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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. (“Household”), William F. Aldinger, David A. Schoenholz and Gary Gilmer (collectively, the “Household Defendants” or “Defendants”),¹ in further support of their motion for an Order precluding Plaintiffs from offering into evidence at trial dozens of statements that Plaintiffs claim are the misrepresentations on which they base their fraud claims, but which Plaintiffs did not identify as such during discovery, or at any time since the close of discovery, until January 15, 2009.

INTRODUCTION

Plaintiffs’ failure to identify in discovery dozens of statements on which they now claim to rely as a basis for their securities fraud claims is a clear violation of Fed. R. Civ. P. 26(e) and must be met with sanctions.² The case for exclusion of the newly-identified statements is especially strong in light of Defendants’ repeated requests during and following the close of discovery for a list of each statement that Plaintiffs contend was a misrepresentation, and Plaintiffs’ representations to Defendants and the Court that their interrogatory responses contained the complete list of statements on which they intend to rely at trial. In their opposition brief, Plaintiffs offer no justification for their discovery violations and argue that Defendants were not harmed because, for years, Defendants have been aware of the general topics covered

¹ Defendants Joseph A. Vozar and Household Finance Corporation (“HFC”) join in this motion and expressly reserve the right to amend, supplement or re-assert objections to Plaintiffs’ proposed “Household International False Statements” to the extent that at any future time Plaintiffs propose to use these statements in a trial of claims asserted against Mr. Vozar and HFC.

² Rule 26(e) states that a party “who has responded to an interrogatory . . . must supplement or correct its . . . response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect.” Fed. R. Civ. P. 26(e)(1)(A).

by the allegedly false statements. In fact, as set forth in Defendants' opening brief and herein, Plaintiffs' misconduct has caused and continues to cause Defendants substantial harm, which will be abated only by a Court order excluding those statements that were not disclosed to Defendants during discovery.

ARGUMENT

The thrust of Plaintiffs' opposition is that Defendants have been on notice for years that the general subject matters covered by the dozens of new statements—*e.g.*, 2+ delinquency rate and chargeoff statistics—were at issue in this litigation. Plaintiffs' position ignores their obligation to put Defendants on notice of the *specific* allegedly false statements on which they base their claims, to provide complete answers to Defendants' interrogatories, and to supplement their answers as appropriate. Indeed, this Court has already instructed Plaintiffs to provide Defendants with a particularized list of the statements on which they intend to rely at trial.³ For Plaintiffs to feign ignorance of their discovery obligations is disingenuous.

Plaintiffs have not met their burden of showing that their failure to comply with Rule 26(e) was substantially justified or harmless. *See Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996) (burden to show substantial justification or harmlessness is on party who failed to comply with the discovery obligations). In their opposition brief, Plaintiffs offer no explanation as to why they waited for years before identifying many of the specific alleged misrepresentations on which they now claim to base their fraud claims. At this late stage of the litigation, it is nothing short of ridiculous for Plaintiffs to characterize as harmless their failure to

³ Ex. 4 to the Declaration of Thomas J. Kavalier ("Kavalier Declaration") submitted with the Motion *in Limine* to Exclude the Allegedly False and Misleading Statements That Were Not Identified by Plaintiffs in Discovery.

disclose, at any point over the past five years, the particular statements on which they intend to rely at trial. Even at the earliest stage of litigation, the filing of the complaint, securities fraud plaintiffs are required to put Defendants on notice of the specific statements on which they base their claims.⁴ Subsequent to the filing of the complaint in this action, Defendants requested through interrogatories and motion practice, and this Court directed, that Plaintiffs particularize each individual statement which forms the basis of their fraud claims. Plaintiffs have cited no authority to support their position that identifying statements in the complaint and otherwise putting defendants on notice of the general subject matter of the alleged fraud somehow satisfies their burden to comply with this Court's orders and instructions to particularize their statements, or their burden under the Federal Rules of Civil Procedure to provide complete answers to Defendants' interrogatories. In short, sufficiency does not guarantee particularity. Indeed, as this case demonstrates, the former can be the antithesis of the latter.

As this Court has already recognized, each individual Defendant is entitled to an identification of the statement(s) he is alleged to have falsely made, in order to prepare an adequate defense. In preparing for trial, Defendants must necessarily analyze and prepare defenses for each of the individual alleged misstatements, taking into account, *inter alia*, the speaker of the statement and the specific facts known to the speaker at the time the statement was made. Defendants have already spent enormous resources in that undertaking based on Plaintiffs' prior representations about the statements it intended to use at trial. It will be a substantial burden on Defendants if they are now forced to refocus their expert analysis and other

⁴ The PSLRA requires that plaintiff "specify each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading . . ." 15 U.S.C. § 78u-4(b)(1), (2).

trial preparations to include the dozens of previously unidentified new statements in the short time left before the start of trial.

Defendants have, over the course of this litigation, made repeated efforts to get Plaintiffs to clarify precisely which statements they intend to prove at trial. As set forth in Defendants' opening brief, on December 16, 2008, Azra Mehdi, Esq. averred in open court that the statements Plaintiffs would rely on at trial would be at most those that are contained in Plaintiffs' interrogatory responses—"no more than that."⁵ Plaintiffs' suggestion that Defendants have not been harmed because there was "only" a 30-day delay between Ms. Mehdi's misrepresentations to the Court and Plaintiffs' disclosure of the new allegedly false statements is absurd. Ms. Mehdi did nothing but perpetuate Plaintiffs' failure to truthfully and completely respond to Defendants' interrogatories. The time period during which Plaintiffs kept Defendants in the dark about the statements that were truly at issue in this case, in direct violation of its Rule 26 obligations, spans years, not days.

Even in their opposition brief, Plaintiffs continue to mislead the Court by stating that the list provided to Defendants on January 15, 2009 "reduced and clarified the false statements" and "included the same documents and statements previously identified." *See* Pl. Opp. Br. at 2. That is only half of the truth. Plaintiffs list did pare down the thousands of statements Plaintiffs had insisted for years (and through January 15, 2009) were central to its case, but it also added dozens of new statements that had not been previously particularized in Plaintiffs' complaint, interrogatory responses or anywhere else. *See* App. A to Ex. 6 of the Kavalier Decl.

⁵ Ex. 4 to Kavalier Declaration.

Plaintiffs' failure to comply with the Federal Rules of Civil Procedure and their decision to wait until the eleventh hour to spring dozens of new allegedly false statements on Defendants carry serious consequences. The Court should, at the very least, impose the mandatory sanction of Fed. R. Civ. P. 37—exclusion of the new false statements.⁶

CONCLUSION

Because Plaintiffs have failed to comply with Rule 26(e) and have failed to show that the failure to comply was justified or harmless, the Court must impose sanctions on Plaintiffs, the very least of which should be exclusion of the previously undisclosed statements, as set forth in column 3 of the Chart of New Statements.⁷

⁶ See Rule 37(c) (“[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless”).

Rule 37(c) also states, “[i]n addition to or instead of this [exclusion] sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of reasonable expenses, including attorney’s fees, caused by the failure;

(B) may inform the jury of the party’s failure;

(C) may impose other sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).”

⁷ See Kavalier Decl. Ex. 6, App. A.

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New York, New York

Respectfully submitted,

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