UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

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

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

INTRODUCTION

Because Plaintiffs have not demonstrated that their failure to disclose the existence of nine secret branch-level witnesses was either substantially justified or harmless, exclusion of these witnesses under Rule 37(c) is "automatic and mandatory." *See Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998).

Plaintiffs' Opposition Brief contains the following statements:

A	B
These witnesses' "significance to this litigation has been obvious to *everyone*, including defendants, since the beginning of this case." (Pls. Opp. at 5.)	"[T]he 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." (Pls Opp. at 5 n.5)
"[T]he Branch Sales Managers' central role in this case was obvious from the face of plaintiffs' own complaint." (*Id.* at 6)	"[P]laintiffs did not discover the identities of seven of the nine Branch Sales Managers until the summer and fall of 2008." (*Id.* at 4)

It is hard to believe, but the contents of both columns A and B come directly from Plaintiffs' brief. Apparently, Plaintiffs position is that "everyone" (*i.e.*, every Defendant) has been aware of the identity of Plaintiffs' nine secret witnesses since the Complaint was filed, but Plaintiffs themselves only became aware of their secret witnesses during the summer and fall of 2008. Yet this in no way justifies Plaintiffs' admitted breach of their discovery obligations under the Federal Rules. Only Plaintiffs knew, or should have determined, *which* of these 1,400 Branch Sales Managers they believed would testify to their version of the facts, or were individuals "likely to have discoverable information . . . that the disclosing party may use to support its claims." Rule 26(a)(1)(A)(i). In other words, Plaintiffs cannot reconcile their

obligation to separate the wheat from the chaff with their suggestion that Defendants play "go fish."

Even if Defendants could have surmised that Plaintiffs considered some branch sales managers to be relevant components of Plaintiffs' case, Defendants could not reasonably have been required to guess which of the 1,400 Household branch sales managers would be selectively chosen by Plaintiffs -- particularly given Plaintiffs' failure to include any of these individuals (including the ones they admittedly had located during discovery) in their list of 300 persons they disclosed as knowledgeable witnesses. In any event, Plaintiffs felt obligated to list over two dozen branch level Company employees in their initial Rule 26 disclosures. But the individuals they disclosed and the witnesses they intend to call are mutually exclusive groups -- None of the branch-level employees Plaintiffs disclosed are testifying for Plaintiffs in this case and none of the branch level employees that Plaintiffs intend to call were disclosed.

Plaintiffs' opposition memorandum now reveals, for the first time, a previously undisclosed declaration from one of the nine witnesses (John Timmons), executed in November, 2007 (the month in which they obtained a declaration from another of the nine, Curtis Howrey, which they submitted in connection with their "spoliation" motion). This was three months before Plaintiffs supplemented their answer to Interrogatory No. 46 expressly seeking the identity of such potential witnesses, and over a full year before Plaintiffs claim that "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." (Pls Opp. at 5 n.5) The stilted wording of that excuse suggests a disingenuous reading of Plaintiffs' obligations under Rule 26(a). Plaintiffs' undeniable lack of candor as to their November 2007 declarants raise serious questions as to how much earlier they knew that any of the nine witnesses possessed relevant information. Plaintiffs' silence about the Timmons declaration even after Defendants

demanded withdrawal of the surprise witnesses raises further questions about Plaintiffs' good faith. Indeed, given Plaintiffs' unjustified failure to make timely disclosures, secrecy when Defendants expressly raised this issue with them, and surprise disclosure in opposition to this motion beg the conclusion that Plaintiffs' intent all along was to ambush Defendants and try to engender prejudice against Defendants in the eyes of the Court by springing concealed "evidence" (such as it is) that Defendants have never had the opportunity to test. The fact that this "newly discovered" evidence is flatly at odds with the consistent record of corporate sales and training policies compounds the legitimate questions about its provenance.

Plaintiffs have failed to carry their burden of demonstrating that their admittedly late disclosure of nine proposed witnesses was "justified or harmless." Under these circumstances, the automatic and mandatory exclusion remedy of Rule 37(c) is the only appropriate remedy.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEIR CONCEALMENT OF AND FAILURE TO IDENTIFY WITNESSES WAS JUSTIFIED

A. Plaintiffs Lack of Diligence in Identifying Surprise Witnesses Does Not Justify Nondisclosure

Plaintiffs concede that they were not diligent in locating the "vast majority" of these surprise branch-level witnesses during discovery -- although their position is deliberately ambiguous about whether their lack of diligence is of the "didn't find" or "didn't look" variety (or some combination). (Pls. Opp. at 3-4) In either case, however, Plaintiffs do not assert any reason why they *could not* have identified them during discovery, and merely argue that they *did not* do so until after the close of fact discovery -- that is, they chose to ignore the discovery schedule set by the Court under the Federal Rules.

The fact that Plaintiffs identified over two dozen current and former Household branch level employees in their initial Rule 26 disclosures indicates that Plaintiffs determined that similarly-situated individuals were "likely to have discoverable information . . . that [Plaintiffs] *may* use to support its claims." *See* Rule 26(a)(1)(A)(i) (emphasis added). Plaintiffs now make the patently disingenuous argument that disclosure was excused because Plaintiffs were somehow unable to discern "the usefulness" of the nine surprise witnesses until late fall 2008, even though they had elicited declarations from at least two of them nearly one year earlier. The most generous conclusions (to them) are that Plaintiffs (a) were not diligent in locating the witnesses and/or (b) deliberately delayed tapping some or all of them until it was too late for Defendants to examine them, and/or (c) knew that the witnesses were "likely to have discoverable information" but willfully failed to disclose them. None of these variations is justified, and Plaintiffs have offered no other.[1]

Even if true, Plaintiffs' purported failure to recognize the "usefulness" of these witnesses until the fall of 2008 does not obviate their failure to conduct a diligent search for relevant individuals during discovery. *See Recycling Sciences Intern., Inc. v. Gencor Industries, Inc.*, No. 95 C 736, 95 C 4422, 1999 WL 160060, at *11-12 (N.D. Ill. March 12, 1999) (Holderman, J.) (affirming exclusion of supplemental interrogatory responses served after discovery where party "did not show due diligence in searching" for such information during discovery; opposing party was denied the opportunity to conduct discovery on undisclosed issues); *Ty, Inc. v. Softbelly's Inc.*, No. 00-C-5230, 2006 WL 5111124, at *6 (N.D. Ill. April 07,

[1] Plaintiffs have not disclosed how many former employees they had to interview to find these nine surprise witnesses, nor have they disclosed the identity of any former employees who refused to supply a declaration or who had knowledge of facts that contradict the individuals they have now belatedly disclosed. To avoid additional sanctions, Plaintiffs should supplement their discovery responses immediately to identify any other individuals with information relevant to their claims.

2006) (Lefkow, J.) (excluding late-disclosed witnesses where parties "offered no reasonable explanation for their failure to supplement" interrogatory response); *Scranton Gillette Comm's, Inc.* v. *Dannhausen,* No. 96 C 8353, 1998 WL 566668 at *1 (N.D. Ill. Aug. 26, 1998) (Urbom, J.) (excluding witnesses where plaintiff claimed to have discovered them after fact discovery but did not show "diligence in searching for them."). *Lancelot Investors Fund, L.P. v. TSM Holdings, Ltd.*, No. 07 C 4023, 2008 WL 1883435 at *5 n.6 (N.D. Ill. April 28, 2008) (Cole, M.J.) ("Rule 26(e) does not give litigants a license to rely on supplements produced after a court-imposed deadline . . . it most assuredly does not excuse a party's lack of diligence . . .").

Ignoring Rule 26, Plaintiffs argue that they were not required to disclose witnesses in the absence of a showing that Plaintiffs "intended to use the testimony" of such witnesses. (Pls. Opp. at 4-5 n.5) Aside from misstating the burden of proof (*Plaintiffs* bear the burden of proving justification for nondisclosure), this "standard" misreads Rule 26, which requires disclosure of all individuals "likely to have discoverable information . . . that the disclosing party *may* use to support its claims." *See* Rule 26(a)(1)(A)(i) (emphasis added).[2] Plaintiffs' proposed test appears nowhere in the Rule and would nullify what the Advisory Committee describes a the "direct connection" between a party's disclosure obligations and the exclusion sanction of Rule 37(c)(1). Fed. R. Civ. P. 26(a) Adv. Comm. Notes, 2000 Amendments. Under Plaintiffs' lax interpretation, a party could avoid both disclosure and sanctions through the simple expedient of reserving judgment as to whether he "intends" to use

