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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION FOR SANCTIONS INCLUDING A RECOMMENDATION OF DISMISSAL FOR FAILURE TO RESPOND AND TO COMPEL RESPONSES TO DEFENDANTS' COURT AUTHORIZED SUPPLEMENT TO DEFENDANTS' SECOND SET OF INTERROGATORIES

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This reply memorandum is respectfully submitted in further support of the Household Defendants' Motion for Sanctions Including a Recommendation of Dismissal for Failure to Respond and to Compel Responses to Defendants' Court Authorized Supplement to Defendants' Second Set of Interrogatories (the "Supplemental Interrogatories").[1]

INTRODUCTION

In this securities fraud case, Plaintiffs have alleged the existence of a scheme to unlawfully generate revenues through "predatory lending"—a vaguely used term that Plaintiffs themselves say they cannot clearly define. Although no specifics are provided, according to the Complaint,[2] the alleged scheme was both "massive" and "widespread" and was orchestrated in its particulars by all the top executives of the Company and then communicated to and executed by the many thousands of employees who worked for them. The "scheme" allegedly artificially inflated Household's earnings, and rendered misleading management's public statements that it did not endorse predatory lending. Several months ago Defendants served interrogatories asking Plaintiffs to identify the "illegal" products and fraudulent revenues allegedly obtained by means of "predatory lending". After Plaintiffs initially evaded those interrogatories, this Court ordered them to identify "which specific products and revenues Plaintiffs claim derived from those illegal practices." (August 10, 2006 Order, Owen Aff., Ex. 4 at 16-17) Given the huge volume of discovery being produced to Plaintiffs, and to allow Plaintiffs' ample time to evaluate the fruits of discovery so that they could provide useful substantive answers, this Court afforded Plaintiffs until near the end of discovery to respond. (*Id.* at 16) However, it cautioned Plaintiffs against misusing the extra time and admonished them to provide real answers when the deadline arrived. Plaintiffs' defiance of the Court's orders and instructions are evident from both their third evasive "responses" and their opposition to this motion. Sanctions are both justified and necessary in the face of this dilatory misconduct.

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1 "Supplemental Interrogatories" refers to Household Defendants' Court Authorized Supplement to Household Defendants' Second Set of Interrogatories to Lead Plaintiffs served on September 15, 2006. (*See* Affidavit of David R. Owen dated December 22, 2006 ("Owen Aff."), Ex. 5)

2 "Complaint" or "AC" refers to the [Corrected] Amended Consolidated Class Action Complaint (Owen Aff., Ex. 1)

Plaintiffs' opposition to Defendants' motion seeks to excuse Plaintiffs' deliberate repetition of nonresponsive answers to interrogatories that contain no more than the same vague allegations contained in the Complaint. Plaintiffs' litany of flimsy and/or insulting excuses includes (1) that responding would interfere with Plaintiffs' own discovery efforts (Plaintiffs' Brief ("PB") at 1), (2) that Defendants have asked too many interrogatories (*id.* at 2-3), (3) that the Court ruled that Plaintiffs do not have to provide any more answers (*id.* at 4-5), (4) that Defendants have asked the "wrong" questions (*id.* at 5), and (5) that Defendants should have asked 40 separate interrogatories instead of the five authorized by the Court. (*Id.* at 6-7)

Not until page eight of their submission do Plaintiffs finally admit their actual position with respect to the vaguely alleged predatory lending scheme. At the end of their brief, Plaintiffs assert (for the first time in the course of this litigation) that even though their case is based in part on unproven claims about legal products, they are not obliged to provide any actual facts and/or details that may (or may not) support their predatory lending allegations. (PB at 8 ("Defendants demand details that are more typical of consumer fraud cases . . . .")) Despite the express Court Order that directed them to provide the details of the alleged predatory lending scheme, Plaintiffs argue that it is enough for them to allege and prove only that Household (1) was accused of a consumer fraud and (2) settled these claims out of court. Plaintiffs assert that they need not provide any details, identify what laws they contend were violated, specify what revenues they contend were illicitly gained, or even say which specific products were illegal. These issues are the center of Plaintiffs' allegations, and as the Court is well aware, they have been at the center of Plaintiffs' exceptionally onerous discovery program against Defendants and third parties. Without question the specifics of these allegations are subject to reciprocal discovery. Yet, in a final attempt to hide the ball, Plaintiffs admit that their present vague responses cover only a "portion" of the illegal scheme (PB at 9), implicitly withholding some undisclosed material for later surprise. The appropriate remedy for this boldfaced sandbagging is an order of preclusion covering any responsive facts or theories omitted or disavowed.

