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 HOUSEHOLD DEFENDANT'S MOTION PURSUANT TO FED. R. CIV. P. 37(C) TO EXCLUDE THE TESTIMONY OF JAMES C. BERNSTEIN

I. INTRODUCTION

James Bernstein is a percipient witness, through whom plaintiffs do not seek to offer expert opinion testimony. Mr. Bernstein was properly disclosed to defendants, first in plaintiffs' March 2003 Amended Complaint (Complaint ¶¶23, 93, 98), then in plaintiffs' June 25, 2004 initial disclosures (Ex. 1 at 7),[1] then in plaintiff's August 20, 2004 amended initial disclosures (Ex. 2 at 34), and finally in plaintiffs' October 31, 2008 trial witness list (Ex. 3 at 1). In short, defendants have been on notice for years that Mr. Bernstein was a witness to Household's predatory practices, and for months that plaintiffs intend to call him to testify at trial. Defendants had several years to depose Mr. Bernstein if they were so inclined, and chose not to. Now apparently regretting that decision, defendants seek to bar Mr. Bernstein from testifying, claiming they are prejudiced by plaintiffs' decision not to call Mr. Bernstein as an expert. However, plaintiffs did nothing to warrant this extreme (or any) sanction and defendants have not been prejudiced. Accordingly, defendants' motion should be denied.

A. Mr. Bernstein Has Been Identified by Plaintiffs as a Witness Throughout This Entire Action

The crux of defendants' motion – that "[d]efendants were not made aware during discovery of Plaintiffs' intent to use Mr. Bernstein" – is demonstrably false. Defs' Mem. at 11. Mr. Bernstein is identified multiple times in plaintiffs' Amended Complaint, filed ***March 7, 2003***. Dkt. No. 50. Complaint, ¶¶23, 93, 98. Mr. Bernstein is identified in Plaintiffs' Initial Disclosures, first served ***June 25, 2004***, and in their Amended Initial Disclosures served two months later. Exs. 1 at 7 and Ex. 2 at 34. Defendants had years to depose Mr. Bernstein, and their failure to do so falls squarely on their own shoulders. Plaintiffs should not be punished by defendants' own inaction.

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[1] Unless noted otherwise, all exhibits referenced throughout are attached hereto.

Faced with the fact that Mr. Bernstein clearly was disclosed, and the prospect of his damaging testimony, defendants attempt to twist his initial inclusion on the plaintiffs' Notice as an admission that he is permitted only to offer expert testimony. Defs' Mem. at 6. This argument fails. Not only did plaintiffs make clear throughout the lengthy process before Judge Nolan on the *Sunstar* issue they did not agree with defendants' expansive reading of this Court's *Sunstar* decision and Federal Rule of Evidence 702,[2] in their February 27, 2008 Notice, plaintiffs explicitly stated: "Consistent with defendants' 'hedging' approach, lead plaintiffs provide this list ***without conceding that any opinion testimony from these witnesses constitutes expert testimony or falls within the scope of this Court's*** [*Sunstar*] opinion." Best Decl., Tab B at 1 (emphasis added); *see also* Best Decl., Tab. C ("As you are aware, in response to Magistrate Judge Nolan's directions, plaintiffs provided on February 27 a list of potential witnesses ***who may or may not*** fall within the scope of the *Sunstar* case.") (emphasis added). Given plaintiffs' clear expression that the inclusion of any witness on their Notice was not a concession that the witness' testimony constituted expert testimony, defendants' cannot contend that Mr. Bernstein's removal from the list amounted to a representation "that Mr. Bernstein would not appear at trial." Defs' Mem. at 11. Plaintiffs never stated that Mr. Bernstein would not testify. Removing Mr. Bernstein from their Notice only restricted plaintiffs from calling him as an expert, which they do not seek to do.

Defendants also imply that somehow plaintiffs' removal of Mr. Bernstein from the Notice precluded them from deposing Mr. Bernstein during ***fact discovery***. Defs' Mem. at 2 ("Now, with

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[2] The entire dispute surrounding the *Sunstar* witnesses issue arose from defendants' refusal to specify the topics about which their purported *Sunstar* experts would testify and insistence that they were permitted to "hedge their bets." Magistrate Judge Nolan rejected defendants' Notice disclosures as inadequate in plain terms. "If . . . Defendants do want the option of eliciting expert testimony from these witnesses at trial, they must provide Plaintiffs with the substance of such expert opinions, and the bases for those opinions. Defendants' generic disclosures to date are not sufficient." January 31, 2008 Minute Order at 2. Defendants' failure to comply with Judge Nolan's January 31, 2008 Order and subsequent identification of 17 percipient experts in their pre-trial disclosures is the subject of plaintiffs' Motion *In Limine* No. 8.

discovery over . . . ."). Again, this is incorrect. The entire dispute over so-called *Sunstar* witnesses occurred during ***expert discovery***. This disposes of defendants' contention that Mr. Bernstein was removed from plaintiffs' Notice in exchange for an agreement that he not be deposed. Defs' Mem. at 2. Further, it was after defendants explicitly rejected plaintiffs' proposal that plaintiffs withdrew Mr. Bernstein from their list. Best Decl. Ex. E ("***We are unable to accept that proposal*** and intend to depose any of those four individuals who remain on Plaintiffs' list"). When defendants moved the Court for permission to depose Mr. Cross, plaintiffs opposed that motion on the grounds that defendants should have deposed him during fact discovery – the same grounds plaintiffs would have opposed Mr. Bernstein's deposition if defendants had sought to depose him. Judge Nolan granted defendants' motion, Mr. Cross's deposition was taken.[3] There was no arrangement between the parties as defendants now claim.

Defendants also claim plaintiffs sprung Mr. Bernstein on them on "the eve of trial" "a few weeks before the pretrial order" and at the "eleventh hour." Defs' Mem. at 10. This too is false. Plaintiffs identified Mr. Bernstein as a trial witness on October 31, 2008 – five months before trial in accordance with the parties' agreement. Defendants have not been prejudiced. Having established defendants were not prejudiced, plaintiffs now turn to defendants' contention that Mr. Bernstein cannot testify as to his Class Period observations.

B. Bernstein Is a Percipient Witness Whose Testimony Resulting from His Personal Observations Should Not be Precluded

James Bernstein is a percipient witness. Plaintiffs intend to adduce at trial from Mr. Bernstein testimony as to events within his personal knowledge. Such testimony is clearly

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[3] Plaintiffs also served a cross-notice for that deposition, and defendants did not object.

admissible regardless of any specialized knowledge Mr. Bernstein may possess. Fed. R. Evid. 602. Mr. Bernstein also can testify as to opinions not based on specialized knowledge. Fed. R. Evid. 701.

Mr. Bernstein attended meetings held between the Minnesota Department of Commerce and Household executives, which are directly probative of scienter. Mr. Bernstein also has personal knowledge of communications between the Department of Commerce and Household. Mr. Bernstein clearly is permitted to testify based on his personal knowledge about what was said at those meetings and in the communications, including the Company's reactions. Mr. Bernstein also has personal knowledge as to the level of Household's cooperation (or lack thereof) with the Minnesota Department of Commerce. To wit, Mr. Bernstein met personally with senior Household executives and observed a lack of cooperation and responsiveness to Minnesota's concerns. Mr. Bernstein has personal knowledge of Household's excuses and attempts to explain away their predatory practices and the Company's failure to undertake any measure to put a stop to them. *See* Declaration of James C. Bernstein, Former Commerce Commissioner of the State of Minnesota ("Bernstein Decl."), ¶¶22-25. Based on Bernstein's observations as a percipient witness, he has a rational basis to testify as to management's response to his queries regarding Household's sales practices in Minnesota. Fed. R. Evid. 602. Mr. Bernstein also has personal knowledge of the Enforcement Division of the Commerce Department's investigation into Household's sales practices, which lasted almost a year, concluding in November 2001. Bernstein Decl., ¶¶9, 16.[4] Defendants cannot dispute that Mr. Bernstein is permitted to testify regarding the foregoing, and other similar categories of personal observation, regardless of any specialized knowledge. *See, e.g.*, *Sunstar, Inc.*

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[4] During the course of that investigation, Mr. Bernstein personally called Household branches pretending to be a customer, one in the St. Paul area and one in the Minneapolis area. Mr. Bernstein wanted to have first-hand knowledge of what people were dealing with because predatory lending issues involved financial security and keeping a roof over his constituent's heads. *Id.*, ¶¶11-12.

v. Alberto-Culver Co., No. 01 C 736, 2006 U.S. Dist. LEXIS 85678, at *20 (N.D. Ill. Nov. 16, 2006) ("If she testifies that DGA was hired by Sunstar and performed research on its behalf, events that any layman could also recount, she is a lay witness."). These areas clearly are not opinion testimony.

Mr. Bernstein is also permitted to testify under Federal Rule of Evidence 701 as to opinions or inferences not derived from specialized knowledge. Opinion testimony by a lay witness is governed by Fed. R. Evid. 701, which provides:

> [A] witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. Essentially, "a lay person may offer opinion testimony providing the witness testifies to what he or she has perceived firsthand." *Sachs v. Reef Aquaria Design, Inc.*, No. 06 C 1119, 2007 U.S. Dist. LEXIS 79809, at *37 (N.D. Ill. Oct. 25, 2007). "[T]he requirement that the opinion be based on the witness's perception is 'the familiar requirement of first-hand knowledge or observation'" as set forth in Fed. R. Evid. 602. *Frey v. Chi. Conservation Ctr.*, 119 F. Supp. 2d 794, 799 (N.D. Ill. 2000) (citing Fed. R. Evid. 701 advisory committee's note). Mr. Bernstein meets this criteria.

As Commissioner of Commerce for the State of Minnesota, Bernstein frequently met with constituents from his state to discuss their complaints and experiences in dealing with various businesses, including with lending institutions like Household. He also met with consumer and advocacy groups to gain an understanding of the group's investigation and evaluation of the companies doing business in the state of Minnesota. In late fall 1999 through summer of 2000, Bernstein had many such meetings with various representatives of ACORN, including Becky Gomer, a housing advocate, and Jordan Ash, director of housing information/advocacy. Bernstein

Decl., ¶¶3-4. During some of these meetings, he reviewed the investigative materials gathered by ACORN alleging that Household engaged in a number of abusive lending practices, including among others, prepayment penalties, sale of credit insurance, misrepresentation of the terms of the loans. *Id.*, ¶4.

During meetings with Minnesota consumers in the summer of 2000, Mr. Bernstein discovered that the majority of the consumers in attendance who complained of abusive lending practices were borrowers who had obtained financing from Household: A typical complaint was that prepayment penalties were either not disclosed during the loan application process or where borrowers questioned the existence of a prepayment penalty, they were told there was not a penalty or that it would be waived as a special favor to them if they closed the loan within a certain time period. *Id.*, ¶5.

Some Minnesota Household borrowers also personally informed Mr. Bernstein of the misrepresentation of the terms of the loans where Household sales personnel frequently gave borrowers a range for the interest rate rather than disclosing the actual interest rate that they would be charged; failed to fill in the interest rate at closing, or convinced the borrower that they could only lock in the loan at the lower range, if the borrower closed the loan by a certain date. *Id.*, ¶6. During the course of his discussions with consumers, he also learned that, instead of using the common term for interest rate, *i.e.*, Annual Percentage Rate or APR, Household sales people were using different terms for interest rate, such as effective rate, equivalent rate, biweekly rate, comparative rate, or payback rate, thus confusing and misleading borrowers as to the specific rate they would be paying. *Id.*, ¶8. Mr. Bernstein also met borrowers who had signed up for the Household EZ Pay Plan without understanding what EZ Pay was or how the interest rate was calculated and were having trouble making the extra payments since Household signed up consumers for the EZ Pay Plan without regard to whether or not the borrower could make the additional payments. *Id.*, ¶7.

Pursuant to Rule 701, Bernstein is permitted to draw "opinions or inferences" from his perception of these events. *See Middleby Corp. v. Hussmann Corp.*, No. 90 C 2744, 1993 U.S. Dist. LEXIS 6150, at *29 (N.D. Ill. May 7, 1993) (allowing witness to testify to the events he observed contemporaneously and opinions he formed about those events). Because any witness is allowed to testify to relevant inferences so long as the inferences are "tethered to perception, to what the witnesses saw or heard," Bernstein's opinion testimony based upon his observations both with Household consumers and salespersons should be admitted. *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000).

II. CONCLUSION

For the foregoing reasons, defendants' motion should be denied and Mr. Bernstein permitted to testify at trial.

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 HOUSEHOLD DEFENDANT'S MOTION PURSUANT TO FED. R. CIV. P. 37(C) TO EXCLUDE THE TESTIMONY OF JAMES C. BERNSTEIN**.

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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
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