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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' CROSS-MOTION PURSUANT TO FED. R. CIV. P. 37(C) TO EXCLUDE DECLARATIONS OF PLAINTIFFS' PREVIOUSLY CONCEALED WITNESSES

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Defendants respectfully submit this reply memorandum in support of their Cross-Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Testimony of Plaintiffs' Previously Concealed Trial Witnesses.

INTRODUCTION

Plaintiffs' recently-filed "spoliation" motion relies upon the declarations of seven former Household branch-level employees whom Plaintiffs did not disclose until well after the close of fact and expert discovery, in violation of Federal Rule of Civil Procedure 26(a) and (e). Because Plaintiffs have not demonstrated that their nondisclosure was either substantially justified or harmless, exclusion of these declarations under Rule 37(c) is "automatic and mandatory." *See Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998).

Plaintiffs begin their opposition brief as follows:

> From the very inception of this case, plaintiffs' allegations have placed the predatory lending practices [sic] of [Household's] Branch Sales Managers directly at issue. Indeed, plaintiffs' complaint is replete with allegations that Household's senior management caused the Branch Sales Managers to engage in predatory lending practices [sic]. It was therefore obvious to everyone, including defendants, that the Branch Sales Managers were in possession of relevant and discoverable information. (Pls. Opp. at 1.)

Simply put, that is the problem. It in no way explains their admitted breach of their discovery obligations under the Federal Rules. "Everyone" knew that Household had 1,400 Branch Sales Managers during the Class Period. But only Plaintiffs knew, or should have determined, *which* of these 1,400 they believed would testify to their version of the facts (as opposed to the vast majority of Branch Sales Managers who Defendants believe would testify exactly the opposite), and thus come within Rule 26(a)(1)(A)(i)'s definition of persons "likely to have discoverable information . . . that the disclosing party may use to support its claims." In other words, Plaintiffs cannot reconcile their obligation to separate the wheat from the chaff with their suggestion that Defendants play "go fish."

Plaintiffs' opposing memorandum fails to demonstrate that this discovery failure was either justified or harmless. In fact, Plaintiffs' assertion that they did not know the identity of the "vast majority" of these declarants until mid-2008 (when they still withheld disclosure), effectively concedes that they did not exercise the required due diligence in seeking out persons with material information during the years of fact discovery in this action. Plaintiffs' contention that general references to "branch services managers" during discovery put Defendants on "notice" of the identities of these declarants is fatuous. Oblique references to an undifferentiated 1,400 member cohort from which ***Plaintiffs*** selected seven non-representative declarants are not a substitute for the concrete identification required by Rule 26 and explicitly requested in Defendants' interrogatories. Even if Defendants could have surmised that Plaintiffs considered some branch sales managers to be relevant components of Plaintiffs' case, Defendants could not reasonably have been required to guess which of the 1,400 Household branch sales managers would be selectively chosen by Plaintiffs -- particularly given Plaintiffs' failure to include any of these declarants (including the ones they admittedly had located during discovery) in their list of 300 persons (including some branch sales managers) they disclosed as knowledgeable witnesses.[1] Under these circumstances, the automatic and mandatory exclusion remedy of Rule 37(c) is the only appropriate remedy.

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[1] Thus, Plaintiffs' accurate observation that "at no point during the two-year discovery period did defendants so much as ask to depose a single Branch Sales Manager," (Pls. Opp. at 1), is nonsensical, because deposing the branch sales managers whom Plaintiffs ***did*** identify -- or even deposing others of the 1,400 possible candidates at random -- would not (except accidentally) have put Defendants on notice of ***these*** previously undisclosed witnesses and their aberrational testimony. Defendants were entitled ***during*** discovery to conduct their investigation with respect to individuals whom Plaintiffs identified as "likely to have discoverable information." Fed. R. Civ. P. 26(a)(1)(A)(i).

ARGUMENT

I. Plaintiffs Have Failed to Show that their Nondisclosure of Secret Declarants Was Substantially Justified

Plaintiffs concede that they *never* disclosed the names of these individuals pursuant to Rule 26(a) or in response to Defendants' Interrogatory 46. Plaintiffs' admitted failure to disclose these declarants during years of fact discovery precludes their belated attempts to offer these surprise declarations at this late date. Plaintiffs assert that they "did not discover the identities of the Branch Sales Managers until after formal discovery had closed" and claim that they "then promptly disclosed the identities of these declarants to defendants." (Pls. Opp. at 2.) Neither statement is true.

- One of the undisclosed individuals (Seth Callen) was cited as a source for a news article quoted by Plaintiffs in their Amended Complaint filed in March, 2003. (*See* January 28, 2009 Dowd Decl., Ex. B, Docket No. 1311-3; Amended Complaint at ¶ 56). Although Plaintiffs did name some branch sales managers in their initial disclosures, Mr. Callen was not among them. In fact, Plaintiffs did not identify Mr. Callen as an individual with relevant knowledge of their claims until Oct. 31, 2008 -- more than five years later.
- Plaintiffs obtained a declaration from at least one of the seven newly-disclosed declarants (Curtis A. Howrey), on November 28, 2007, yet failed to disclose Mr. Howrey (or any of the others) in their February 2008 response to Interrogatory No. 46, or at any time prior to Oct. 31, 2008 -- almost a year after they had obtained a statement from him under the caption of this case. (*See* Declaration of Landis C. Best in support of Defendants' Cross-Motion, dated January 19, 2009, Docket No. 1286 ("Best Decl."), Ex. 5 at 63-66)

Thus, Plaintiffs clearly viewed at least two of these seven declarants as "likely to have discoverable information," Fed. R. Civ. P. 26(a)(1)(A)(i), during discovery, yet they did not identify them to Defendants until October 31, 2008. That delayed disclosure can hardly be considered "prompt," and it plainly violates both the letter and spirit of the Federal Rules. *Ty, Inc.* v. *Publications Int'l, Inc.*, No. 99 C5565, 2004 WL 421984 at *2 (N.D. Ill. Feb. 17, 2004) (Zagel, J.) (excluding testimony from six fact witnesses where proponent's choice "not to name these . . . witnesses when discovery was open or shortly thereafter" required exclusion under Rule 37).

Plaintiffs have not met their burden of proving that this belated disclosure was "justified" within the meaning of Rule 37. As to these two declarants, at least, there is no excuse and Plaintiffs' explanation is demonstrably false.

As for the other declarants, Plaintiffs concede that they were not diligent in locating the "vast majority" of them during discovery -- although their position is deliberately ambiguous about whether their lack of diligence is of the "didn't find" or "didn't look" variety (or some combination). (Pls. Opp. at 2.) In either case, however, Plaintiffs do not assert any reason why they *could not* have identified them during discovery, and merely argue that they *did not* do so until after the close of fact discovery -- that is, they chose to ignore the discovery schedule set by the Court under the Federal Rules. Plaintiffs offer no explanation as to why they delayed identifying the declarants in question until two years after the close of fact of discovery, why they did not promptly identify the newly-found witnesses as soon as they became known to Plaintiffs as Rule 26 requires, or why they did not disclose the identities of the declarants that Plaintiffs did know of prior to the end of fact and expert discovery. *See Reddick* v. *Bloomingdale Police Officers*, No. 96 C 1109, 2003 WL 1733560, at *12 (N.D. Ill. April 1, 2003) (Brown, M.J.) (party had a duty to supplement its Rule 26(a)(1) disclosures as soon as it located and contacted a previously disclosed witness); Fed. R. Civ. Pro. 26(e) Advisory Committee Notes, 1993 amendment ("The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures and responses are in some material respect incomplete or incorrect."). Plaintiffs' failure to exercise diligence in identifying persons with material information during discovery does not justify their late disclosure or avoid exclusion of the witnesses' proposed testimony. *See Scranton Gillette Communications, Inc.* v. *Dannhausen,* No. 96 C 8353, 1998 WL 566668 at *3 (N.D. Ill. Aug. 26, 1998) (Urbom, J.) (excluding witnesses where plain-

tiff claimed to have discovered them after fact discovery but did not show "diligence in searching for them").

II. Defendants Were Not on "Notice" that Plaintiffs Would Rely on these Undisclosed Declarants

Having admitted that they did not bother to locate and identify most of these declarants until well after the close of fact discovery (and having elected to conceal the others), it does not avail Plaintiffs to argue that *Defendants* should have been able to identify them with ease before the end of fact discovery. Even putting aside Plaintiffs' failure to identify the two declarants who were known to Plaintiffs well before they last updated their interrogatory responses, if it took Plaintiffs several years to locate branch-level employees to support their story, it is wholly contradictory for Plaintiffs to argue that their identities were so obvious as to render Plaintiffs' concealment harmless. Defendants could have had no way of determining (without the required discovery from Plaintiffs) which of the 1,400 branch sales managers Plaintiffs planned to advance as purported support for their theories. It was Plaintiffs' burden to provide that information, not Defendants' burden to guess. The purpose of Rule 37(c)'s exclusion sanction is "to provide parties with an incentive to timely disclose all material evidence *in support of their positions that they intend to use at any point during the course of the litigation . . .*" 7 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 37.60[1] at 37-124 (3d. ed 2008) (emphasis added). The purpose of Rule 26 is "total disclosure." *Salgado* v. *Gen. Motors Corp.*, 150 F.3d 735, 742 n.6 (7th Cir. 1998); *see also Ty, Inc.*, 2004 WL 421984 at *1 ("[I]t is not PIL's belated identification of trial witnesses, but rather its belated identification of people with knowledge relevant to the issues of this case" which violates Rule 26).

Plaintiffs also argue that their belated disclosure of the seven declarants must be harmless because Defendants never asked for their depositions once they finally were disclosed almost

two years after the close of fact discovery. (Pls. Opp. at 2.) Plaintiffs fail to mention that, during the parties' November 25, 2008 meet and confer, Plaintiffs' counsel took the position "that pre-trial depositions of the nine witnesses would not be appropriate or justified under the circumstances" (Best Decl. ¶ 15) and that defense counsel explained that the only appropriate remedy for this attempted ambush was to exclude the testimony of the concealed witnesses. *Id.* This position is consistent with Rule 37(c), which makes exclusion mandatory and does not impose on Defendants a duty to mitigate the prejudice resulting from Plaintiffs' failure to meet their discovery obligations.

In any event, fact discovery had been over for almost two years when Plaintiffs finally disclosed their secret declarants, and Plaintiffs' argument that Defendants should have tried to reopen discovery stands Rule 26 on its head. The purpose of the initial disclosure requirement (and the automatic, ongoing supplemental disclosure requirement of Rule 26(e)) is to facilitate the ability of opposing parties to plan their discovery efforts. *See Ty, Inc.*, 2004 WL 421984 at *1 (where supplemental disclosures are withheld, "the purpose of Rule 26 is effectively frustrated because the opposing party is denied the opportunity to conduct discovery on the supplemental response.") (citations omitted); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, No. 95 C 0673, 1996 WL 680243 at *8 (N.D. Ill. Nov. 21, 1996) (Ashman, M.J.) (after the completion of fact discovery, supplemental disclosure of information by way of expert reports "was not what the drafters of Rule 26(e)(2) envisioned" and constituted trial by ambush). Rule 26 places a burden on the proponent of evidence to identify relevant witnesses during discovery. It places no obligation on the opposing party to incur the burden, expense, and distraction of deposing belatedly disclosed witnesses and adjusting for their proposed new evidence well after discovery has ended. *See Civix-DDI LLC* v. *Cellco*, 387 F. Supp. 2d at 904 n.43 (defendant "was

entitled to rely on the fact that Civix did not disclose Rehfeld as either a fact or expert witness and therefore would not be relying on his testimony at trial"); *Lyman v. St. Jude Medical S.C., Inc.*, No. 05-C-122, 2008 WL 2224352 at *7-8 (E.D. Wis. May 27, 2008) (although names of witnesses surfaced during discovery, proponent of witnesses never disclosed they were likely to have information to support propoponent's claims; prejudice shown because opponent made a "strategic decision not to depose these individuals"); *Finwall* v. *City of Chicago*, 239 F.R.D. 504, 507 (N.D. Ill. 2006) (Manning, J.) (last minute disclosure of expert witnesses was "not harmless . . . simply because there is time to reopen discovery" and schedule depositions).

Nor are Plaintiffs aided by the argument that in a June 2006 letter, Defendants noted that individuals who may have relevant information had been identified in Defendants' deposition testimony, interrogatory answers, and other of Defendants' discovery responses in addition to their initial disclosures. (Pls. Opp. at 5.) If that were true of *Plaintiffs*' disclosure track record, a motion seeking to exclude Plaintiffs previously undisclosed witnesses would not have been needed. It is Plaintiffs, not Defendants, who now seek to offer declarations of fact witnesses whom they never identified in any fashion during discovery as required by Rule 26. In any event, Plaintiffs -- who bear the burden under Rule 37(c) -- fail to identify any documents they produced in this action that identify these witnesses by name or describe their significance to Plaintiffs' case.

Plaintiffs also try to gloss over their intentional discovery violations as harmless by arguing that Defendants' immense document production included a September 2, 2002 *Forbes* article in which one of the seven declarants (Seth Callen) was quoted. (Pls. Opp. at 5-6.) Setting aside the fact that Plaintiffs themselves liberally cited this article in their Complaint (yet failed to include Mr. Callen as one of the branch sales managers listed in their subsequent Rule 26 disclo-

sures[2]), this Court has consistently held the mere appearance of a witness's name in produced documents is insufficient to put parties on "notice" for the purposes of excusing Rule 26 compliance. *See Ty, Inc.*, 2004 WL 421984 at *2 ("merely because the names of these witnesses appeared, among hundreds of other names, somewhere in the thousands of pages of documents produced by Ty, does not mean that Ty should have anticipated that PIL would call these individuals as trial witnesses and deposed them accordingly"); *Boynton* v. *Monarch*, No. 92 C 140, 1994 WL 463905 at *2-3 (N.D. Ill. Aug. 25, 1994) (Kocoras, J.) (the mere appearance of a witness's name on documents produced by defense counsel did not give defendant sufficient knowledge of the witnesses' relevance to the case prior to the close of discovery).

Similarly, Plaintiffs' argument that Defendants were on notice of the significance of the seven declarants because the words "branch sales manager" appeared in deposition testimony, (Pls. Opp. at 6), is unavailing as well as misleading. Plaintiffs state that "the Branch Sales Managers . . . were discussed at length in 15 separate depositions," *Id*. at n.3 (citing transcripts). As phrased, Plaintiffs' assertion implies that the seven new witnesses at issue here were the subject of deposition testimony, but that simply is not the case. Plaintiffs fail to mention that *not one* of the transcripts they cite includes the name of *any* of Plaintiffs' secret declarants. Instead, Plaintiffs' citation to deposition transcripts appears to be no more than the product of an electronic search for the words "branch sales manager" or "BSM," which yielded testimony given in contexts completely unrelated to the substance of Plaintiffs' spoliation arguments. Mere passing references to the job titles held by some 1,400 individuals is not a substitute for the concrete,

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[2] In other words, if seeing Seth Callen's name in the *Forbes* article is sufficient to place anyone on notice of anything, it serves to place *Plaintiffs* on notice sufficient to trigger their Rule 26 disclosure obligations. Thus, their argument proves too much.

specific identification of names, addresses, and identities of the individual branch managers on whom Plaintiffs intend to rely, as Rule 26 requires. *See Civix-DDI, L.L.C.* v. *Cellco P'ship*, 387 F. Supp. 2d 869, 885 n.14 (N.D. Ill. 2005) (St. Eve, J.) (merely mentioning witness's name during deposition or disclosing name of witness's former employer "do not equate to formal disclosures that [plaintiff] may rely on [their] testimony"); *United States* v. *Dunn*, No. 04 C 50472, 2007 WL 1100754, at *4-*5 (N.D. Ill. April 12, 2007) (Mahoney, M.J.) (where proponent of belatedly-disclosed witnesses argued that opponent was "on notice", the court allowed testimony of only the witnesses identified by name during deposition as having knowledge regarding a topic).

III. Plaintiffs Offer No Relevant Authority in Support of their Position that their Nondisclosure Was Substantially Justified or Harmless

Plaintiffs cite no authority from any court within this Circuit supporting any of their arguments. Instead, Plaintiffs seek to distinguish the dozen relevant cases supporting exclusion as factually inapposite because "none arose from consideration of declarations in support of a spoliation motion," (Pls. Opp. at 4) -- truly a distinction without a difference. Plaintiffs concede that exclusion would be appropriate if undisclosed information were used on a motion for summary judgment or at trial (Pls. Opp. at 3-4)[3] -- yet take the position that Rule 37 sanctions do not apply when the same information is offered in support of a motion for evidentiary sanctions that would have the effect of barring Defendants from introducing any defense on the merits to key elements of Plaintiffs' claims. In the face of the express language of Rule 37(c), which prohibits use of such information "*on a motion*, at a hearing, or at trial," Plaintiffs' putative distinction is

[3] Plaintiffs thus concede the validity of Defendants' Jan. 30, 2009 Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Testimony of Plaintiffs' Previously Concealed Trial Witnesses.

frivolous at best. The Rule does not distinguish one kind of motion from another, or one stage of litigation from another, notwithstanding Plaintiffs' bootless suggestion.

The only cases cited by Plaintiffs in support of their position are two decisions from district courts outside this Circuit -- and even these cases are cited only for the proposition that depositions can "cure" the prejudice. (*See* Pls. Opp. at 7, n.4.) Setting aside the fact that depositions can *not* cure the prejudice in this case (Defendants have already responded to Plaintiffs' "spoliation" motion on the schedule set by the Court), both of these cases are factually and legally distinguishable. The first case, *L-3 Communications Corp*. v. *OSI Sys., Inc.*, No. 02 Civ. 9144, 2006 WL 988143 (S.D.N.Y. Apr.13, 2006), involved the plaintiff's belated disclosure of the names of its President and Chief Financial Officer as witnesses. *Id*. at *4. The court held that the plaintiff's failure to disclose pursuant to Rule 26 was unjustified, but indicated that the remedy of exclusion may be "unduly harsh" in situations such as "the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties" or "the failure to list as a trial witness a person so listed by another party." *See id.* at n.8 (citing the Rule 37(c) Advisory Committee notes). The court held in that unique circumstance that the Rule 26 violation would be rendered "harmless" *if* the defendant was subsequently allowed to depose the witnesses. In this case, where Plaintiffs waited so long after discovery to file their expansive motion for sanctions, and their newly disclosed anecdotal evidence would open the door to multiple mini-trials at which Defendants could introduce substantial contrary evidence, we are well past the time when mere additional depositions of the concealed witnesses would present a reasonable solution to Plaintiffs' attempted ambush. In any event, the inadvertent failure to disclose the well-known and unique President and CFO of the company as witnesses is wholly different from Plaintiffs' non-disclosure of seven hand-picked former branch-level employees (out of

1,400) whose testimony ranges far afield from the discovery record as to the consumer lending policies established and enforced by senior management.

The second case cited by Plaintiffs, *Lobato* v. *Ford*, No. 05-cv-01437, 2007 WL 2593485 (D. Colo. Sept. 5, 2007), is also inapposite. Although the *Lobato* court agreed that the plaintiffs had failed to timely disclose the identity of a fact witness (the former girlfriend of one of the defendants), it noted that the defendants had failed to timely invoke Rule 37's exclusion sanction and ruled that the prejudice could be cured by granting a deposition of the witness. *Id*. at *8-10. In contrast, Defendants in this case requested exclusion as soon as practicable upon learning of Plaintiffs' surprise declarants. Defendants promptly raised these issues at the December 2, 2008 and December 16, 2008 presentments before this Court, and requested guidance as to the timetable for filing this motion. (*See* Tr. of December 2, 2008 Conf. at 17-24; Tr. of December 16, 2008 Conf. at 21-23). Given the factually complex nature of this litigation, the amount of time and money expended in discovery and in preparation for an imminent trial, the number of undisclosed declarants Plaintiffs seek to offer, the novelty of their proffered testimony, and the need (if the testimony were accepted) for extensive mini-trials to put it in proper perspective, the cases cited by Plaintiffs do not support Plaintiffs' argument that merely taking the declarants' depositions could "cure" the prejudice occasioned by Plaintiffs' gamesmanship.

Finally, Plaintiffs offer the non-sequitur argument that their spoliation motion "is not dependent on" and "does not rely 'in substantial part' on" the declarations. (*See* Pls. Opp. at 7-8). Defendants agree that the declarations of a statistically insignificant fraction of 1,400 branch sales managers are not entitled to any weight on the "spoliation" motion, especially as the declarations at most show only scattered non-compliance with corporate policy by a few rogue former employees, and appear to have been injected only for their prejudicial value. However, even the

slight (if any) probative value of the declarations militates in favor of their exclusion, not against. *See Musser v. Gentiva Health Servs.*, 356 F.3d 751, 759-60 (7th Cir. 2004) (suggesting that remedies short of exclusion may be more appropriate where exclusionary sanctions would be outcome-determinative). If the declarations really are as inconsequential as Plaintiffs now suggest, Plaintiffs should withdraw them voluntarily in the interest of conserving the Court's resources. If they refuse to do so, this stealth evidence is subject to the express, mandatory dictates of Rule 37(c).

CONCLUSION

For the foregoing reasons, the Court should exclude the declarations of Plaintiffs' seven previously concealed witnesses and exclude the contents of such declarations from consideration on Plaintiffs' Motion Requesting Evidentiary Sanctions.

Dated: February 4, 2009
New York, New York

Respectfully submitted,

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