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 PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER QUASHING DEFENDANTS' INTERROGATORIES SERVED ON THE LAST DAY OF THE CLOSE OF FACT DISCOVERY

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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" or "Defendants") in opposition to the Class' Motion For a Protective Order Quashing Defendants' Interrogatories Served on the Last Day of the Close of Fact Discovery.[1]

INTRODUCTION

Over a year ago when Defendants propounded their first contention interrogatories, Plaintiffs argued that their responses to such requests should be postponed. The Court agreed and allowed Plaintiffs to defer their responses until near the end of fact discovery. The Court's expressed purpose was that "Plaintiffs' theories should be well-developed and Plaintiffs should be able to articulate their position in this case." (Owen Aff., Ex. 3 at 16). When the time came to answer, however, Plaintiffs disputed their obligation to respond, which led to several motions and objections to Judge Guzman that delayed substantive responses even further. After Plaintiffs finally produced most (but not all) of the responses on January 30, 2007, Defendants promptly served "follow-up" contention interrogatories based upon those responses the very next day.

Now, just when Plaintiffs' fact discovery is nearing completion and Plaintiffs' counsel should be able to "articulate their position," Plaintiffs argue that "fact discovery" is over and Defendants' follow-up contention interrogatories are untimely. Plaintiffs assert this even though they continue to withhold various responses to existing requests as "premature" and despite their continuing pursuit of additional depositions and documents for themselves. Defendants have been seeking substantive responses to their outstanding contention interrogatories for a long time. During this time Plaintiffs have continually opposed these efforts and refused to provide the requested responses. Plaintiffs' purpose has been clear — to delay having to articulate their substantive position for as

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[1] "Interrogatories" refers to Household Defendants' Sixth Set of Interrogatories to Lead Plaintiffs served on January 31, 2007. (See Affidavit of David R. Owen dated February 23, 2007 ("Owen Aff."), Ex. 1.)

long as possible. Now, having run the clock on these requests for months, Plaintiffs ask the Court to reward their dilatory conduct by insulating them from any follow-up discovery.

Plaintiffs have been granted several years to conduct their discovery of Defendants. In that time Plaintiffs have served over 100 document requests, 86 interrogatories, approximately 300 requests for admission, and have taken almost 55 deposition (encompassing more than 70 days of testimony). Much of this overwhelming volume of discovery by Plaintiffs has been taken as a "follow-up" to prior discovery responses. Plaintiffs have continuously served additional document requests, interrogatories, and deposition notices regarding information obtained from prior discovery. They have even refused to schedule certain depositions until completing prior ones because they claimed that these prior depositions would dictate whom they would schedule next. Defendants' discovery, on the other hand, has been extremely limited. Plaintiffs have virtually no documents, Defendants have been precluded from taking any fact-depositions and were disallowed answers to their initial interrogatories until December 1, 2006. In fact, Defendants received no answers to the vast majority of their contention interrogatories until the day before fact-discovery was scheduled to end because of the delays caused by Plaintiffs. Refusing Defendants' the right to conduct any follow-up discovery would improperly reward Plaintiffs' delays and gamesmanship and deprive Defendants of the right to defend against Plaintiffs' overblown charges.

RELEVANT BACKGROUND

On August 10, 2006, the Court ordered that Defendants' contention interrogatories would be delayed until the end of discovery and that Plaintiffs would not have to begin responding until December 1, 2006 by which time "Plaintiffs' theories should be well-developed and Plaintiffs should be able to articulate their position in this case." (Owen Aff., Ex. 3 at 16) The Court repeated this sentiment on September 19, 2006, when ordering Plaintiffs to respond to Defendants' third set of interrogatories.

Instead of complying with these orders, however, Plaintiffs appealed the Court's September 19 Order with regard to the counting of interrogatories to Judge Guzman. By the time Judge Guzman issued an opinion rejecting Plaintiffs' objections and affirming this Court's opinion in full on January 19, 2007, Plaintiffs had successfully avoided providing any responses to Defendants' third, fourth and fifth sets of interrogatories for nearly two months. Many of these requests had been

outstanding since early 2006. Finally, on January 30, 2007, Plaintiffs responded to the three sets of interrogatories.[2] After hurriedly reviewing Plaintiffs' lengthy and often incomprehensible objections and responses, the next day Defendants served the follow-up Interrogatories at issue here. (Owen Aff., Ex. 1) All of the Interrogatories at issue are follow-up interrogatories to answers received in response to previous interrogatories, that should have been answered months ago.[3]

- Interrogatory No. 63[4] is a follow-up to Plaintiffs' response to interrogatory No. 55 in which Plaintiffs refused to identify any facts or documents showing that Household's loss reserves were inadequate.
- Interrogatories Nos. 64 and 77-79 are follow-ups to Plaintiffs' response to interrogatories Nos. 30-33, in which Plaintiffs identified dates in which they contend the "truth" was revealed but did not state how they contend their alleged economic loss was "caused".
- Interrogatories Nos. 65-73 are follow-ups to Plaintiffs' responses to interrogatories Nos. 16, 18-21, in which Plaintiffs were asked to identify facts and documents supporting their contentions of illegal lending practices. Clarification was needed because although Plaintiffs repeatedly alleged that Household senior management trained and instructed employees to break the law, none of the thousands of documents they cited as supposed support for these allegations substantiated or explained the basis for these claims. (Indeed, more than 80% of the cited documents were completely non-responsive to the requests).
- Interrogatories Nos. 74-76 and 80 are follow-ups to interrogatories Nos. 50-53, which concerned Plaintiffs' contentions as to the Individual Defendants' scienter, several of which Plaintiffs have failed to address as of the filing of this brief.

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2 Indeed, even Plaintiffs responses to Defendants court authorized supplemental interrogatories, which were not stayed pending any ruling by Judge Guzman, were not received until January 19, 2007 following a second Court order directing Plaintiffs to respond.

3 Plaintiffs contend that a few of the January 31 follow-up interrogatories relate to the Complaint rather than quoting from particular responses received on January 30, 2007. Plaintiffs argument is irrelevant. Needless to say, all of the contention interrogatories are based some way on the Complaint. The contents of all of the January 31, 2007 Interrogatories, however, are similarly based upon the responses to recently answered interrogatories. While Interrogatories Nos. 65-73 quote from responses that were received on December 2, 2006, Defendants acted swiftly in evaluating the responses in order to formulate the instant interrogatories. Defendants had to sift through tens of thousands documents cited by Plaintiffs in responses to these interrogatories before determining that only a small percentage were responsive and none of the documents concerned Plaintiffs' allegations that senior management instructed and trained employees to violate the law.

4 Plaintiffs continue to renumber Defendants' interrogatories despite the Court's September 19, 2006 Order rejecting Plaintiffs' numbering and Judge Guzman's affirmance. Reference herein will always be to Defendants' original numbering unless otherwise stated.

ARGUMENT

A. In Postponing Responses to Defendants' Contention Interrogatories Until the End of Fact Discovery The Court Contemplated Follow-Up Contention Interrogatories and/or Responses After January 31, 2007

Contention interrogatories are different from fact interrogatories. Contention interrogatories require a party to articulate the specifics of their claims and to choose a definitive position. (Nov. 10, 2005 Order, Owen Aff., Ex. 2 at 4) For this reason, courts frequently will postpone responses to contention interrogatories until after the end of discovery. *See Breffka & Hehnke GMBH & Co.* v. *M/V Glorious Success*, No. 01 Civ. 10599, at *7, 2002 U.S. Dist. LEXIS 20601 (S.D.N.Y. Oct. 25, 2002) ("The fact interrogatories are untimely since they were served only two and one-half weeks before the end of fact discovery. . . . [but] we direct that defendants respond within thirty days to plaintiffs' contention interrogatories.").

In fact, Fed. R. Civ. P. 33(c) specifically states that it is appropriate for contention interrogatories to be deferred "until after designated discovery has been completed or until a pre-trial conference or other later time." Fed. R. Civ. P. 33(c). *See also United States* v. *Merck-Medco Managed Care, LLC*, No. 00-CV-737, 2005 U.S. Dist. LEXIS 17014, at *6-7 (E.D. Pa. Aug. 15, 2005) ("'Medco Defendants may issue contention interrogatories relating to Topics 2, 3, and 6 through 19 at the close of fact discovery.'"); *Tribune Co.* v. *Purcigliotti*, No. 93 Civ. 7222, 1997 U.S. Dist. LEXIS 13165, at *3-4 (S.D.N.Y. Sept. 2, 1997) (rejecting argument that contention interrogatories are premature when "fact discovery in this case is near completion and, in any event, is likely to be at an end by the time plaintiffs' responses to the interrogatories are due").

Recognizing these differences, this Court provided that Plaintiffs' responses to contention interrogatories would be postponed until the end of discovery. (Aug. 10, 2006 Order, Owen Aff., Ex. 3 at 16)[5] As the end of discovery approached, the Court repeatedly reminded Plaintiffs of their duty to respond fully to Defendants' contention interrogatories, stating, for example:

[5] Further evidencing this view of the extension as an accommodation to Plaintiffs, the Court did not similarly postpone Defendants' responses to Plaintiffs' contention interrogatories.

> "I want to say for this record . . . when we allowed these contention interrogatories to be answered at the end of the case, inherent in my ruling was but for something really outrageous, really outrageous you were going to answer these interrogatories because I realize that the defendants had not been given any depositions, and I thought it was fair to the class to say we were to postpone this. But I want you to know that I firmly believe that the class isn't -- I mean, that the defendants are entitled, so I want you to answer"

(Jan. 10, 2007 Status Hearing, Owen Aff. Ex. 5 at 42:11-20). It is noteworthy that by January 10, 2007, when the Court made the above statement, Defendants were already too late — according to Plaintiffs' new theory — to follow-up on the responses that remained to be served.

The Court has repeatedly noted that while January 31 was the fact-discovery deadline, time would be allowed for discovery that was delayed as a result of objections to Judge Guzman. The Court repeated this position as recently as the January 10, 2007 status hearing. Stating that the Court would urge a ruling from Judge Guzman on the interrogatory counting issue and in response to Plaintiffs asking for rulings on all pending objections, the Court stated: "I'm calling Judge Guzman myself, okay, and say I need a ruling, period. I think this is the easiest of the issues that are before him . . . I want these interrogatories. . . . I will allow you time to do your work. So if you get the ruling on the 29th of January, I'm going to — and he allows more discovery, I'm going to give you time to do it." (*Id*. at 123:24-124:25)

The Court has been true to its word, permitting Plaintiffs to take numerous depositions well after the January 31, 2007 deadline because issues appealed to Judge Guzman were not resolved until late January. The Court has also permitted other discovery (*i.e.* Morgan Stanley and Wells Fargo) to spill over the deadline even though it was not dependant on any objections to Judge Guzman. Plaintiffs have been permitted to reschedule depositions (sometimes twice) into February and March that were scheduled for January simply to accommodate the availability of Plaintiffs' counsel.[6]

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[6] Plaintiffs falsely state in their brief that the only reason that any depositions have been permitted after the deadline is "to accommodate witnesses' schedules". (Plaintiffs' Brief ("PB") at 5) As the Court is aware, this is not the case.

Plaintiffs' new assertion that contention interrogatories served in January are untimely also contradicts their conduct to date. For the last year Plaintiffs have insisted that responses should wait until after all fact discovery is actually complete. For example, on January 30, 2007, in response to the three sets of outstanding interrogatories, Plaintiffs continued to object and withhold information arguing "discovery has not yet been completed and a significant number of depositions . . . are yet to be taken. Defendants are in possession, custody and control of some or all of the information required . . . to respond to contention interrogatories." (Response to Third Set, Owen Aff., Ex. 6 at 2, 8, 13, 18, 21; Response to Fourth Set, Owen Aff., Ex. 7 at 2, 8, 10, 24, 30, 34, 36, 38, 47, 56; Response to Fifth Set, Owen Aff., Ex. 8 at 2, 9, 45, 48, 103, 104, 106, 117, 119, 120, 122, 127, 129, 131, 134, 140, 155). Indeed, to this day Plaintiffs insist that interrogatories Nos. 50, 52 and 53, which ask for identification of all facts and documents supporting their allegations that the Individual Defendants acted with scienter, are "premature". (Owen Aff., Ex. 8 at 105, 118, 120)

Under Plaintiffs' cynical approach, all that they needed to do to foreclose any follow-up questioning was to withhold their answers until January 2. In fact, Plaintiffs were able to stall all the way to January 30 on most responses, and continue to stall on others. The self-serving and unreasonably restrictive result now urged by Plaintiffs could not have been the intention of the Court in postponing Plaintiffs' responses.

B. Defendants Acted Diligently in Serving Interrogatories on January 31, 2007

A decision of whether to permit discovery past the scheduled deadline "is committed to the sound discretion of the district court, which must try to fashion a sensible and fair result under the circumstances presented." *Coburn* v. *DaimlerChrysler Services North America, L.L.C.*, No. 03 C 759, 2005 U.S. Dist. LEXIS 40255, at *7 (N.D. Ill. Apr. 13, 2005). Courts permit such discovery where the party demonstrates "good cause" that they "exercised 'due diligence' in failing to meet the court's deadline." *Id*. On assessing allegations of delay, "'courts usually focus on three questions: (i) how long was the delay; (ii) was there an explanation for it; and (iii) what happened during the delay.'" *West* v. *Miller*, No. 05 C 4977, 2006 U.S. Dist. LEXIS 56243, at *14 (N.D. Ill. Aug. 11, 2006) (citation omitted).

Plaintiffs' dilatory tactics are the reason that Defendants could not serve these Interrogatories until January 31, 2007. Indeed, Defendants anticipated and expressed precisely this con-

cern to the Court in December when Plaintiffs were withholding responses based upon their "counting" objection to Judge Guzman:

> "[W]e haven't received any responses. This is what they are saying is held up because they filed objections to Judge Guzman on how you count interrogatories. I mean, these are contention interrogatories that go at the heart of what the theory of their securities fraud claims are. And we fully expected that we would be getting responses to these basic interrogatories by December 1st or December 4th. We're concerned, your Honor, that this is just going to push us back further and further, and we're not going to be able to have timely follow up."

(Dec. 15, 2006 Status Hearing, Owen Aff., Ex. 4 at 17:15-24).

The Interrogatories at issue are follow-ups to interrogatories served much earlier in discovery but only responded to on January 30, 2007. Despite the Court repeatedly ordering Plaintiffs to respond to Defendants' outstanding contention interrogatories by December 1, 2006, Plaintiffs delayed providing responses until the day before the close of fact discovery. Defendants' efforts to craft and serve these additional Interrogatories *one day* after substantial delay on the part of Plaintiffs should be applauded, not punished.[7] Such diligence in the face of Plaintiffs' dilatory conduct constitutes "good cause" under the rules. *Coburn*, 2005 U.S. Dist. LEXIS 40255, at *7-8. Indeed, it is precisely under these circumstances — where the opposing party responds to prior discovery responses at the end of discovery period and the requesting party promptly moves for additional discovery — that courts typically permit such discovery. *Healey* v. *Allison Transportation Systems, Inc.*, No. 1:05-CV-00386, 2006 U.S. Dist. LEXIS 55493, at *5 (N.D. Ind. Aug. 9, 2006) (permitting plaintiff's discovery despite the passing of the discovery cut-off when defendants did not provide information regarding the issue until one week prior to the discovery deadline and plaintiffs reacted promptly); *Decker* v. *Board of Trustees*, No. 1:02-CV-178, 2005 U.S. Dist. LEXIS 302, at *2 (N.D. Ind. Jan. 7,

[7] If anything, Plaintiffs should be penalized for using dilatory tactics in an attempt to prevent Defendants' already limited discovery. Where a party is unable to serve follow-up interrogatories prior to the close of discovery because the opposing party delayed in responding to previous interrogatories, the responding party may be precluded at trial from offering direct evidence regarding the information requested in the tardy interrogatories beyond what they had already produced during discovery. *See Manning* v. *Buchan*, 357 F. Supp. 2d 1036, 1055 (N.D. Ill. 2004); *Wesley-Jessen Corp.* v. *Pilkington Visioncare, Inc.*, 844 F. Supp. 987, 990 (D. Del. 1994) (when responses to interrogatories were delayed until right before fact-discovery deadline, party was barred from introducing at trial any evidence not provided).

2005) ("While there is no 'precise test' for what constitutes good cause, it generally exists where a party, despite its diligence, cannot reasonably meet the deadline.") (citations omitted).

During the two month delay caused by Plaintiffs' objections to Judge Guzman, Defendants continually urged the Court of the importance of Defendants receiving responses to their outstanding interrogatories so they could continue their discovery process. Moreover, Defendants urged that the parties brief all outstanding interrogatory issues that were not on appeal before Judge Guzman so that when Judge Guzman affirmed the Court's ruling (as he did) Defendants could obtain responses without delay — and the Court agreed. (Dec. 15, 2006 Status Hearing, Owen Aff., Ex. 4 at 78:9-12 ("I want you to brief those right now because I don't frankly believe of all of your appeals, I do not believe Judge Guzman is going to reverse me on counting.")).[8]

Just as Plaintiffs' permission to take post-January 31 depositions was dependant upon the issuance of certain rulings by Judge Guzman, so too was Defendants' ability to serve follow-up interrogatories. The only reason that Defendants were unable to ask these follow-up interrogatories sooner was that they had not yet received the responses upon which to follow-up. Courts permit follow-up discovery under such circumstances. *See, e.g., American Civil Liberties Union* v. *Gonzales*, 237 F.R.D. 120, 124 (E.D. Pa. 2006) (finding that interrogatories served two weeks after discovery deadline were not untimely since judge's order permitting party to serve interrogatories was issued only eight days before the end of discovery and "my inherent power to manage this court's affairs and to achieve the orderly and expeditious disposition of cases, my order implicitly allowed plaintiffs to serve their contention interrogatories in lieu of the deposition within a reasonable time after the order was entered"). Courts also routinely permit follow-up discovery when the opposing party responds to timely interrogatories late in discovery. *Convolve, Inc.* v. *Compaq Computer Corp.*, 223

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[8] Putting aside that the cases that Plaintiffs cite in their brief stand only for the most basic principal that discovery deadlines should generally be followed, Plaintiffs misrepresent the previous holdings of this Court. Plaintiffs represented that "this Court has previously rejected as untimely interrogatories in light of the pending discovery cut-off date. *Canal Barge Co. v. Commonwealth Edison Co.*, Case No. 98 C 0509, 2001 U.S. Dist. LEXIS 10097, at *6 (N.D. Ill. July 18, 2001)." However, in *Canal Barge* this Court denied defendants' motion to quash plaintiffs' notice of deposition in which the defendant argued that plaintiffs should serve interrogatories instead, holding that the questions at issue are "more appropriately posed in a 30(b)(6) deposition rather than through contention interrogatories." *Canal Barge Co.*, 2001 U.S. Dist. LEXIS 10097, at *6.

F.R.D. 162, 181 (S.D.N.Y. 2004) (noting that the court had provided defendant a "three-week window after [plaintiff] supplemented its answer for [defendant] to take discovery with respect to those answers. . . . well after fact discovery had otherwise closed"); *Bristol-Myers Squibb Co.* v. *Rhone-Poulenc Rorer, S.A.*, No. 95 Civ. 8833, 2000 U.S. Dist. LEXIS 4075, at *2 (S.D.N.Y. Apr. 3, 2000) ("Fact discovery ended two months ago . . . The Court authorized RPR to conduct such discovery after the discovery cut off in view of Bristol's response to that interrogatory at the end of the discovery period.")

Plaintiffs make no argument as to why responding to Defendants' Interrogatories would result in prejudice. Rather, Plaintiffs' only argument is that the "deadline" should apply more to Defendants than Plaintiffs.[9] Defendants acted quickly and efficiently to serve these follow-up interrogatories in only one day. Good cause existed why these Interrogatories were not served sooner — the responses upon which they were based were not provided to Defendants until the day before they were served. There is simply no basis to deny Defendants answers to these Interrogatories.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion for a Protective Order Quashing Defendants' Interrogatories Served on the Last Day of the Close of Fact Discovery.

[9] Plaintiffs also argue that some of the Interrogatories at issue should not be permitted because they "are questions subject to expert opinion and analysis." (PB at 5n) Even if Plaintiffs' position had merit (which it does not), it is not a reason that Plaintiffs should be excused from even responding to Defendants' discovery. To the contrary, if they choose to interpose such an objection, they should be required to include it in their responses.

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