow-up to their prior document demands might have merit.

established, is certainly not the only factor to consider in determining whether discovery is justified. Indeed, in his November 22, 2006 Opinion rejecting Plaintiffs' objections to this Court's Order on 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 of 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."[3]

Since October 1, 2006, in addition to their vexatious nit-picking regarding Defendants' previous production, Plaintiffs have served the following discovery demands which have required Defendants' time and attention:

- Plaintiffs' Fourth Request for Production of Documents served on October 3, 2006;
- Plaintiffs' Fifth Requests for Admission, served on October 3, 2006;
- Plaintiffs' Fifth Request for Production of Documents, served on October 12, 2006; and
- Plaintiffs' Sixth Request for Production of Documents, served on October 25, 2006.

In addition, during September and October, Plaintiffs served subpoenas seeking documents and testimony from various third-parties including Wells Fargo, Goldman Sachs, Morgan Stanley & Co., Promontory Financial, Wilmer Cutler Hale & Doar, and purported to serve HSBC Holdings plc. This recent third-party discovery has likewise required additional resources from Defendants.

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[3] *See* November 22, 2006 Memorandum Opinion and Order (emphasis supplied).

All the while, Plaintiffs have refused to comply with *their own* legitimate discovery obligations by, *inter alia*, failing to respond to Defendants' interrogatories altogether or serving responses consisting almost entirely of objections. Defendants thus urge the Court to consider this dispute in the broader context of the enormous, one-sided burden that Defendants have already borne and continue to bear in this litigation — compounded by Plaintiffs' well-documented pattern of complying with none of their limited discovery obligations absent (and, as shown in two motions to compel that Defendants were forced to file today, often notwithstanding) explicit orders form this Court. It is outrageous and unjust for Plaintiffs to demand that Defendants search for such plainly gratuitous data as the amount Household paid various consultants years ago, when they have produced literally no meaningful information on such key issues as the products Plaintiffs allege to have been sold by Household illegally and the revenue supposedly derived there from. In the totality of the discovery landscape in this case, therefore, the extreme and unjustified burden Plaintiffs have tried to place on Household by their Fourth Demand is clear.

Enough is enough. Except as to Fourth Demand No. 2 (on which Plaintiffs' motion is moot in that Defendants have agreed to produce responsive documents), the Court should deny Plaintiffs' motion to compel in its entirety. Each of the six groupings of requests, as set forth in Plaintiffs' motion, is addressed as follows.

ARGUMENT

1. Fourth Demand No. 1

Fourth Demand No. 1, which seeks "[a]ll documents relating to any compensation paid to Andrew Kahr" is a prime example of Plaintiffs' improper eleventh-hour expansion and escalation of discovery in the guise of filling in the "gaps" in Defendants' prior production. Plaintiffs' claim that this request "falls within the broader ambit of prior predatory lending requests" (Pl. Br. at 2) is plainly contradicted by the examples that Plaintiffs themselves provide. For example, Second Demand Nos. 7 and 8 (cited by Plaintiffs and attached to their motion at Exhibit C) dealt with the subjects of EZ-Pay and discount points. How Plaintiffs believe that the compensation provided by Household to Andrew Kahr "falls within the ambit" of these requests is entirely unclear and Plaintiffs, of course, offer no explanation. In other words, Fourth Demand

No. 1 is a new request over which Plaintiffs have casually draped prior requests in a clumsy attempt to disguise its novelty.[4]

This disconnect, however, is really beside the point because Fourth Demand No. 1 seeks documents entirely irrelevant to the issues in this case. This is a securities fraud case in which Plaintiffs represent no consumers and assert no consumer lending claims as such. Even in that context it is the lending policies actually implemented by Household during the relevant time period that are indirectly at issue — not the non-party individuals who may have recommended these and other policies or the fees they may have been paid. Surely Plaintiffs would not ascribe less probative value to one of the practices they allege to be "predatory" if it was determined that the idea for the practice had been acquired by Household *pro bono*. Indeed, it is difficult to conceive of a trial or summary judgment response in which Plaintiffs would have need to introduce information about Household's payments to this or any other consultant — even assuming that it would be possible to determine which payments related to particular ideas suggested during the Class Period.