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[2] Rather than citing the Rule itself, Plaintiffs cite the advisory notes and a case that addressed documentary evidence, not disclosure of witnesses. Plaintiffs cite dicta from *Robinson v. Moran*, No. 06 CV 3058, 2007 WL 2915620 at *3-*4 (C.D. Ill. Oct. 5, 2007) (Cudmore, M.J.) which denied a motion for exclusion of a unique document that had previously been the subject of extensive, specific testimony during a deposition. *Id.* at *2. This case is not remotely analogous to the situation here, in which Plaintiffs, during and well beyond the discovery period, concealed numerous witnesses, none of whom were disclosed to Defendants.

the information at trial. This is plainly not the law. *See Reddick* v. *Bloomingdale Police Officers*, No. 96 C 1109, 2003 WL 1733560, at *12 (N.D. Ill. April 1, 2003) (Brown, M.J.) (party had a duty to supplement its Rule 26(a)(1) disclosures as soon as it located and contacted a previously disclosed witness); Fed. R. Civ. Pro. 26(e) Advisory Committee Notes, 1993 amendment ("The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures and responses are in some material respect incomplete or incorrect."). Defendants were entitled to rely on the absence of disclosure as an indication that Plaintiffs would not call these witnesses trial. *See Lancelot Investors Fund* v. *TSM Holdings, Ltd.*, No. 07 C 4023, 2008 WL 188435 at *6 (N.D. Ill. April 28, 2008) (Cole, M.J.) (the "primary thrust" of amendments to Federal Rules of Civil Procedure "was to allow parties to rely on their opponent's disclosures as required in Rule 26 . . ."); *Civix-DDI LLC* v. *Cellco P'ship*, 387 F. Supp. 2d 869, 904 n.43 (N.D. Ill. 2005) (St. Eve., J.) (defendant "was entitled to rely on the fact that Civix did not disclose Rehfeld as either a fact or expert witness and therefore would not be relying on his testimony at trial").

Plaintiffs assert the novel argument that their belated identification was justified as part of a permissible post-discovery "investigation" process. (Pls. Opp. at 4). Plaintiffs cite inapposite authority that they say suggests that post-discovery investigation justifies noncompliance with Rule 26(a) and (e).[3] While Defendants do not object to the uncontroversial

[3] The cases cited by Plaintiffs are distinguishable as involving disclosures made at most 18 days after the close of discovery (as opposed to Plaintiffs' months and years of unjustified delay), much simpler factual records, or evidence that the opposing party had greater notice of during discovery. *See Marianjoy Rehabilitation Hospital* v. *Williams Electronic Games, Inc.*, No. 94 C 4918, 1996 WL 411395 (N.D. Ill. July 19, 1996) (Plunkett, J.) (medical services recovery action where proponent informed opposing party via a letter sent before the close of fact discovery that it was seeking specific medical records and disclosure occurred only 18 days after close of fact discovery); *Charles v. Cotter*, 867 F.Supp. 648, 654 (N.D. Ill. 1994) (Castillo, J.) (disclosure only 11 days after close of discovery; proponents in § 1983 excessive force case were "remiss" in failing to identify medical records during discovery, but such evidence nonetheless admissible

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proposition that a party need not cease the investigation at the close of discovery, the scope of investigation undertaken *after* discovery in preparation for trial must necessarily be narrowed and defined by the disclosures that take place *during* discovery and the confines of Rule 37(c). *Scranton Gillette Communications, Inc.*, 1998 WL 566668 at *1 (purpose of Rule 26 disclosures is to narrow the issues for trial). A "continuing investigation" exception would improperly allow any party to set an ambush by compiling facts, evidence, and witnesses outside of the formal discovery process right up until the day of trial. Even if Rules 26 and 37 were vitiated in this way (*but see* cases cited above), a party would still be obliged to supplement discovery disclosures without delay. In the case of at least three of their stealth witnesses (and perhaps others), Plaintiffs offer no justification for their blatant breach of the discovery rules.