What little information Plaintiffs have provided is not what the rules require or what the Court ordered. If it were, then Plaintiffs would be hard-put to explain their supposed need for the expansive discovery they have demanded, covering over four million pages of documents, 55 depositions, 86 interrogatories and approximately 300 requests for admission targeted at every aspect of Household's lending business, from its internal policies, products, practices, dealings with individual consumers and quarterly revenues from specific practices, to the privileged results of state and federal agency examinations. Under Plaintiffs' flawed reasoning, they have no need to explain the purported

relevance of any of that massive discovery because an actionable claim of securities fraud can be made out against any publicly traded corporation that ever settled a consumer lawsuit or threatened claim, without the need for discovery or specific factual support. According to Plaintiffs, the settlement and negotiations are themselves sufficient to prove securities fraud, and Plaintiffs need not identify any direct evidence that Defendants actually did anything other than settle. This is not a legally viable theory. *See, e.g., Whicker* v. *Consolidated Rail Corp.*, No. 85 C 6137, 1987 WL 15752, at *2 (N.D. Ill. Aug. 12, 1987) ("[T]he court knows of no authority, and [defendant] has pointed to none, which says that settlement of a litigation is an admission of liability."). It is also the exact opposite of what Plaintiffs' counsel have been representing to the Court all along to justify their ever increasing discovery demands.[3] In view of Plaintiffs' bad-faith response to these interrogatories and the instant motion, Defendants should not be forced to depend on Plaintiffs' inconsistent and unreliable word about how they might prove their case if given a chance, and the Court should not consider such conjecture to be a valid substitute for the required interrogatory answers or a justification for defying the Court's Order.

Having patently engaged in discovery abuse, and having deliberately disobeyed the Court's Order, Plaintiffs must be sanctioned. This litigation is in its fifth year. Defendants have diligently, and at enormous burden and expense, provided Plaintiffs with a veritable mountain of discovery. (Indeed, if Defendants' hard-copy production alone were piled up it would dwarf the Sears

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[3] Plaintiffs themselves have argued to this Court the relevance of detailed consumer loan information to justify interrogatories demanding that Defendants run computer programs to extract quarterly numbers of loans having individual characteristics that Plaintiffs deem predatory. Plaintiffs stated that information regarding the "quarterly number of loans" for which (1) finance charges, (2) discount points, (3) single premium credit life insurance, and (4) prepayment penalties were charged "is relevant to the pervasiveness and materiality of these practices over time. . . . For example, how many loans in a particular quarter involved prepayment penalties will show just how pervasive this practice was." (Pls. 1/20/06 Mem. in Sup. of Mot. to Compel Resp. to Second Set of Interrogs. from Household Defs at 12-13)

Plaintiffs further demanded individual numbers of loans responsive to their interrogatory Nos. 40-42 that they characterized as "seek[ing] to discover information relevant to prove that Household engaged in a pattern of predatory lending with respect to: (1) discount points and origination fees; (2) loans with high loan-to-value ("LTV") ratios; and (3) prepayment penalties." Plaintiffs stated that: "Information regarding the number of loans with high points and fees (over 7%) along with the average interest rate on those loans is relevant to prove that Household in fact did not use discount points to buy down interest rates. Similarly, information regarding the number of loans with high points and fees that also have a second loan is relevant to prove that customers were forced to take out second loans simply to pay off the fees on their first loan." (Pls. 7/21/06 Reply in Support of Class' Mot. to Compel Household Defs' Resp. to the Third Set of Interrogs. at 11)

Tower.) Discovery, however, is a two-way street. Despite having demanded and received the details of every aspect of Household's lending policies, practices, products and results, and despite the prior order and cautionary instructions of this Court, Plaintiffs have again willfully defied their duty to participate in good faith in discovery. Their improper strategy should no longer be countenanced by the Court.[4] Plaintiffs know precisely what information Defendants are seeking. Defendants have asked for this information three times, and although the Court has expressly ordered its production, Plaintiffs remarkably still claim that they do not have to provide it. Plaintiffs must be ordered to respond fully, fairly and immediately to Defendants' interrogatories and Plaintiffs should be sanctioned by means of any appropriate monetary and substantive remedies, up to and including a recommendation of dismissal.

ARGUMENT

Under Rule 33(b), contention interrogatories must be answered fully and "include all the information within the responding party's knowledge and control." *Bell* v. *Woodward Governor Co.*, No. 03 C 50190, 2005 U.S. Dist. LEXIS 19602, at *4 (N.D. Ill. Sept. 8, 2005). Evasive, vague or incomplete responses to an interrogatory are treated as a failure to respond. *Jones* v. *Syntex Laboratories, Inc.*, No. 99 C 3113, 2001 U.S. Dist. LEXIS 17926, at *4, *6 (N.D. Ill. Oct. 24, 2001) (Nolan, M.J.); Fed. R. Civ. P. 37(a)(3).