While admissibility is not a prerequisite under Rule 26, this Court is absolutely entitled to determine whether demands for marginally relevant details are too far beyond the pale to justify the work and distraction compliance would entail, especially so late in the discovery period and with so many other demands being made on Defendants' time and resources. Even a seemingly small request of this sort imposes a significant burden. In this regard it is important to recall that although Plaintiffs have recently decided that Mr. Kahr is the *eminence gris* behind Household's alleged improprieties, in fact he was one of many outside contractors Household consulted over time, and there is no central file to search for an easy answer to this demand. Rather to find out what Mr. Kahr was paid, Household employees would have to consult all of the former employees who did or may have used his services, identify all projects on which he might have received compensation, figure out which budgets may have been implicated, track down related

[4] Plaintiffs' motion also ignores the fact that the Court has given them leave to subpoena Andrew Kahr, pursuant to the Walsh Act. *See* December 13, 2006 Order of Hon. Nan R. Nolan. With this authorization in hand, Plaintiffs can certainly query Mr. Kahr on any subject that they wish, including any compensation he may have received from Household.

records of uncertain date from warehouses and electronic archives, coordinate payment information with particular projects to see which may be relevant here, etc. These tasks would fall to already fully occupied in house counsel and their assistants who are already overburdened with efforts to comply with numerous other unexplained eleventh-hour requests, such as the recent demand for documents regarding Household's trades in its securities. Defendants properly objected to Fourth Demand No. 1 as irrelevant and the Court should reject Plaintiffs' motion on this request accordingly.

2. Fourth Demand No. 2 is Moot

That Plaintiffs have moved to compel on Fourth Demand No. 2 merely highlights their willingness to abuse the discovery process in the hopes of prejudicing Defendants in the eyes of the Court. As Plaintiffs well know, Defendants have represented that they are in the process of investigating this request and will produce documents responsive thereto. (*See* Exhibit H to Plaintiffs' Brief). Accordingly, Plaintiffs' motion on this request should be denied as moot.

3. Fourth Demand Nos. 3, 5 and 8

Plaintiffs' motion to compel on Fourth Demand Nos. 3, 5 and 8 should likewise be rejected. While Plaintiffs acknowledge that these HSBC merger-related requests are based on "prior requests" (Pl. Br. at 3), they again mischaracterize the requests as a "subset" of those prior requests and make the laughable assertion that the new requests are "narrow" and "specific." (Pl. Br. at 3).[5] Defendants' previous productions of merger-related documents followed numerous meet and confers between the parties as to the proper scope of Plaintiffs' demands and

5 The Court need only examine the phrasing of Fourth Demand Nos. 3, 5 and 8 to see that they are far from "specific" and even further from "narrow" as Plaintiffs have suggested. For example, Fourth Demand No. 8 demands:

> "All documents Household shared with HSBC prior to November 14, 2002 as part of the negotiations between the two entities that concern one or more of the following subjects: actual or projected charge-offs; actual or projected delinquency numbers; actual or projected restructure policies; actual or projected state or federal investigations or regulatory actions; actual or projected third party litigation involving claims of predatory lending; actual or projected ratings given to Household or its debt offerings by Fitch, Moody's or Standard and Poors [sic]; or Household's access to the capital markets."

Defendants' good-faith production on merger-related subjects has been comprehensive. Among other things, Defendants agreed to produce documents well outside the class period, going to March 2003, and produced more than 1,200 documents comprising more than 20,000 pages. These documents include meeting agendas, e-mails and other correspondence, presentations, integration progress reports, drafts of the merger agreement and over 1500 pages of disclosures made to HSBC. By Fourth Demand Nos. 3, 5 and 8 (and this motion), however, Plaintiffs seek to erase this history of careful negotiation between the parties and substantial production by Household and expand their discovery into a litany of new inquiries on the Household-HSBC merger with little justification other than the conclusory argument that they do not have the documents they want. (Pl. Br. at 3)

It is simply too late in the discovery process for Plaintiffs to throw these sorts of "Hail Mary" document demands into the mix and expect the Court to impose the immense burden of compliance on Defendants — especially given the volume of discovery demands served by Plaintiffs to date. Plaintiffs have had ample opportunity to seek relevant information during the nearly two and one-half years that the discovery process has been underway in this action. This opportunity certainly extended to subjects related to the Household-HSBC merger, a well-known public fact and, indeed, many of the requests in Plaintiffs' First, Second and Third Demands were based on these very merger-related subjects. That Plaintiffs have now — on the eve of the Court-ordered January 31, 2007 fact discovery deadline — sought to reopen and expand document discovery into the same merger-related subjects they have been exploring since 2004 is outrageous. Defendants should not be put to the burden and expense of engaging in yet another full-scale search at the last-minute just because Plaintiffs have thought of another means of asking for the same things that they have previously demanded and received. *See Vakharia* v. *Swedish Covenant Hospital*, No. 90 C 6548, 1994 U.S. Dist. LEXIS 2712, at *15 (N.D. Ill. March 9, 1994) (denying additional document requests because defendant "previously has represented that it has produced all responsive documents that it has been able to locate" and it is unreasonable for plaintiff "to impose upon [defendant] the burden of yet again combing through its files."); *Concord Boat Association* v. *Brunswick Corporation*, No. 96 C 6026, 1996 U.S. Dist. LEXIS 18012 (N.D. Ill. Dec. 4, 1996), at *11 (denying document request because "[m]ere assertions of necessity are insufficient to establish that [the] documents are relevant" where

requests were broad and burdensome, and it was unclear that plaintiff could not glean the necessary information from the documents it already received).

Furthermore, despite Plaintiffs' attempt to justify their requests with a throwaway line from their Complaint (Pl. Br. at 3), Fourth Demand Nos. 3, 5, and 8 in fact seek information largely irrelevant to the claims at issue in this case. Plaintiffs' Complaint does not allege any claim based on the merger between Household and HSBC — which post-dated the Class Period. The expansion of discovery into the merger sought by Plaintiffs in Fourth Demand Nos. 3, 5 and 8 is simply too far afield from subjects relevant to claims in this case to justify the burden that the requests would impose on Defendants. Moreover, this is true *even if* the Court ascribes some level of relevance to the merger-related subjects, as made clear by Judge Guzman in rejecting Plaintiffs' objections to this Court's Order on post-class period discovery. *See* November 22, 2006 Memorandum Opinion and Order ("[C]ontrary to plaintiffs' contention, the mere fact that further discovery might be relevant does not mean that plaintiffs are entitled to that discovery.").

Defendants properly objected to Fourth Demand Nos. 3, 5 and 8 as overly burdensome given the late stage of discovery in this action and their lack of relevance to the claims at issue here. As this Court cogently observed in denying Plaintiffs' previous effort to expand Defendants' discovery obligations significantly at this late stage, "the burden imposed on Household in repeating its already extensive document search and production" would "outweigh[] any likely benefit to Plaintiffs." *See* June 15, 2006 Order at 9. The Court should reject Plaintiffs' motion to compel on these requests accordingly.

4. Fourth Demand Nos. 9 and 10

As Plaintiffs themselves acknowledge, Fourth Demand Nos. 9 and 10 are duplicative of First Demand Nos. 1, 2 and 3, all of which — like the requests at issue here — sought documents related to state or federal investigations or regulatory actions.[6] While Plaintiffs claim, in

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[6] First Demand No. 1 requested: "All documents and communications concerning or relating to investigations by any state or federal governmental, administrative or regulatory agency, department or other body into Household's lending policies and practices."

First Demand No. 2 requested: "All documents and communications concerning or relating to investigations by any state or federal governmental, administrative or regulatory agency,

conclusory fashion, that "to date, neither Promontory nor Household has produced any documents constituting any reports/memoranda generated by Mr. Ludwig or describing the scope of Mr. Ludwig's duties" (Pl. Br. at 4), they provide no basis for their suggestion that such documents exist, other than the allegation that "Mr. Ludwig was paid millions of dollars to advise Household on its regulatory problems with federal and state agencies." (Id.) Because Defendants' production of documents responsive to the First Demand is complete and the First Demand covered the same general subject matter addressed by Plaintiffs' Fourth Demand Nos. 9 and 10, Plaintiffs likely have everything responsive on these subjects. Again, however, Plaintiffs have saddled the Court with a motion to compel based solely on their unsupported idée fixe that documents of the type they seek *must* exist somewhere at Household. This is neither a proper basis for a discovery demand at this late stage nor for a motion to compel.

As to the documents sought in Fourth Demand Nos. 9 and 10 on "billing statements" and the "compensation provided" to Eugene Ludwig, such demands are irrelevant to the facts at issue in this case. As with Fourth Demand No. 1 (discussed above), if anything is relevant here, it is the course of action taken by Household in the face of investigations and regulatory actions — not the compensation paid to individuals who may have advised Household on this course. Moreover requiring that Household comb through its files again in search of any additional documents regarding Promontory or Mr. Ludwig would be unduly burdensome given the late stage of discovery, the numerous other discovery burdens currently being shouldered by Defendants and the massive discovery that Plaintiffs have already received in this case. Defendants properly objected to Fourth Demand Nos. 9 and 10 as duplicative, irrelevant and overly burdensome and the Court should reject Plaintiffs' motion on these requests accordingly.

5. Fourth Demand No. 19

As the Court is by now well aware, in connection with Plaintiffs First, Second and Third Demands, Defendants scheduled and conducted interviews of more than 200 individuals,

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department or other body into Household's regaing policies and practices."

And First Demand No. 3 requested: "All documents concerning communications between Household and/or the Individual Defendants and the SEC, any state or federal administrative or regulatory agency, department or other body."

collected and reviewed hard copy and electronic documents from approximately 150 individuals and produced millions of pages of documents from more than 125 individuals and more than 10 departments. Defendants also collected, reviewed and produced native format e-mails and attachments for nearly 300 custodians. Yet by Fourth Demand No. 19 (and this motion), Defendants would have this Court compel Defendants to needlessly duplicate much of that time and effort by causing the Defendants to interview at least fifteen of these same individuals again in order to determine if they in fact have calendars that were not previously captured. If so, Defendants would then be required to review years' worth of calendars for entries related to the subjects addressed by Fourth Demand No. 19.

Plaintiffs have had ample opportunity to seek information relevant to any subject during the nearly two and one-half years that the discovery process has been underway in this action, including the dates on which particular meetings occurred. Now — on the eve of the Court-ordered January 31, 2007 fact discovery deadline — Plaintiffs have decided that Defendants should be put to the burden of once again undertaking the efforts expended in connection with the First, Second and Third Demands because some "Household witnesses are having difficulty recalling the timing of events and their participation in them." (Pl. Br. at 5) This is another last-minute "Hail Mary" pass from Plaintiffs and Defendants should not be put to the needless burden that it would entail. *See Ocean Atlantic Woodland Corp*. v. *DRH Cambridge Homes, Inc*., 262 F. Supp. 2d 923, 926-27 (N.D. Ill. 2003) (J. Guzman) ("Discovery under Fed. R. Civ. P. 26(b) is not without limits; the manner and scope of discovery must be tailored to some extent to avoid harassment or being oppressive."). The Court should reject Plaintiffs' motion on this request accordingly.

6. Fourth Demand No. 20 Seeks to Compel the Production of Documents Which Have Been Properly Withheld On the Basis of Privilege

Finally, Fourth Demand No. 20 seeks privileged attachments to the Disclosure Schedule to the November 14, 2002 Merger Agreement between Household and HSBC. As is evident from the Disclosure Schedule itself, the attachments are properly privileged in that they address litigation-related matters. (*See* Exhibit L to Plaintiffs' Brief) Defendants have informed

Plaintiffs that anything not already in Plaintiffs' possession has been withheld on the basis of privilege. (*See* Exhibit H to Plaintiffs' Brief) Nonetheless, based on a copy of the Disclosure Schedule (which they have taken from Defendants' production to Plaintiffs of the entire set of documents previously produced by Household to the SEC), Plaintiffs argue that "[n]one of the documents constituting the Disclosure Schedule is privileged, as evidenced by the fact that defendants produced the entire Merger Agreement to the Securities and Exchange Commission." (Pl. Br. at 5-6) Plaintiffs also cite a letter from Household to the SEC (attached as Exhibit N to Plaintiffs' Brief) which they claim accompanied the production of the privileged attachments they seek through Fourth Demand No. 20 and this motion. In fact, however, it is Defendants' understanding that all that was provided to the SEC along with this letter was a copy of the Merger Agreement itself and a copy of the Disclosure Schedules — documents which Plaintiffs already have in their possession. (*See e.g.*, HHS 02071093 - HHS 02071193).[7] It is Defendants' understanding that the privileged attachments to the Disclosure Schedules were not produced to the SEC (with the letter in question or otherwise) and it is Defendants' position that they are privileged and will not be produced to Plaintiffs. The Court should reject Plaintiffs' motion on this request accordingly.

CONCLUSION

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

Dated: December 22, 2006
Chicago, Illinois

EIMER STAHL KLEVORN & SOLBERG LLP

By: /s/ Christine M. Johnson
Nathan P. Eimer
Adam B. Deutsch
Christine Johnson

[7] Moreover, the letter in question is stamped "Confidential Treatment Requested" and concludes: "Please note that submission of this letter and the materials enclosed herewith to the Commission are without prejudice to and with full reservation of all privileges, rights and protections, including the attorney-client privilege and work product immunity, that may pertain to such documents." (*See* Exhibit N to Plaintiffs' Brief)

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