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-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

MEMORANDUM OF LAW IN SUPPORT OF THE HOUSHOLD DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE THE ALLEGEDLY FALSE AND MISLEADING STATEMENTS THAT WERE NOT IDENTIFIED BY PLAINTIFFS IN DISCOVERY

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz and Gary Gilmer (collectively, the "Household Defendants" or "Defendants"),[1] in support of their motion for an Order precluding Plaintiffs from offering into evidence at trial dozens of statements that Plaintiffs claim are the misrepresentations on which they base their fraud claims, but which Plaintiffs did not identify as such during discovery, or at any time since the close of discovery, until January 15, 2009.

INTRODUCTION

On January 15, 2009, Plaintiffs provided Defendants with the list of statements they intend to rely upon at trial. Plaintiffs claim that each item on the list is an affirmative misrepresentation made by one or more of the Household Defendants during the Class Period. Many of the statements on the list they intend to use at trial are a subset of statements previously identified in discovery by Plaintiffs. Many others are not, however, and were never previously identified by Plaintiffs as alleged misrepresentations. Plaintiffs' latest additional statements were added despite Defendants' repeated requests during and since discovery for a list of each statement that Plaintiffs contend was a misrepresentation. Plaintiffs are in clear violation of Rule 26 of the Federal Rules of Civil Procedure, and the Court must therefore preclude Plaintiffs from using any of these statements as a basis of the alleged fraud at trial. *See* Fed. R. Civ. P 37(c).

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[1] Defendants Joseph A. Vozar and Household Finance Corporation ("HFC") join in this motion and expressly reserve the right to amend, supplement or re-assert objections to Plaintiffs' proposed "Household International False Statements" to the extent that at any future time Plaintiffs propose to use these statements in a trial of claims asserted against Mr. Vozar and HFC.

FACTUAL BACKGROUND

The Amended Complaint, filed in March 2003, refers to tens of quarterly reports, annual reports, press releases, and other documents that contain literally thousands of "statements." Plaintiffs provided no detail whatsoever as to which particular statements within these documents, many of which consist of hundreds of pages, they actually contend are false. Accordingly, on October 31, 2006, during fact discovery, Defendants promulgated three interrogatories designed to discover Plaintiffs' contentions as to which of the universe of alleged false statements is at issue in this case. Those interrogatories read as follows:

- Interrogatory No. 41: "If Plaintiffs contend that Defendants made affirmative misrepresentations regarding Household's alleged 'Fraudulent Scheme' involving 'Illegal Predatory Lending Practices' as set forth in Part VI.A of the Complaint (AC ¶¶ 50-106), identify each statement that Plaintiffs contend was an affirmative misrepresentation and the reasons that Plaintiffs contend that each statement was false."

- Interrogatory No. 42: "If Plaintiffs contend that Defendants made affirmative misrepresentations regarding Household's alleged 'Fraudulent Scheme' involving 'Improperly 'Reaging' or 'Restructuring' Delinquent Accounts,' as set forth in Part VI.B of the Complaint (AC ¶¶ 50, 107-133), identify each statement that Plaintiffs contend was an affirmative misrepresentation and the reasons that Plaintiffs contend that each statement was false."

- Interrogatory No. 43: "If Plaintiffs contend that Defendants made affirmative misrepresentations regarding Household's alleged 'Fraudulent Scheme' involving 'Improper Accounting of Costs Associated With Various Credit Card Co-Branding, Affinity and Marketing Agreements' as set forth in Part VI.C of the Complaint (AC ¶¶ 50, 134-155), identify each statement that Plaintiffs contend was an affirmative misrepresentation and the reasons that Plaintiffs contend that each statement was false."

Plaintiffs initially responded to Interrogatories Nos. 41-43 on December 4, 2006 with a list of hundreds of statements from, *inter alia*, newspaper articles, press releases and company financial statements. Subsequently, on January 10, 2007, Plaintiffs were ordered by Magistrate Judge Nolan to provide more useful responses to those interrogatories. Plaintiffs

amended or supplemented their responses to Interrogatories Nos. 41-43 on several occasions, most recently on February 1, 2008.[2] The operative responses to Interrogatories Nos. 41-43 indicate Plaintiffs' contention that Defendants made over 80 bullet-pointed "affirmative misrepresentations" related to "Illegal Predatory Lending Practices," "Reaging," or the "Improper Accounting of Costs Associated With Various Credit Card Co-Branding, Affinity and Marketing Agreements."

