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

LEAD PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION PURSUANT TO FED. R. CIV. P. TO EXCLUDE TESTIMONY OF BRANCH SALES MANAGERS

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I. INTRODUCTION

Defendants' insistence that plaintiffs have acted in bad faith, concealing the identities of the Branch Sales Managers as part of some scheme to "hide the ball," is flatly contradicted by the facts and the law. Contrary to defendants' arguments, parties are not required in their initial disclosures, before any discovery has been conducted, to identify or list the persons that they intend to call as witnesses. They are only required to identify or list the persons that they believe may have information about their claims or defenses. As discovery and informal investigation is conducted, and as the identity of new witnesses, or the usefulness of existing witnesses, becomes apparent or meaningful to a party, only then is the party required to disclose the identity of the witnesses. That is precisely what plaintiffs have done here.

Plaintiffs have fully complied with their disclosure obligations. Plaintiffs first interviewed seven of the nine Branch Sales Managers in the summer and fall of 2008. Shortly thereafter, plaintiffs obtained witness statements from most of these Branch Sales Mangers. Only then did plaintiffs learn that it would need to use these witnesses in any trial of this case. Within just weeks (or days) of obtaining witness statements from virtually all of these Branch Sales Managers, plaintiffs disclosed the identity of these Branch Sales Managers to defendants.

Defendants complain that they have been prejudiced by the late disclosures, but fail to explain how. All of the witnesses identified by plaintiffs are former employees of Household International, Inc. ("Household") who plaintiffs discovered from documents produced by defendants in this litigation. *See* Declaration of Daniel S. Drosman in Support of Plaintiffs' Opposition to Defendants' Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Testimony of the Branch Sales Managers ("Drosman Decl."), ¶¶2-10. Simply because the period for conducting formal discovery has expired does not mean that all investigation must cease. Defendants are free to interview any of the witnesses who have been identified by plaintiffs. In the event defendants believe they need to

depose any of these witnesses, they are free to file a motion to that effect. Defendants were certainly not prejudiced by a lack of time within which to interview these witnesses because plaintiffs identified ***all*** of these witnesses a full five months before trial is scheduled to commence.

Equally unpersuasive is defendants' claim that that they are surprised by the fact that plaintiffs decided that they will call defendants' former employees as witnesses. With regard to the names of defendants' co-employees, defendants have known the names of these people since early in the case – indeed, earlier, since defendants themselves worked with them. Indeed, plaintiffs expressly alerted defendants to the importance of the Branch Sales Managers in its initial disclosures filed in August 2004, explaining that there were certain Branch Sales Managers "within the Household organization whose identities are not known to plaintiffs at this time, who are likely to have discoverable information relating to one or more of the subjects outlined in the Complaint." Accordingly, defendants cannot claim surprise by the fact that plaintiffs intend to use some of these co-employees at the trial.

Lastly, defendants argue that the Branch Sales Managers should be excluded because plaintiffs are calling some, rather than all, of the Branch Sales Managers during the Class Period and, in defendants' opinion, the testimony will create "minitrials." But the number of percipient witnesses plaintiffs choose to call – whether from Household's branch offices or from other areas of the corporation – would only affect the quantity of the evidence on plaintiffs' side, not the quality. It is black-letter law that whether a party has sustained his burden of proof at trial does not depend on the number of witnesses it calls. Similarly, the testimony of the Branch Sales Managers does not create "minitrials." It creates a trial. These former employees are percipient witnesses – the same as all others – who offer evidence regarding the falsity of defendants' public statements and the scienter with which defendants made those statements.

II. ARGUMENT

A. No Discovery Violation Warranting Exclusion Occurred

Defendants claim that plaintiffs committed egregious discovery violations by failing to disclose the identity of nine Branch Sales Managers in their Rule 26(a) disclosures and interrogatory responses.[1] Defendants are wrong.

As an initial matter, Plaintiffs disclosed the identity of the vast majority of the Branch Sales Managers as soon as they discovered them. Plaintiffs discovered the identity of seven of the Branch Sales Managers in the summer and fall of 2008 and then promptly disclosed them to defendants in October 2008. *See* Drosman Decl., ¶¶2-11. In particular, plaintiffs interviewed and/or obtained witness statements from Seth Callen, Robert Feiffer, Kimberly McNeal, Jessie Valverde and Chantel Dorsey in October 2008 – ***less than one month*** before disclosing their identities to defendants.[2] *Id.*, ¶¶6-11. Indeed, plaintiffs obtained declarations from Robert Feifer and Kimberly McNeal on October 24th and 25th – ***less than one week*** before disclosing their identities to defendants. *Id.*, ¶¶9-11. In light of plaintiffs' prompt disclosure, defendants' claim that "[p]laintiffs unjustifiably failed to disclose the identity of these secret witnesses" is simply puzzling. *See, e.g.*, Defs' Mem. at 1. The court's observation in *Marianjoy Rehabilitation Hospital v. Williams Electronic Games, Inc.*, No. 94-C-4918, 1996 WL 411395 (N.D. Ill. July 19, 1996) applies with equal force here: "Defendant

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[1] The nine Branch Sales Managers that plaintiffs intend to call at trial are Kimberly McNeal, Chantel Dorsey, Seth Callen, Jessie Valverde, John Buwalda, Robert Feiffer, Robert Kuhn, John Timmons and Curtis Howrey.

[2] Plaintiffs obtained declarations from Robert Kuhn in July 2008 and from John Buwalda in September 2008 – and disclosed the identity of these witnesses to defendants in October 2008. *See* Drosman Decl., ¶¶4-5.

thus finds itself in the curious position of requesting the imposition of sanctions for behavior that not only is not prohibited by the Federal Rules of Civil Procedure, but is required by them." *Id.* at *3.[3]

Because plaintiffs did not discover the identities of seven of the nine Branch Sales Managers until the summer and fall of 2008 – and then promptly disclosed their identities to defendants in October 2008 – defendants cannot contend that plaintiffs have failed to disclose anything. The most defendants can claim is that plaintiffs disclosed the identities of these seven witnesses after the close of formal discovery. Without citation to any authority, defendants suggest that plaintiffs are somehow precluded from continuing their investigation after the close of formal fact discovery: "The time for Plaintiffs to locate and identify witnesses was at the time they prepared their Amended Complaint or, at minimum, during fact discovery . . . ." *See* Defs' Mem. at 3. But the law is to contrary: "***We know of no rule that requires a party to cease the investigation of its own case at the close of discovery***." *Marianjoy*, 1996 WL 411395, at *3;[4] *see Charles v. Cotter*, 867 F. Supp. 648, 654 (N.D. Ill. 1994) ("***[I]t does not follow from the fact that the court has set a date for the close of discovery, that all investigation into a party's claims . . . must come to a halt on that date. The parties remain free to track relevant evidence – including, as in the instant case, obtaining information from cooperative third parties***."); *Smith v. Dwire Co.*, No. 04-CV-02182-WYD, 2005 U.S. Dist. LEXIS 38168, at *4-*5 (D. Colo. 2005) ("***Simply because the period for conducting formal discovery has expired does not mean that all investigation must cease***.").[5]

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[3] For this reason, the cases on which defendants rely are completely inapposite. Not surprisingly, defendants do not – and cannot – cite to a single case in which a court excluded the testimony of a witness who was disclosed almost immediately after a party discovered that person's identity.

[4] Here, as elsewhere, emphasis is added and citations omitted unless noted otherwise.

[5] Nor were plaintiffs obligated pursuant to Rule 26(e) to disclose the names of Curtis Howrey and John Timmons any earlier than October 2008. While both witnesses signed declarations in November 2007, the Advisory Committee Notes to Rule 26(a) provide that a party is not obligated to disclose witnesses that it does not intend to use at trial. *See* Adv. Comm. Notes on 2000 Amendments to Fed. R. Civ. P. 26(a) ("A

While defendants now feign surprise by the fact that the Branch Sales Managers would submit declarations refuting their assertions regarding widespread predatory lending practices and branch-wide intentional destruction of evidence, their significance to this litigation has been obvious to everyone, including defendants, since the beginning of this case. Rule 26(e) does not require disclosure of the obvious; formal disclosure is required only "if the additional or corrective information ***has not otherwise been made known to the other parties during the discovery process*** or in writing." Fed. R. Civ. P. 26(e)(1)(A). Simply put, there is no duty under Rule 26(e) to supplement discovery information when the opposing party is already aware of it.

Although defendants now ignore the plain language of Rule 26, they made clear almost three years ago that neither party need disclose the names of witnesses contained in documents produced in the litigation. In response to a letter from plaintiffs' counsel asking defendants to supplement their initial disclosures, defense counsel wrote:

> I refer you to the various individuals who have been identified to date, or who may be identified in the future, in deposition testimony, in responses to Plaintiffs' interrogatories and requests for admission, and in ***documents produced in response to Plaintiffs' and Defendants' document requests***.

Letter of June 8, 2006 from Ira Dembrow, Esq. to Luke Brooks, Esq., Drosman Decl., Ex. 9. Indeed, ***defendants included on their witness list three witnesses – Christine Cunningham, Lawrence Bangs and John Davis – who they never identified in their Rule 26 disclosures***. *Compare* Drosman Decl., Ex. 10 (Defendants' initial disclosures) *with* Drosman Decl., Ex. 11 (Defendants' witness list). Simple fairness requires that the same disclosure rules, derived from the plain language

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party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.); *Robinson v. Moran*, No. 06-CV-3058, 2007 WL 2915620 (C.D. Ill. Oct. 5, 2007) (refusing to impose sanctions for failure to disclose information where there had been no showing that party intended to use information). Here, too, defendants have made no showing that plaintiffs intended to use the testimony of Messrs. Howrey and Timmons earlier than October 2008. That is because the usefulness of these witnesses did not become apparent or meaningful to plaintiffs until the fall of 2008, shortly before plaintiffs disclosed their identities to defendants.

of Rule 26(e), under which defendants operated should also apply to plaintiffs. What is sauce for the goose is sauce for the gander.

Here, the Branch Sales Managers' central role in this case was obvious from the face of plaintiffs' own complaint. *See, e.g.*, [Corrected] Amended Consolidated Class Action Complaint ("Complaint"), ¶59 ("[B]ranch managers were instructed by Household corporate headquarters to tell the customers that, in effect, they were cutting their interest rate to 7% by participating in the EZ Pay Plan when, in reality, the interest rate was substantially higher."); ¶93 ("Household District Managers almost immediately beg[a]n to pressure branch managers to engage in dishonest lending practices."); ¶96 (defendant Gilmer oversaw the dissemination of EZ Pay Plan sales documents to branch managers); ¶251 (quoting analyst report discussing compensation plan for branch managers).

In particular, the identities of the Branch Sales Managers are contained in documents produced by defendants themselves in this litigation. *See* Drosman Decl., ¶¶2-10. In fact, one of the Branch Sales Mangers, Seth Callen, is quoted in a September 2, 2002 *Forbes* magazine article, in which he stated: ***Household "was a 'pressure cooker,' . . . which at times . . . led to deceptive tactics***." *See* Drosman Decl., Ex. 12.[6] Likewise, plaintiffs identified the other eight Branch Sales Managers from documents that defendants produced in the litigation. Given that the Branch Sales Mangers were identified in defendants' own documents, plaintiffs were under no duty to make separate disclosure of the existence of these witnesses, and defendants cannot possibly show that any non-disclosure prejudiced them in the least.

Nor can defendants credibly claim that they failed to understand the import of Household's Branch Sales Managers when they were discussed at length in 15 separate depositions, including

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[6] In fact, plaintiffs quoted the *Forbes* article in their amended complaint (Complaint, ¶56) and defendants produced the article in discovery. *See* Drosman Decl., Ex. 12.

depositions that took place more than six months before the fact discovery period expired.[7] Under these circumstances, defendants' suggestion that they were somehow prejudiced by plaintiffs' failure to identify Household's Branch Sales Managers in an amendment to initial disclosures is simply specious.

Further, although plaintiffs had not yet identified specific individuals, plaintiffs advised defendants of the relevance of the Branch Sales Managers in their initial disclosures served on August 20, 2004:

> [P]laintiffs believe that there are Regional Sales Managers (RSM), District Sales Managers (DSM), Branch Sales Managers (BSM), Senior Account Executives, Account Executives (AE), Sales Assistants, as well as trainers, collections people, underwriters, and other individuals within the Household organization whose identities are not known to plaintiffs at this time, who are likely to have discoverable information relating to one or more of the subjects outlined in the Complaint.

See Declaration of Landis C. Best in Support of Defendants' Cross-Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Declaration of Plaintiffs' Previously Concealed Witnesses ("Best Decl."), Ex. 2 at 67 (Docket No. 1286).

The recent holding in *Wells v. Berger, Newmark & Fenchel, P.C.*, No. 07 C 3061, 2008 WL 4365972, at *3 (N.D. Ill. Mar. 18, 2008) is instructive. In *Wells*, the defendants moved to exclude certain witnesses who defendants claimed had not been timely identified in the plaintiff's initial disclosures and interrogatory responses. *Id.* The *Wells* court observed that the witnesses were the defendants' former employees and "their names and addresses were initially provided by" the defendant to the plaintiff. *Id.* Accordingly, the court concluded that the defendant "cannot claim

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[7] *See* Allcock Tr. at 337:19-21, 233:10-24; Bangs Tr. at 123:19; Bley Tr. at 252:14, 254:2-13, 261:24-263:13, Creatura Tr. at 112:2-113:4; Cross Tr. at 58:5-19; Davis Tr. 62:10; Detelich Tr. at 158:9-159:2; Hennigan Tr. at 4:13, 5:7-16; 47:23-24, 68:20-21, 182:1-6; Hueman Tr. at 25:2-5, 40:5-7; Kauffman Tr. at 131:24-132:3; O'Han Tr. at 19:22-20:7; 42:15-19, 61:7, 66:16-20; 175:20-21, 253:6; Robin Tr. at 126:18-22; Sodeika Tr. at 17:13-18, 104:23-24; Walker Tr. at 68:5-13, 93:5, 128:20-24. Drosman Decl., Ex. 13.

prejudicial surprise because it was aware of their identities before the litigation began." *Id.*; s*ee also El Ranchito, Inc. v. City of Harvey*, 207 F. Supp. 2d 814, 818 (N.D. Ill 2002) (holding that the failure to disclose key witnesses did not require exclusion under Rule 37 where the witnesses were known to the defendants and were "obvious subjects for deposition through the close of discovery"); *Stolarczy v. Senator Int'l Freight Forwarding, LLC*, 376 F. Supp. 2d 834, 843 (N.D. Ill. 2005 (holding that it was harmless to allow nondisclosed witness to testify where the witness was disclosed during discovery). For defendants to argue now that they were unaware of these witnesses – defendants' former employees who were identified in documents produced by defendants in this action – is unreasonable and invalid.

Defendants chose not to inquire of these witnesses, either through deposition or interview. Defendants were perfectly capable of seeking out these witnesses and exploring their potential testimony. *See, e.g.*, *Wells*, 2008 WL 4365972, at *3 (parties should make own judgments of significance of information already in their possession). Indeed, even after receiving plaintiffs witness list (in which the nine Branch Sales Managers were identified), defendants did nothing and have now admitted they made absolutely no effort to depose the Branch Sales Managers. Defendants knew of the Branch Sales Managers, were ware of their involvement in the fraud and made the conscious decision not to depose them. This Court should not rescue defendants from a strategy decision they knowingly made simply because, with the benefit of hindsight, they now regret that decision. Where a party is aware of a witness months before trial, it is improper to exclude his testimony even if disclosure occurs after the close of discovery. *David v. Caterpillar, Inc.*, 324 F.3d 851, 857-58 (7th Cir. 2003).

