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' MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM OFFERING EXPERT TESTIMONY FROM ANY OF THEIR IDENTIFIED WITNESSES OTHER THAN THEIR THREE RETAINED EXPERTS

PLAINTIFFS' MOTION *IN LIMINE* NO. 8

Plaintiffs move to preclude defendant Household International, Inc., William F. Aldinger, David A. Schoenholz and Gary D. Gilmer (collectively "defendants") from offering expert testimony from any witness other than their three retained expert witnesses. In their witness list, defendants identify 17 fact witnesses as possible expert witnesses. Defendants' Witness List at Pre-Trial Order Ex. E-3. Further, defendants requested that the "qualifications" of these 17 fact witnesses be read to the jury. Defendants' Statement of Qualifications of Experts to Be Read to the Jury. Pursuant to Fed. R. Civ. P. 37(c)(1), defendants may not offer any expert testimony from these witnesses because they have failed to comply with the expert disclosure requirements set out in Fed. R. Civ. P. 26. Defendants are also barred by their failure to comply with this Court's Local Rule requiring that any proposed expert testimony be described in the pre-trial order materials. Northern District of Illinois Local Rules, Form LR 16.1.1 Final Pretrial Order Form at 2 n.7 ("If more than one F.R. Evid. 702 witness is listed, the subject matter of each expert's testimony shall be specified."). Accordingly, defendants should be precluded from offering any expert testimony from these lay witnesses.

The Federal Rules of Civil Procedure requires parties to make disclosures under Rule 26 regarding persons who, at trial, may present evidence under Fed. R. Evid. 702. Defendants have failed to comply with these disclosure requirements. On December 10, 2007, pursuant to the schedule set forth by Magistrate Judge Nolan, defendants submitted a "Notice" that listed 5 retained experts and an additional 23 lay witnesses, including the named defendants, as possible experts. Notice Concerning Expert Testimony at 2-4. All but one of the 23 lay "experts" had been previously deposed during fact discovery.[1] During these depositions, defense counsel "interposed objections to

[1] The lone exception, John Nichols, is not relevant to this motion as he is not on defendants' witness list.

questions seeking to elicit expert opinions, creating an explicit understanding that the witnesses would ***not*** be providing any expert testimony." January 31, 2008 Minute Order at 2 (emphasis in original).

Defendants' Notice contained only vague descriptions of both the proposed testimony of the 23 lay witnesses and their asserted qualifications. By way of example, "William Aldinger may be called to provide testimony regarding Household's corporate governance and management practices that is informed by his specialized knowledge of corporate governance practices and polices, and management practices and policies." Notice at 2.

Plaintiffs challenged the adequacy of defendants' descriptions in the Notice before Magistrate Judge Nolan.[2] Magistrate Judge Nolan rejected the Notice disclosures as inadequate in plain terms. "If . . . Defendants do want the option of eliciting expert testimony from these witnesses at trial, they must provide Plaintiffs with the substance of such expert opinions, and the bases for those opinions. Defendants' generic disclosures to date are not sufficient." January 31, 2008 Minute Order at 2.[3] Defendants did not amend the disclosures found to be inadequate.

In this context, defendants may not now elicit expert testimony from their 17 fact witnesses. As Magistrate Judge Nolan's January 31, 2008 Order makes clear, defendants' disclosures did not

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[2] In a memorandum dated January 30, 2008, plaintiffs provided the Court with case law setting forth the standards regarding disclosure of the subject matter of testimony from non-retained experts. *See* Lead Plaintiffs' Reply in Support of Their Request for Additional Information Relating to Defendants' 23 Non-retained Experts (citing *Osterhouse v. Grover*, Case No. 3:04-CV-93-MJR, 2006 U.S. Dist. LEXIS 30904 (S.D. Ill. May 17, 2006); *KW Plastics v. United States Can Co.*, 199 F.R.D. 687 (M.D. Ala. 2000); *Musser v. Gentiva Health Servs.*, 356 F.3d 751 (7th Cir. 2004); *B.H. v. Gold Fields Mining Corp.*, No. 04-CV-0564-CVE-PJC, 2007 U.S. Dist. LEXIS 2309 (N.D. Okla. Jan. 11, 2007); *Funai Elec. Co. v. Daewoo Elecs. Corp.*, No. C 04-1830 CRB (JL), 2007 U.S. Dist. LEXIS 29782 (N.D. Cal. Apr. 11, 2007)).

[3] Defendants may contend that Magistrate Judge Nolan somehow withdrew this Minute Order on February 7. That is incorrect. On that date, Magistrate Judge Nolan stayed defendants' obligation to provide the required disclosures based on the possibility that the parties would be able to stipulate to resolution of the issue. *See* Feb. 7, 2008 Transcript at 54-55; *see also* Feb. 2, 2008 Minute Order. The parties did not in fact reach such an agreement.

comply with Fed. R. Civ. P. 26. Although the defendants had the opportunity to amend these disclosures, they did not. As defendants have never complied with Fed. R. Civ. P. 26 as to these witnesses, this bars them from now seeking to introduce any testimony from these witnesses within the purview of Fed. R. Evid. 702. *Sachs v. Reef Aquaria Design, Inc.*, No. 06 C 1119, 2008 U.S. Dist. LEXIS 22851, at *36-*37 (N.D. Ill. Mar. 20, 2008).

Further, defendants have not complied with Local Rule 16.1.1 by providing a description of the subject matter of the testimony from these "experts." Here, the only description that defendants provided is a generic and inaccurate description that "[t]he subject matter of their expert testimony is contained in their respective reports and depositions."[4] Defendants' Statements of Qualifications of Expert Witnesses to be Read to the Jury and Defendants' Statements of Qualifications of Witnesses Who May Offer Testimony Based on Specialized Knowledge at 2. Defendants' fact witnesses have provided no "reports" and their depositions provide no inkling as to what "expert" opinions may be offered. Indeed, before Magistrate Judge Nolan back in January of last year, defendants stated that there was nothing in the depositions that they intended to assert as expert testimony.[5]

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[4] In correspondence, plaintiffs requested that defendants provide a real description of the proffered expert testimony of these witnesses. Defendants refused.

[5] During the oral argument on January 16, 2008, Magistrate Judge Nolan inquired of defense counsel what they intended to offer in the way of expert testimony from these witnesses. January 16, 2008 Transcript at 19-20 ("you have something in mind that you may wish to offer at trial from these 23 people, . . . The only thing that is before the Court at this moment is should you have to tell what those statements are?"). The response from defense counsel was,

> You're simply mistaken about (inaudible) our thinking. . . . We have no plans whatsoever to elicit, quote, "expert testimony" from any of these [] witnesses . . . . If your Honor directs us to answer the very question you just posed, I'll answer it now: None. The answer for each of these witnesses, what do we currently today, whatever today's date is, January whatever, intend to elicit from these people by way of opinions? Nothing.

Id. at 20-22 (statements of T. Kavaler).

To evade this issue, defendants suggested in their correspondence that Local Rule 16.1.1 does not apply to non-retained experts. This assertion makes no sense. This Court has a key gatekeeper role with respect to expert testimony. *Sachs*, U.S. Dist. LEXIS 22851, at *7. This gatekeeper role applies equally for non-retained experts. To determine whether the proffered expert testimony should be admitted under Fed. R. Evid. 702, i.e. whether the subject matter of the opinion is helpful to the jury and whether the witness possesses sufficient qualifications to render the opinion, the Court must know the opinions at stake and the alleged qualifications of the fact/expert witness. Similarly, plaintiffs must know both the intended opinions and putative qualifications if they are to oppose admission of the opinions and if so, the proper grounds. Defendants' failure to provide the necessary descriptions precludes the Court from making that assessment and thus, bars defendants from seeking any expert testimony subject to Fed. R. Evid. 702 from these witnesses.

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' MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM OFFERING EXPERT TESTIMONY FROM ANY OF THEIR IDENTIFIED WITNESSES OTHER THAN THEIR THREE RETAINED EXPERTS**.

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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