In exchanging pretrial materials, Plaintiffs refused to identify the statements they intend to prove at trial were false and misleading. Without explaining or justifying their position, Plaintiffs merely stated in a letter dated November 10, 2008 that they "do not believe in this case it is necessary or appropriate to include each false statement or omission in the jury instructions or verdict form."[3] Plaintiffs' position is at odds with the Securities and Exchange Act of 1934, which requires a securities fraud plaintiff to prove that each defendant made a false and misleading statement, and that each allegedly false statement made by the defendant was material, made with scienter and actually caused the plaintiff to suffer a loss. Failure to prove any element for any statement precludes liability for securities fraud based upon that statement. At trial, the jury must be told what statements and claims of falsity are at issue, and therefore, in their submissions for the pretrial order, Plaintiffs must identify those statements. Because Defendants were unable to obtain cooperation from Plaintiffs, on December 11, 2008,

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2 A copy of the relevant portions of Lead Plaintiffs' Second Supplemental Amended Responses and Objections to Household Defendants' [Seventh] Set of Interrogatories to Lead Plaintiffs Pursuant to the Court's March 30, 2007 Order is attached as Exhibit 1 to the Declaration of Thomas J. Kavaler dated January 30, 2009, which was submitted in connection with this motion ("Kavaler Declaration").

3 A copy of the November 10 Letter from Luke O. Brooks to Ira J. Dembrow is attached as Exhibit 2 to the Kavaler Declaration. A copy of the November 7, 2008 Letter from Ira J. Dembrow to Luke O. Brooks is attached as Exhibit 3 to the Kavaler Declaration.

Defendants made a Motion Pursuant to Local Rule 16.1 to Require Plaintiffs to Identify the Allegedly False and Misleading Statements to be Proved at Trial (the "December 11 Motion").

At the presentment of the December 11 Motion, Plaintiffs' counsel, Azra Mehdi, Esq., represented to the Court that Plaintiffs understood they were limited to the "false statements" alleged in their interrogatory responses:

> THE COURT: So you tell me. When can we have a more particularized listing of the allegedly false and misleading statements and/or omissions that you're going to actually use at trial?
>
> MS. MEHDI: The particularized listing will at least be all of the statements listed in our interrogatory responses. No more than that. We're not going to do any more than that.
>
> THE COURT: So your assertion is that you are going to present evidence as to each of the statements alleged in your interrogatory answers?
>
> MS. MEHDI: Yes.
>
> THE COURT: There you have it, counsel. The interrogatory answers is the blueprint of misleading statements.
>
> MS. MEHDI: And it's listed in bullet form.[4]

Lo and behold, approximately one month later, on January 15, 2009, plaintiffs served on defendants a list of "Household International False Statements" (the "New List"),[5]

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[4] A copy of the relevant portions of the Transcript of the December 16, 2008 presentment of Defendants' Motion Pursuant to Local Rule 16.1 to Require Plaintiffs to Identify the Allegedly False and Misleading Statements to be Proved at Trial is attached as Exhibit 4 to the Kavaler Declaration.

[5] A copy of the New List is attached as Exhibit 5 to the Kavaler Decl. (as amended by the E-Mail from Spence Burkholz to Josh Newville on January 20, 2009).

which contains dozens of statements that were not included in Plaintiffs' responses to Interrogatories Nos. 41-43. Attached as Appendix A to Exhibit 6 of the Kavaler Declaration is a chart that lists, in Column 3, those statements from the New List (Column 2) that were not disclosed in Plaintiffs' responses to Interrogatories Nos. 41-43 (Column 1) ("Chart of New Statements").

On January 23, 2009, during a meet and confer session, Defendants insisted that Plaintiffs omit from the New List of alleged "False Statements" to be proved at trial those statements Plaintiffs had not previously identified in response to Defendants' discovery requests ("New Statements"). Plaintiffs refused. Later that same day, Defendants wrote to Plaintiffs, urging that they reconsider that position without requiring Defendants to file a motion with the Court (the "January 23 Letter").[6] Defendants demanded that Plaintiffs omit the New Statements from their list of alleged "False Statements" to be proved at trial, and that Plaintiffs then re-promulgate the list of alleged "False Statements." Defendants received no response from Plaintiffs. Because Plaintiffs failed to include the New Statements in their responses to Interrogatories Nos. 41-43, the New Statements should be excluded from use at trial.

ARGUMENT

Under Rule 37(c), "[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Absent a finding of substantial justification or harmlessness, sanctions are mandatory, though the

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[6] A copy of the January 23 Letter from Jason M. Hall to Spencer A. Burkholz is attached as Exhibit 6 to the Kavaler Declaration.

Court can grant alternative (or additional) sanctions other than exclusion.[7] *See Musser* v. *Gentiva Health Services*, 356 F.3d 751, 758 (7th Cir. 2003) ("the exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless"); *Salgado* v. *Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir.1998) ("the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26 . . . was either justified or harmless"); *McEntegart* v. *Sunrise Transportation, Inc.*, No. 07 C 2006, 2009 WL 35285 at *2 (N.D. Ill. Jan. 6, 2009) (Guzman, J.) ("Barring the use of evidence wrongfully withheld is among the sanctions available for a violation of the discovery rules.").[8] Plaintiffs have blatantly violated Rule 26(e), which states that a party "who has responded to an interrogatory . . . must supplement or correct its . . . response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). Plaintiffs filed their initial responses to Interrogatories 41 through 43 more than two years ago. Fact discovery has now been closed for more than two years. Nowhere in Plaintiffs' initial interrogatory responses or in their several subsequent amendments thereto did Plaintiffs identify the dozens of new statements that they suddenly now claim provide the basis of their fraud allegations. Plaintiffs' withholding of this

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7 Rule 37(c) states, "[i]n addition to or instead of this [exclusion] sanction, the court, on motion and after giving an opportunity to be heard:

> (A) may order payment of reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure;
>
> (C) may impose other sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)."

8 A copy of the unpublished decision in *McEntegart* v. *Sunrise Transportation, Inc.*, No. 07 C 2006, 2009 WL 35285 at *2 (N.D. Ill. Jan. 6, 2009) (Guzman, J.) is attached as Exhibit 7 to the Kavaler Declaration.

information from Defendants until two weeks before pre-trial submissions are due and two and a half months before trial is scheduled to begin is an obvious well-planned attempt to derail Defendants' trial preparations. There is no justification for Plaintiffs' unconscionable behavior, and the Court should, at the very least, exclude Plaintiffs from basing their showing of alleged fraud on these new statements, and grant whatever additional sanctions the Court deems fit.

Plaintiffs' deliberate failure to comply with the Federal Rules of Civil Procedure governing discovery has caused Defendants serious harm. Much as Plaintiffs would like to forget, these statements are not ancillary to this lawsuit—they are at the very heart of Plaintiffs' securities fraud claims. *See Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 342 (2005) (identifying a misleading statement as the first of the six "basic elements" of a securities fraud claim); *see also Musser*, 356 F.3d at 759 (citation omitted) (finding that there was no substantial justification for plaintiffs' failure to disclose certain witnesses as experts, noting that plaintiffs "should have known that expert testimony was 'crucial' to their case, and 'likely to be contested'"). This is not a case where disclosure was late by a trivial amount of time. *See Musser* at 759 (failure to disclose was not harmless when defendants had less than three months to prepare for trial). If the Court does not grant the requested relief, Defendants will be forced to shift gears and focus on dozens of previously unidentified new statements in the less than two months before the start of trial.

The time and expense Plaintiffs' recalcitrance has caused Defendants is immeasurable. By way of example, Defendants have spent millions of dollars and countless hours over the course of more than 18 months on expert discovery and analysis that could have been conducted differently if Defendants had known the statements that Plaintiffs now claim are the basis of the alleged fraud. Defendants would have focused on different market reactions and analyst commentary in assessing the impact of the various new statements at the time they were

made. Defendants will now be forced to expend even more time and money to assess the ramifications of the previously undisclosed statements.

Indeed, it was in an effort to avoid precisely this type of ambush that Defendants have, over the course of this litigation, made repeated efforts to get Plaintiffs to clarify precisely which statements they intended to prove at trial. As set forth above, as recently as six and a half weeks ago, counsel for Plaintiffs stood up ***before this Court*** and averred that the statements they would rely on at trial would be ***no more than*** those contained in their interrogatory responses. Clearly, Plaintiffs were just giving Defendants and this Court the runaround.

CONCLUSION

Because there has been an unjustified Rule 26 violation which has caused substantial harm to Defendants, the Court must impose sanctions on Plaintiffs, the very least of which should be exclusion of the New Statements, as set forth in column 3 of the Chart of New Statements.[9]

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[9] *See* Kavaler Decl. Ex. 6, App. A.

Dated: January 30, 2009
Chicago, Illinois

Respectfully submitted,

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