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

REDACTED VERSION

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

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar

This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Household Defendants" or "Defendants") in opposition to the Class' Motion for a Report and Recommendation for Evidentiary Sanctions Against the Household Defendants.

Plaintiffs' motion seeking a report and recommendation in respect of discovery sanctions is nothing more than a continuation of Plaintiffs' campaign to impugn the conduct of defense counsel without basis. This latest in a long line of burdensome and time-consuming discovery motions is unsupported in law and in fact and should be denied.

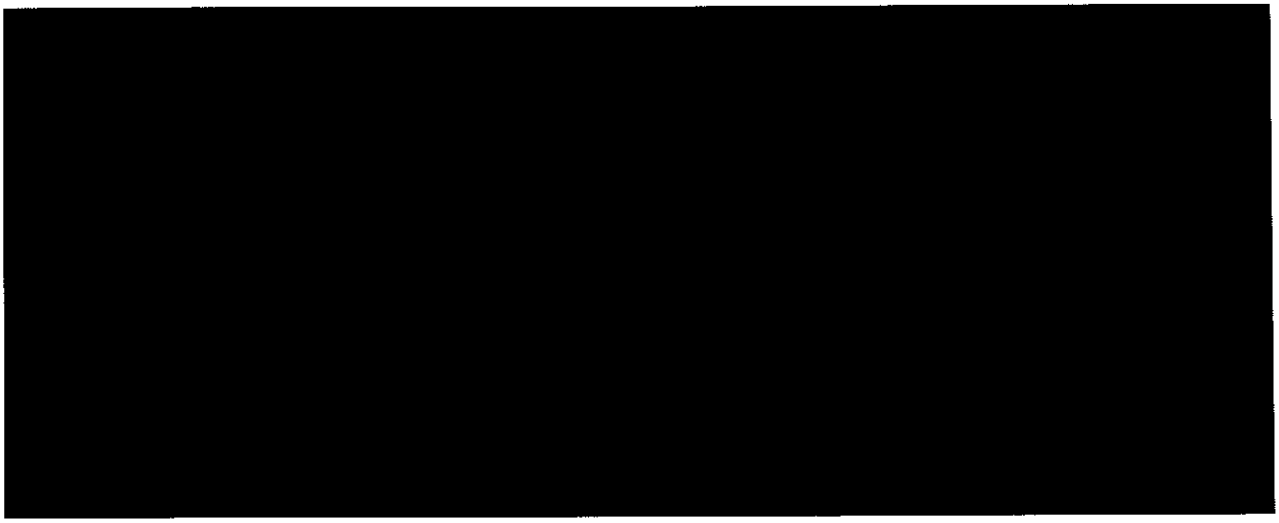
ARGUMENT

I. PLAINTIFFS HAVE OFFERED NO VALID BASIS FOR THIS COURT TO RECOMMEND EVIDENTIARY SANCTIONS IN RESPECT OF FRIEDRICH EXHIBITS 98 AND 117

Although Plaintiffs would undoubtedly prefer that defense counsel remain mute while they conduct depositions in any abusive manner they see fit, such a view is entirely inconsistent with the Federal Rules of Civil Procedure as this Court has repeatedly made clear. Contrary to Plaintiffs' repeated proclamations that defense counsel should be unequivocally barred from stating the basis for their objections and instructing witnesses not to answer inappropriate deposition questions, this Court has expressly recognized that counsel may direct a witness not to answer to preserve a privilege or in cases of "very extreme badgering." (1/10/07 Status Conf. Transcript 86:6.) The Court also rejected Plaintiffs' view that the only permissible objection at a deposition is to the form of the question. (1/10/07 Status Conf. Transcript 87:21 – 87:25.) Indeed, this Court has agreed with Defendants' position that it is proper for counsel to voice objections to questions on the grounds that they concern events that occurred outside the class period. (1/10/07 Status conf. Transcript 88:7 – 88:10.) Again, at the January 24th status conference, the Court refused to grant Plaintiffs' request for an order limiting defense counsel at depositions to uttering only the word "objection." (1/24/07 Status Conf. transcript Draft 67:1 – 67:4.) The Court stated that counsel should keep their objections "as direct as can be" but went on to clarify, "I'm not going to micromanage it any more than that … I can't envision

everything that could possibly happen there." (1/24/07 Status Conf. Transcript Draft 68:4 – 68:9.) There is simply no basis to support a recommendation for the imposition of the sanctions requested here.

Defense counsel did nothing to impede the questioning of Mr. Friedrich, notwithstanding the fact that Plaintiffs' counsel conducted the deposition in a manner designed to badger and fatigue the witness. Plaintiffs' counsel questioned Mr. Friedrich for 6 hours and 55 minutes[1] and introduced over 100 exhibits in that time. Despite having previously deposed eight employees and former employees from Mr. Friedrich's business unit, which should have permitted Plaintiffs' counsel to conduct a focused examination, Mr. Friedrich was continuously asked vague and unintelligible questions and was repeatedly subjected to redundant questioning about topics as to which he had no knowledge and events he could not recall.[2] For example, Mr. Baker at numerous points throughout the deposition questioned Mr. Friedrich about the Benchmarking Study, of which Mr. Friedrich clearly and unambiguously stated that he had no recollection:



1 Throughout the course of discovery, Plaintiffs' counsel have adhered to the philosophy that, whether they are given 7 or 14 hours, a deposition must be extended nearly to its limit, notwithstanding the fact that in almost every case a significant portion of that time is focused on asking redundant questions of marginal relevance.

2 Plaintiffs' counsel's questioning techniques are particularly troubling in the case of a deponent like Mr. Friedrich who, as a retired former employee, has already been subjected to significant inconvenience and whose only role at Household during the relevant period was with the Mortgage Services business unit, a unit whose business practices are not central to the issues in this litigation.

[redacted]

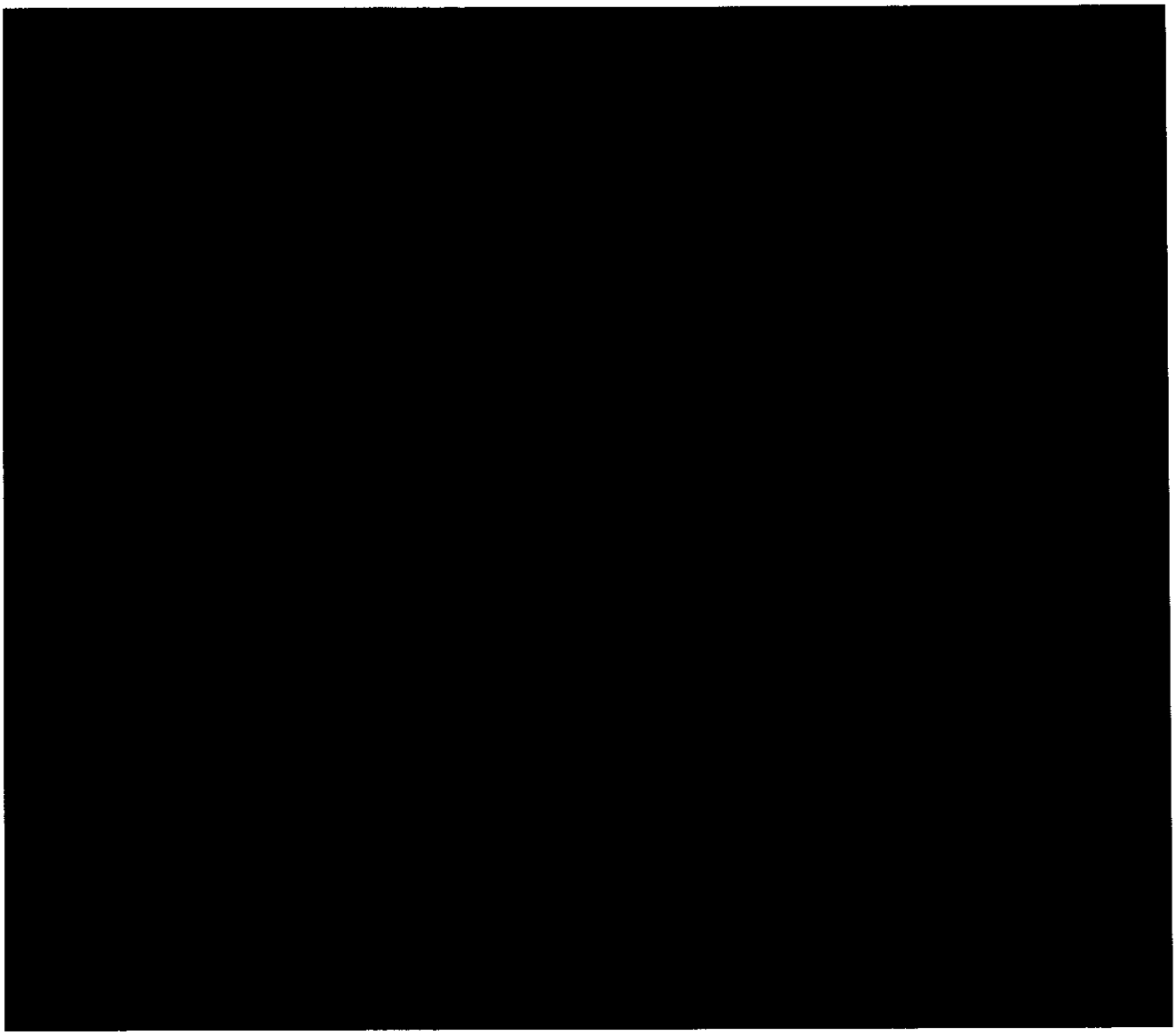
Friedrich Tr. at 112:22 – 113:18 (Declaration of Janet A. Beer, Esq. dated February 16, 2007 ("Beer Decl.") Ex. 1). Incredibly, despite this unequivocal testimony, Mr. Baker resurrected the topic and resumed questioning three more times. *See* Friedrich Tr. at 139:17 – 139:22; 141:18 – 141:20; 184:25 – 186:9. That Plaintiffs' counsel persisted in this wasteful line of questioning despite the fact that Plaintiffs have already deposed numerous Household personnel and KPMG personnel who worked directly on the Benchmarking Study is inexplicable. Mr. Baker's conduct could have had no other purpose but to frustrate and fatigue the deponent.

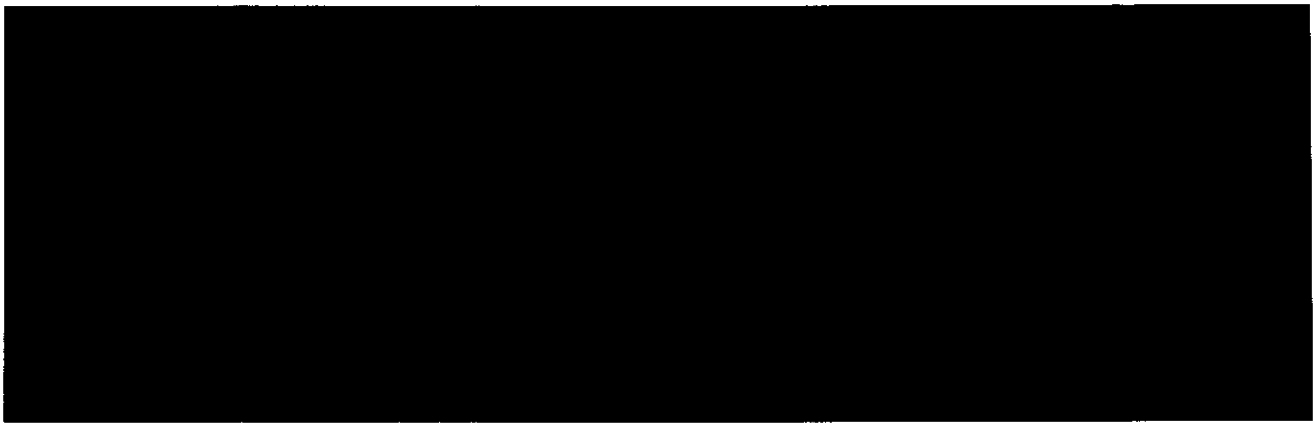
Even as Plaintiffs' counsel continued to pepper Mr. Friedrich with pointless and repeated requests to testify concerning matters as to which he had no knowledge, Defense counsel did not interfere. Rather Plaintiffs' counsel was allowed to question Mr. Friedrich for nearly seven hours with relatively few objections or instructions being interposed (each of which was clearly and concisely stated). *Without any interference from Defense counsel, Mr. Friedrich gave testimony in response to at least 50 questions that specifically called for testimony regarding events that occurred outside of the class period, over 100 questions that specified no time period at all, and in relation to at least 12 marked exhibits that were created outside the class period.*[3] At the end of the very long day, the witness had given voluminous testimony on a wide range of issues and received only one

[3] *See, e.g.*, Friedrich Tr. at 228:10 - 228:13 [redacted] (emphasis added).

instruction not to answer. Considering all of the facts and circumstances surrounding this deposition, there is no justification whatever for the recommendation that Plaintiffs seek here.

With regard to Exhibit 117, a post-Class-Period document introduced several hours into the deposition, defense counsel initially instructed the witness not to answer a question unless Plaintiffs' counsel confirmed that it had something to do with Class Period events. Plaintiffs fail to mention in their sanctions motion — but the record clearly shows — that the instruction was then reconsidered, and although the questioner had to rephrase a question to overcome a well-placed privilege objection and instruction, the witness did in fact answer questions relating to the document, confirming his lack of recollection of its subject matter:





Friedrich Tr. at 264:24-267:11.

The fact that Plaintiffs' counsel chose not to ask any further questions about this document does not support the bald assertion that the witness was instructed not to answer any question relating to its subject matter. Rather, the witness did answer questions relating to the subject matter in Exhibit 117 and Defense counsel expressly stated that his initial instruction would be reconsidered if the witness was presented with proper questions. Defense counsel's objection was direct, narrow and interposed in an effort to urge Plaintiffs' counsel to curb an ongoing pattern of harassment. The initial instruction, also stated in a clear and concise manner, was reconsidered and questioning ensued without further input from Defense counsel. Simply put, the record confirms that Defense counsel did not impede questioning regarding Exhibit 117 and certainly did not commit any discovery violation in respect of this exhibit. There is no basis to support a recommendation for sanctions.

Defense counsel did interpose one isolated instruction not to answer during the course of the Friedrich deposition. After more than five hours of testimony Plaintiffs' counsel marked Exhibit 98. Friedrich Tr. at 229:4 – 229:6. Defense counsel asked Mr. Baker if the document was outside the class period. Mr. Baker conceded that it was and offered no explanation at all as to why he should be permitted to examine the witness about it.[4] Defense counsel then instructed the witness not

[4] Plaintiffs' counsel failed to proffer any explanation of the relevance of this post-class period document or to pose a question relating to Exhibit 98 that Defense counsel could consider. Had Plaintiffs' counsel done so, or, had Plaintiffs' counsel initiated a meet and confer before filing the instant motion (as is required of them), Defense counsel may — as they have many times throughout the conduct of dis-

Footnote continued on next page.

to answer questions regarding the document. Instructing the witness not to answer questions about a document that is facially irrelevant and likely inadmissible in order to urge Plaintiffs' counsel to cease the ongoing pattern of abusive questioning is entirely consistent with the guidelines provided by this Court. In any event, one isolated instruction, posed in a clear and concise manner, does not support a recommendation that the draconian sanctions requested be imposed.[5]

The remedy Plaintiffs seek for what they characterize as Defense counsel's improper conduct is also revealing.[6] Plaintiffs ask this Court to recommend to the District Judge that Defendants be precluded from introducing "any evidence with respect to the subject matters noted in Exhibits 98 and 117...." Pl. Mem. at 4. Passing the vagueness and overbreadth of Plaintiffs' request — reasons in and of itself to deny it — it is ironic at best for Plaintiffs to demand that Defendants be barred from introducing two post-class period documents at trial as a sanction for reminding Plaintiffs that the Court has already rejected Plaintiffs' requests for open-ended post-Class Period discovery. This pointless exercise suggests that Plaintiffs have no regard for this Court's time. Their motion should be denied.

Footnote continued from previous page.

covery in this case — have reconsidered the position taken and allowed Mr. Friedrich to testify regarding Exhibit 98. Plaintiffs' counsel chose instead to burden this Court with yet another frivolous discovery motion.

5 The isolated and inconsequential instruction complained of here stands in stark contrast to the conduct considered and sanctioned by the Court of Appeals for this Circuit in *Redwood* v. *Dobson,* Nos. 05-4324, 06-1165, 2007 WL 397499 (7th Cir. Feb. 7, 2007). There the Circuit found it appropriate to censure defense counsel (not to impose broad and draconian evidentiary sanctions as sought here) for "repeatedly" instructing the witness not to answer questions during a deposition in which the Circuit found that all parties were guilty of a "breakdown of decorum". *Id.* at **3, 5. Here, as the record shows, Defense counsel conducted himself professionally throughout a long and tedious deposition and clearly and concisely interposed one isolated instruction to the witness not to answer with respect to one of many facially irrelevant exhibits.

6 Plaintiffs also seek the imposition of monetary sanctions pursuant to Federal Rules of Civil Procedure 30(d) and 37. For all of the reasons stated herein, Plaintiffs fail to establish that Defense counsel committed any sanctionable conduct upon which such sanctions could be based. Moreover, Plaintiffs certainly have not shown that Defense counsel acted with the willfulness or bad faith that is required for the imposition of monetary sanctions.

II. THERE IS NO BASIS TO GRANT PLAINTIFFS' REQUESTS RELATING TO THE NUMBER OF EMPLOYEES IN THE QAC GROUP DURING 1999-2000

Plaintiffs bring this motion for a recommendation that the District Judge impose evidentiary sanctions — *without so much as an allegation that Defendants have done anything improper*. *See* Pl. Br. at 5-7. Plaintiffs fail to establish that Defendants have disregarded any discovery obligation or otherwise committed sanctionable conduct and it should go without saying — though apparently it does not — that absent a default of some discovery obligation there is no basis to support the imposition of discovery sanctions. Further, Plaintiffs' request that the Court recommend that the District Judge deem admitted the so-called "fact" that there were no employees in Household's Quality Assurance and Compliance Department ("QAC") during 1999-2000 is essentially a request that the Court disregard the factual record simply because Plaintiffs don't like what it says. As set forth below, documents produced by Defendants (in some cases years ago), as well as deposition testimony, clearly establish that there were QAC employees at Household throughout the class period. Plaintiffs therefore have no need for "summary documents" and certainly are not entitled to a recommendation that discovery sanctions be imposed.

A. Plaintiffs' Request for an Order Deeming Admitted That There Were No Employees in the QAC Department During 1999-2000 Is Both Improper and Factually Inaccurate

Plaintiffs' assertion that Defendants have produced no documents reflecting the number of QAC employees for calendar years 1999 and 2000 (*see* Pl. Br. at 5) is easily belied by the ample factual record that Plaintiffs have gone out of their way to ignore. Indeed, Defendants have produced hundreds of documents from throughout 1999 and 2000, including e-mail correspondence, draft bulletin boards and training manuals, that clearly list names, titles, staffing levels and/or functions of QAC employees. *See, e.g.*, HHS 02897284 (Beer Decl. Ex. 2); HHS 02897229 (Beer Decl. Ex. 3); HHS 03364739 (Beer Decl. Ex. 4); HHS 02142433 (Beer Decl. Ex. 5). The fact that a document has not been produced that provides the particular information Plaintiffs seek, or in the particular format that Plaintiffs wish to find it, does not support a finding that Defendants have improperly withheld production of documents or otherwise failed to comply with their discovery obligations. Rather, Defendants have already confirmed completion of production of documents responsive to

Plaintiffs' myriad document requests and Plaintiffs have not — and cannot — establish that Defendants have committed any sanctionable discovery violation. *See, e.g.*, *Philips Medical Systems International, B.V.* v. *Bruetman*, 982 F.2d 211, 214 (7th Cir. 1992) ("[S]anctions may only be imposed where a party fails to comply with a discovery order and displays willfulness, bad faith or fault."); *accord Miller* v. *Pinkston*, No. 96 C 4675, 1999 U.S. Dist. LEXIS 13607, at *6 (N.D. Ill. Aug. 24, 1999).

