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

DEFENDANTS' MOTION FOR LEAVE TO FILE *INSTANTER* MEMORANDUM OF LAW IN EXCESS OF FIFTEEN PAGES

Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz and Gary Gilmer (collectively, "Defendants"), by and through their attorneys, hereby move this Court for leave to file their 23-page Memorandum of Law in Partial Opposition to Plaintiffs' Miscellaneous Motions *In Limine* (Plaintiffs' Motion *In Limine* No. 2), attached hereto as Exhibit A. In support of their application to exceed the 15-page limit, Defendants state as follows:

1. The accompanying Memorandum of Law sets forth arguments addressing Plaintiffs' Miscellaneous Motions *In Limine* (Motion *In Limine* No. 2), which comprises at least 6 separate Motions *In Limine*.

2. Although Defendants could have filed 6 individual memoranda addressing each distinct ruling sought by Plaintiffs, in an effort to reduce the burden on the Court, the 6 possible separate briefs were consolidated into the single Memorandum of Law in Opposition.

3. No single section of the brief, corresponding to each of Plaintiffs' 6 individual Motions *In Limine*, surpasses the 15-page limit.

4. Defendants have attempted to address these issues fairly and completely as efficiently as possible, and any further reduction would impact the quality and clarity of the presentation made to the Court.

WHEREFORE, for the reasons stated above, Defendants respectfully request that they be granted leave to file a Memorandum of Law in excess of fifteen pages.

Dated: February 10, 2009

Respectfully submitted,

CAHILL GORDON & REINDEL LLP

By: /s/ Thomas J. Kavaler
Thomas J. Kavaler
Howard G. Sloane
Patricia Farren
Susan Buckley
Landis C. Best
David R. Owen

80 Pine Street
New York, New York 10005
(212) 701-3000

- and-

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Avenue
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

Exhibit A

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

DEFENDANTS' MEMORANDUM OF LAW IN PARTIAL OPPOSITION TO PLAINTIFFS' MISCELLANEOUS MOTIONS *IN LIMINE*

(PLAINTIFFS' MOTION *IN LIMINE* NO. 2)

CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Avenue
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

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household" or the "Company"), William F. Aldinger, David A. Schoenholz, and Gary Gilmer (collectively, the "Defendants"),[1] in partial opposition to Plaintiffs' Miscellaneous Motions *In Limine* (Plaintiffs' Motion *In Limine* No. 2). As described below, Defendants are willing to consent to an Order as to certain matters set forth in Plaintiffs' motion.[2] However because the much of the relief Plaintiffs request would impermissibly extend far beyond appropriate or justified measures and because Plaintiffs have not demonstrated they are entitled to such vague and overbroad "relief," Defendants are compelled to file this limited opposition.

INTRODUCTION

Plaintiffs' "Miscellaneous Motions *In Limine*" request certain forms of relief that are not contested, which Plaintiffs could have determined merely by seeking Defendants' consent before wasting the time of Defendants and the Court on general, apparently *pro forma*, "miscellaneous" demands. In particular, *Defendants do not oppose Plaintiffs request for an equal number of peremptory challenges per side, the use of leading questions within the confines of Fed. R. Evid. 611(c), a reasonable order for witness sequestration, and the exclusion of a settlement relating to Plaintiffs' damages expert and the post-Class Period conviction of Plaintiffs' former counsel in this action, William Lerach, for conspiracy to obstruct justice in connection with the filing of actions like this one.* (*See* Parts A, B, D and F, *infra*.)

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1 Non-Class Defendants Joseph A. Vozar and Household Finance Corporation ("HFC") join in this opposition, and do not waive but expressly reserve the right to amend, supplement or re-assert these objections and arguments to the extent that Plaintiffs at any future time seek *in limine* rulings against Mr. Vozar and/or HFC.

2 Plaintiffs failed to file a formal motion setting forth either the procedural justification for or the specific relief requested by their motion *in limine*. For the Court's convenience, Defendants have prepared a [Proposed] Order specifying the precise relief to which they have no objection and to whose entry they consent. The [Proposed] Order is attached hereto as Appendix A.

Although Plaintiffs bear the burden of establishing that they are entitled to the remaining forms of relief they seek, they have failed to provide adequate notice of the basis for their demands. (*See* Parts B and C, *infra*.) Plaintiffs compounded the problem by failing to file a formal motion or proposed order specifying the precise relief they seek. Because many of these "motions" provide no adequate explanation of the requested relief and relevant facts and in effect ask the Court to rule in a vacuum, they should be denied. *See Wells* v. *Berger, Newmark & Fenchel P.C.*, No. 07 C 3061, 2008 WL 4365972, at *6 (N.D. Ill. Mar. 18, 2008) (Conlon, J.) (denying motion *in limine* where argument was deficient and request for relief was overly broad and vague); *Alexander* v. *Mount Sinai Hospital Medical Center of Chicago*, No. 00 C 2907, 2005 WL 3710369, at *6-7 (N.D. Ill. Jan. 14, 2005) (Kocoras, J.) (denying motions *in limine* asking for "precautionary rulings" on vague issues and fundamental evidentiary principles); *Tomao* v. *Abbott Laboratories, Inc.*, No. 04 C 3470, 2007 WL 141909, at *1 (N.D. Ill. Jan. 16, 2007) (Nolan, M.J.) (denying motion *in limine* "based on unsupported representations").

Plaintiffs generally seek premature, overly broad rulings as to, for example, *all* witnesses or *all* communications, without specifying the specific evidence in question or the manner in which the rulings would apply. (*See* Parts B, C, D and E, *infra*.) Such requests cannot be granted in the manner Plaintiffs have proposed. *See Shuff* v. *Consolidated Rail Corp.*, No. 91 C 5326, 1994 WL 548232, at *1 (N.D. Ill. Oct. 5, 1994) (Guzman, M.J.) (denying motion *in limine* as "too broad in the relief it requests"); *Native American Arts* v. *Earthdweller Ltd.*, No. 01 C 2370, 2002 WL 1173513, at *2 (N.D. Ill. May, 31, 2002) (Conlon, J.) (denying "vague, conclusory, and overbroad" motions *in limine* that failed "to sufficiently explain the evidence" they seek to exclude); *Figueroa* v. *City of Chicago*, No. 97 C 8861, 2000 WL 520926, at *3-4 (N.D. Ill. Apr. 24, 2000) (Conlon, J.) (denying motions *in limine* as conclusory and overbroad).

As indicated by the attached [Proposed] Order, and as discussed in more detail below, Plaintiffs' motions should be granted in part and denied in part, as follows:

A. Defendants do not oppose an equal number of three peremptory challenges per side.

B. Although Defendants agree that current employees are "identified with" the Company, Plaintiffs are not automatically entitled to examine *former* employees using leading questions under Rule 611(c).

C. Plaintiffs' premature demand that Defendants "produce" certain non-party witnesses on Plaintiffs' case in chief -- or not at all -- does not comply with the Federal Rules. Plaintiffs' demand that Defendants be prohibited from offering the testimony of unavailable non-party witness Louis Levy is frivolous at best.

D. Defendants do not oppose a reasonable order for percipient witness sequestration, but Plaintiffs' request to exclude witnesses from closing arguments and prevent them from discussing "the trial" with other witnesses or attorneys is overly broad.

E. A preliminary, across-the-board ban on all conversations between a witness and counsel regarding testimony after the witness is sworn is overly broad and should instead be left to the Court's discretion during trial.

F. Defendants agree that evidence of the Lexecon/Milberg Weiss settlement should be excluded for the same reason that the many settlements on which Plaintiffs rely to impute wrongdoing to Defendants should be excluded. (*See generally* Defendants' Memorandum of Law in Support of Defendants' Omnibus Motion *In Limine* To Exclude or Limit 14 Categories of Evidence ("Omnibus Motion *In Limine*").) However, if and to the extent that Plaintiffs seek to prejudice the jury in Plaintiffs' favor by implying that the genesis of this lawsuit was anything other than a lawyer-driven (in particular, a William Lerach-driven) initiative or that the "purpose" of this private civil action is some altruistic enforcement of the federal securities laws, Defendants should be able to introduce contradictory evidence of the conduct that led to Mr. Lerach's criminal conviction for conspiracy to obstruct justice in connection with federal securities class actions such as this one. Absent such tactics, the jury has no need to hear that this suit was initiated during the time period of Mr. Lerach's admitted securities class action kick-back scheme. But if Plaintiffs attempt to mislead the jury to believe that a small group of relatively miniscule shareholders sought out counsel to redress a perceived grievance, or otherwise put the veracity of Mr. Lerach and his then colleagues or clients at issue, Defendants must be permitted to take appropriate countermeasures.

ARGUMENT

A. Defendants Do Not Oppose an Equal Number of Peremptory Challenges for Each Side

Plaintiffs could have resolved this issue without burdening the Court with this motion *in limine*. In civil cases, each party is entitled to exercise three peremptory challenges, and in multi-party cases "[s]everal defendants or several plaintiffs may be considered as a single

party for the purpose 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. Plaintiffs have not stated what specific number of peremptory challenges they believe is appropriate. Instead, they served a vague, boilerplate motion requesting only that the allocation should be identical between Plaintiffs and all Defendants. (*See* Plaintiffs' Memorandum of Law in Support of Plaintiffs' Miscellaneous Motions *in Limine* ("Pls. Mem.") at 1-3.) Defendants do not object to an equal allotment and propose that each side be allowed to exercise three peremptory challenges, to be exercised jointly among the parties on each side of the case. Defendants have submitted a [Proposed] Order to that effect. (*See* App'x. A)

B. Plaintiffs Are Not Entitled to Examine All Former Employees with Leading Questions

Plaintiffs seek a premature ruling that all current or former officers or employees of Household should automatically be deemed "identified with" Defendants, and thus subject to examination by leading questions under Fed. R. Evid. 611(c). Defendants agree that Plaintiffs may examine the Individual Defendants as adverse parties by leading questions under Fed. R. Evid. 611(c). Defendants agree that all current Company employees[3] are "identified with" Household pursuant to Fed. R. Evid. 611(c). Defendants also agree that Non-Class Defendant Vozar[4] and former General Counsel Kenneth Robin, Esq. may be deemed "identified with" Household pursuant to Fed. R. Evid. 611(c). Thus, there is no need for an *in limine* ruling as to those individuals.

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[3] Plaintiffs identify the following current employees listed on Plaintiffs' Witness List: Thomas Detelich, Clifford Mizialko, Carin Rodemoyer, Dan Anderson, James Connaughton, Curt Cunningham, Stephen Hicks, Peter Alan Sesterhenn and Lisa Sodeika. (Pls. Mem. at 3 n.1)

[4] Vozar is not a defendant as to the class-wide Section 10(b) and Section 20(a) claims at issue in this trial.

Plaintiffs are not correct, however, that all former employees of Household should automatically be considered "identified with" Defendants.[5] This overbroad request for relief, without any witness-specific explanation, should be denied. Although Plaintiffs bear the burden of demonstrating that a particular witness is "identified with" an adverse party, *see Washington* v. *Illinois Dep't of Revenue*, 01 C 3300, 2006 WL 2873437, at *1 (C.D. Ill. Oct. 5, 2006) (Cudmore, M.J.), they have not made any showing as to any former employee on Plaintiffs' witness list.[6] Because Plaintiffs have not provided such information to Defendants or the Court, a blanket *in limine* ruling would be inappropriate and prejudicial to Defendants.[7]

Former employees are not automatically "identified" with their former employer under Rule 611(c), as demonstrated by the opinion in *Washington* v. *Illinois Dep't of Revenue*, 2006 WL 2873437, at *1 (C.D. Ill. Oct. 5, 2006), which Plaintiffs prominently cite in their moving brief (at 4). *Washington* defined a witness "identified with" a party as "an employee, agent, friend or relative of an adverse party," and held that a *former* employee called as a witness was not "identified with" an adverse party. *Id.* at *1. The witness at issue had served for fourteen years as the defendant's "Program Administrator," but had retired approximately four

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5 Plaintiffs identify the following former employees listed on Plaintiffs' Witness List: Megan E. Hayden-Hakes, Celeste Murphy, Daniel Pantelis, Richard J. Peters, Walter Rybak, Thomas Schneider, Kathleen Kelly A. Curtin, Kay Nelson and Craig A. Streem. (Pls. Mem. at 3 n.1)

6 Plaintiffs' statement that "[m]any of the witnesses . . . served in a variety of positions at Household, reported directly to the individual defendants and participated in events that led to this action" does not suffice. Which witnesses? Who reported? What positions? Which events? This vague, blanket statement, completely lacking in specificity, cannot serve to meet Plaintiffs' burden on this argument.

7 Because Plaintiffs merely seek a blanket ruling and have not attempted to make any such showing in their opening brief, any arguments based on the individual employees' status are waived and may not be raised in a reply brief. *See Holmes v. Pierce*, No. 04 C 8311, 2009 WL 57460, at *5 (N.D. Ill. Jan. 7, 2009) (Guzman, J.) ("It is well settled that issues raised for the first time in a reply brief are deemed waived.") (citing *Nelson v. La Crosse County Dist. Atty.*, 301 F.3d 820, 836 (7th Cir. 2002)).

years before he was called by the plaintiff. Because the plaintiff had not met the burden of demonstrating a "current alliance" between the witness and the defendant under Rule 611(c), the court held that leading questions were not appropriate on direct examination.

The fallacy of Plaintiffs' request for an across-the-board ruling as to *all* former employees is irrefutably demonstrated by Plaintiffs' stated intent to call nine former branch-level employees of Household who were never disclosed to Defendants during discovery. These former employees, all of whom have apparently agreed to testify on behalf of Plaintiffs (and seven of whom provided declarations in support of Plaintiffs' "spoliation" motion), cannot be considered "identified with" Defendants. If Plaintiffs' logic were to be accepted, then Plaintiffs would be entitled to examine their own cooperating witnesses on direct with leading questions, but Defendants would not. Although the mandatory exclusion of these heretofore undisclosed witnesses pursuant to Rule 37(c) will obviate this concern as to these particular witnesses (*see* Defendants' Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Testimony of Plaintiffs' Previously Concealed Trial Witnesses), this example aptly illustrates the overbreadth of Plaintiffs' blanket demand.

Plaintiffs cite only two cases, neither from within this Circuit, in support of their assertion that former employees are "identified with" a company for purposes of Rule 611(c). The courts in both cases (unlike Plaintiffs) analyzed the issue on a witness-specific basis and both are inapposite. *Haney* v. *Mizell Memorial Hospital*, 744 F.2d 1467, 1478 (11th Cir. 1984), stated that the witness at issue was "an employee of one of the defendants," *i.e.*, a current, as opposed to former, employee. In *Stahl* v. *Sun Microsystems*, 775 F. Supp. 1397, 1398 (D. Colo. 1991), the plaintiff was allowed to examine a former employee of the company using leading

questions based on "her ongoing relationship" with a key representative of the company, not merely her status as a former employee.[8]

Plaintiffs cite no authority for their position that any witness who is or was represented by Defendants' counsel is necessarily "identified" with Defendants for purposes of Rule 611(c). It is a common practice (and sometimes required) for companies to provide representation for former employees who are called as witnesses concerning events within their past employment, and this fact should not be granted any special weight in this case. The only case Plaintiffs cite in this context is *U.S.* v. *McLaughlin*, 1998 U.S. Dist. LEXIS 18588, at *1 (E.D. Pa. Nov. 19, 1998), which makes no mention of the witness's representation by any party's counsel. In that case, the court concluded that the witness was identified with the defendant because of a continuous (*i.e.*, on-going), decade-long business relationship. *Id.* at *4.

Plaintiffs should not be permitted to use leading questions on the direct examination of any former Household employee under Rule 611(c), absent a showing that a particular witness is evasive or hostile.[9] To the extent the Court makes any *in limine* ruling on

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8 The court in *Stahl* also allowed the defendant company to examine the former employee using leading questions because she had been called as a witness by the plaintiff. *Stahl*, 775 F.Supp. at 1398-99 ("It is well recognized that the Court may allow counsel to propound leading questions to his or her own witness when such witness has been called as an adverse witness by opposing counsel.") (citing cases) To the extent the Court believes that blanket rulings on this subject are appropriate, Defendants should be allowed to use leading questions on cross examination of any witness called by Plaintiffs in their case in chief, including current and former employees of Household.

9 Former Household employees can only be "hostile" to Plaintiffs if their testimony is shown to be actually evasive or hostile. A witness is not rendered "hostile" simply because that witness's testimony is inconsistent with Plaintiffs' case. *See LaSalle National Bank* v. *Massachusetts Bay Insurance Company*, No. 90 C 2005, 1997 WL 24677, at* 3 (N.D. Ill. Jan. 17, 1997) (Williams, J.) ("The only indication that the [witnesses] are 'hostile witnesses' is that they have stated opinions on an important issue that contradict the opinions of plaintiffs. However, expressing a contrary view does not in an[d] of itself make a witness hostile under Rule 611(c). If it did, nearly every witness in every lawsuit could be treated as 'hostile.'").

this issue, Defendants urge the Court to order that Defendants can use leading questions to cross examine any witness called by Plaintiffs in their case in chief, regardless of whether such witness is a current or former employee of the Company. Defendants have submitted a [Proposed] Order to that effect. (*See* App'x. A)

C. Plaintiffs Are Not Entitled to Bar Testimony from Non-Party Witnesses

Section C of Plaintiffs' brief prematurely seeks an *in limine* ruling on two issues: (1) barring Defendants on a blanket basis from calling "any witness[]" on Defendants' will call or may call lists if Defendants do not "make [the witness] available" for Plaintiffs' case in chief; and (2) barring Defendants' use of deposition testimony of unspecified witnesses "under defendants' control." (Pls. Mem. at 5-7) Plaintiffs bear the burden of proof when seeking an *in limine* ruling. *See, e.g., Noble* v. *Sheahan* 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000) (Castillo, J.); *Hawthorne Partners* v. *AT&T Techs.*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993) (Conlon, J.). Plaintiffs' motion should be denied for failure to meet this burden because Plaintiffs do not provide any analysis regarding individual witnesses and fail even to identify any witness at issue. Furthermore, these requests are too vague and overbroad to be considered by the Court and must be denied.

1. The Federal Rules Do Not Require Defendants to Produce Their "May-Call" Witnesses for Plaintiffs' Case in Chief

Plaintiffs' motion seeks a blanket ruling under Fed. R. Evid. 611(a) that all witnesses should be barred from testifying live on Defendants' case unless Defendants produce them to testify live on Plaintiffs' case in chief. (Pls. Mem. at 5-6). During a meet and confer on February 5, 2009, after this motion was filed, Defendants requested clarification of Plaintiffs' position, and (although the motion is open-ended and has not been reformed) Plaintiffs specified that this request applied only to Ned Hennigan, Robert O'Han and Kenneth Walker. (*See* Declaration of Joshua Newville in Opp. to Pls' Mot. *In Limine* No. 2, dated February 10, 2009 ("Newville Decl."), ¶ 4.) These three witnesses reside outside of the Court's jurisdiction, are

listed on Plaintiffs' deposition designation list, and are also listed on Defendants' "may-call" witness list. Contrary to Plaintiffs' arguments, Messrs. Hennigan and Walker are not current employees of the Company. Plaintiffs are not entitled preemptively to bar them from appearing live on Defendants' case for four reasons.

First, Plaintiffs' gambit is an improper attempt to force Defendants to shuffle the sequence of this trial in the order that Plaintiffs decree -- or force Defendants to move these witnesses *now* either to Defendants' will-call list or to their deposition list. Yet Defendants are allowed during the pre-trial process to list witnesses who "*may* be called as a possibility only." *See* N.D. Ill. Final Pretrial Order Form (LR16.1.1). (Plaintiffs themselves have listed nine may-call witnesses.) Defendants' case is necessarily responsive to Plaintiffs' case, and Defendants may not know whether these witnesses will be called (or whether they will be able to appear) until after Plaintiffs have presented their case in chief.[10] *See, e.g.*, *Matthews* v. *Commonwealth Edison Co.*, No. 93 C 4140, 1995 WL 478820, at *2 (N.D. Ill. Mar. 24, 1995) (Guzman, M.J.) (noting that "[r]ebuttal witnesses are oftentimes not known until after the trial is commenced because the need to call such a witness may not arise until the opposing party introduces an argument in issue or a fact during the course of the trial which must now, unexpectedly, be rebutted"). If these witnesses do appear, Plaintiffs will be free to cross examine them.

Second, the witnesses are outside of the Court's jurisdiction, and Plaintiffs' attempt to force Defendants to "produce" them does not comply with the Federal Rules. Fed. R. Civ. P. 45(c) provides that on timely motion, the court "must quash or modify a subpoena that . . . requires a person who is neither a party nor a party's officer to travel more than 100

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10 On October 8, 2008, Defendants informed Plaintiffs that they had no present intention to ask these three individuals (and ten other deposed witnesses identified by Plaintiffs) to travel to Chicago for the trial. That statement is still accurate, and is consistent with Defendants' listing these individuals as "may-call" witnesses.

miles from where that person resides, is employed, or regularly transacts business in person . . . ." Fed. R. Civ. P. 45(c)(3)(A)(ii). None of these three may-call witnesses is a party or an officer of a party.[11] None of them has represented that he would appear at trial. In each case any appearance would be voluntary, as these witnesses are not subject to the Court's jurisdiction. *See In re Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 647, 648 (E.D. Mich. 1989) (Rule 45 "explicitly lists the geographic limitations on the authority of federal district courts to compel the attendance of nonparty witnesses at trial"); *Martinkovic* v. *Bangash*, No. 84 C 9568, 1987 WL 28400, at *3 (N.D. Ill. Dec. 18, 1987) (Marshall, J.) ("[T]o the extent that plaintiffs seek an order directing defendant to produce employees who do not reside within the subpoena power of the court, the motion is denied"). If Plaintiffs want these witnesses to appear live on Plaintiffs' case in chief, they can request their appearance, just as Defendants would have to do. In the alternative, all three witnesses were deposed in this case. The Federal Rules provide that if a witness is "unavailable," then Plaintiffs are free to introduce his or her deposition testimony. Fed. R. Civ. P. 32(a)(4).

Third, Plaintiffs' contention that former employees such as Hennigan and Walker are somehow under the "control" of Defendants is incorrect and unsupportable. *See H.B. Sherman Manufacturing Co.* v. *Rain Bird National Sales Corp.*, 979 F. Supp. 627, 630-631 (N.D. Ill. 1997) (Bucklo, J.) (in analyzing convenience of witnesses on motion for transfer, stating that former employees would not be subject to the subpoena power of the court); *Somers* v. *Flash Technology Corp. of America*, No. IP00-455-C-B/S, 2000 WL 1280314, at *3 (S.D. Ind. Aug. 25, 2000) (former employees not subject to former employer's control and beyond the subpoena power of the court).

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[11] Mr. O'Han, who is the only current employee of the three, is not an officer of the Company. In the corporate context, the term officer "refers especially to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary, or treasurer." Black's Law Dictionary (8th Ed. 2004).

Finally, each of the cases Plaintiffs cite in support of their motion involved bad faith or gamesmanship, such as withdrawing a prior commitment to produce a key witness who was under a party's control. Here, Plaintiffs have not demonstrated any lack of good faith in cooperating with scheduling requests, nor could they, and the exclusion of live testimony under Rule 611 is an extraordinary penalty justified only in the event of bad faith or egregious behavior by a party, which has certainly not been shown here. Although Defendants will use their best efforts to cooperate with Plaintiffs on the order of available witnesses, Plaintiffs have not demonstrated that a punitive *in limine* ruling is appropriate.

2. The Federal Rules Permit Defendants to Designate the Deposition Testimony of Unavailable Non-Party Witness Louis Levy

Plaintiffs also ask the Court to preclude Defendants from offering into evidence deposition testimony of witnesses "under defendants' control." (Pls. Mem. at 6-7). Plaintiffs' motion fails to specify any particular witnesses, or whether Plaintiffs seek to prohibit not only affirmative designations but also counter-designations. Although Plaintiffs have not reformed their motion to reflect any limitation, during the February 5, 2009 meet and confer, Plaintiffs specified that this request applied only to Louis Levy, a former member of the Household Board of Directors who is on ***both*** parties' deposition designation lists. (Newville Decl. ¶ 5)

Mr. Levy was deposed by Plaintiffs in this case on August 25, 2006. Mr. Levy was not a director at the time he was deposed (Newville Decl. Ex. 2 at 8:1-8); he was deposed outside of this jurisdiction (*id*. at 1, 3:17-20); he is not currently a director, officer or employee of the Company; and he does not regularly conduct business or reside within 100 miles of the Court. (He resides in New Jersey and Florida.) Mr. Levy has not committed to appear at trial. Mr. Levy is, in short, an unavailable witness. Defendants are therefore entitled to present his testimony under Rule 32(a)(4) ("A party may use for any purpose the deposition of a witness,

whether or not a party, if the court finds: . . . that the witness is more than 100 miles from the place of hearing or trial).[12] Furthermore, because Plaintiffs have also designated portions of Mr. Levy's deposition, Defendants are entitled to present his testimony under Fed. R. Civ. P. 32(a)(6) ("If a party offers in evidence only part of a deposition . . . any party may itself introduce any other parts.").

Plaintiffs' argument is frivolous at best. The notion that Defendants should not be permitted to rely on the Fed. R. Evid. 804(b)(1) hearsay exception is not only incorrect (forcing a non-party to fly to Chicago is not "reasonable means") but beside the point. Rule 32 provides a "freestanding exception to the hearsay rule." *See PRG-Schultz Int'l., Inc.*, v. *Kirix Corp.*, No. 03 C 1867, 2003 U.S. Dist. LEXIS 18786, at *4 (N.D. Ill. Oct. 21, 2003) (Conlon, J.). Plaintiffs request to bar Mr. Levy's testimony should be denied.

D. Plaintiffs' Demand for Witness Sequestration Is Overbroad and Will Hinder Defendants' Trial Preparation

Pursuant to Fed. R. Evid. 615, Plaintiffs request that the Court exclude percipient witnesses from the courtroom, except for Defendants, one Company representative and Defendants' retained expert witnesses. (Pls. Mem. at 7-9)[13] Defendants do not contest the sequestration of percipient trial witnesses as a general matter, and Household intends to

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12 Plaintiffs did not argue in their opening brief that Defendants "procured" the absence of Mr. Levy. *See* Rule 32(a)(6). Plaintiffs have no basis to make such an argument, but even if they had, it is now waived.

13 Fed. R. Evid. 615 provides that "at the request of a party the Court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." This 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, or (4) a person authorized by statute to be present."

designate one Company representative. However, the requested "relief" set out in Plaintiffs' Memorandum is both far too broad and insufficiently specific.[14]

Plaintiffs request that percipient witnesses be excluded from the courtroom during opening *and* closing statements, but Plaintiffs have failed to submit sufficient justification for this overbroad rule, or any explanation for excluding a witness after both sides have rested. Furthermore, without supporting authority, Plaintiffs broadly request "that the Court enter an order preventing percipient witnesses from discussing *the trial* with other witnesses *or attorneys* involved with the case" (Pls. Mem. at 9) (emphasis added) The request is entirely too broad, unworkable and unjustified. "Although Rule 615 provides that a court shall exclude witnesses upon request by a party, it does not completely limit the court's discretion." *In re Scarlata*, 127 B.R. 1004, 1012 (N.D. Ill. 1991) (Schmetterer, J.). This discretion extends to both the application of the Rule's (often broadly-interpreted) exemptions and the crafting of orders pertaining to out-of-court discussions of testimony between witnesses. A more appropriate order would allow percipient trial witnesses to (a) attend closing arguments, and (b) discuss the trial with attorneys or with the Company representative involved with the case. Defendants have submitted a [Proposed] Order to that effect. (*See* App'x. A)

1. Witnesses Should Not Be Sequestered During Closing Statements

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14 The Court should reject Plaintiffs' hypocritical suggestion that their motion seeks a bilateral order. In making patently overbroad requests such as this, Plaintiffs are not constrained by any notions of reciprocity, just as they have not been constrained throughout the past six years while Defendants produced over 5 million pages of documents to Plaintiffs' roughly 40,000 and gave over 50 depositions of current and former employees to Plaintiffs' one. This case, like many class actions, is a case study in asymmetrical warfare. In a litigation between equals, neither side would waste the other's time by conducting an abusive two-day deposition of its CEO for fear of the boomerang effect. Here, however, Plaintiffs have demonstrated *ab initio* that they recognize no such self restraint. Likewise, the overbroad sequestration order they seek would affect at least 14 witnesses affiliated with Defendants (plus 9 former employees, if Plaintiffs' assertion that they are under the "control" of Defendants were accepted) and none affiliated with Plaintiffs other than Ms. Wieck (*see* pp. 18-19, *infra*) and perhaps the 9 former branch-level employees of Household whom Plaintiffs never disclosed to Defendants during discovery.

Defendants oppose Plaintiffs' request for sequestration during closing arguments. Rule 615 "by its own terms applies only during the testimony of witnesses." 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 615.02[2][a] (9th Ed. 2008). Plaintiffs have offered no compelling reason to expand sequestration to apply to situations other than the presentation of witness testimony. While courts have recognized that exclusion from opening statements may be appropriate because of the possibility that an opening statement will summarize anticipated testimony, *see U.S.* v. *Brown*, 547 F.2d 36, 37 (3d Cir. 1976) (opening statements are not automatically included in Rule 615 but rather are committed to judicial discretion, and require party requesting to present an argument as to reason for sequestration), exclusion of witnesses from closing statements boasts no such rationale. The Court of Appeals for the Eleventh Circuit rejected such a position, finding over the objections of the defendant that the presence of government agents during closing arguments did not violate Rule 615. *See U.S.* v. *Alvarez*, 755 F.2d 830, 861 (11th Cir. 1985) (noting that the purpose behind the rule is to prevent witnesses from hearing the testimony of other witnesses; therefore, "[b]y its own terms, Rule 615 is inapplicable after all witness testimony has been concluded") (citing 6 J. Wigmore, *Evidence* § 1840 (1976) for the proposition that the time for sequestration ends "with the close of testimony"). Defendants ask that the Court in its discretion apply the more rational rule that percipient witnesses be permitted to attend closing statements after all testimony has concluded.

2. Witnesses Should Not Be Prohibited on a Blanket Basis from Discussing the Trial with Counsel

Plaintiffs' request that witnesses be prohibited from discussing *the trial* with other witnesses and counsel, as opposed to being prohibited from discussing prior testimony (Pls. Mem. at 9), is breathtakingly overbroad and well outside the scope of Rule 615 and, as framed, would hinder the normal course of trial preparation. *See, e.g.*, *U.S.* v. *Aguilar*, 948 F.2d 392, 396 n.6 (7th Cir. 1991) (The defendant "also claims that the government violated [Rule 615] by coaching [the witness] before trial. [The defendant] misapprehends the nature of Rule 615. . . .

In this case, [the defendant] does not assert that [the witness] heard other testimony, only that reports were read to him in preparation for trial.").

As to conversations between witnesses and attorneys concerning the trial, Plaintiffs' lack of specificity ties Defendants' hands in responding to their motion. A blanket prohibition on contact between attorneys and percipient witnesses is unwarranted and entirely untenable. The overwhelming weight of authority provides that witnesses are permitted to discuss the trial itself with counsel. *See U.S.* v. *Rhynes*, 218 F.3d 310, 317 (4th Cir. 2000) (en banc) (witnesses generally permitted to discuss case with counsel from either party) (citing cases). This authority comports with common sense:

> [L]awyers are not like witnesses, and there are critical differences between them that are dispositive . . . . Unlike witnesses, lawyers are officers of the court and, as such, they owe the court a duty of candor . . . . Moreover, the purpose and spirit underlying sequestration are not absolute . . . . To all clients, an attorney owes competence. To fulfill this basic duty, the attorney must prepare carefully for the task at hand. . . . Thorough preparation demands that an attorney interview and prepare witnesses before they testify. . . . [W]e must trust and rely on lawyers' abilities to discharge their ethical obligations, including their duty of candor to the court, without being policed by overbroad sequestration orders.

Id. at 317-20; *see also Minebea Co., Ltd.* v. *Papst*, 374 F. Supp. 2d 231 (D.D.C. 2005). As the court in *Rhynes* pointed out, Rule 615 is by its own terms a limitation on witnesses. Other methods already exist to determine whether an attorney has coached a witness impermissibly, specifically, cross-examination. *Id.* at 320. Furthermore, the extensive depositions taken in this case provide ample tools for opposing counsel to use in exploring any substantive discrepancies in testimony that counsel may believe have resulted from mid-trial conversations.

E. Plaintiffs' Request to Prohibit Counsel from Communicating with Witnesses During Trial Is Overly Broad

Plaintiffs seek an absolute bar on any communication between counsel and a witness regarding that witness's testimony until such testimony has concluded. (Pls. Mem. at 9). This request should be denied as overbroad. Defendants agree that counsel should not be permitted to interfere with the fact-finding process by improperly coaching a witness during breaks in testimony. But an absolute bar on communication between counsel and a sworn witness during trial is not necessary. The ruling Plaintiffs seek would prevent counsel from conferring with a Defendant (or any other witness) during an overnight recess, for example, if the witness remained sworn to testify the following day. Contrary to Plaintiffs' contention that "[t]here is absolutely no reason why [witnesses] should be consulting with counsel once they have been sworn" (Pls. Mem. at 9), the Court of Appeals has held that "while a judge may instruct the lawyer not to coach his client, he may not forbid all 'consideration of the defendant's ongoing testimony' during a substantial recess, since that would . . . preclude the assistance of counsel across a range of legitimate legal and tactical questions, such as warning the defendant not to mention excluded evidence." *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000). Moreover, if Plaintiffs call a Defendant (or any other witness) to testify during their case in chief, the ruling Plaintiffs seek would prohibit *any* discussion of the subject matter of that testimony until that witness concluded his or her testimony during the defense's case in chief -- perhaps three weeks later.[15]

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[15] This might not be so were the Court to adopt what appears to be Plaintiffs' view that if they call a witness -- including a Defendant -- on their case, Defendants are required to exhaust their direct examination of that witness then and there on cross and may not further call that same witness again on their own case in chief. (*See* [Proposed] Final PTO, Ex. I-4, at 3, Pls' Objections to Defs' Proposed Instruction 1.02.)

The only case Plaintiffs cite in support of their argument, *Perry v. Leeke*, makes clear that such an absolute bar is unnecessary:

> Our conclusion [that a judge may bar communication with a client during a 15-minute recess] does not mean that trial judges must forbid consultation between a defendant and his counsel during such a brief recess. *As a matter of discretion in individual cases,* or of practice for individual trial judges . . . *it may well be appropriate to permit such consultation.*

488 U.S. 272, 284 (1989) (emphasis added). Any concerns regarding witness coaching are negated by Plaintiffs' ability to cross examine witnesses and explore whether any discussions with counsel affected their testimony, and to do so using transcripts of the more than 60 fact depositions taken in this case. This Court should exercise its discretion during trial to prohibit counsel from communicating with a specific witness about the subject of a witness's testimony only if the Court finds it is necessary to avoid witness coaching. However, Plaintiffs' request for overbroad, *a priori* relief as to all communications with witnesses should be denied.

F. Evidence of Convictions and Settlements Should Be Excluded Unless Plaintiffs Put Relevant Facts at Issue

1. Evidence of William Lerach's Conviction Should Be Permitted if Plaintiffs Seek a Biased Instruction on the Purpose of the Securities Laws or Imply that This Lawsuit Was a Client-Driven Initiative

Plaintiffs seek to exclude at trial any mention of William Lerach's 2007 felony conviction for conspiracy to obstruct justice and make false statements in the course of his role as lead counsel for numerous plaintiffs in numerous federal securities fraud lawsuits during the period of time that includes the filing of this action. As this Court is no doubt aware, Mr. Lerach was the architect of this litigation, founded the law firm that still acts as counsel for Plaintiffs in this matter, and served as lead counsel for Plaintiffs from the inception of this case until his "retirement" in 2007 (he is still listed as a recipient of electronic PACER filings in this case). Plaintiffs' position is that Mr. Lerach's conviction and the underlying acts are irrelevant to the elements of Plaintiffs' securities fraud claim. (Pls. Mem. at 10). Defendants agree in principle

with the implied premise of Plaintiffs' argument: the jury should not hear facts that have no bearing on whether Plaintiffs have met their burden to prove the elements of securities fraud. Defendants could not agree more that a post-Class Period conviction does not cast light upon the elements of Plaintiffs' securities fraud claim – just as Household's post-Class Period settlement with the SEC, which Plaintiffs seek to introduce, is irrelevant. (*See* Defendants' Omnibus Motion *In Limine* at 23-29.)

Unless it is necessary to counter misleading statements introduced by Plaintiffs, Defendants do not seek to distract or inflame the jury by recounting the history of Plaintiffs' counsel's influence on federal securities law (*i.e.*, the abuses that triggered the enactment of the PSLRA, the Milberg Weiss/Lerach admitted defalcations). Defendants assume that, by making this motion, Plaintiffs are conceding that jury instructions calculated to mislead the jury into thinking that Plaintiffs and their counsel are performing an "enforcement device for the public interest" (*see* Plaintiffs' Proposed Instruction No. 5) are likewise of no value to the jury's deliberations. Therefore, unless Plaintiffs attempt to prejudice the jury by casting the genesis and purpose of this lawsuit in a false light, or by suggesting that Plaintiffs or their counsel are engaged in some altruistic mission to protect investors or safeguard the integrity of the securities markets, Defendants see no need to provide the jury with contrary evidence. However, Plaintiffs may raise various matters in this case that would put Mr. Lerach's conviction (and the acts that led to that conviction) at issue, in which case Defendants should be allowed to set the record straight. For example:

First, Defendants should be able to introduce evidence of William Lerach's conviction (and the underlying criminal conduct) if and to the extent that Plaintiffs imply to the jury that the genesis of this lawsuit was anything other than a lawyer-driven (in particular a William Lerach-driven) initiative. The jury has no need to hear that this suit was initiated during the time period of Mr. Lerach's admitted class action kick-back scheme, unless it is necessary to prevent the jury from being misled into believing that this lawsuit came about because a small

group of relatively miniscule shareholders sought out counsel to redress a perceived grievance. If Plaintiffs do try to employ that fictitious account to prejudice the jury in Plaintiffs' favor, or if they in any other way put the veracity of Mr. Lerach and his then colleagues and clients at issue, appropriate countermeasures should be allowed.

Maria Wieck, the representative of Lead Plaintiff PACE who will be called as a witness by Plaintiffs at trial, testified that

(*See* Newville Decl., Ex. 3 at 39:14-41:16, 47:5-48:23) Ms. Wieck also testified that

Lerach's firm. (*Id.* at 229:2-6)

as well. (*Id.* at 26:22-27:22; 229:7-8, 229:17-230:11) Based upon those facts this Court can easily conclude that Defendants have a good-faith basis to ask Lead Plaintiffs about Lerach's contemporaneous pattern of conduct to the extent that Plaintiffs put into issue Ms. Wieck's veracity or that of Plaintiffs' counsel, and/or to the extent that Plaintiffs seek to advance a fictional account of the genesis of this suit.

Second, Plaintiffs ask the Court for a jury instruction extolling the virtues of private civil actions under the federal securities laws and implying that class action plaintiffs play an altruistic role in enforcing those laws for the public benefit. For example, Plaintiffs seek to have the Court instruct the jury that:

> Private lawsuits under the federal securities laws such as this Class Action are an important enforcement mechanism to supplement governmental regulations of the securities market. Public policy encourages private actions as enforcement devices for the public interest. . . . Thus, the courts recognize that private actions provide an essential tool for the enforcement of the securities laws and are a necessary supplement to SEC action." ([Proposed] Final PTO, Ex. I-1, Plaintiffs' Proposed Instruction No. 5)

Plaintiffs also seek an instruction stating that "[a]mong the primary objectives of the Exchange Act and Rule 10b-5 are the maintenance of fair and honest securities markets and the elimination of manipulative practices that tend to distort the fair and just price of stock." (*Id.*, Plaintiffs' Proposed Instruction No. 6) Defendants have objected to these proposals because they would convey the misleading impression that the Court is vouching for and looks with favor upon these Plaintiffs and their claims. (*See* [Proposed] Final PTO, Ex. I-2, Defs' Objections to Pls' Proposed Instructions, at 11-15.) If these instructions are nevertheless presented to the jury, Defendants should be allowed to present a fair exposition of how Mr. Lerach's sharp practices led to the enactment of the Private Securities Litigation Reform Act ("PSLRA").

Congress enacted the PSLRA's reforms in large part because legislators were convinced that Mr. Lerach and other lawyers with similar practices were undermining the private securities litigation system by habitually filing abusive and meritless lawsuits to "line their own pockets." H.R. Conf. Rep. 104-369, at 31 (Nov. 28, 1995). *See also* 141 Cong. Rec. S 17933, S 17951 (Dec. 5, 1995) (comment by Sen. Bennett noting that "the Bill Lerach's [sic] of this world" have been "conducting the kind of practice that we have seen described here on the floor"); *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (noting that William Lerach, known as the "King of Strike Suits," was a direct target of Congress in enacting the PSLRA). As Lerach infamously stated: "I have the greatest practice of law in the world. I have no clients. . . . I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do." S. Rep. No. 104-98, at 6 (June 19, 1995) (quoting William P. Barrett, "I Have No Clients," *Forbes*, Oct. 11, 1993, at 52); *see also In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (citing facts raised by counsel opposing appointment of Mr. Lerach's former firm as lead counsel).

Congress explicitly criticized the practice it attributed to Mr. Lerach and others of filing suit "whenever there is a significant change in an issuer's stock price, without regard to

any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 104-369, at 31 (Nov. 28, 1995). Congress noted that the discovery process often resembeled a "fishing expedition," in which "the plaintiff's law firm proceeds to search through all of the company's documents and take endless depositions for the slightest positive comment which they can claim induced the plaintiff to invest and any shred of evidence that the company knew a downturn was coming." *Id*. at 37 (internal quotations omitted); *see also Dura Pharmaceuticals* v. *Broudo*, 544 U.S. 336, 347 (2005) (recognizing the harm in allowing a plaintiff "with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an ***in terrorem*** increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'").

In 2007 Mr. Lerach admitted to maintaining a stable of professional plaintiffs who regularly perjured themselves at his direction by declaring under oath that they would not accept payment for serving as lead class members beyond their pro rata share of any class award. (Newville Decl., Ex. 4; Plea Agreement for Defendant William S. Lerach, at Exhibit A, at 22-23 of 31, *United States* v. *William S. Lerach*, 2:07-cr-00964, (C.D. Cal. Sept. 17, 2007)). According to Lerach, "[s]uch payment arrangements generally enabled [his then firm] Milberg Weiss to file more Class Actions and to file them more quickly than would be possible absent such arrangements." (Newville Decl., Ex. 4 at 22-23 of 31) Lerach admitted that the plaintiffs with whom he colluded understood that they would make false declarations under oath. (*Id*. at 23 of 31.) Lerach admitted in his plea agreement that he used such collusive arrangements with various lead plaintiffs for over 20 years and ***at least*** into 2002, when the instant case was filed. (*Id*. at 22 of 31.)

To the extent that Plaintiffs ask the Court to instruct the jury about Plaintiffs' purported role in enforcing concepts of fairness and honesty and stamping out deceit and manipulation in the securities markets, Plaintiffs put the foregoing facts at issue. The jury is

entitled to know the full story behind the architect of this action, who until relatively recently served as lead counsel for Plaintiffs. This Court should not permit Plaintiffs to open the door by hypocritically extolling Plaintiffs' role in an "enforcement mechanism . . . for the public interest," but then slam it shut when Defendants seek to introduce facts that give the jury the complete picture.

Defendants do not seek a ruling by this Court that evidence or mention of Lerach's crimes should generally be permitted at trial. However, to the extent Plaintiffs seek to prejudice the jury by "explaining" the purpose of private actions under the federal securities laws or by portraying Plaintiffs' counsel as performing a public service, put the veracity of their clients or counsel for Plaintiffs at issue, or imply that this lawsuit was anything other than a lawyer-driven initiative, this Court should permit the defense to inquire into the Lerach/Milberg Weiss conspiracy and convictions.

2. Evidence of the Lexecon/Milberg Weiss Settlement Is Inadmissible

Plaintiffs contend that the lawsuit by Milberg Weiss, Plaintiffs' predecessor counsel, against Plaintiffs' retained expert witness Daniel Fischel and subsequent settlement with Lexecon, Mr. Fischel's company, are irrelevant to the elements of Plaintiffs' securities fraud claim. (Pls. Mem at 10) Defendants agree, for the same reasons that civil and regulatory settlements are inadmissible under Fed. R. Evid. 408. (*See* Omnibus Motion *In Limine* at pp. 47-55.) Although Plaintiffs have been unable to discover any evidence of securities fraud, despite years of discovery and millions of documents produced, they seek to use settlements between Household and various civil plaintiffs and government regulators to establish Defendants' liability. Defendants have asserted, and the law is clear, that settlement evidence is not admissible for these purposes. Plaintiffs' motion to exclude evidence of the Lexecon/Milberg Weiss settlement reflects their concession that unsubstantiated allegations contained in lawsuits and settlements have no place in this action. We agree.

CONCLUSION

For the foregoing reasons, the Court should deny (except insofar as set forth herein) Plaintiffs' Miscellaneous Motions *In Limine* and enter the [Proposed] Order attached hereto as Appendix A.

Dated: February 10, 2009
New York, New York

Respectfully submitted,

CAHILL GORDON & REINDEL LLP

By: /s/ Thomas J. Kavaler
Thomas J. Kavaler
Howard G. Sloane
Patricia Farren
Susan Buckley
Landis C. Best
David R. Owen

80 Pine Street
New York, NY 10005
(212) 701-3000

-and-

EIMER STAHL KLEVORN & SOLBERG LLP
Nathan P. Eimer
Adam B. Deutsch
224 South Michigan Avenue
Suite 1100
Chicago, Illinois 60604

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J. A. Vozar

Appendix A

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

[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MISCELLANEOUS MOTIONS *IN LIMINE* (PLAINTIFFS' MOTION *IN LIMINE* NO. 2)

The Court has considered Plaintiffs' Miscellaneous Motions *In Limine* (Plaintiffs' Motion *In Limine* No. 2) and Defendants' partial opposition thereto.

IT IS HEREBY ORDERED that:

1. Plaintiffs (as a group) and Defendants (as a group), shall each be entitled to exercise three peremptory challenges, to be exercised jointly among the respective parties on each side of the case.

2. Plaintiffs are permitted to examine the individual Defendants, Non-Class Defendant Joseph A. Vozar, former Household General Counsel Kenneth Robin, Esq., and all

current employees of Defendant Household by leading questions on direct examination pursuant to Federal Rule of Evidence 611(c).

3. Plaintiffs will not permitted to examine witnesses Hayden-Hakes, Murphy, Pantelis, Peters, Rybak, Schneider, Curtin, Nelson, and Streem with leading questions on direct examination, absent a showing at trial that a particular witness is hostile under Fed. R. Evid. 611(c).

4. Defendants will be permitted to cross-examine using leading questions any witness called by Plaintiffs in their case-in-chief, regardless of whether such witness is a current or former employee of the Company.

5. The parties will use best efforts to cooperate on the order of witnesses, but will not be instructed to produce or make available on Plaintiffs' case-in-chief witnesses outside of this Court's jurisdiction.

6. Defendants may introduce the testimony of Louis Levy as an unavailable witness under Fed. R. Civ. P. 32(a)(4) and pursuant to Fed. R. Civ. P. 32(a)(6).

7. Percipient trial witnesses will be excluded from the courtroom during opening arguments and during trial testimony of other witnesses, and shall refrain from reviewing transcripts of other witnesses' trial testimony. This sequestration shall not apply to the Individual Defendants, one designated corporate representative of Defendant Household, and the parties' retained expert witnesses.

8. Percipient trial witnesses shall be allowed to (a) attend closing arguments, and (b) discuss the trial with attorneys and the Company representative involved with the case.

9. Evidence of William Lerach's conviction and the related Lerach/Milberg Weiss conspiracy shall be excluded at trial, except to to the extent Plaintiffs seek to prejudice the jury by "explaining" the purpose of private actions under the federal securities laws or by portraying Plaintiffs' counsel as performing a public service, put the veracity of their clients or counsel for Plaintiffs at issue, or imply that this lawsuit was anything other than a lawyer-driven initiative.

Entered: _____, 2009

_____
Hon. Ronald A. Guzman

United States District Judge