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, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

STATUS REPORT TO MAGISTRATE JUDGE NAN R. NOLAN IN ADVANCE OF THE JANUARY 10, 2007 STATUS CONFERENCE

The Class submits the following status report in advance of the January 10, 2007 Status Conference:

A. REQUEST FOR INSTRUCTION THAT DEFENDANTS BE PRECLUDED FROM IMPEDING THE CLASS' FAIR EXAMINATION OF WITNESSES AT DEPOSITIONS

Throughout this case, defendants' tactics during depositions have been marked by unprofessional behavior, including improper instructions to witnesses not to answer questions, witness coaching, wasting time on the record, and generally uncivil behavior. In letters and on the record during depositions, Lead Counsel have repeatedly requested that counsel for defendants follow the Federal Rules and professional courtesy. These requests have fallen on deaf ears. Defendants' efforts to frustrate the Class' examination during the December 22, 2006 deposition of Tom Detelich, Chief Executive Officer of Household's Consumer Lending business unit, left the Class with no choice but to alert the Court to this growing problem. Given upcoming depositions of the Individual Defendants, Lead Counsel requests that the Court instruct defense counsel to conduct themselves in accordance with the Federal Rules of Civil Procedure and basic civility.

Accordingly, the Class seeks the following relief: (1) an Order restricting defense counsel from instructing witnesses not to answer questions on any grounds other than privilege; (2) an Order allowing the Class to re-open the deposition of Mr. Detelich and instructing Mr. Detelich to respond to the questions that Class Counsel was precluded from asking as well as any follow-up questions the Class may have on these topics; and (3) an Order restricting counsel for defendants from making any statement on the record other than: "Objection to form."

1. Improper Instructions Not to Answer Deposition Questions

It is well established that "[a]bsent a claim of privilege it is improper for counsel at a deposition to instruct a client not to answer." *Jockell v. Village of Lake Zurich*, No. 01 C 5421, 2003 U.S. Dist. LEXIS 2977, at *3 (N.D. Ill. Feb. 27, 2003). During Mr. Detelich's deposition, however,

Tom Kavaler, counsel for defendants, instructed the witness not to answer numerous questions without any claim of privilege. For example, Mr. Kavaler instructed Mr. Detelich not to answer questions regarding admissions he made in a recent newspaper interview:

Mr. Baker:	Mr. Detelich, were you interviewed by the Los Angeles times this year.
Mr. Kavaler:	Is that outside the class period?
Mr. Baker:	Yes.
Mr. Kavaler:	***Don't answer that***.
Mr. Baker:	And during the course of your interview did you state that we have changed the corporate culture to make it more focused on what our customers want?
Mr. Kavaler:	***Don't answer that***.
	* * *
Mr. Baker:	Okay. And as part of that culture change, did you in 2003 realign the compensation programs.
Mr. Kavaler:	***Don't answer that*** –
Mr. Detelich:	I would –
Mr. Kavaler:	***Don't answer that***.
Mr. Detelich:	Okay.
Mr. Baker:	Okay. Did you inform the Household board in 2003 that there needed to be changes to the compensation program because of the results that you had seen in 2002.
Mr. Kavaler:	***Don't answer that***.

Ex. 1 at 302-303 (all exhibits attached hereto unless otherwise noted). Mr. Kavaler also obstructed questioning regarding an e-mail (Detelich Exhibit 74) that was written on October 14, 2002, three days after the Class Period ended despite the fact that Mr. Detelich testified that "he could not say whether or not there was a discussion before that date." *Id.* at 318.

Mr. Kavaler's refusal to allow Mr. Detelich to respond to these questions was entirely improper. Courts have found such behavior to be "***indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure***." *Ralston Purina Co. v. McFarland,* 550 F.2d 967, 973 (4th Cir. 1977). As Judge Guzman noted in *Great Southern Co. v. Kleinman*, No. 87 C 5822, 1991 U.S. Dist. LEXIS 6559 (N.D. Ill. May 8, 1991), counsel's belief that the question posed lacks relevance is not grounds for instructing the witness not to answer: "***If counsel***

objects to a question, he should state his objection for the record and then allow the question to be answered." *Id*. at *6-*7.

Furthermore, the basis for Mr. Kavaler's objections – that the subject matter of the Class' questioning is not relevant to the Class' claims – does not withstand scrutiny. For example, the subject matter of Detelich Exhibit 74 – Household's "need for slower growth for the 4th quarter" of 2002 – relates directly to the Class' allegation that following exposure of its improper practices Household was forced to change its business model. Complaint, ¶30. As alleged in the Complaint, Household's credit rating in the debt market was downgraded, inhibiting the Company's ability to fund its loans and forcing the Company to modify its business model. *Id.* The e-mail sent by Mr. Detelich reflects different strategies discussed by Household management as to how the Company could slow growth, in part due to funding restrictions in the debt market. The Class is entitled to question Mr. Detelich on this subject in order to discover his knowledge as to why Household was forced to slow its growth, which of the initiatives reflected in Exhibit 74 was ultimately was adopted and why, who was aware of the plan to slow growth, etc.[1]

Similarly, Mr. Detelich's admission to the *Los Angeles Times* that Household "changed the corporate culture to make it more focused on what [the Company's] customers want" also is relevant. Ex. 2. His statement implies that, contrary to defendants' representations to investors during the Class Period, Household's corporate culture was focused not on the customer's needs, but rather on growth at any cost. Similarly, the Class is entitled to explore with Mr. Detelich whether and how the Company changed its compensation plan following Household's $484 million AG

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[1] Exhibit 74 also directly contradicts CEO defendant William Aldinger's public statement on October 11, 2002 that the Company would not have to change its business model following its $484 million predatory lending settlement with the multistate group of Attorney Generals. Absent an order from the Court, the Class anticipates that defendants will also improperly instruct Mr. Aldinger not to answer questions regarding this subject at his upcoming deposition.

settlement. This information is directly relevant to the Class' allegation that during the Class Period incentives were driving improper behavior at Household.

Defendants have taken the position that "the judge has ordered that information outside the class period does not need to be produced. That ruling does not apply only to paper documents. It will apply equally to deposition testimony." Ex. 3 at 178. Defendants' attempt to distort this Court's prior order does not withstand scrutiny. The June 15, 2006 Order related to the specific document requests and interrogatories at issue in the Class' motion. Dkt. No. 534 at 2-4. Indeed, in that Order and Judge Guzman's subsequent Order, post-Class Period information was found to be ***relevant***. *Id.* at 5; Dkt. No. 785 at 5. These orders, moreover, do not provide any basis to impede testimony on responsive documents already produced.[2] At bottom, defense counsel's instructions not to answer on relevance grounds are prohibited by the Federal Rules. Defendants' repeated disregard for these rules has frustrated the Class' examination of witnesses and should not be permitted.

Mr. Detelich's deposition was not the first time defendants improperly instructed witnesses not to answer deposition questions on grounds other than privilege. In fact, counsel for defendants have instructed witnesses not to answer questions during at least twelve separate depositions, based on improper objections such as: hypothetical, "too far afield, 'totally outside the witnesses' knowledge,'" outside the Class Period and seeks opinion.[3] Defendants should be ordered to cease

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[2] Defendants acknowledged this during the January 8, 2007 deposition of HSBC when defendants' cross-examination focused entirely on a post-Class Period conference call with investors. Again, defendants seek to have it both ways: they produce the post-Class Period documents of their choice and restrict questioning on those documents at their discretion while at the same time pursuing post-Class Period discovery when it suits their needs.

[3] *See, e.g.*, Exs. 3-13 (Anderson Tr. at 179-180 (outside class period); Mizialko 30(b)(6) Tr. at 91-92, 93-94, 99-100, 114, 121, 126, 130-131, 132-133, 140-141, 144, 150, 153-154, 157 (refusing to allow witness to answer as outside the scope of deposition notice); Robin Tr. at 87 (outside class period); Walker Tr. at 138-140 (hypothetical); Worwa 30(b)(6) Tr. at 49-50, 53-54, 116-117, 121-122, 132-134 (outside the scope of

these improper instructions.

2. Witness Coaching and Wasting Time on the Record

Defense counsel also has engaged in extensive witness coaching. Typical of defendants' coaching is the repeated interjection of the phrase "If you know" between Lead Counsel's question and the witness' answer, invariably followed by an "I don't know" from the witness. *See e.g.* Exs. 1, 7, 14-15. Counsel's interjections violate Rule 30(d) which requires that "any objection during a deposition must be stated concisely and in a non-argumentative and ***non-suggestive*** manner." Defendants' witnesses have demonstrated repeatedly that they are capable of responding "I don't know" without the prompting of counsel. Another common interjection by defense counsel is "I don't understand the question." Again, this commentary is most often followed by the witness requesting clarification:

Mr. Brooks:	Do you know of any correlation between prepayment penalty percentage and HMS income?
Mr. Owen:	Objection to form. If you understand the question, you can answer it.
Ms. Worwa:	I'm not sure I understand what you mean by correlation.

Ex. 7 at 49-50. Counsel's coaching must not continue. *See McDonough v. Keniston*, 188 F.R.D. 22, 24 (D.N.H. 1998) ("The effectiveness of this coaching is clearly demonstrated when the plaintiff subsequently adopts his lawyer's coaching and complains of the broadness of the question").

Further, despite being completely inflexible in working with Lead Counsel on issues of deposition duration, defense counsel think nothing of wasting time on the record with nonsensical matters, only to walk out of depositions at seven hours on the dot. *See* Ex. 1 at 113-115 (arguing about a blank page attached at the end of an exhibit). For example, Mr. Kavaler went to great

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notice); Schneider Tr. at 114, 128 (totally outside the witnesses' knowledge); Sprude Tr. at 145, 177 (no real reason given); Makowski Tr. at 120 (seeks opinion); Titus 30(b)(6) Tr. at 118-119 (outside time period); Sodeika Tr. at 240-241 (seeks opinion of witness); Mizialko Tr. at 49-50 (outside time period)).

lengths to impede the flow and progress of the Detelich deposition, often interjecting speaking objections and long speeches, reframing Lead Counsel's questions and hurling unprovoked and unfounded accusations:

> Mr. Kavaler: If Mr. Baker tells you something that refreshes your recollection, that's fine. But as a general rule, it is a mistake to believe him or trust him. He's repeatedly told people things on the record that is false and demonstrably so, and probably known by him to be so. So if it rings bells with you about Vozar, that's fine. But the mere fact that he says it, it doesn't mean there was such a thing as a Vosar project.
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> * * *
>
> Mr. Baker: Is that your handwriting on this –
> Mr. Kavaler: Is this a document during the class period?
> Mr. Baker: I don't know.
> Mr. Kavaler: You don't know? Well, here is what you do. You look at the date. And you see if the date is outside the date of the class period. The class period begins on July 30, 1999. This document is dated May 18, 1998. You consult third grade learning, and you find out whether May 18, 1998 comes before or after July 30, 1999 and you answer the question.

Ex. 1 at 179-180, 229-230. In *Heriaud v. Ryder Transp. Svcs.*, No. 03 C 0289, 2005 U.S. Dist. LEXIS 19378 (N.D. Ill. Sept. 8, 2005), the court sanctioned counsel for similar conduct including "consistently insert[ing] himself into the process by giving lengthy soliloquies as to how counsel's performance and questions were lacking," suggesting testimony and generally hostile behavior. *Id.* at **10-16. Like counsel in *Heriaud*, Mr. Kavaler "would not be ignored." *Id.* at *11. Indeed, Mr. Kavaler even went so far as to levy a crude sexual *ad hominem* attack on counsel for the Class. Ex. 1 at 94-96. Again, like counsel in *Heriaud* "it is impossible to imagine that" Mr. Kavaler "actually believed his conduct was required, or even appropriate, under the federal rules." *Id.* at *13. There is no place for such behavior in deposition proceedings. Until now, the Class has resisted raising this behavior with the Court; however, defendants' attempts to waste time and frustrate the Class' ability to question witnesses at depositions have grown bolder and bolder.

B. DISCOVERY FROM DEFENDANTS

1. Document Production

Three issues remain with respect to defendants' document production. Although defendants were ordered to produce all documents by December 29, 2006, they have not done so. Defendants' non-compliance seriously prejudices the Class' ability to prepare and take the upcoming depositions. Due to the imminent fact-discovery cut-off, the Class urges the Court to hear the parties and make a determination relating to the production of such documents at the January 10, 2007 status conference.

(a) Over-NIM Reports (4th Request): Defendants produced some documents, but it is apparent that they have not produced the types of reports that the Class is seeking and their production is incomplete. If defendants certify under oath that their production is complete, the Class will not move to compel further production of these documents at this time.

(b) Stock Repurchase Documents (5th Request): Despite defendants' representation at the December 15, 2006 status conference and the Court's Order that all documents relating to stock repurchases would be produced by December 29, 2006, defendants failed to produce documents requested by the Class. Indeed, defendants still have not produced their list of Household trades, indicating when each trade was made as they were ordered to do by the Court. Defendants provided only a general ledger spreadsheet. *See* Ex. 17. That general ledger appears to reflect the sum totals of all trades made throughout the course of an entire month as a single entry. It does not show the dates of purchases or sales; the volume purchased or sold; or the price at which the shares were purchase or sold. Thus, it is impossible to determine the day on which the trade was actually executed. By producing the list of trades in general ledger form, defendants are trying to conceal the actual date on which they made trades. Defendants also failed to produce any documents

that describe the "policies" or the "decision on when and whether" any such purchases would be made.

(c) Quality Assurance & Compliance Documents (6th Request): Defendants have produced no documents despite agreeing to produce such documents by December 29, 2006 and with full awareness that such documents are relevant to the upcoming depositions.

2. **"Skip Sheets" & Missing Documents Issue**

The Court ordered defendants to provide and explanation and/or produce documents by January 3, 2007. Defendants provided a letter with the lists, but have not produced any documents. The following issues remain and the Class has filed a motion to compel concurrently with the filing of this status report:

(a) Defendants' response confirms that they have failed to list ***over 700*** documents on privilege logs have were either redacted or withheld in their entirety despite the passage of several years. Defendants have not provided the Class with a supplemental privilege log. The Class has filed a motion to compel a finding that defendants have waived the privilege with respect to these as well as previously identified documents that defendants did not list on privilege logs. The Class urges the Court to rule promptly so that the Class may use these documents in the upcoming depositions.

(b) Defendants' response also confirms that they did not produce a number of responsive documents. These documents also were not produced on January 3, 2007. This demonstrates that defendants "certification" that their production is complete, was inaccurate.

(c) Defendants admit that they have either redacted or withheld about 247 documents based on "non-responsiveness." As outlined in the Class' motion, well-established legal authority holds this is improper. Accordingly, the Class requests that defendants be compelled to produce these documents in their entirety.

(d) Defendants claim that they have already produced the remaining documents, identified on the Class' lists but refuse to provide any information that would allow the Class to confirm this representation.

3. **Defendants' Repeated Failure to Assert Privilege Should Be Deemed Defendants Waiver**

At the October 19, 2006 status conference, the Court instructed defendants that they had two weeks to assert privilege on any inadvertent productions "even if they had to work around the clock" because as the Court recognized "we're running out of time." October 19 Hearing Tr. at 110-112. Yet, defendants did not do so. Instead, defendants waited until the Class attempted to use documents in depositions, precisely what the Court sought to avoid by its instructions at various status conferences.

Defendants' failure to adhere to the Court's directives results in waiver of any claimed privilege on previously produced documents. For example, at the December 7, 2006 deposition of Kenneth Robin, defendants objected to the Class using audit letters produced by KPMG. In early 2005, KPMG produced work papers and other audit-related documents. In the first half of 2006, Household asserted a privilege on certain audit letters, but failed to include audit letters produced by KPMG to the Class. Counsel for KPMG informed Class Counsel that KPMG did not intend to make a motion with the Court with respect to this dispute. Class counsel then raised this issue with defense counsel and informed them that defendants' delay in seeking recovery of these documents warranted a finding of waiver and that the Class would raise with the Court any further delays by defendants on this issue. Despite repeated requests, defendants refuse to do anything about resolving this dispute.

Accordingly, the Class requests that the Court find that defendants have waived any privilege they could have asserted on these documents, and the deposition of Ken Robin be re-opened to allow the Class to question Mr. Robin on this audit letter, as well as other audit letters that were produced

to the Class by KPMG. Additionally, defendants have waived any privilege on the 804 documents that they failed to list on privilege logs.

4. **Motion to Compel Andrew Kahr Documents Withheld by Household Defendants**

The Class intends to file a motion to compel documents relating to Andrew Kahr improperly withheld by defendants.

C. DISCOVERY FROM THIRD PARTIES

The Court gave defendants until January 3, 2007 to review third-party productions. By January 3, the Class was to receive all non-objectionable third-party documents. Importantly, although counsel for defendants was allotted extra time to review the Wells Fargo and Morgan Stanley productions for privilege, the Class has received no privilege log related to these productions and has not been informed whether documents have been withheld. Defendants should be ordered to produce a log of documents withheld from these productions at Household's instruction immediately.

1. HSBC: Produced documents and anticipates producing additional documents with a commitment that production will be complete by January 31, 2007; FRCP 30(b)(6) deposition of HSBC was scheduled and occurred on January 8 in London, England.

2. Wells Fargo: Produced some documents on January 4, but have not confirmed production is complete despite numerous requests from Class Counsel, and have not yet provided dates for depositions.

3. Morgan Stanley: Produced some documents on a rolling basis, but have not confirmed production is complete. Morgan Stanley is apparently in the process of searching their e-mails for responsive documents. Morgan Stanley has offered deposition dates which the parties are evaluating.

4. Goldman Sachs: Produced some documents but have not confirmed if production is complete. Goldman Sachs has not offered deposition dates as of the date of this report.

5. Ernst & Young: Negotiations on document production and deposition dates are not presently occurring pending a ruling from Judge Guzman on the Household Defendants' objection.

6. Wilmer Cutler: Negotiations on document production and deposition dates are not presently occurring pending a ruling from Judge Guzman on the Class' objection.

7. Arthur Andersen: Deposition dates are still pending from Andersen counsel for two deponents - Christopher Bianucci and John Keller. However these depositions will likely be deferred pending a ruling from Judge Guzman on the audit letter objection and the Ernst & Young production objection.

8. Andrew Kahr: The Class is continuing in its attempts to serve Mr. Kahr.

DATED: January 8, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on January 8, 2007, declarant served by electronic mail and by U.S. Mail to the parties the: **STATUS REPORT TO MAGISTRATE JUDGE NOLAN IN ADVANCE OF THE JANUARY 10, 2007 STATUS CONFERENCE**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of January, 2006, at San Francisco, California.

s/ Monina O. Gamboa
MONINA O. GAMBOA