Plaintiffs' request that the Court recommend that the so-called "fact" that there were no employees in QAC during 1999-2000 be deemed admitted is improper not only because it would amount to the recommendation of sanctions absent any sanctionable conduct, but also because the Court would be recommending that the District Judge deem true a "fact" that is contradicted by the record. In addition to the documents discussed above which clearly show the existence of a QAC group throughout the class period, several witnesses have testified to the existence of QAC employees during 1999-2000. For example, Household's Vice President of Internal Audit, John Davis testified that [redacted] *See* Davis Tr. at 43:18-21 (Beer Decl. Ex. 6). Plaintiffs asked Tom Detelich, the Managing Director of U.S. Consumer Lending, whether [redacted] Detelich Tr. at 29:2-29:6 (Beer Decl. Ex. 7). The testimony of Kenneth Walker, National Director of QAC, that [redacted]

Faced with a clear factual record not to their liking, Plaintiffs seek to have this Court manufacture a counterfactual record. It strains credulity — even for Plaintiffs — to seek a recommendation from this Court that the District Judge declare that there were no QAC employees from 1999-2000 in the absence of any remotely sanctionable conduct on Defendants' part and in the face of a clear record to the contrary.

B. Plaintiffs' Request for an Order to Produce Summary Documents Setting Forth the Relevant Number of Employees in the QAC Group Is Also Improper

As Plaintiffs are already in possession of documents (and testimony) establishing the existence of QAC during 1999-2000, and as Defendants have already confirmed completion of production of documents responsive to Plaintiffs' myriad document requests, Plaintiffs' request for an order that Defendants be required to produce "summary" documents setting forth the number of QAC employees during 1999-2000 is baseless.[7] *See, e.g., Mata. Illinois State Police*, No. 00 C 676, 2004 U.S. Dist. LEXIS 16048, at *4 (N.D. Ill. Aug. 13, 2004) ("Defendant asserts that it has produced all relevant documents in its possession. . . For this reason, I see no need to order any further production."); *Nauman* v. *Abbott Laboratories*, No. 04 C 7199, 2006 U.S. Dist. LEXIS 27701, at *15 (N.D. Ill. Apr. 12, 2006) (Motion to compel considered to be moot where party contends it has produced all responsive documents in its possession, custody or control); *see also Ocean Atlantic Woodland Corp.* v. *DRH Cambridge Homes, Inc.*, 262 F. Supp. 2d 923, 935 (N.D. Ill. 2003) ("Ocean Atlantic's motion to compel is moot with respect to Request No. 11. Cowhey represents that it has already produced all responsive documents for Request No. 11.").

As the Court is aware, Defendants have produced almost 5 million pages of documents in this case in response to Plaintiffs' *six* sets of sweeping document demands. Plaintiffs' request that the Court require Defendants to create "summary documents" when Plaintiffs have apparently failed to review the documents already in their possession — which they maintain on seven fully searchable databases — speaks volumes about the lack of merit and the true motivation for this frivolous motion.

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[7] Nor have Plaintiffs demonstrated any need for "summary" documents. Plaintiffs' argument that information regarding the number of employees in the QAC department is "highly probative of the absence of adequate internal controls over compliance and of defendants' scienter" (Pl. Br. at 5) is severely flawed. The 1999 "realignment" of certain quality control mechanisms, including the transfer of certain audit responsibilities previously performed by the QAC department to the District Sales Managers (*see* Davis Tr. at 40:4-22; *see also* Detelich Tr. at 44:19-45:6), was a change in form, not function. Household at all times during the class period had strong internal controls in place, including and extending beyond the QAC department — both the Policy and Compliance department and an Internal Audit department had their own internal monitoring responsibilities at a company-wide level.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion should be denied.

Dated: February 16, 2007
New York, New York

EIMER STAHL KLEVORN & SOLBERG LLP

By: /s/Adam B.Deutsch

Nathan P. Eimer
Adam B. Deutsch
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

-and-

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

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar