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

LEAD PLAINTIFFS' SUBMISSION IN RESPONSE TO JANUARY 16, 2008 ORDER

Pursuant to the Court's January 16, 2008 Order, lead plaintiffs hereby identify the depositions at which defense counsel instructed the witness not to answer a question on the grounds that the witness was not an expert. The specific instances (with deposition page references) are identified on a chart, attached hereto as Exhibit A. As shown in the chart, defense counsel gave this instruction to ten witnesses. Five of these witnesses – Lisa Sodeika, Lawrence Bangs, Clifford Mizialko, Jr., Daniel Anderson and James Kauffman – are now listed as potential experts by defendants. The chart also identifies seven other depositions where defense counsel obstructed the questioning of a witness based on the objection that the question called for opinion testimony.[1] Two of these deponents – James Connaughton and David Schoenholz – are listed as experts. Thus, although 7 of the 23 depositions of witnesses now listed as experts involved instructions not to answer or objections, the clear message was that none of the defendants' witnesses would be called as experts. As a result, all 23 witnesses now listed as experts should be required to provide their expert opinions and the basis for those opinions since discovery of any of those opinions was effectively foreclosed by defendants. Defense counsel early on conveyed a clear message that their witnesses were fact witnesses and not expert witnesses. Thus, plaintiffs' counsel had no reason to believe that these 23 witnesses or any other "fact" witnesses would be called as experts and tailored their questions accordingly to use efficiently the limited deposition time.

Indeed, one of defense counsel, David Owen, stated as much as the June 21, 2006 deposition of Mr. Connaughton: "This has come up in the past, and we have raised this objection in the past. You guys have understood that's not a proper use of the witness's time. Pose questions relating to

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[1] Plaintiffs have neither tried to identify all of these instances where the questioning was impeded because of this issue nor identify all the instances where defense counsel objected to a question based on an expert witness/opinion objection.

his facts." Connaughton Dep. Tr. at 84 (Chart, Entry No. 13). Significantly, Mr. Connaughton is one of the newly identified "experts."

Although Mr. Owen did not at that time reference any particular prior deposition, lead plaintiffs highlight the following excerpts from two prior depositions now for emphasis. At the Celeste Murphy deposition, which took place on April 11, 2006, defense counsel (Thomas Kavaler in this instance) made the following speech when Ms. Murphy was asked whether a particular analyst's report was negative:

> Don't answer that. Are you asking her, did she view it as such at the time. She's not going to sit here today and give you the benefit of her expertize analyzing documents that amuse you. If you want to know that she had a conversation with somebody in the years 1999 to 2002 about this document in which she or the other person used the word "negative," you can explore that to your heart's content. But if you want this woman to sit here today and perform expert functions, engage her as an expert witness. She is not here to offer opinions generated on her first contact.

Murphy Dep. Tr. at 83-84 (Chart, Entry No. 1). Mr. Kavaler subsequently confirmed that this speech was his instruction not to answer. *Id.* at 84.

And in the May 4, 2006 deposition of Tom Schneider, defense counsel, this time Peter Sloane, took the same position. Here is the relevant colloquy:

> Q: Isn't it true that the right to rescind is worthless if a customer doesn't know that they were misled?
>
> Mr. Sloane: Again, this is not – this is not a proper scope of this deposition: totally outside this witness' knowledge. There is no basis for it. I instruct him not to answer. If you want to ask him if he had a good faith belief in what he said here, that's fine. If you want to ask him what he said here, that's fine. He's not an expert.
>
> Ms. Winkler: I was asking for his person opinion.
>
> Mr. Sloane: That's not the proper – I instructed him not to answer. Leave it at that.

Schneider Dep. Tr. at 128 (Chart, Entry No. 6).

In light of the foregoing and the excerpts referenced in the attached charts, the fact scenario in this case is similar to that in *Sunstar, Inc. v. Alberto-Culver Co.*, No. 01 C 736, 2006 U.S. Dist.

LEXIS 85678 (N.D. Ill. Nov. 16, 2006), with respect to the element that at the time of the prior depositions of individuals now identified by defendants as "experts," plaintiffs' counsel could not anticipate that defendants would subsequently seek to call these witnesses as expert witnesses. *See generally Sunstar*, 2006 U.S. Dist. LEXIS 85678 (N.D. Ill. Nov. 16, 2006). Put differently, plaintiffs' counsel would have pursued different questioning and/or promptly brought a motion to compel if they had believed the contrary. However, in light of defendants' consistent position with respect to opinion questions, as exemplified by Mr. Owen's statement at the Connaughton deposition, plaintiffs' counsel reasonably understood that these witnesses would ***not*** be called as experts and chose to devote their limited deposition time to pursuing the witnesses' factual knowledge and the voluminous document in each one's files.

Plaintiffs should be entitled to know the expert opinions these 23 witnesses will give and the basis for those opinions. If, as Mr. Kavaler stated in open court yesterday that these witnesses will not be giving expert opinions, they should be deleted from their expert witness list. However, Mr. Kavaler also stated that defendants cannot decide what these witnesses expert opinions will be until their case in chief. Besides clearly knowing what plaintiffs case is by now, "springing" these opinions on plaintiffs at that time would be patently unfair. In sum, the opinions and the basis for those opinions should be provided at this time.

DATED: January 17, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL 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 17, 2008 declarant served by electronic mail and by U.S. Mail to the parties: **LEAD PLAINTIFFS' SUBMISSION IN RESPONSE TO JANUARY 16, 2008 ORDER**. 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 17th day of January, 2008, at San Francisco, California.

/s/ Juvily P. Catig
JUVILY P. CATIG