Defendants' half-hearted argument that they sought the identities of the Branch Sales Managers in Interrogatory No. 46 issued on December 22, 2006 deserves short shrift. First, defendants' Interrogatory No. 46 did ***not*** ask plaintiffs to identify former Household employees, such

as the Branch Sales Managers. Rather, defendants' convoluted interrogatory asked for the identities of "any person ***not affiliated with Household*** believed by Plaintiffs to have knowledge of alleged 'predatory lending practices.'" *See* Best Decl., Ex. 3, at 2. Plaintiffs specifically objected to this interrogatory as "vague and ambiguous with respect to the terms 'any person not affiliated with Household'" and did not include former employees in their response because such people are clearly affiliated with Household. *See* Best Decl., Ex. 4, at 13. At no time did defendants move to compel a different response. Second, even if defendants' interrogatory had asked for the names of former Household employees (instead of an opaque reference to a "person not affiliated with Household," whatever that means), plaintiffs had not yet identified any of the witnesses in late-2006 and thus could not have provided the names to defendants in response to an interrogatory.

Given the nature of plaintiffs' allegations, it is absurd for defendants to suggest that they did not know that the Branch Sales Managers held relevant information or that these Branch Sales Managers might agree to submit declarations to the Court. Yet, defendants never sought to discover which former Branch Sales Managers had personal knowledge concerning plaintiffs' claims. Defendants ignored this issue entirely. The plain language of Rule 26 imposed no requirement on plaintiffs to formally supplement their disclosures with information that defendants knew or had been made known to them during the discovery process.

B. Defendants Have Suffered No Harm

As described above, defendants' motion to exclude all the Branch Sales Managers is not based on a lack of information about these witnesses. And it is precisely for this reason that defendants cannot legitimately claim that they were harmed in any way. Defendants request sanctions because plaintiffs did not supplement their Rule 26 disclosures before disclosing these witnesses on their witness list five months before trial. This is exactly the type of form-over-substance motion rejected by the Seventh Circuit in *Caterpillar*, 324 F.3d at 857-58. In *Caterpillar*,

the defendant sought to bar a witness from testifying because the plaintiff had not updated her Rule 26(a) disclosures to list her trial witnesses and the subject matter of their testimony. *Id.* at 856. The district court refused to the bar the witness from testifying and the Seventh Circuit affirmed, noting that the defendant had known about this witness long before trial because she was disclosed as a trial witness. *Id.* at 857-58. The Seventh Circuit also noted that the defendant did not take any steps to mitigate any claimed prejudice. *Id.*

In this case, the defendants have known since at least last October that defendants intended to call certain Branch Sales Managers at trial. They have long had the declarations of many of these witnesses. Yet, defendants ask this Court to exclude all these witnesses because plaintiffs did not disclose these witnesses earlier. Defendants' position runs contrary to the federal rules and the case law of this Circuit, which favors disclosure in substance and a trial on the merits, not the rigid adherence to procedural rules on pain of draconian sanctions. Plaintiffs' disclosure was too early to be unduly prejudicial. *See, e.g.*, *Israel Travel Advisory Service, Inc. v. Israel Identity Tours*, No. 92-C-2379, 1993 U.S. Dist. LEXIS 15373 (N.D. Ill. Nov. 2, 1993) (refusing to exclude witnesses not disclosed in discovery, but disclosed for the first time one month before trial in the final pre-trial order, because of lack of prejudice); *Woolsey v. Luberda*, No. 91-C-4490, 1992 U.S. Dist. LEXIS 3147 (N.D. Ill. Mar. 17, 1992) (no unfair prejudice when witness disclosed after the close of discovery but in the pre-trial order); *Orgler Homes, Inc. v. Chicago Regional Council of Carpenters*, No. 06 C 50097, 2008 WL 2271571, at *2 (N.D. Ill. May 30, 2008) (where party disclosed evidence "well after fact discovery had closed," the Court held "that the prejudice allegedly inflicted upon [the party] has been greatly exaggerated and was capable of being cured").[8] Given that the majority of

[8] *See also Guitierrez v. AT&T Broadband, LLC*, 382 F.3d 725, 733 (7th Cir. 2004) (upholding refusal to exclude evidence not disclosed in discovery because defendants had knowledge that this was potentially relevant information through deposition testimony); *Se-Kure Controls, Inc. v. Vanguard Prods Group, Inc.*,

Branch Sales Managers were disclosed to defendants just weeks after plaintiffs obtained their witness statements – and five full months before trial – any violation of Rule 26 is at most harmless. *See Sherod v. Lingle*, 223 F.3d 605, 612 (7th Cir. 2000) (district court abused its discretion by excluding testimony when the disclosure violation was harmless).

Nor have defendants taken any steps at all to mitigate the claimed prejudice stemming from the disclosure of the Branch Sales Managers. In deciding motions to exclude witnesses, courts consider whether the party allegedly prejudiced has taken steps to mitigate any alleged injury, such as, for example, seeking leave of court to reopen depositions. *Mathers v. NorthShore Mining Co.*, 217 F.R.D. 474 (D. Minn. 2003) (holding that party did not mitigate claimed prejudice by seeking court order requesting a second deposition); *GAVCO, Inc. v. Chem-Trend Inc.*, 81 F. Supp. 2d 633 (W.D.N.C. 1999) (party's failure to mitigate new disclosures regarding expert witness by, for example, attempting to depose expert warranted permitting use of expert's affidavit in support of summary judgment); *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, 02 Civ. 9144(PAC), 2006 WL 988143, at *4-*5 (S.D.N.Y. Apr. 13, 2006) (concluding that failure to disclose witnesses was harmless so long as defendants were provided with an opportunity to depose the witnesses); *Lobato v. Ford*, No. 05-cv-01437-LTB-CBS, 2007 WL 2593485, at *9 (D. Colo. Sept. 5, 2007) (same).

No. 02-C-3767, 2007 U.S. Dist. LEXIS 17228, at *20-*21 (N.D. Ill. Mar. 7, 2007) (refusing to exclude evidence where the information "was made known to the side in the context of the case"); *Fidelity Nat'l Title Ins. Co of New York v. Intercounty Nat'l Title Ins.*, No. 00 C 5658, 2003 WL 2005233, at *7 (N.D. Ill. Apr. 30, 2003) (holding on a motion to strike an allegedly late identification of a witness was without merit when movant already knew of witness via other discovery and no resulting prejudice had been shown); *Parks v. Mississippi Dep't of Trans.*, No. 1:04CV240, 2006 WL 2973232, at *3 (N.D. Miss. Oct. 16, 2006) (refusing to exclude witnesses who were disclosed for the first time in pretrial order filed after the close of fact discovery).

Here, defendants admit they affirmatively chose not to depose the Branch Sales Managers. *See* Best Decl., ¶15 ("***Defendants never asked for depositions of these witnesses***."). [9] Remarkably, defendants have made no showing that they have even attempted to contact or interview these nine Branch Sales Managers, despite the fact that plaintiffs disclosed their identities in October 2008. Defendants' failure to seek to depose – or even interview – these witnesses establishes their motion for what it is: an opportunistic ploy to exclude witnesses who seriously undermine their defenses. Because defendants have made no effort to mitigate any claimed prejudice, this Court should deny their motion to exclude the testimony of the Branch Sales Managers.

Furthermore, plaintiffs disclosure of the Branch Sales Manager was not in bad faith. Plaintiffs did not obtain the information from the Branch Sales Managers before the close of fact discovery. Nor did plaintiffs withhold the identities of the Branch Sales Managers from defendants. Rather, plaintiffs promptly disclosed the identities of the Branch Sales Managers and the subject matter of their testimony once it was revealed to them. This is all the law requires. *See, e.g.*, *Orgler Homes, Inc. v. Chicago Regional Council of Carpenters*, No. 06 C 50097, 2008 WL 2271571, at *2 (N.D. Ill. May 30, 2008) (holding that disclosure of evidence after the close of fact discovery is harmless where there is no indication that party acted in bad faith); *Gross v. Town of Cicero*, No. 04 C 0489, 2005 WL 2420372, at *2 (N.D. Ill. Sept. 28, 2005) (where Rule 26 disclosures were made after the close of fact discovery because they were based on lack of evidence not discovered until after that date, the court denied motion to strike evidence, finding a "lack evidence of bad faith or willfulness in not disclosing the evidence at an earlier time").

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[9] Nor would defendants have attempted to depose these Branch Sales Managers even if plaintiffs could have disclosed their identities in plaintiffs' Rule 26 disclosures filed in August 2004. In fact, plaintiffs included the names of several branch sales managers in their August 2004 initial disclosures. Tellingly, defendants ***never*** attempted to depose a single one of those individuals.

C. The Testimony of the Branch Sales Managers Is Relevant and Admissible

Defendants argue that the testimony of the Branch Sales Managers should be excluded under Fed. R. Evid. 403. No such result is warranted, however. "'[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material." *Kelsay v. Consolidated Rail Corp*., 749 F.2d 437, 443 (7th Cir. 1984); *see United States v. Medina*, 755 F.2d 1269, 1274 (7th Cir. 1985) ("'Relevant evidence is inherently prejudicial; but it is only ***unfair*** prejudice, ***substantially*** outweighing probative value, which permits exclusion of relevant matter under Rule 403.'") (court's emphasis). Rather, "Evidence is unfairly prejudicial only if it 'will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented.'" *United States v. Pulido*, 69 F.3d 192, 201 (7th Cir. 1995).

Defendants cannot reasonably claim that the admission of the Branch Sales Managers' testimony raises the risk of ***unfair*** prejudice. After all, these former Household employees offer consistent accounts of being instructed by Household's senior executives to engage in predatory lending practices. While this testimony of percipient witnesses to defendants' fraud is indeed damaging to defendants' case, nothing about this evidence could prompt the jury to find liability on an improper basis.

Nor are defendants correct that plaintiffs' decision to call some, rather than all, of the Branch Sales Managers as witnesses at trial requires the witnesses' exclusion. Although defendants pejoratively characterize these witness accounts as "sample information" or "untested anecdotes" (s*ee* Defs' Mem. at 9), it is well established that the "[t]he law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial." Seventh Circuit Federal Civil Jury Instructions ¶1.18 (2008). Rather, a jury "may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number." *Id.*, ¶1.17. Thus,

defendants' criticism of the testimony of nine Branch Sales Managers – all of whom were percipient witnesses – as "statistically insignificant anecdotes" misses the mark.[10]

Also, admission of the testimony of the Branch Sales Managers will ***not*** require "literally hundreds of minitrials," as defendants erroneously contend. Merely because the defendants claim to have contradictory evidence on some of these points does not occasion a "minitrial"; it merely occasions a trial. Defendants can offer whatever (admissible) evidence during the portion of time they have allotted for their defense. The testimony of the Branch Sales Managers is no different from any other testimony from percipient witnesses in this case. There is no need for any "minitrial" on this evidence. The only question is the weight that the jury decides to give to it.

Similarly, defendants' claim of confusion of issues has a decidedly hollow ring. There is no chance of confusion here because the evidence is confined, straightforward and relates to the same issue: whether defendants instructed employees from New England to California to engage in predatory lending practices.

III. CONCLUSION

For the foregoing reasons, the Court should deny defendants' motion to exclude the testimony of the Branch Sales Managers at trial.

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[10] In support of their Rule 403 argument, defendants point to several cases that have nothing to do with the testimony at issue here. For example, in *United States v. Mikos*, No. 02 CR 137, 2003 WL 22922197 (N.D. Ill. Dec. 9, 2003) and *Muzzey v. Kerr-McGee Chemical Corp*., 921 F. Supp. 511, 519 (N.D. Ill. 1996), the courts refused to admit certain ***expert*** evidence which was deemed unreliable because the experts did not base their conclusions on statistically significant evidence or empirical data. Here, by contrast, the Branch Sales Managers were all employed by Household during the Class Period and are ***percipient witnesses to defendants' fraud***. Equally unpersuasive is defendants' reliance on *BASF Corp. v. Old World Trading Co.*, No. 86 C 5602, 1992 WL 232078, at *4 (N.D. Ill. Sept. 8, 1992). In *BASF*, the court excluded testimony from dissatisfied customers because their testimony was not relevant to the issue of whether the defendant had properly tested its antifreeze to determine whether it met certain specifications. *Id.* In this case, on the other hand, the testimony of these former employees is directly relevant to whether defendants instructed their employees to engage in predatory lending practices.

DATED: February 10, 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 February 10, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **LEAD PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION PURSUANT TO FED. R. CIV. P. TO EXCLUDE TESTIMONY OF BRANCH SALES MANAGERS**.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of February, 2009, at San Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE