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

DEFENDANTS' STATUS REPORT FOR THE FEBRUARY 7, 2008 TELEPHONE STATUS CONFERENCE WITH MAGISTRATE JUDGE NOLAN

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

The Household Defendants respectfully submit this Status Report in advance of the February 7, 2008 telephone Status Conference to (i) advise the Court that the reply report submitted on February 1, 2008 by Plaintiffs' damages expert, Professor Fischel, fails to comply with the Court's November 20, 2007 Order; (ii) confirm the scheduling of expert depositions in all other areas; and (iii) discuss the Court's January 31, 2008 Order pertaining to Defendants' Notice Concerning Expert Testimony.

1. Plaintiffs' Non-Compliance with the November 20, 2007 Order

On November 20, 2007, the Court ordered Plaintiffs to identify when the "artificial inflation" calculated in Professor Daniel Fischel's report came into Household's stock price. Specifically, the Court ordered that "Professor Fischel will provide a regression analysis showing the date on which there was zero inflation in the stock price, and orders the parties to meet and confer regarding this issue." (November 20, 2007 Order, at 2) Plaintiffs did not file an objection to this order or seek any related relief. As the Order contemplated, Defendants offered to meet and confer with Plaintiffs regarding any issues they may have encountered in complying, but Plaintiffs refused. However, they did not disagree with our stated inference that there were no impediments to their full compliance, and during the January 16, 2008 status conference they assured the Court that Professor Fischel's rebuttal report would contain the information and analysis that the Court had ordered them to provide. (Jan. 16, 2008 Status Hearing Transcript, at 13)

Nevertheless, Professor Fischel's rebuttal report, which Plaintiffs served on February 1, does not identify the date on which there was zero inflation in Household's stock price, and does not provide the required regression analysis showing when the alleged "artificial inflation" arose. Rather, Professor Fischel inexplicably claims that "no regression analysis can

be used to identify the day on which the stock price became inflated in this case." (Fischel's rebuttal report at ¶38) This statement makes no sense, since Professor Fischel acknowledges elsewhere in his rebuttal report that a "[r]egression analysis . . . can be used in this case to calculate the amount of artificial inflation resulting from an alleged omission on any day". (Fischel's rebuttal report at ¶39) Indeed, in his opening report he used a regression analysis to calculate the alleged per share inflation for every day of the Class Period. In view of his refusal to provide the information ordered by this Court, Defendants and the Court are still left in the dark as to when and how Plaintiffs contend the alleged inflation was introduced. (As the Court may recall, this issue bears, *inter alia*, on whether Plaintiffs are seeking damages for the consequences of time-barred events.)

Defendants attempted to avoid this very situation by trying to schedule a meet and confer before Professor Fischel's rebuttal was due, as the Court had expressly required. Plaintiffs refused and only after defying the Court's Order have Plaintiffs agreed to meet and confer — not about their own expert's lack of compliance, which they contest, but about the issue of Dr. Bajaj's sur-reply report. Defendants have asked to confer with Plaintiffs regarding the deficiencies in Professor Fischel's rebuttal report, with the hope of resolving this issue without the need for further intervention from the Court, and a meet and confer has been scheduled for Wednesday, February 6 at 3:00 EST.[1] However, if the meet and confer is not successful, Defendants reserve their right to seek appropriate relief.

Before Defendants learned of Plaintiffs' failure to comply with the Court's Order, the parties had worked out a schedule for the submission of a sur-reply report by Dr. Bajaj on

[1] Although Plaintiffs requested the meet and confer to discuss, inappropriately, the "topics or opinions the [Bajaj] sur-rebuttal report will address," a determination which is to be made solely by Defendants and Dr. Bajaj, Defendants assume Plaintiffs will be willing to discuss the deficiencies in Prof. Fischel's rebuttal report during this meet and confer.

consent. However, that schedule assumed that Professor Fischel's report would contain the information and analysis ordered by the Court, and it goes without saying that the timing of any sur-reply will depend on the resolution of the deficiencies in Professor Fischel's reports. The same is true of the scheduling of the depositions of Dr. Bajaj and Professor Fischel, although we trust that if Plaintiffs cooperate in curing the deficiencies, both depositions can be completed during the last two weeks of March.

2. Other Expert Depositions

The depositions of all of the parties' experts, other than the two damages experts, Prof. Fischel and Dr. Bajaj, will proceed as follows:

February 13	-	Plaintiffs' proffered expert, Catherine Ghilglieri
February 20	-	Plaintiffs' proffered expert, Harris Devor
February 27	-	Defendants' proffered expert, Robert Litan
March 6	-	Defendants' proffered expert, Carl LaSusa
March 12	-	Defendants' proffered expert, Roman Weil
March 14	-	Defendants' proffered expert, John Bley

3. Defendants' Notice Concerning Expert Testimony

Following a discussion at the January 16, 2008 conference and subsequent briefing by the parties, the Court issued an Order on January 31, 2008, directing Defendants, by February 7, 2008, to "(1) submit a revised expert disclosure notice identifying only individuals who may provide expert testimony at trial; and (2) provide a detailed statement of the specific opinions any non-retained experts may offer at trial, and the bases for those opinions." (January 31, 2008 Order, at 2). Given the lack of certainty as to what portion(s) of a witness's testimony might be deemed "expert" under Judge Guzman's decision in *Sunstar, Inc*. v. *Alberto Culver*

Company, Inc., 2006 U.S. Dist. LEXIS 85678 (N.D. Ill. Nov. 16, 2006) ("*Sunstar*"), insofar as the witness's account of his activities and judgments during the relevant period reflected the exercise of specialized knowledge, it appears that Defendants' only prudent course is to retain on their Rule 26 Notice the names of all 23 "will call" and "may call" non-retained witnesses. Let us first explain why we believe we have no other choice but to do so.

All of the 23 witnesses in question participated in events and transactions that Plaintiffs have put at issue in their Amended Complaint in this action; indeed, all but one have been deposed, several for more than one day. Before reviewing the decision in *Sunstar* (which was issued near the end of a multi-year fact discovery period in this case and after many of the subject depositions were completed) and considering the amendments to Rule 701 as interpreted in *Sunstar*, Defendants would not have anticipated identifying any of these witnesses in our Notice. That is because we do not intend to elicit expert testimony from these witnesses in the classic sense. We only intend to elicit from any of them who may be called at trial testimony as to *what* they did in real time, *why* they did it and *why* they thought what they did was right. But, as we understand the ruling in *Sunstar*, if an otherwise traditional fact witness may be asked to testify to what could be characterized as an opinion (*e.g*., why they accounted for a particular financial transaction as they did and why they believed it was correct to do so), if that testimony is based on specialized knowledge (*e.g*., knowledge of accounting rules and methodologies in the example), then they were required to be disclosed on the date set for Rule 26 expert disclosures, in this case December 10, 2007. That is precisely what Defendants did in their December 10, 2007 Notice.[2]

[2] Although we appreciate that the Court views the timing of those disclosures as the "problem" here, as the Court also noted, Defendants complied to the letter with the Federal Rules and the Scheduling Order in this case. If there is a timing problem in this regard, it is a timing problem created by the Federal Rules themselves. Defendants had

We note in this regard that in its January 31, 2008 ruling the Court inferred that Defendants "appear to be hedging their bets; i.e., they have generically identified the 23 witnesses as non-retained 'experts' just in case they later decide to elicit expert opinions from them after hearing Plaintiffs' case-in-chief." January 31, 2008 Order, at 2. We regret any lack of clarity on our part that may have led the Court to believe that Defendants intended to unfairly preserve an ability to elicit any "new opinions" from these witnesses in response to Plaintiffs' case-in-chief. That is not the case. Any of these witnesses whom Defendants elect to call will be asked to testify only about events and transactions and formation of judgments that occurred in real time (*i.e*. the time of the events in question), matters that were all fair game during their depositions, and as to which not a single witness was ever instructed not to answer a single question.[3] Defendants simply want to ensure that witnesses whom we would ordinarily have considered fact witnesses but who employed specialized knowledge in the course of their normal duties will not be precluded from testifying about what they did, and also *why they did it* and *why they believed it was the right thing to do*.

The Court's Order of January 31, 2008 goes on to require that as to each witness identified on Defendants' Notice, Defendants should disclose any "opinion" the witness may be

---

no obligation to expressly advise Plaintiffs in advance of fact discovery that these witnesses had specialized knowledge in their respective fields, even passing the fact that that information was obvious to Plaintiffs anyway. It is also beyond dispute that Plaintiffs were never restricted in their ability to ask these witnesses about what they did during the relevant period, why they did it and why they thought it was right, even though under *Sunstar*, the subject matter of that testimony reflected the specialized knowledge the witness applied to the task at hand.

[3] As more fully set forth in Defendants' January 25, 2008 Memorandum in opposition to Plaintiffs' submission in response to the Court's January 16, 2008 Order (at pp. 7-10 and Exhibit C), counsel for Defendants instructed a few witnesses not to answer questions calling for them to give an opinion "as you sit here today", or an opinion about wholly hypothetical facts, both the province of the classic "retained expert". *None* of the witnesses was instructed not to answer any question concerning opinions formed during the course of the witness's duties during the events in questions. Plaintiffs were certainly free to ask those types of questions, and in many instances did.

asked to testify about and the bases for those opinions. It would be exceedingly burdensome to comply with such a requirement at this stage of the case, and it is certainly not possible to determine and summarize all the possible testimony of the 23 listed witnesses that might be deemed to be "opinion" testimony under *Sunstar* and then to articulate the bases for each of those opinions in the seven-day time period contemplated by the Court. The difficulty arises from the sheer ordinariness of the witnesses' potential testimony about what they did, and how and why they did it, during the Class Period. Requiring Defendants to disclose each of the opinions formed by each of these witnesses in the course of the events at issue in this case and the bases for those opinions would require Defendants first to outline the possible trial testimony of these witnesses now (anticipating all details of Plaintiffs' case in advance and without the benefit of decisions on in limine motions or any narrowing of the case on summary judgment) and then to isolate and identify what portions of that testimony might be considered an "opinion" based on specialized knowledge and then catalogue the bases for each of those opinions. This will require us to take the broadest view of each witness's possible testimony as we do not know how the Plaintiffs may choose to narrow their case for trial, what questionable categories of evidence may be excluded or which of Plaintiffs' claims might survive summary judgment. This is an enormous undertaking, which would correspond substantially with Defendants' ultimate preparation for any trial of this action.

By way of example, nine of the witnesses on the list have specialized knowledge of accounting. Of those nine, three are current or former employees of Household, four are outside auditors of Household and two are outside directors.[4] By definition, auditors analyze and

[4] We recognize that the Court's Order recited that each of the 23 witnesses were current or former employees. That is not the case as set forth in Defendants' Notice and the supplementing information submitted to the Court. *See* Exs. A and B to Defendants' January 25, 2008 Memorandum.

reach judgments (necessarily "opinions") about how, for example, financial transactions should be accounted for. Those judgments are informed, and necessarily explained, by reference to their specialized knowledge in accounting. Such individuals would have brought their specialized knowledge to bear in countless judgments and decisions made in the course of performing their duties during the almost three-year Class Period. To require Defendants to outline the trial testimony they may seek to elicit from these witnesses now, then isolate all "opinions" they might possibly be asked to explain and then articulate the bases for those judgments is a very daunting, time-consuming and expensive task. The same of course is true for witnesses with specialized knowledge in other fields, fields which were not only disclosed in Defendants' Notice but were already known to Plaintiffs as a result of the enormous amount of discovery they have received to date.

Defendants accept that identifying these witnesses is the consequence of the 2000 amendments to Rule 701 as interpreted by the Court in *Sunstar*. However, the distinction between retained experts and transaction witnesses who were not retained to give expert testimony remains. Retained experts are new; they are asked to opine post-litigation about specific issues presented by the case; their appointed tasks are unknowable to an adversary; the scope of their inquiries is clearly defined. In contrast, the testimony of on-the-ground, real time witnesses is not cabined by requests of counsel; such witnesses aren't given any subjects by counsel and asked to opine on them; the scope of their testimony is defined instead by what relevant actions they took or related judgments they reached during the subject time period. The decision of those who drafted the Federal Rules to require that opinions and their bases be expressly articulated for retained experts only and not for other witnesses implicitly recognizes

the inherent differences between these categories and the extreme difficulty, burden and unfairness that would inhere by the adoption of a different rule.

As such, Defendants respectfully submit that the Court's January 31, 2008 Order creates a Hobson's choice for Defendants of risking preclusion of testimony based on specialized knowledge, or effectively completing their witness preparation within a matter of days in order to create the equivalent of retained expert reports for 23 witnesses. If the concerns expressed by Plaintiffs and the Court were based on an assumption that any of the 23 witnesses will be held in reserve to give classic, retained expert testimony, Defendants are willing to revise their Notice to make clear, if we otherwise have not, that we will be offering these witnesses to testify only about what they did in real time, why they did it and why they believe what they did was right. We would hope that this would provide adequate reassurance to the Court and to Plaintiffs that there is no stealth expert testimony in store and thereby obviate any need to prepare detailed statements of the real-time opinions and the bases therefore for all of these 23 individuals. Failing that, and given the impossibility of complying with the Court's Order by February 7, we respectfully ask the Court to stay that deadline so that Defendants may seek guidance on the so-called *Sunstar* issue from this Court, if it is willing to entertain an application for reconsideration, or from Judge Guzman. We believe this is an important issue, fraught with significant consequences that are likely to arise in every complex, commercial litigation.

Dated: February 6, 2008
Chicago, Illinois

Respectfully submitted,

Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

and

Cahill Gordon & Reindel LLP

By: /s/ Landis C. Best
Thomas J. Kavaler
Peter Sloane
Patricia Farren
Susan Buckley
Landis C. Best
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