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

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

[PLAINTIFFS' MOTION *IN LIMINE* NO. 8]

I. INTRODUCTION

Defendants seek to elicit expert testimony from 17 witnesses without prior notice to plaintiffs or the Court as to the substance of that testimony or the witnesses' qualifications. This approach prejudices plaintiffs and impedes the Court's gatekeeping function under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Judge Nolan rejected defendants' disclosures as deficient, and they failed to cure. Plaintiffs' motion should be granted, and defendants precluded from adducing expert testimony from their 17 fact witnesses.

II. ARGUMENT

Federal Rule of Civil Procedure ("Rule") 26(a)(2) requires litigants to identify their experts and detail their opinions and the basis for those opinions "'sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.'" *B.H. v. Gold Fields Mining Corp.*, Case No. 04-CV-0564-CVE-PJC, 2007 U.S. Dist. LEXIS 2309, at *14 (N.D. Okla. Jan. 11, 2007) (quoting commentary to Rule 26(a)(2)). Judge Nolan held more than a year ago that defendants' disclosures do not satisfy the requirements of Rule 26(a)(2). January 31, 2008 Minute Order (Dkt. No. 1172) at 2 ("Defendants' generic disclosures to date are not sufficient."). Despite being given every opportunity, defendants failed to cure. Accordingly, they are barred under Rule 37 from offering expert opinions from their 17 fact witnesses. Fed. R. Civ. P. 37.

As the record stands, defendants have provided no information as to what expert opinions will be elicited at trial from these witnesses or the bases for those opinions, no information useful for cross-examination, and no information sufficient to allow the Court to assess the admissibility of the expert testimony defendants intend to elicit. Despite this, and notwithstanding Judge Nolan's clear holding that their disclosures were inadequate, defendants contend they have satisfied Rule 26(a)(2).

Defendants' interpretation of Rule 26 would permit them to offer expert testimony without ever disclosing the nature of the testimony or qualifications. This result is contrary to logic and the law. *Osterhouse v. Grover*, Case No. 3:04-cv-93-MJR, 2006 U.S. Dist. LEXIS 30904, at *10 (S.D. Ill. May 17, 2006) (The purpose of disclosing experts is to "avoid so-called trial by ambush."); *KW Plastics v. United States Can Co.*, 199 F.R.D. 687, 688-90 (M.D. Ala. 2000) (finding that a statement of "the basis and reasons" is required for every witness who testifies under Fed. R. Evid. 702). Incredibly, defendants argue both that their disclosures were sufficient (Defs' Mem.[1] at 9-10), and that "[i]t would be impossible for [d]efendants to indicate the substance" of the expert testimony they intend to offer (Defs' Mem. at 11). These two positions cannot be reconciled. If defendants do not know, how can plaintiffs and the Court? Without information sufficient for the Court and plaintiffs to understand the qualifications of defendants' putative experts and subject matter of their testimony, any disclosure is meaningless. Defendants seek to divert the Court's attention from this reality by arguing they were not required to submit formal ***expert reports*** for each of their 17 witnesses. Defs' Mem. at 9-10. This is a straw man. Defendants did not violate Rule 26 by failing to produce reports, but instead, as Judge Nolan held, failing to provide any meaningful information. January 31, 2008 Minute Order.

The cases cited by defendants do not excuse their failure to comply with Rule 26. In those cases, the subject matter of expert testimony was disclosed. In *Cicero v. Paul Revere Life Ins. Co.*, No. 98 C 6467, 2000 U.S. Dist. LEXIS 7165 (N.D. Ill. Mar. 22, 2000), the court allowed the witnesses to testify despite not having expert reports; however the specific subject-matter of the expert opinions had already been disclosed. *Id.* at *1-*3. In *Garza v. Abbott Labs.*, No. 95 C 3560,

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[1] "Defs' Mem." refers to Defendants Memorandum of Law in Opposition to Plaintiffs' Motion *In Limine* "to Preclude Defendants from Offering Expert Testimony from Any of Their Three [*sic*] Retained Experts."

1996 U.S. Dist. LEXIS 12506 (N.D. Ill. Aug. 26, 1996), the court had before it an affidavit setting forth the doctor's opinions. *Id.* at *3. In *Zurba v. United States*, 202 F.R.D. 590 (N.D. Ill. 2001), the plaintiff notified defendant by letter that his treating physician would offer testimony regarding "the nature of plaintiff's condition, its cause, the permanency of her condition, and the necessity and cost of future medical care." *Id.* at 591. This letter was sent ***prior*** to the doctor's deposition and defendant's counsel "***elected***" not to question him about these issues. *Id.* Here, in stark contrast to *Zurba*, as Judge Nolan held, defendants "on a number of occasions interposed objections to questions seeking to elicit expert opinions, creating an explicit understanding that the witnesses would ***not*** be providing expert testimony." January 31, 2008 Minute Order at 2 (emphasis in original).

Defendants' waiver argument also lacks merit. Judge Nolan never ruled that defendants' disclosures were adequate, and, thus, plaintiffs had nothing to appeal. To the contrary, as set forth in plaintiffs' opening papers, Judge Nolan held that "[d]efendants' generic disclosures" were "not sufficient" and ordered defendants either to amend their deficient Rule 26 disclosures or drop their 23 non-retained experts from their notice. January 31, 2008 Minute Order. On February 6, 2008, in a status conference statement, defendants sought relief from the January 31, 2008 Order, contending that identifying the expert opinions and basis for those opinions "at this stage of the case" would be "an enormous undertaking, ***which would correspond substantially with Defendants' ultimate preparation for any trial this action***." Defs' Mem. at 3-4 (quoting Defendants' Status Report, Dkt. No. 1173 (Feb. 6, 2008)). During the February 7, 2008 status hearing, Judge Nolan indicated she was inclined to instruct ***defendants*** to appeal her January 31, 2008 Order to this Court, but agreed with plaintiffs' suggestion that a stipulation would be more efficient. February 7, 2008 Hrg. Tr. at 7-8 (attached hereto as Exhibit A). The parties and the Court were clear that the January 31, 2008 Order was ***stayed*** pending agreement on a stipulation:

> MS. BEST: And that is just, you know, we're going to work on the stipulations that we talked about before with respect to *Sunstar*. But just for the record, I just want to make sure we have a ***stay*** then ***staying*** our obligations to provide the opinions and the (unintelligible) therefore which were due today.
>
> THE COURT: ***Yes, correct***.

February 7, 2008 Hrg. Tr. (Ex. A) at 54-55 (emphasis added). This understanding was memorialized in the Court's February 7, 2008 Minute Order. *See* Dkt. No. 1176. The parties were unable to reach a stipulation and on March 13, 2008, Judge Nolan granted defendants' request to depose Charles Cross and again instructed the parties to reach a stipulation, or alternatively, "appeal the matter" to this Court. March 13, 2008 Minute Order (Dkt. No. 1206). Following Mr. Cross's deposition, the parties were unable to reach an agreement. At no point did defendants modify the disclosures Judge Nolan found deficient, nor did they appeal the Court's January 31, 2008 Order.

Under these facts, the suggestion that plaintiffs waived their right to object to defendants' deficient expert notification is absurd. Plaintiffs had nothing to appeal. There is no order holding defendants' disclosures respecting these 17 witnesses were adequate. To the contrary, the Court found defendants' disclosures deficient, and they failed to cure despite several opportunities. Defendants must now live with that decision.

As to Local Rule 16.1.1, defendants concede they have not complied, but contend without support that the Local Rule does not apply to non-retained experts. Defs' Mem. at 10-12. This makes little sense. The Local Rule requires defendants to provide a description of the subject matter about which their "experts" will testify. The purpose of this rule is similar to Rule 26(a)(2) – to provide the Court and the other side notice of what expert testimony the parties intend to offer under Fed. R. Evid. 702. As defendants concede, discerning what these "experts" will opine on constitutes an "enormous undertaking." Defs' Mem. at 4. Defendants' failure to identify the testimony, and the basis for that testimony, impermissibly shifts that burden to plaintiffs and the Court. Their disregard for Local Rule 16.1.1 deprived plaintiffs of any opportunity to challenge the "expert" opinions via

Daubert motion or otherwise, and the Court of any basis for determining whether the witness possesses sufficient qualifications to render the opinions under Fed. R. Evid. 702, including whether the opinions are reliable and helpful to the jury.

Defendants seek to excuse their failure to comply with the Local Rule's disclosure requirements by arguing that their witnesses are not truly experts. Defs' Mem. at 11. Defendants' persistence in designating these 17 fact witnesses as experts makes clear, however, that if allowed, they fully intend to elicit from them more than lay opinion. If not, these 17 fact witnesses should not be identified as experts. Defendants' true intent is revealed by their "proposed order" which seeks to create an uneven playing field, whereby defendants are permitted to elicit opinion testimony from their lay witnesses while at the same time preserving some frivolous objection that plaintiffs' percipient witnesses are somehow "experts" based on their work experience. Defs' Mem. at 12. This result should not obtain. Defendants have not complied with their obligations under Rule 26 and Local Rule 16.1.1, and are barred from offering expert testimony from their 17 fact witnesses.

III. CONCLUSION

For the foregoing reasons, and those in plaintiffs' opening brief, defendants should be precluded from eliciting at trial expert testimony from their 17 non-retained experts.

DATED: February 13, 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 Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on February 13, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM OFFERING EXPERT TESTIMONY FROM ANY OF THEIR IDENTIFIED WITNESSES OTHER THAN THEIR THREE RETAINED EXPERTS**.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February, 2009, at San Francisco, California.

/s/ Marcy Medeiros
MARCY MEDEIROS