B. For Over a Year, Plaintiffs Concealed Witnesses Undeniably Known to Them

At least three of the witnesses, Seth Callen, Curtis Howrey, and John Timmons, were known to Plaintiffs during discovery, but affirmatively concealed:

- Seth Callen was cited as a source for a news article quoted by Plaintiffs in their Amended Complaint filed in March, 2003. Plaintiffs did not identify Mr. Callen as an individual with relevant knowledge of their claims until Oct. 31, 2008 -- more than five years later.
- Plaintiffs claim to have contacted Curtis Howrey in July, 2007, and obtained a declaration from him in November, 2007. (*See* Declaration of Daniel S. Drosman in Support of Pls. Opp., filed Feb. 10, 2009 ("Drosman Decl."), ¶ 3.)
- Plaintiffs claim to have contacted John Timmons in October, 2007, and obtained a declaration from him in November, 2007. (*See* Drosman Decl. ¶ 2.) The Timmons Declaration was not disclosed to Defendants until it was submitted on January 10, 2009, with Plaintiffs' Opposition to this motion. (*See* Drosman Decl., Ex. A)

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because "highly probative"); *Smith v. Dwire*, No. 04 CV 02182, 2005 WL 3543058 (D. Colo. 2005) (disclosure in employment discrimination case only 6 days after close of discovery).

- Plaintiffs failed to disclose Timmons and Howrey in their February 2008 response to Interrogatory No. 46 and further failed to disclose them (or any other of the nine witnesses) at any time prior to Oct. 31, 2008 – a year and a quarter after they say they met Howrey, a full year after they say they met Timmons, and almost a year after they had obtained their sworn statements under the caption of this case

Thus, Plaintiffs clearly viewed at least three of these nine witnesses as "likely to have discoverable information," Fed. R. Civ. P. 26(a)(1)(A)(i), during discovery, yet they did not identify them to Defendants until October 31, 2008. That untimely disclosure can hardly be considered "prompt," and it plainly violates both the letter and spirit of the Federal Rules. *Ty, Inc.* v. *Publications Int'l, Inc.*, No. 99 C5565, 2004 WL 421984 at *2 (N.D. Ill. Feb. 17, 2004) (Zagel, J.) (excluding testimony from six fact witnesses where proponent's choice "not to name these . . . witnesses when discovery was open or shortly thereafter" required exclusion under Rule 37). Plaintiffs have not met their burden of proving that this belated disclosure was "justified" within the meaning of Rule 37. As to these three individuals, at least, there is no excuse and Plaintiffs' explanation is demonstrably false. According to Plaintiffs' logic, they should have disclosed Messrs. Callen, Howrey, and Timmons as soon as they were contacted, because it was "obvious to everyone . . . since the beginning of this case" that these witnesses had evidence of the kind that Plaintiffs would present at trial. (Pls. Opp. at 5).

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEIR BELATED DISCLOSURES WERE HARMLESS

A. Nondisclosure Is Not Rendered "Harmless" by Passing References to the Concealed Witnesses' Generic Job Titles in Deposition Testimony or Appearance of Names in Five Million Pages of Documents

Having claimed that they did not bother to locate and identify most of these witnesses until well after the close of fact discovery (and having elected to conceal the others), it does not avail Plaintiffs to argue that *Defendants* should have been able to identify them with ease before the end of fact discovery. If it took Plaintiffs several years to locate branch-level employees to support their story, it is wholly contradictory for Plaintiffs to argue that their

identities were so obvious as to render Plaintiffs' concealment harmless. Defendants could have had no way of determining (without the required discovery from Plaintiffs) which of the 1,400 branch sales managers Plaintiffs planned to advance as purported support for their theories. It was Plaintiffs' burden to provide that information, not Defendants' burden to guess. The purpose of Rule 37(c)'s exclusion sanction is "to provide parties with an incentive to timely disclose all material evidence *in support of their positions that they intend to use at any point during the course of the litigation . . .*" 7 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 37.60[1] at 37-124 (3d. ed 2008) (emphasis added). The purpose of Rule 26 is "total disclosure." *Salgado* v. *Gen. Motors Corp.*, 150 F.3d 735, 742 n.6 (7th Cir. 1998); *see also Ty, Inc.*, 2004 WL 421984 at *1 ("[I]t is not PIL's belated identification of trial witnesses, but rather its belated identification of people with knowledge relevant to the issues of this case" which violates Rule 26).

Plaintiffs try to gloss over their intentional discovery violations as harmless by arguing that Defendants' immense, five-million page document production included a handful of documents sufficient to put Defendants on notice of the possibility that Plaintiffs would call the witnesses to testify at trial. (Pls. Opp. at 6; Drosman Decl., ¶¶ 2-10). All of these documents are voluminous lists of names of former Household employees or merely contain stray references to the names of individuals with little other identifying information. It strains credulity for Plaintiffs to argue that such undifferentiated lists in Defendants' production put Defendants on "notice" that any or all of the thousands of people referenced in the documents were potential witnesses that Plaintiffs would call at trial.[4] This Court has consistently held the mere

[4] One of the documents is a September 2, 2002 *Forbes* article in which one of the nine witnesses (Seth Callen) was quoted. (Pls. Opp. at 6.) Plaintiffs themselves liberally cited this article in their Complaint, yet failed to include Mr. Callen as one of the branch sales managers listed in their subsequent Rule 26 disclosures. If seeing Seth Callen's name in the *Forbes* article was

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appearance of a witness's name in produced documents is insufficient to put parties on "notice" for the purposes of excusing Rule 26 compliance. *See Ty, Inc. v. Publications Int'l, Inc.*, No. 99 C5565, 2004 WL 421984 at *2 (N.D. Ill. Feb. 17, 2004) (Zagel, J.); *Boynton* v. *Monarch*, No. 92 C 140, 1994 WL 463905 at *2-3 (N.D. Ill. Aug. 25, 1994) (Kocoras, J.). This type of "needle in a haystack" identification does not render nondisclosure "harmless."

Similarly, Plaintiffs' argument that Defendants were on notice of the significance of the nine witnesses because the words "branch sales manager" appeared in deposition testimony, (Pls. Opp. at 6), is unavailing as well as misleading. Plaintiffs state that "the Branch Sales Managers . . . were discussed at length in 15 separate depositions," (*Id.* at 6-7 n.7) As phrased, Plaintiffs' assertion implies that the seven new witnesses at issue here were the subject of deposition testimony, but that simply is not the case. Plaintiffs fail to mention that ***not one*** of the transcripts they cite includes the name of ***any*** of Plaintiffs' proposed witnesses. (*See* Drosman Decl. Ex. 13) Instead, Plaintiffs' citation to deposition transcripts appears to be no more than the product of an electronic search for the words "branch sales manager" or "BSM." Mere passing references to the job titles held by some 1,400 individuals are not a substitute for the concrete, specific identification of names, addresses, and identities of witnesses upon whom Plaintiffs intend to rely, as Rule 26 requires. *See Civix-DDI, L.L.C.* v. *Cellco P'ship*, 387 F. Supp. 2d 869, 885 n.14 (N.D. Ill. 2005) (St. Eve, J.) (merely mentioning witness's name during deposition or disclosing name of witness's former employer "do not equate to formal disclosures that [plaintiff] may rely on [their] testimony"); *United States* v. *Dunn*, No. 04 C 50472, 2007 WL

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> sufficient to place anyone on notice of anything, it served to place ***Plaintiffs*** on notice sufficient to trigger their Rule 26 disclosure obligations. Thus, their argument proves too much.

1100754, at *4-*5 (N.D. Ill. April 12, 2007) (Mahoney, M.J.) (where proponent of belatedly-disclosed witnesses argued that opponent was "on notice", the court allowed testimony of only the witnesses identified by name during deposition as having knowledge regarding a topic). The cases cited by Plaintiffs do not support their argument, because they involve witnesses who were all specifically identified by name prior to the end of discovery or otherwise undisputedly known to the opposing party. *See Wells v. Berger, Newmark & Fenchel, P.C.*, No. 07 C 3061, 2008 WL 4365972 at *2-*3 (N.D. Ill. March 18, 2008) (Conlon, J.) (all witnesses were disclosed before the close of discovery; deposition testimony revealed the name and relevance of one witness; party opposing the witnesses had disclosed the others by name and address to the proponent of testimony); *Stolarczyk v. Senator Int'l Freight Forwarding, LLC*, 376 F.Supp. 2d 834, 843 (N.D. Ill. 2005) (Filip, J.) (witness was plaintiffs' daughter who had been specifically identified and discussed in deposition testimony); *El Ranchito, Inc.* v. *City of Harvey*, 207 F.Supp.2d 814, 818 (N.D. Ill. 2002) (Bucklo, J.) (witnesses at issue were employees detained by defendant police officers and "main actors" in the subject of the litigation).

Nor are Plaintiffs aided by the argument that in a June 2006 letter, Defendants noted that individuals who may have relevant information had been identified in Defendants' deposition testimony, interrogatory answers, and other of Defendants' discovery responses in addition to their initial disclosures. (Pls. Opp. at 5-6) If the same were true of Plaintiffs' disclosure compliance, a motion seeking to exclude Plaintiffs previously undisclosed witnesses would not have been needed. Similarly unavailing is Plaintiffs' argument that Defendants have listed three trial witnesses (Christine Cunningham, Lawrence Bangs, and John Davis), who were not formally identified in Rule 26 disclosures. All three of these witnesses were not only known to Plaintiffs, but were deposed by Plaintiffs in this litigation, well within the time that this Court allotted for discovery and well before trial. In contrast, none of Plaintiffs' nine concealed trial

witnesses was identified to Defendants until long after discovery closed, much less deposed. It is Plaintiffs, not Defendants, who seek to offer testimony of fact witnesses whom they never identified in any fashion during discovery as required by Rule 26, and thus Plaintiffs' goose/gander argument is more akin to apples/oranges.

B. Defendants Have No Duty to Cure or Mitigate the Prejudice Caused by Plaintiffs' Delay

Because Plaintiffs failed to disclose their surprise witnesses, Defendants were not able during discovery to discover the nature and basis of their positions, test the validity of their testimony through additional depositions or otherwise, investigate possible bases for bias or mistake closer to the events at issue, and assemble evidence necessary to counter their anecdotal accounts. Although this prejudice cannot be "cured," Plaintiffs argue that their belated disclosure of the nine witnesses must be harmless because Defendants never asked for their depositions once they finally were disclosed almost two years after the close of fact discovery. (Pls. Opp. at 8.)[5] Plaintiffs fail to mention that, during the parties' November 25, 2008 meet and confer, Plaintiffs' counsel took the position "that pretrial depositions of the nine witnesses would not be appropriate or justified under the circumstances" and that defense counsel explained that the only appropriate remedy for this attempted ambush was to exclude the testimony of the concealed witnesses. This position is consistent with Rule 37(c), which makes exclusion

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[5] Defendants did not depose the current and former branch-level employees identified in Plaintiffs Rule 26 disclosures, but this fact does not render Plaintiffs' discovery violations "harmless." Defendants can only speculate as to why Plaintiffs do not intend to call at trial *any* of the branch level employees they identified in their initial disclosures, or why the *only* branch-level employees that have agreed to testify on behalf of Plaintiffs are the ones that Plaintiffs did *not* list on their initial disclosures. Defendants did not need to depose the disclosed individuals, because there was ample time (four years, in fact) during and after discovery to conduct and complete their investigation. As it turns out, Defendants made a wise choice not to waste time and resources deposing them.

mandatory and does not impose on Defendants any duty to mitigate the prejudice resulting from Plaintiffs' breach.

The authority that Plaintiffs cite for their contention that Defendants should now take depositions of the nine undisclosed witnesses (at great expense and at a time when Defendants cannot afford the distraction from their final trial preparation), is inapplicable to these facts. None of the cases is from within this Circuit, and all are factually distinguishable as involving far fewer witnesses, witnesses who were readily identifiable (unlike these nine witnesses who are selectively drawn from a pool of 1,400 former Household branch sales managers), or a much lower degree of prejudice than that caused by Plaintiffs' extended concealment of these nine witnesses. *See Mathers v. NorthShore Mining Co.*, 217 F.R.D. 474, 482-83 (D. Minn. 2003) (single witness who had already been deposed once and thus known to opponents); *GAVCO, Inc. v. Chem-Trend, Inc.*, 81 F.Supp. 2d 633, 639 (W.D.N.C. 1999) (single expert witness whom proponents timely identified in discovery; failure to "mitigate" was actually opponents' failure to seek information about the witness's undisclosed expert report); *L-3 Communications Corp. v. OSI Sys., Inc.*, No. 02 Civ. 9144, 2006 WL 988143 at *4-*5 (S.D.N.Y. Apr. 13, 2006) (two witnesses who were plaintiff company's unique and well-known President and CFO); *Lobato* v. *Ford*, No. 05-cv-01437, 2007 WL 2593485 at *9 (D. Colo. Sept. 5, 2007) (single fact witness who was defendant's former girlfriend; exclusion not proper because opponents failed to timely invoke Rule 37(c)).

In any event, Plaintiffs' argument that Defendants should have tried to reopen discovery stands Rule 26 on its head. The purpose of the initial disclosure requirement (and the automatic, ongoing supplemental disclosure requirement of Rule 26(e)) is to facilitate the ability of opposing parties to plan their discovery efforts. *See Ty, Inc.*, 2004 WL 421984 at *1 (where supplemental disclosures are withheld, "the purpose of Rule 26 is effectively frustrated because

the opposing party is denied the opportunity to conduct discovery on the supplemental response.") (citations omitted); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, No. 95 C 0673, 1996 WL 680243 at *8 (N.D. Ill. Nov. 21, 1996) (Ashman, M.J.) (after the completion of fact discovery, supplemental disclosure of factual information by including it in expert reports "was not what the drafters of Rule 26(e)(2) envisioned" and constituted trial by ambush). Rule 26 places a burden on the proponent of evidence to identify relevant witnesses during discovery. It places no obligation on the opposing party to incur the burden, expense, and distraction of deposing belatedly disclosed witnesses and adjusting for their proposed new evidence well after discovery has ended. *See Lyman v. St. Jude Medical S.C., Inc.*, No. 05-C-122, 2008 WL 2224352 at *7-8 (E.D. Wis. May 27, 2008) (although names of witnesses surfaced during discovery, proponent of witnesses never disclosed they were likely to have information to support proponent's claims; prejudice shown because opponent made a "strategic decision not to depose these individuals"); *Finwall v. City of Chicago*, 239 F.R.D. 504, 507 (N.D. Ill. 2006) (Manning, J.) (last minute disclosure of expert witnesses was "not harmless . . . simply because there is time to reopen discovery" and schedule depositions).

III. PREJUDICIAL AND STATISTICALLY INSIGNIFICANT BRANCH-LEVEL ANECDOTES ARE IRRELEVANT TO THE ELEMENTS OF SECURITIES FRAUD AND INADMISSABLE UNDER FED. R. EVID. 403

Finally, Plaintiffs argue that these nine concealed witnesses do not pose the risk of unfair prejudice, even though they are a statistically unrepresentative subset of the pool of 1,400 former Household branch sales managers. (Pls. Opp. at 13-14). Plaintiffs correctly note that "the law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial." (*Id*. at 13). But that does not advance Plaintiffs' argument. Plaintiffs are, at the end of the day, trying a securities fraud case that requires them to present proof of facts as to the policies and state of mind of the Company and certain of its senior officers. None of the belatedly disclosed witnesses had any interaction with any of the

Individual Defendants or any other person who was authorized to make policy for Household that would yield evidence that bears upon the question of scienter.

During the Class Period, Household's 1,400 branch sales managers (like these concealed BSMs) reported to 125 District Sales Managers, who reported to 16 Division General Managers, who reported to 3 Regional General Managers, who then reported to Defendant Gary Gilmer. Each of these individuals was therefore at least four reporting levels below any Individual Defendant. As is apparent from the witnesses' declarations (Drosman Decl. Ex. 1-8), all of the witnesses were branch level sales managers who had no interaction with any of the individual Defendants or who can report receiving any instructions from anyone within the company higher than a Division General Manager (several rungs below those responsible for making corporate policy). Only a single witness's declaration mentions attending an annual branch sales managers' meeting at which Gary Gilmer was present, but that witness is "not certain" whether Mr. Gilmer was present at any of the allegedly offending workshops or presentations. (Dorsey Decl. ¶ 9). With nothing pertinent to report about corporate policy with respect to predatory lending, and no competent evidence about the Defendants' state of mind, the nine witnesses' inflammatory testimony has no capacity to do anything except unfairly prejudice the jury. For the reasons stated in Defendants' opening brief, the testimony of Plaintiffs' stealth witnesses should be excluded under Fed. R. Evid. 403.

CONCLUSION

For the foregoing reasons, the Court should enter an Order excluding the testimony of Plaintiffs' nine previously undisclosed witnesses.

Dated: February 13, 2009
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Respectfully submitted,

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