

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**THE CLASS' MOTION FOR A REPORT AND RECOMMENDATION FOR
EVIDENTIARY SANCTIONS AGAINST THE HOUSEHOLD DEFENDANTS**

Lead Plaintiffs, on behalf of the Class, respectfully requests that the Court issue a report and recommendation for evidentiary sanctions against the Household Defendants for an order (1) precluding defendants from presenting any evidence on the subject matters in Exhibits 98 and 117 marked at the Douglas Friedrich deposition;¹ and (2) deeming admitted the fact that there were no employees in the Quality Assurance & Compliance (“QAC”) group during the 1999-2000 time period, or in the alternative for production of documents demonstrating how many employees were in QAC for that time period. Additionally, the Class requests that the Court sanction defense counsel pursuant to Federal Rules of Civil Procedure 30(d) and 37 for their repeated violations of this Court’s orders not to impede the examination of witnesses with instructions not to answer for any reason other than privilege and to limit objections. *See* January 10, 2007 and January 24, 2007 Orders.

I. DEFENDANTS’ IMPROPER CONDUCT MANDATES PRECLUSION OF EVIDENCE BASED UPON FRIEDRICH EXHIBITS 98 AND 117

On January 25, 2007, the Class took the deposition of Douglas Friedrich, who was employed during the Class Period as the Managing Director of the Household Mortgage Services Group. During the deposition, counsel for defendants obstructed Lead Counsel’s questioning on numerous instances. Specifically, with respect to Exs. 98 and 117, defense counsel impeded Lead Counsel’s examination of Mr. Friedrich and in direct violation of the Court’s Order, instructed the witness not to answer questions about these exhibits that are relevant to the Class’ allegations of improper reaging of delinquent loans. The following are excerpts of those exchanges:

Mr. Baker: Let’s mark this next in order.
 (Exhibit No. 98 was marked for identification.)
 Okay. If I could direct your attention to the bottom of the
 first page here. Second to last paragraph?

¹ These exhibits are being provided under separate cover to the Court.

Mr. Sloane: Is this -- am I missing something or is this outside the class period?
Mr. Baker: I think this is technically outside the Class Period.
Mr. Sloane: **Good. No questions on this document.**
Mr. Baker: **You are instructing the witness not to answer?**
Mr. Sloane: **Yes, I am** – I'm tired at 98 ridiculous documents you've marked with absolutely no relevance. **Yes, I am.** Let's go on.

See Ex. A attached hereto, at 228. With respect to Ex. 117, although not required to do so, Lead Counsel even explained the relevance of the document, but was still precluded from questioning Mr. Friedrich on the document. The following memorializes that exchange:

Mr. Baker: Okay. Let's mark this next in order?
(Exhibit No. 117 was marked for identification.)
In calendar year 2002, do you recall receiving an e-mail from Ms. Markell -- actually, do you remember being forwarded an e-mail from Ms. Markell indicating that the slides being prepared for the Fitch servicer presentation should be changed?
Mr. Sloane: Is this -- is this within the class period?
Mr. Baker: It's dated November 11th -- sorry, November 12th, 2002.
Mr. Sloane: Is that inside the class period or outside.
Mr. Baker: It's outside.
Mr. Sloane: I just want to see whether you know.
Mr. Baker: It's outside.
Mr. Sloane: **Good. Does this have to do with something that occurred during the class period?**
Mr. Baker: Yes.
Mr. Sloane: **It has to do with a meeting that occurs during the class period?**
Mr. Baker: **It has to do with policies being presented that were in place since September 27th.**
Mr. Sloane: **I instruct the witness not to answer that question.** You won't answer my question, that's fine. Next document please.
Mr. Baker: I thought I did. I said the answer is yes.
Mr. Sloane: No, no. I asked you whether it was — it related to a meeting that occurred during the class period.
Mr. Baker: No. It relates to policies that were in place during the class period.
Mr. Sloane: That is a very large category if you have something specific you want to ask him about this document that relates to the class period, tell me what it is, and I'll be glad to reconsider.

Id. at 263-65.

Defense counsel's refusal to allow Mr. Friedrich to respond to these questions was entirely improper, particularly given that the Court has on two separate occasions ordered defense counsel not to instruct witnesses not to answer absent privilege. Class Counsel have previously raised the issue of defense counsel's improper deposition conduct. *See* January 8, 2007 and January 22, 2007 Status Reports (Dkt. Nos. 889 and 927). The Court issued two orders just in the last month reminding the parties that "[a]bsent a claim of privilege, it is improper for counsel at a deposition to instruct a client not to answer," (January 10, 2007 Order at 3) and that "[o]bjections during the deposition should then be limited to a concise, specific statement, such as objection as to the form of the question." (January 24, 2007 Order at 1). Despite these orders, defense counsel continue to demonstrate a blatant disregard for this Court's rulings. 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.

Courts in this district have awarded evidentiary sanctions for such conduct. *See, e.g., Heriaud v. Ryder Transp. Servs.*, No. 03 C 0289, 2005 U.S. Dist. LEXIS 19378 (N.D. Ill. Sept. 8, 2005) (barring expert testimony at trial); *Wilson v. Sundstrand Corp.*, No. 99 C 6944, 2003 U.S. Dist. LEXIS 14356, *47-*48 (N.D. Ill. Aug. 18, 2003) (granting plaintiffs' motion for an order deeming certain fact admitted as a sanction for improper conduct of defendant's counsel at deposition).

