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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MISCELLANEOUS MOTIONS *IN LIMINE*

PLAINTIFFS' MOTION *IN LIMINE* NO. 2

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I. INTRODUCTION

In filing these motions, plaintiffs seek *in limine* rulings from the Court relating to particular types of evidence that plaintiffs believe should be excluded from trial and the manner in which evidence will be presented at trial. Plaintiffs ask that the Court enter the following orders:

A. Plaintiffs Should Be Granted the Same Number of Peremptory Challenges as Defendants Combined;

B. Plaintiffs Should Be Permitted, Pursuant to Federal Rule of Evidence 611(c), to Examine Witnesses Identified with Defendants by Leading Questions;

C. Defendants Should Be Precluded from Introducing Live Testimony from Persons Unavailable to Plaintiffs and Introducing Deposition Testimony of Persons in Their Control;

D. Percipient Witnesses Should Be Excluded from the Courtroom;

E. Counsel Should Be Precluded from Communicating with a Witness Until the Witness's Testimony is Concluded; and

F. Evidence of and Reference to William Lerach's Conviction and the Lexecon/Milberg Weiss Settlement Should be Excluded.

II. MOTIONS IN LIMINE

A. Plaintiffs Should Be Granted the Same Number of Peremptory Challenges as Defendants Combined

Plaintiffs respectfully move this Court for an order equalizing the number of peremptory challenges between the Plaintiff Class and all defendants. The relevant statute governing the allocation of peremptory challenges states that:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

28 U.S.C. §1870. In multi-party civil litigation, it is well established that courts have considerable discretion in allocating additional peremptory challenges. *See, e.g.*, *Creek v. Village of Westhaven*, No. 83 C 1851, 1994 WL 11625, at *11 (N.D. Ill. Jan. 3, 1994) (acknowledging "§1870 provides the court with broad discretion in determining the number of challenges available to each 'side' of the lawsuit . . . the court grant[ed] each 'side' six peremptory challenges"); *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1287 (7th Cir. 1990) ("while the number of peremptory challenges is determined by statute in single party civil cases, a trial judge has broad discretion in determining the appropriate number and allocation of peremptory challenges in multiparty civil cases").

Under 28 U.S.C. §1870 the Court is permitted to increase the number of peremptory challenges on one side or consider multi-party defendants to be one for the purpose of making a challenge as long as the interests of justice are served. *See Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856, 858 (3d Cir. 1978) (no abuse of discretion in allocating six peremptory challenges to a single plaintiff and two each to the three defendant parties); *Moore v. S. African Marine Corp.*, 469 F.2d 280, 281 (5th Cir. 1972) (no error in requiring multiple defendants to share the same number of peremptory challenges given to the plaintiff). It is well settled, therefore, that it is within the Court's discretion to grant the same number of peremptory challenges to each side.

It would be inequitable for the Court to grant the defendants as a group more peremptory challenges than the plaintiffs. As the Court is fully aware, *voir dire* and peremptory challenges are critical components in the trial process. Since jurors often have personal biases affecting their impartiality, the peremptory challenge is an essential tool in effectuating an impartial jury. If plaintiffs are denied the same number of challenges as the defendants, they will be at a material disadvantage in selecting a fair and balanced jury.

In fact, in a situation similar to the one here, an appellate court even held that the lower court abused its discretion by ***failing*** to equalize the number of peremptory challenges exercised by each

side. *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir. 1984). The *Goldstein* case involved a single plaintiff and two defendants that were represented by the same counsel. On appeal, in response to plaintiff's argument that the magistrate judge should have equalized the number of peremptory challenges, the *Goldstein* court agreed, stating:

> We believe he should have done so given the fact that the two defendants . . . clearly had identical interests at the trial. . . . [I]t is hard to see any reason here for not equalizing peremptories as between plaintiff and defendants.

Id. at 37. Furthermore, the court stated that the "magistrate abused his discretion in refusing either to treat both defendants as a single party or to allow plaintiff to exercise double the number of peremptory challenges." *Id*.

For these reasons, plaintiffs respectfully request that the Court allocate the peremptory challenges so that an equal number of peremptory challenges are provided to defendants and plaintiffs.

B. Plaintiffs Should Be Permitted, Pursuant to Federal Rule of Evidence 611(c), to Examine Witnesses Identified with Defendants by Leading Questions

Plaintiffs intend to call in their case-in-chief several witnesses who are either current or former officers or employees of defendant Household International ("Household"), including Defendants Aldinger, Schoenholz and Gilmer.[1] Plaintiffs should be permitted to examine these witnesses using leading questions, pursuant to Federal Rule of Evidence 611(c), which provides that "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse

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[1] The following witnesses on Plaintiffs' Witness List are current or former Household officers or employees identified with the defendants: Defendant William F. Aldinger, Thomas Detelich, Defendant Gary D. Gilmer, Megan E. Hayden-Hakes, Clifford Mizialko, Celeste Murphy, Daniel Pantelis, Richard J. Peters, Kenneth Robin, Carin Rodemoyer, Walter Rybak, Thomas Schneider, Defendant David A. Schoenholz, Joseph A. Vozar, Dan Anderson, James Connaughton, Curt Cunningham, Kathleen Kelly A. Curtin, Stephen Hicks, Kay Nelson, Peter Alan Sesterhenn, Lisa Sodeika, Craig A. Streem and a Household Custodian of Records.

party, interrogation may be by leading questions." Fed. R. Evid. 611(c). "'The normal sense of a person "identified with an adverse party" has come to mean, in general, an employee, agent, friend, or relative of an adverse party.'" *Washington v. Ill. Dep't of Revenue*, No. 01-3300, 2006 WL 2873437, at *1 (C.D. Ill. Oct. 05, 2006) (quoting *Vanemmerik v. Ground Round*, No. 97-5923, 1998 U.S. LEXIS 11765, at *6 (E.D. Pa. July 16, 1998)). *See also Garden v. Gen. Elec. Co.*, No. 91-1204 (CSF), 1992 U.S. Dist. LEXIS 11695, at *5 (D.N.J. July 6, 1992) (witness found to be "identified" with defendant company because he was an employee).

Many of the witnesses plaintiffs may call served in a variety of positions at Household, reported directly to the individual defendants and participated in events that led to this action and several governmental investigations. Because these witnesses are "identified with" Household and the individual defendants, Rule 611(c) permits plaintiffs to use leading questions to examine them. As this Court explained in *LaSalle Nat'l Bank*, for a witness to be identified with an adverse party the witness must have an "apparent relationship or connection to the defendant . . . in the normal sense of being an employee, agent, friend, or relative of an adverse party." *LaSalle Nat'l Bank v. Mass. Bay Ins. Co.*, No. 90 C 2005, 1997 WL 24677, at *4 (N.D. Ill. Jan. 17, 1997). *See also United States v. McLaughlin*, No. 95-CR-113, 1998 U.S. Dist. LEXIS 18588, at *3 (E.D. Pa. Nov. 19, 1998) (the phrase "'"witness identified with an adverse party" is intended to apply broadly to an identification based upon employment by the party or by virtue of a demonstrated connection to an opposing party'") (citation omitted); *Washington*, 2006 WL 2873437, at *1. It has also been applied to witnesses who are former employees of a defendant. *See Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1477-78 (11th Cir. 1984); *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991).

Finally, the defendants and each of the remaining Household employee witnesses were also represented by Household's counsel, Cahill Gordon & Reindell LLP, at Household's (or its

insurer's) expense, during their depositions and each spent time with defendants' counsel in preparation for their depositions. This is further evidence indicating their association with defendants. *See McLaughlin*, 1998 U.S. Dist. LEXIS 18588, at *3 (""witness identified with an adverse party"" is, in part, based upon a "'demonstrated connection to an opposing party'") (citation omitted).

Because many witnesses are current or former employees of defendants, and because each has been represented in this matter by defendants' counsel, they are undoubtedly "identified with" defendants. Therefore, plaintiffs should be permitted to conduct their direct examination of these adverse witnesses with leading questions.