A. The Court Has Ordered Plaintiffs to Provide Defendants With the "Specific Products and Revenues" That Were Derived From the Alleged Illegal Predatory Lending Scheme

In its August 10, 2006 Order, the Court clearly held that Plaintiffs must identify the "specific products and revenues Plaintiffs claim derived from [Household's] illegal practices".

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[4] These tactics are such a recognizable stock in trade of the Lerach firm that pundits have coined the term "Lerached" to describe the outcome of its strategy of demanding everything, yielding nothing, and doing everything it can to avoid a showdown on the merits while seeking to shift the blame to others and making a case unreasonably long, expensive and unpleasant in order to coerce improvident settlements. *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 Business Section; Peter Elkind, *The Law Firm of Hubris, Hypocrisy & Greed*, Fortune, Nov. 13, 2006, at 154 (saying of the firm's senior partner, "if defense lawyers didn't buckle, he'd simply cash in on another lawsuit and continue to torment their clients").

(Owen Aff., Ex. 4 at 16-17)[5] Despite this Court's unambiguous orders and instructions, Plaintiffs now argue that the Court actually held the exact opposite — that Defendants are not entitled to know whether Plaintiffs contend that all or only some of Household's loans were illegal and when these "illegal" practices were and were not employed. (PB at 3-4)

In support of this frivolous position, Plaintiffs purport to rely on the fact that the Court's August Order did not require any further responses to different interrogatories (Nos. 9-14) concerning their definition of the term "predatory lending." Plaintiffs' attempt to construe this portion of the holding in a vacuum and without reference to the Order at issue here mischaracterizes the Court's holding and typifies the frivolous positions Plaintiffs have taken throughout discovery in order to avoid responding to Defendants' interrogatories. While the Court did hold that no additional response was required as to what practices Plaintiffs included in their general definition of predatory lending, the Court expressly held that Defendants were entitled to know which specific Household products employed predatory lending practices and which specific revenues were generated as a result. (Owen Aff., Ex. 4 at 16-17)

For example, Plaintiffs have alleged that Household concealed, misrepresented and otherwise illegally employed prepayment penalties. Defendants are entitled to know whether Plaintiffs claim that all prepayment penalties were employed illegally or whether the alleged "concealing" and "misrepresentation" only occurred occasionally, under particular company policies or on particular loans or in certain branches. The Court allowed Defendants to serve supplemental interrogatories to request this critical information and ordered Plaintiffs to provide specific responses. Plaintiffs' third set of evasive and vague responses continues to ignore this history and make a mockery of the Court's Orders.

As this Court understood, it is simply illogical to argue that in a fraud case premised on the allegation that Defendants condoned illegal lending practices that Plaintiffs do not have to tell Defendants the specifics of that allegation. *See Ziemack* v. *Centel Corp.,* No. 92 C 3551, 1995 WL

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[5] Plaintiffs' opposition fails to account for their litany of irrelevant and inflammatory objections, spanning more than twenty pages in response to this Court authorized inquiry. The substance of Plaintiffs' objections is typically irrelevant and deliberately intended to be non-responsive. (*See*, *e.g.*, Owen Aff., Ex. 11. at 7-9, 11-13, 15-17, 19-20, 21-25.) There is also no indication of what information is being withheld on the basis of these objections. Given that the discoverability of this information has been conclusively established (without objection to Judge Guzman—i.e., waiver), this litany of objections cannot be reconciled with the Court's August Order. Plaintiffs should be meaningfully sanctioned for this conduct and ordered to serve new responses without objections.

729295, at *2 (N.D. Ill. Dec. 7, 1995). Such details cannot be withheld by Plaintiffs now in order to sandbag Defendants in the course of summary judgment practice or at trial. Their contentions must be disclosed during discovery. *See Portis* v. *City of Chicago*, No. 02 C 3139, 2005 U.S. Dist. LEXIS 7972, at *9-10 (N.D. Ill. Apr. 15, 2005) (Nolan, M.J.).

Plaintiffs do not seriously contest the relevance of this information but blatantly refuse to provide it, based on the supposed permission of this Court. For example, as Plaintiffs recount in their brief (PB at 4), during the conference call with Plaintiffs on November 10, 2006, Defendants complained that "[y]ou can't tell from your response whether you are saying that all single premium credit life insurance is part of the illegal predatory lending scheme." (Owen Aff., Ex. 6 at 9) Instead of correcting this deficiency, Plaintiffs responded that "the more fundamental question is are you are entitled to that information? Because we read the court's order as saying, no, you don't get that information." *Id.* This "interpretation" of the Court's Order has no basis in logic, fairness or law, and Plaintiffs must be ordered to respond immediately and sanctioned for their bad faith evasion.

B. Plaintiffs Refused to Identify "Specific Products" As Ordered By the Court

Plaintiffs concede that their amended responses to Defendants' Supplemental Interrogatories were substantially a repetition of the same vague allegations that they asserted in the Complaint, in their response to Defendants' interrogatories Nos. 10-14, and in their original response to Defendants' Supplemental Interrogatories. Plaintiffs' only effort to connect any of these uninformative generalities with any particular product is the following stock phrase that Plaintiffs now repeat in response to each Supplemental Interrogatory: "***[S]uch products would include Household's real estate products,*** such as mortgages, PHLs, second loans, rewrites and refinances." (*See, e.g.,* Owen Aff., Ex. 11 at 10, 14, 18) (emphasis added)[6] However, "real estate products" is the broadest cate-

[6] Plaintiffs dedicate an entire page of their brief to accusing defense counsel of "blatant misrepresentations to the Court" for "intentionally omitt[ing]" this part of Plaintiffs' response from Defendants' brief. (PB at 6) This is a malicious attack on defense counsel that is wholly unsupported in fact. If Plaintiffs bothered had to read Defendants' brief (as any competent attorney would) they would have seen that the exact phrase that they complain was omitted from Defendants' brief actually appears on page 2. ("The identification of allegedly 'illegal' products and/or policies is no better, disclosing, for example, that 'such products would include Household's real estate products, such as mortgages, second loans, rewrites and refinances.'). Moreover, Defendants attached a complete copy of Plaintiffs' objections and responses to Defendants' Supplemental Interrogatories as Exhibit 11 to the Affidavit of David R. Owen that accompanied the brief. This is another ploy by Class counsel to distract the Court from Plaintiffs' own deficient responses and intentional misconduct with respect to these interrogatories as well as their refusal to generally participate in discovery in good faith. This intentional and

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gory that Plaintiffs could have chosen and provides no way to distinguish which particular loans Plaintiffs contend were illegal and which were not. In fact, Plaintiffs' response provides no limiting principle at all.

Plaintiffs insist that the identification of "real estate products" is sufficient because this is a term that Household used in their own documents. (PB at 6) Plaintiffs argue that since their answer therefore includes a reference to "a product", they do not have to provide any additional details. This is simply wrong. It is not sufficient for a party responding to a contention interrogatory near the end of fact discovery to simply provide ***an*** answer. Under Rule 33(b), contention interrogatories must be answered fully and "include all the information within the responding party's knowledge and control." *Bell* v. *Woodward Governor Co.*, 2005 U.S. Dist. LEXIS 19602, at *4. Defendants have provided voluminous discovery, disclosing details of all of Household's lending practices, products, policies and results. Plaintiffs have also been granted wide access to internal audits, reviews and even privileged regulatory examinations. In fact, Plaintiffs' initial document demand requested all documents related to all of Households policies and practices concerning real estate products between 1997 and 2002, and in response to this and similar demands, they received millions of pages of documents. Now, two years later, after exhaustively reviewing the inner workings of the Company's lending operations, Plaintiffs must be required to provide more than "real estate products" as the "specific product" identification ordered by this Court. Plaintiffs' "disclosures" are rendered even more obscure by their stating that the products utilizing the illegal practices "include" real estate products (PB at 5) while failing to indicate whether there are additional products at issue or even whether the alleged fraud includes every real estate loan. It is too late in this lengthy discovery process for Plaintiffs to conceal such fundamental details, yet their response is plainly designed to obfuscate their claims, not clarify them as the federal discovery rules, and this Court's express Order require. Evasive, vague or incomplete responses to an interrogatory amount to a failure to respond. *Jones* v. *Syntex Laboratories, Inc.*, 2001 U.S. Dist. LEXIS 17926, at *4, *6; Fed. R. Civ. P. 37(a)(3).

Plaintiffs do not claim that their vague reference to "real estate products" is the only response that they are able to provide and that any further specificity is impossible. To the contrary,

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> willful misconduct should be added to the reasons that Class counsel should be sanctioned and their claims dismissed.

Plaintiffs admit that they ***can*** provide more specific information but will not because Defendants did not say the "magic words". (PB at 7) Plaintiffs acknowledge that they could provide a complete response to the question "[w]hat discount points are illegal in the State of Illinois and how much revenue did Household generate by charging points over the legal limit?" (PB at 7) However, they refuse to provide this very information in response to Defendants' request that they "identify the Household products utilizing 'discount points' that Plaintiffs contend were part of any alleged illegal practices, including any revenues illegally derived thereby." (Owen Aff. Ex. 5 at 1-2) The question that Plaintiffs are unwilling to answer is not only squarely included within the interrogatory propounded by Defendants, but is precisely the type of information the Court ordered Plaintiffs to provide when holding that they must identify "which specific products and revenues Plaintiffs claim derived from [Household's] illegal practices." (Owen Aff. Ex. 4 at 16-17)

Plaintiffs' argument that Defendants must elicit each individual fact with a separate interrogatory (PB at 7) is specious (and obviously would have disqualified most if not all of Plaintiffs' own interrogatories). Not only does this position afford no substantive basis for their refusal to respond to Defendants' Court-authorized interrogatories, but it has already been rejected by the Court when it held that this information is properly the subject of five interrogatories. (Owen Aff., Ex. 4 at 16-17) As this Court held in its November 10, 2006 Order, interrogatories that are directed at eliciting details of a "common theme" should be considered a single question. (Owen Aff., Ex. 2 at 2n.) Plaintiffs' practice of dividing interrogatories into their smallest possible elements was specifically rejected by the Court in its September 19, 2006 Order. Moreover, as to these interrogatories in particular the Court expressly stated that technical counting exercises would not apply. When ruling that Defendants were entitle to this information, the Court expressly stated that five interrogatories would be appropriate to request this information as to the five practices at issue. (Owen Aff., Ex. 4 at 17) Then, at the August 22, 2006 status conference, after the Court had indicated that neither party will be allowed to exceed the 85-question limit, defense counsel asked for and received confirmation that this limitation did not preclude Defendants from reframing and reissuing the five subject interrogatories in keeping with the Court's permission and guidance. (*See* Affidavit of Janet A. Beer dated January 3, 2007, Ex. 1 at 53) Plaintiffs' reiteration of their flawed and rejected counting arguments as an excuse for flouting the Court's Order should not be tolerated. Plaintiffs admit that the information is relevant. They admit that they can answer the interrogatories. They must be ordered to do so, ***again***, and with serious sanctions to penalize their bad faith tactics and the added burden they have imposed on Defendants and the Court.

C. Plaintiffs Are Required to Provide the Details and Factual Support For Their Predatory Lending-Based Fraud Claims Now

Admitting that their "responses" are limited to a "portion" of their claims of illegal revenue, Plaintiffs assert that they will provide no additional insight into their claims until trial. (PB at 9) However, Plaintiffs are not permitted to limit their responses to contention interrogatories to portions, parts or pieces of their allegations. *See Ziemack* v. *Centel Corp.*, 1995 WL 729295, at *2. They are required to provide complete responses with all available information. Fed. R. Civ. P. 33(b); *Bell* v. *Woodward Governor Co.*, 2005 U.S. Dist. LEXIS 19602, at *4.

Plaintiffs argue without support that since less information is required to succeed in a securities fraud action, they do not have to provide Defendants with "details [that] are more typical of consumer fraud cases" such as the ones on which Plaintiffs have founded their claims. (PB at 8) Plaintiffs assert that "the Class only need demonstrate that Household's financial statements were materially false and misleading because the revenues earned by the Company were subject to refund or other contingencies, thereby reducing income." (*Id.*) This position is insupportable.

In the first place, as noted above, discovery under the Federal Rules — and the need to comply with an express judicial Order — is not limited by a party's purported current trial strategy or by the minimum elements of its claim, but rather must be at least as expansive as the theories that party has alleged and pursued through aggressive discovery. Plaintiffs' expansive discovery demands on Defendants and third parties have been allowed under the liberal standards of relevance under Rule 26, and Plaintiffs cite no reason why they should be relieved from the relatively minor reciprocal compliance they have been ordered to provide. Although the exact focus of their claims has been obscured by Plaintiffs' failure to answer these interrogatories (and others that ask what Defendants should have disclosed to avoid misleading investors), at a minimum Plaintiffs allege (and have the burden to prove) that Household's earnings were artificially inflated by reason of an alleged predatory lending scheme, and that Household's disclosures about whether or not it engaged in predatory lending were themselves false. Because Plaintiffs cannot prevail on either of these theories without proving the underlying facts by a preponderance of the evidence, their argument that Defendants are not entitled to know what Plaintiffs consider that evidence to be is absurd.

Given the unlimited consumer lending details that Plaintiffs demanded in discovery, the convenient simplification of their claims when it suits their purposes of evading discovery is outrageous. When it suited their interest in demanding broad discovery from Defendants and third parties about Defendants' supposed consumer abuses, Plaintiffs represented to this Court that such de-

tails were "relevant to the pervasiveness and materiality of these practices over time" and were essential to "prove that Household engaged in a pattern of predatory lending with respect to (1) discount points and origination fees; (2) loans with high loan-to-value ("LTV") ratios; and (3) prepayment penalties". (*See* Plaintiffs' submissions cited in footnote 3 above.) As Plaintiffs have built their case around Defendants' alleged failure to disclose a pattern of illegal and predatory lending and have elicited this Court's aid in obtaining broad discovery on this subject (including the compilation of quarterly loan data by product through specially-created programs), they cannot in good faith withhold discovery on what they contend the components of the illegal scheme and related revenues to be. As summary judgment practice in this case will invariably focus on whether Plaintiffs have mustered sufficient evidence of materiality, scienter and other crucial elements of their fraud claims to proceed to trial, it is long past the time for them to disclose which sales and revenues they contend were illegally obtained.

Plaintiffs' newly-minted excuse for evading such discovery — in effect that such details were never really relevant and will not be a proper focus at trial — merely confirms that their oppressive discovery campaign in this matter was nothing more than a fool's errand, designed in true Lerach fashion to impose maximum burden and expense on Defendants in the hope of forcing them into an unjust settlement. Nevertheless, as Plaintiffs have not withdrawn their predatory lending allegations, which remain a central focus of their Complaint and discovery demands and motions (such as their recent request to subpoena Mr. Kahr), their opportunistic brush with candor does not justify or excuse their refusal to comply with the subject interrogatories and the Court's related Order.

This Court has already found that Defendants are entitled to know Plaintiffs' factual support for these allegations. While Plaintiffs may be correct that some of the required information is similar to that requested in a consumer fraud case, that is only because Plaintiffs have alleged an organized consumer fraud scheme as the principal basis for their securities fraud claim and assembled voluminous discovery of precisely that nature. It is Plaintiffs who have put the alleged illegality of Household's products and revenues at the forefront of their purported "securities fraud" claim. They cannot be heard to complain about being ordered to provide the details and factual support of those allegations. *See Ziemack* v. *Centel Corp.*, 1995 WL 729295, at *2.[7]

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[7] Indeed, even the case law cited by Plaintiffs undermines their position. As quoted by Plaintiffs (PB at 7), *TSC Industries Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) states that "[t]he determination [of materiality] requires delicate assessments of the inferences a 'reasonable shareholder' would draw

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Plaintiffs' related assertion that they do not have to show what revenues were illegally obtained because they only need to prove that the "revenues earned by the Company were subject to refund or other contingencies, thereby reducing income" (PB at 8) is without merit for many of the same reasons and because its underlying predicate — that Plaintiffs can prevail on their claims by demonstrating only that (1) Household was accused of illegal predatory lending and (2) Household entered into a settlement in which they refunded money to certain consumers — is completely without merit. Plaintiffs cite absolutely no law to support this position because the well-settled law on this subject is exactly the opposite of what they contend.

It is black letter law that settlements do not constitute an admission of wrongdoing or liability. *See, e.g., Wabash Publishing Co.* v. *Stoppa,* No. 93 C 1040, 1994 WL 48785, at *3 (N.D. Ill. Feb. 15, 1994) (settlement agreement is not an admission of unlawful conduct but rather an "expeditious alternative to litigation"). Federal Rule of Evidence 408 explicitly prohibits the admission of settlements, offers to settle, and settlement negotiations in order to prove liability. *Russell* v. *PPG Industries, Inc.*, 953 F.2d 326 (7th Cir. 1992). Plaintiffs must particularize their claim that Defendants actually employed illegal practices that generated unlawful revenues. Settlement negotiations entered into by the Company without any admission of wrongdoing have no probative value for the purpose offered by Plaintiffs here and are inadmissible.

Plaintiffs admit in their response that all the documents that they rely on were created for settlement purposes, alleging "*In connection with the Attorney General settlement*, Household calculated it would lose at least $161 million as a result of refunding certain improper prepayment penalty revenues generated by certain real estate products from 1999 through 2002. . . . [I]t was created to measure the financial impact of Households' [sic] predatory lending practices as asserted by the Attorneys General." (Owen Aff. Ex. 11 at 18-19) (emphasis added) Even passing Plaintiffs' inaccurate characterization of the calculations (which Defendants will address in the appropriate contexts)[8], Plaintiffs' proffer of these documents in their responses to show a supposed "awareness" of

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from ***a given set of facts*** and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." (emphasis added) While the assessment of materiality is for the trier of fact (assuming sufficient evidence to avoid summary judgment), a plaintiff obviously must provide the "given set of facts" for the trier of fact to evaluate. Materiality (or falsity) in this case cannot be assessed if Plaintiffs refuse to even allege what sales and revenues were illegal.

[8] Plaintiffs' reliance on these settlement calculations are also wrong as a factual matter. The settlement

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unlawfully obtained revenue (Owen Aff. Ex. 11 at 10, 15, 18, 22, 27) is both meaningless and explicitly forbidden by the Federal Rules of Evidence. *See Winchester Packaging, Inc.* v. *Mobil Chemical Co.*, 14 F.3d 316 (7th Cir. 1994) (affirming district court's exclusion of documents that discussed amounts for which the parties were willing to settle); *Whicker* v. *Consolidated Rail Corp.*, No. 85 C 6137, 1987 WL 15752, at *2 (N.D. Ill. Aug. 12, 1987) ("[T]he court knows of no authority, and [defendant] has pointed to none, which says that settlement of a litigation is an admission of liability.").

The cases cited by Plaintiffs reflect these basic principles and do not support Plaintiffs' position. *See, e.g., MCI Communications Corp*. v. *American Telephone & Telegraph Co.*, 708 F.2d 1081, 1152 (7th Cir. 1983) (affirming trial court's rejection of admission of settlement agreement as proof of liability and instruction to jury that although the agreement was admitted for other purposes "it is very important for you to understand that the defendant doesn't admit anything and its having made those changes and having agreed to those changes does not constitute an admission"); *Brooks* v. *Grandma's House Day Care Centers, Inc.*, 227 F. Supp. 2d 1041, 1044 (E.D. Wis. 2002) (finding document admissible because "the letter was not written in the course of EEOC conciliation efforts" and "contained no statements relating to compromise, settlement or negotiation", but instead "provided purely factual material in support of defendant's position"). Here, however, Plaintiffs are explicitly clear that they intend to introduce these settlement calculations as admissions to prove liability — that this revenue was illegally generated. (PB at 8-9 ("[T]hese documents constitute admissions of a party opponent, and are admissible.")) When Plaintiffs specifically identify the allegedly illegally obtained revenues as ordered by the Court it must do so by some legitimate basis. *Slaven* v. *City of Chicago*, No. 95 C 7310, 1999 WL 1024563, at *1 (N.D. Ill. Nov. 1, 1999) ("[A]bsent an admission of wrongdoing, a settlement proves nothing.").[9]

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calculations offered by Plaintiffs generally estimate what it would cost the Company to refund ***all*** revenues obtained from product categories and/or policies criticized by regulators irrespective of any particular legal criteria or jurisdiction or product feature. For example, these computations merely calculate what revenue was made from all prepayment penalties between 1999 and 2002. They are not a calculation of illegal revenues, and Plaintiffs are aware of this when they offer such material only to describe an "awareness" of wrongdoing (Owen Aff. Ex. 11 at 10, 15, 18, 22, 27) rather than what they were asked and ordered to provide. This is exactly why Plaintiffs persistantly refuse to state whether the alleged fraud includes everything or less than everything in such categories.

9 The very purpose of Rule 408 is that it "allows a potential litigant to settle its disputes without fear that such a settlement will be used as an admission." *Merk* v. *Jewel Food Stores*, No. 85 C 7876, 1990 WL 71027, at *6 (N.D. Ill. Apr. 27, 1990) (Posner, J., sitting by designation). *See also Kritikos* v.

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Even if Plaintiffs' purportedly preferred method of proof were admissible, it is not the only one they have alleged or pursued through discovery, and as noted above, relevance for discovery purposes is not limited to a parties' supposed trial strategy at the time a discovery dispute is under consideration. In any event, Plaintiffs lose sight of the fact that this Court has already considered and rejected their objections to providing the information requested through these interrogatories, which it explicitly authorized. The question is therefore not whether Plaintiffs should comply, but rather when they must at last produce full and fair answers and what sanction is appropriate for their persistent defiance of the court's Order.[10]

D. Plaintiffs Should Be Sanctioned For Their Deliberate and Bad Faith Refusal to Comply with Discovery

Plaintiffs make no attempt to justify their bad faith conduct with respect to the subject matter of these Supplemental Interrogatories. Rather, their only argument as to why they should not be sanctioned is that while they have provided inadequate responses, they have technically responded. (PB at 10) However, the bad faith, evasive nature of Plaintiffs' "responses" is one of the reasons why they ***should*** be sanctioned. Despite numerous requests by Defendants and an Order by the Court requiring the specifics of Plaintiffs' claims, Plaintiffs have refused to provide any details underlying their allegations of predatory lending. For example, with regard to prepayment penalties (which are commonplace in the lending context and not inherently illegal), the following is the progression of "information" Plaintiffs have provided about which sales were part of the allegedly "massive" scheme:

1) "Failing to disclose that loans contained prepayment penalties that effectively prevented refinancing with another lender" (Owen Aff., Ex. 1 at ¶ 52 (Complaint));

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Palmer Johnson, Inc., 821 F.2d 418, 423 (7th Cir. 1987) (noting that Rule 408's purpose of encouraging settlements "will be inhibited if the parties know that their statements may later be used as admissions of liability" (quoting *Central Soya Co.* v. *Epstein Fisheries, Inc*., 676 F.2d 939, 944 (7th Cir. 1982)); *Bachenski* v. *Malnati,* 11 F.3d 1371, 1376 (7th Cir. 1993) (affirming district court's exclusion of settlement where court noted that jury might improperly construe such a settlement as admission of fault).

10 Another sanction that is at the Court's disposal is to bar Plaintiffs from proving at trial any fact that was not disclosed in their deficient responses. Fed. R. Civ. P. 37(b)(2)(B); *In re Industrial Gas Antitrust Litigation*, No. 80 C 3479, 1985 U.S. Dist. LEXIS 15646, at *4-7 (N.D. Ill. Sept. 24, 1985).

2) "Failing to disclose or actively concealing that loans contained prepayment penalties" (Owen Aff. Ex. 3 at 24-25 (Plaintiffs' First Response to Interrogatory No. 12));
3) "[P]repayment penalties that were not disclosed or which were actively concealed, or whose existence or imposition was misrepresented in some fashion." (Owen Aff., Ex. 11 at 18 (Plaintiffs' Second Response to Supplemental No. 12))

This pattern of evasiveness alone demonstrates Plaintiffs' lack of good faith cooperation. However, Plaintiffs continued to string Defendants along even after the Court ordered Plaintiffs to provide more information regarding which specific products and revenues were illegal. After providing the exact same answer for the third time in response to the Court's authorized revised interrogatories, on November 14 Plaintiffs promised to supplement their most recent deficient responses and finally identify the specific products at issue. On the strength of that promise, Defendants delayed seeking judicial relief. However, over a month later, weeks after the Court-ordered deadline of December 1 for contention interrogatories, Plaintiffs finally provided their "supplemental" responses. However, all that Plaintiffs added after this further delay was the stock phrase that "such products would include Household's real estate products". Such a useless response cannot be considered anything other than a bad faith lack of compliance with the Court's Order and an intentional refusal to participate in discovery.

Defendants have diligently, and at enormous burden and expense, responded to Plaintiffs' extremely broad discovery requests, even creating special programming to provide quarterly data regarding specific challenged practices. Plaintiffs have received millions of pages of documents in response to dozens of requests and will depose over 50 witnesses. Defendants have received practically nothing in return. Rather, when they asked Plaintiffs to spell out their contentions in light of all the documents and testimony they have obtained, Plaintiffs responded with frivolous objections and vague, useless answers.

Plaintiffs have not only evaded their discovery obligations but have done so in violation of the Court's Order. These Interrogatories were served in keeping with the August Order of the Court that required Plaintiffs to identify "which ***specific*** products and revenues Plaintiffs claim derived from those illegal practices." (Owen Aff. Ex. 4 at 16-17 (emphasis added)) The relevant rules and established case law make clear that dilatory conduct of this type is sanction able, especially where there is an existing court order. Fed. R. Civ. P. 37(b)(2). *In re Industrial Gas Antitrust Litigation*, 1985 U.S. Dist. LEXIS 15646, at *4-7 (sanctioning plaintiffs for providing evasive, inadequate

responses to contention interrogatories which the court had ordered them to answer, including paying defendants' attorneys fees for bringing the motion and recommending that the court bar plaintiffs from proving any fact that was not disclosed in their responses). Contrary to their arrogant assumption, Plaintiffs cannot avoid sanctions by repeatedly and purposefully providing evasive responses to proper interrogatories or by reiterating objections previously found to be baseless. Evasive, vague or incomplete responses to an interrogatory are treated as a failure to respond. *Jones* v. *Syntex Laboratories, Inc.*, 2001 U.S. Dist. LEXIS 17926, at *4, *6; Fed. R. Civ. P. 37(a)(3). Where, as here, the refusal to respond adequately to a court ordered discovery request was intentional, appropriate sanctions can include substantive remedies including dismissal. *In re Thomas Consolidated Industries, Inc.,* 456 F.3d 719, 726 (7th Cir. 2006) (dismissal was "justified" where "[plaintiff] repeated the same non-responsive, inadequate answers that the bankruptcy court expressly warned him were unacceptable").

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that Plaintiffs should be sanctioned for deliberately engaging in dilatory and obstructive conduct, including the provision of two sets of non-responsive answers in the face of the Court's August Order. Monetary and substantive sanctions including a recommendation of dismissal should be ordered to deter such conduct in the future. Plaintiffs should also be ordered to respond forthwith, substantively and without further objection, to Supplemental Interrogatories No. 10-14 in accordance with the Court's August 10, 2006 Order. An order of preclusion should also issue with respect to any responsive theories or facts that have been omitted or disavowed in connection with the Interrogatories.

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