A district court is required to impose a sanction that is proportionate to the party's violation. *See, e.g., Johnson v. J.B. Hunt Transport, Inc.*, 280 F.3d 1125, 1132 (7th Cir. 2002); *Melendez v.*

Illinois Bell Tel. Co., 79 F.3d 661, 673 (7th Cir. 1996). Fed. R. Civ. P. 30(d)(3) allows the court to impose on the responsible party an appropriate sanction, including reasonable costs and attorney's fees, "if the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent." Fed. R. Civ. P. 37 governs motions to compel as well as the imposition of more severe sanctions for the failure of a party to obey a court order.

Rule 37(b) also provides for the imposition of sanctions in the form of attorney's fees and costs incurred by the other party because of the failure to adhere to a court's order, particularly where there is willfulness, bad faith, or fault on the part of the disobeying party. *See, e.g., Ladien v. Astrachan*, 128 F.3d 1051, 1057 n.5 (7th Cir. 1997). The sanctions authorized by Fed. R. Civ. P. 37(b)(2) include (A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; and (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence. *Plump v. Kraft Foods N. Am., Inc.*, No. 02 C 7754, 2003 U.S. Dist. LEXIS 17788 (N.D. Ill. Oct. 6, 2003) (imposing sanctions under Rule 30 and 37 for violating a court order regarding proper deposition conduct).

Defendants' continued violations of the Federal Rules governing conduct at deposition is an affront to this process. Defendants' blatant disregard for the Court's orders should not be tolerated. Accordingly, the Class requests that the Court issue a report and recommendation barring defendants from presenting any evidence with respect to the subject matters noted in Exhibits 98 and 117 of the Friedrich deposition. The Class also respectfully requests that the Court impose a monetary sanction on defense counsel in an amount the Court deems fit for defense counsel continued violations of the Court's orders.

II. INSTRUCTION REGARDING DEFENDANTS' FAILURE TO PRODUCE DOCUMENTS DEMONSTRATING THE NUMBER OF EMPLOYEES IN THE QAC GROUP DURING 1999-2000

As the Court is aware, the Class has been seeking documents respecting the Quality Assurance and Compliance or QAC group within the Consumer Lending business unit since its first set of document requests, which were propounded on May 17, 2004. In response to gaps in that production, the Class propounded additional "belt and suspenders" QAC document requests as part of its sixth set of document requests, including requests directed to the number of employees in that group during the Class Period. *See* Request No. 27 of the Class' Sixth Request for Production of Documents. Defendants on January 26, 2007 certified their production of QAC-related documents as complete. *See* Ex. B attached hereto. However, defendants have produced no documents reflecting the number of QAC employees for calendar years 1999 and 2000. Accordingly, the Class requests an order deeming admitted the fact that there were no QAC employees during 1999-2000, or defendants should be ordered to produce summary documents setting forth the relevant numbers of employees in the QAC group.

The QAC group was responsible for monitoring compliance in the branch sales offices. According to testimony and internal documents, Household disbanded the QAC in 1999 and decided to reinstate that section sometime in 2000. *See* O'Han Tr. at 59. To date, the relevant witnesses have been unable to state when that 2000 decision to reinstate the QAC was implemented, *i.e.*, when the QAC again existed. Obviously, the time period when there was no QAC is highly probative of the absence of adequate internal controls over compliance and of defendants' scienter in terms of predatory lending practices existing in the branch offices.

Request No. 27 of the sixth set of document requests is very focused on this issue and requests *in toto*: "All documents discussing or relating to the number of employees within the QAC during the Class Period." As noted above, Household has produced no documents reflecting the

number of QAC employees for 1999 or 2000. Household did produce an undated proposed organization chart for the QAC.

Again, witnesses, including the head of the QAC unit, Ken Walker, have been unable to state how many employees remained in QAC department after compliance duties shifted from the QAC to sales employees:

Mr. Brooks: Was the QAC Department downsized at the time these duties were transferred?

Mr. Kesch: Objection to the word “downsized.”

Mr. Walker: There was a reduction of QAC in approximately January of 99.

* * *

Mr. Brooks: How many people remained in the QAC Department after these duties were transferred from QAC to the District Sales Managers?

Mr. Walker: I don't recall.

Walker Tr. at 25, 29.

The Class is willing to accept summary documents reflecting the number of employees for each of these years (1999-2000) on a quarterly basis if available, or a yearly basis if not. Such quarterly documents should be easily obtainable from Human Resources records, which generally tracked the number of full time employees (FTE) per group. Accordingly, given defendants' certification that they have produced all responsive “QAC” documents and the inability of Household witnesses to provide testimony related to this issue, the Court should deem admitted the fact that there were no QAC employees during the period 1999-2000. Alternatively, Household should produce the quarterly records for calendar years 1999 and 2000 that show the FTEs in the QAC group.

III. CONCLUSION

For all the foregoing reasons, the Class' motion for a report and recommendation for evidentiary sanctions against the Household Defendants should be granted.

DATED: January 31, 2007

Respectfully submitted,

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