C. Defendants Should Be Precluded from Introducing Live Testimony from Persons Unavailable to Plaintiffs and Introducing Deposition Testimony of Persons in Their Control

Plaintiffs move under Federal Rule of Evidence 611, and in the interest of judicial economy and fairness, to require defendants to make available for live examination in plaintiffs' case-in-chief any witnesses defendants intend to call in their case-in-chief. Under Rule 611, the Court has control over "the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth" and "(2) avoid needless consumption of time." Fed. R. Evid. 611(a). Additionally, the Court has the authority to compel the attendance of the desired witnesses. Moreover, the court in *In re Disaster at Detroit Metro. Airport*, 130 F.R.D. 647 (E.D. Mich. 1989), explaining the court's decision in *In re Beverly Hills Fire Litig.*, MDL No. 77-79 (E.D. Ky. Dec. 7, 1984), stated that "the court may utilize Rule 611 and preclude [defendants] from introducing witnesses who are not available to testify during the plaintiff's case in chief because this 'is the fairest method of making sure the complete truth is told to the jury in this case and the least likely method of wasting time.'" *Detroit Metro.*, 130 F.R.D. at 650 n.4 (quoting *Beverly Hills*, slip op. at 6). *See also Niebur v. Town of Cicero*, 212 F. Supp. 2d 790, 806 (N.D. Ill.

2002) (court prohibited last-minute testimony of witness in defendants' case-in-chief where witness under defendants' control initially refused to testify); *Maran Coal Corp. v. Societe Generale de Surveillance S.A.*, No. 92 CIV. 8728 (DLC), 1996 U.S. Dist. LEXIS 172, at *4 (S.D.N.Y. Jan. 10, 1996) ("Courts have used their discretion under [Rule 611] 'to preclude parties who refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence'") (citation omitted).

Here, there is no reason that plaintiffs should be denied the opportunity of examining a witness in person during their case-in-chief if defendants intend to present that same witness live. If this were to occur, valuable Court time would be needlessly wasted by the repeated introduction of deposition testimony followed by live testimony by the same witness. It is within the Court's discretion under Rule 611 to prevent gamesmanship which is inefficient and wastes judicial resources. Plaintiffs ask the Court to preclude defendants from calling a witness for live testimony in their case-in-chief if they refuse to honor a reasonable request for the production of that witness for plaintiffs' case-in-chief, thereby forcing plaintiffs to present deposition testimony.

Plaintiffs further request that the Court preclude defendants from offering into evidence deposition testimony of witnesses under defendants' control. Generally, a party may introduce deposition testimony of a witness who is unavailable as contemplated by Federal Rule of Evidence 804(b)(1). Defendants should not be permitted to rely on Rule 804(b)(1) to introduce deposition testimony of witnesses that are under their control, including current employees, since such witnesses are not unavailable within the meaning of the Rule. *See* Fed. R. Evid. 804(a)(5); *Chesler v. Trinity Indus., Inc.*, No. 99 C 3234, 1999 WL 498592, at *3 n.1 (N.D. Ill. July 6, 1999) (observing that "[c]ourts ordinarily assume that a defendant's employees will be available to testify regardless of venue, since they are under defendant's control"). Similarly, the defendants should not be able to

rely on Federal Rule of Civil Procedure 32(a)(4)(D), as they can procure the attendance of a witness that is under their control.

D. Percipient Witnesses Should Be Excluded from the Courtroom

Plaintiffs request that the Court exclude percipient witnesses from the courtroom to prevent them from hearing the testimony of other witnesses. Federal Rule of Evidence 615 provides that "[a]t the request of a party the court ***shall*** order witnesses excluded so that they cannot hear the testimony of other witnesses." Fed. R. Evid. 615 (emphasis added). Preventing a witness from hearing ongoing testimony of other witnesses reduces the risk of fabrication, collusion and inaccuracy. 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* §615.02 (2d ed. 2008). Moreover, sequestration under Rule 615 properly extends to opening and closing statements in order to fulfill the Rule's purpose of promoting truthful and accurate testimony that is not shaped by the remarks or testimony of others. 3 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* §339, at 561-62 (2d ed. 1994). According to the Supreme Court:

> It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections.

Perry v. Leeke, 488 U.S. 272, 281-82 (1989).

Thus, upon request such an order is ***mandatory***, as it is a party's ***right*** under Rule 615 to exclude witnesses from the courtroom and prohibit discussion between and among witnesses. Fed. R. Evid. 615 advisory committee's note ("The authority of the judge [to sequester witnesses] is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position."); *United States v. Warner*, No. 02 CR 506, 2005 U.S. Dist. LEXIS 21367, at *40 (N.D. Ill. Sept. 23, 2005) ("Rule 615 . . . mandates the exclusion of potential witnesses."); *Gov't of the Virgin Islands v. Edinborough*, 625 F.2d 472, 474 (3d Cir. 1980) ("The

mandatory language of the rule shows that it was intended to change the prior practice under which the trial court had discretion to determine whether a witness should be excluded.").

Plaintiffs will be severely prejudiced if the Court allows adverse witnesses to observe each other's testimony and consult with defense counsel before testifying. The failure to enter the above order will particularly handicap and prejudice plaintiffs who will present their case almost exclusively through adverse witnesses. Indeed, many of the witnesses are former employees of defendants and third parties. Moreover, an order excluding witnesses from the courtroom for the purpose of insulating them from others' testimony would be meaningless if they nonetheless learned of the testimony from others, including other witnesses or a party's counsel.

There are several exceptions to Rule 615, as the "rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." Fed. R. Evid. 615. Plaintiffs, of course, do not move to exclude defendants, including Household's representative, from trial. While plaintiffs do not dispute Household's right to designate ***one*** natural person as its representative to sit in the courtroom, Household should not be permitted to skirt Rule 615 by designating more than one representative. *See United States v. Hickman*, 151 F.3d 446, 453-54 (5th Cir. 1998) (abuse of discretion to permit government to designate two representatives as excepted from Rule 615 without finding that two agents were "essential"); *United States v. Phibbs*, 999 F.2d 1053, 1072-73 (6th Cir. 1993) (Rule 615 entitles government to designate only one representative as excepted from the rule; additional government representatives excepted only if shown to be "essential"); *Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co.*, 519 F. Supp. 668, 679 (D. Del. 1981) ("the exception is clearly framed in the singular and the Court concludes . . . that it does not permit counsel to designate more than one person to be present as a corporation's representative"). Finally, plaintiffs do not seek to

exclude expert witnesses from hearing the trial, as experts are generally the types of witnesses that fall within the third exception to the exclusion rule.[2]

For the reasons stated above, plaintiffs request that the Court exclude all percipient witnesses, except defendants and/or their representative and expert witnesses, from the trial and that the Court enter an order preventing percipient witnesses from discussing the trial with other witnesses or attorneys involved with the case.

E. Counsel Should Be Precluded from Communicating with a Witness Until the Witness's Testimony is Concluded

Plaintiffs request that once a witness has been sworn, counsel should be prohibited from communicating with the witness regarding his or her testimony until it is completed. Such an order is essential to minimize the risk of witnesses being coached and to insure the unobstructed discovery of truth during witness examination:

> Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness . . . to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess.

Perry, 488 U.S. at 282 (holding no Constitutional violation on order barring defendant from consulting with his counsel during recess in defendants' testimony). There is absolutely no reason why percipient witnesses should be consulting with counsel once they have been sworn. As *Perry* teaches, parties are first and foremost witnesses when they testify. *Id*. ("[R]ules that serve the truth-seeking function of the trial – are generally applicable to [the party] as well."). Counsel can fully

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[2] "This exception is frequently invoked in the case of expert witnesses, usually on the ground that the expert will base his or her testimony and conclusions on evidence that will be shown at trial." 4 *Weinstein's Federal Evidence* §615.04[3][c]. *See also Syndia Corp. v. Gillette Co.*, No. 01 C 2485, 2002 U.S. Dist. LEXIS 9259, at *6 (N.D. Ill. May 24, 2002) ("court construes 'essential' in the third exception as 'reasonably necessary' and finds that . . . expert should be allowed to observe the [trial]"). In fact, Rule 615 advisory committee's notes concede that the third category "contemplates such person as . . . an expert needed to advise counsel in the management of the litigation."

prepare a witness before trial begins, but not after a witness has taken the stand and sworn to tell the truth.

F. Evidence of and Reference to William Lerach's Conviction and the Lexecon/Milberg Weiss Settlement Should Be Excluded

In an unsolicited January 15, 2008 letter to the Court and during a hearing the following day, Thomas Kavaler, lead trial counsel for defendants, raised several times a guilty plea entered by former Milberg Weiss and Lerach Coughlin partner William Lerach in a transparent attempt to prejudice the Court against lead counsel. In the same letter and hearing, Mr. Kavaler referenced a 1999 verdict in favor of plaintiffs' loss causation and damages expert Professor Daniel R. Fischel's former firm Lexecon against the Milberg Weiss firm, and the subsequent settlement between Lexecon and Milberg Weiss. Although it is clear neither of these issues bears any relation to the elements of plaintiffs' securities fraud claim or any of the facts at issue in this trial, plaintiffs are compelled to file this motion to safeguard against a similar performance in front of the jury.

Accordingly, plaintiffs respectfully move *in limine* for an order precluding evidence of or reference to the Lexecon/Milberg Weiss action and Mr. Lerach's guilty plea and conviction. Such evidence, whether introduced via cross-examination or argument by counsel, has no rational connection to any of the elements of plaintiffs' securities fraud claim or any of the defenses in this action.

Pursuant to Rule 401, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Rule 402 precludes irrelevant evidence. Introduction of Mr. Lerach's conviction and/or the Lexecon/Milberg Weiss lawsuit will not tend to make the existence of any fact at issue more or less probable, but instead will serve only to confuse the issues and prejudice the plaintiff Class.

Mr. Lerach's conviction was for conduct not connected to this case that occurred while working at a different firm, Milberg Weiss. Mr. Lerach's conviction is completely unrelated to the claims and defenses at issue here, and any attempt to introduce or reference the conviction would be for the sole impermissible purpose of prejudicing the plaintiffs and maligning their counsel. It is axiomatic, however, that "disparaging remarks directed at [ ] counsel are reprehensible," can engender prejudice and are therefore improper and inadmissible at trial. *United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001). Accordingly, defendants should be barred from raising Mr. Lerach's conviction which would serve no purpose other than to confuse the issues and prejudice the plaintiff class.

The Lexecon/Milberg Weiss lawsuit and settlement are similarly irrelevant. Any argument that the Lexecon/Milberg Weiss lawsuit bears on Professor Fischel's bias or motivation as an expert witness defies logic. Indeed, the fact that Professor Fischel and Milberg Weiss were adversaries in a lawsuit settled ten years ago tends to show lack of bias and, if anything, enhances Professor Fischel's credibility as an independent expert. This irrelevant evidence should be precluded under Rule 402. Such evidence is also subject to exclusion under Rule 403 because any probative value is substantially outweighed by the danger of prejudice and juror confusion. Undoubtedly, defendants' questioning of Professor Fischel on the prior action would focus on the connection between Milberg Weiss and class counsel and imply that class counsel has previously brought non-meritorious claims. Such an inquiry is impermissible and would engender prejudice against the plaintiff class in this action "by directing the jurors' attention away from the legal issues in or by inducing the jury to give greater weight to [the opposing party's] view of the case." *Xiong*, 262 F.3d at 675. Additionally, such questioning or argument could create prejudice "by causing the jury to believe that [plaintiffs' counsel's] characterization of the evidence should not be trusted." *Id.*

In short, this case should be decided on the merits of the evidence presented to the jury, not inflammatory insinuation, rhetoric or invective directed at counsel, which is inadmissible under Rules 401 and 403. Evidence related to the Milberg Weiss/Lexecon lawsuit and Mr. Lerach's conviction should be excluded pursuant to Rules 402 and 403, and counsel for defendants should be instructed not to raise either issue in front of the jury.

III. CONCLUSION

By way of the foregoing, plaintiffs request that the Court enter orders granting their motions *in limine.*

DATED: January 30, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC 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 Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway Suite 1900, San Diego, California 92101.

2. That on January 30, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MISCELLANEOUS MOTIONS *IN LIMINE***.

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 30th day of January, 2009, at San Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE