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' MISCELLANEOUS MOTIONS *IN LIMINE*

[PLAINTIFFS' MOTION *IN LIMINE* NO. 2]

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A. Plaintiffs' Request for an Equal Number of Peremptory Challenges Should Be Granted

Defendants concede that each side should be afforded the same number of peremptory challenges. Therefore, plaintiffs' motion should be granted.

B. Plaintiffs Should Be Permitted to Examine Defendants' Former Employees – All of Whom Are Currently Represented by Defense Counsel – With Leading Questions

Despite defendants' efforts at misdirection, there is one simple fact that they cannot overcome: defendants do not – and cannot – cite to a single case (or any other authority) where a court refused to allow examination by leading questions of an opposing party's former employees who defense counsel represent in the current litigation. In fact, the overwhelming weight of authority establishes that where defendants' former employees are represented by defense counsel in the litigation – as they are in this case – plaintiffs should be permitted to use leading questions on direct examination of Household's former employees identified by plaintiffs. *See, e.g.*, *Chonich v. Wayne Co. Comm. College*, 874 F.2d 359, 368 (6th Cir. 1989) (upholding trial court's decision allowing plaintiffs' counsel to examine defendants' former employees with leading questions); *Stewart v. Hooters of America, Inc.*, No. 8:04-CV-40, 2007 U.S. Dist. LEXIS 84681, at *20-*21 (M.D. Fla. Nov. 15, 2007) (holding that, although the witness's employment ended five years before trial, the opposing party could examine a party's former employee by leading questions); *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991) ("Although Ms. Cox is no longer employed by Sun, she is clearly identified with [Sun], both through her previous employment and her ongoing relationship with Mr. Waters, a key witness who attended the trial on behalf of Sun.").[1]

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[1] Even under the more narrow strictures of Fed. R. Civ. P. 43(b) – prior to the adoption of Fed. R. Evid. 611 – courts liberally construed the rule to permit a party to cross-examine an adverse party's former employees. *See, e.g.*, *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 970-71 (5th Cir. 1969) (former employee "could reasonably be expected to identify with the interests" of the company); *Jones v. John*

Accordingly, defendants' argument that certain witnesses are not "identified with" defendant Household because the witnesses are no longer employed by Household is without merit.[2]

Federal Rule of Evidence 611(c) is straightforward: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." "'The term "witness identified with an adverse party" is intended to apply broadly to an identification based upon employment by the party or by virtue of a demonstrated connection to an opposing party.'" *United States v. McLaughlin, Jr.*, No. 95-CR-113, 1998 U.S. Dist. LEXIS 18588, at *3 (E.D. Pa. Nov. 19, 1998) (quoting Glen Weissenberger, *Federal Evidence 1996 Courtroom Manual* 134 (1995)). In the Seventh Circuit, Rule 611(c) has been used in civil trials to allow a plaintiff's attorney to use leading questions in the direct examination of two non-defendant police officers because they were clearly "identified with" the defendant City of Chicago through their employment. *Ellis v. Chicago*, 667 F.2d 606, 612-13 (7th Cir. 1981) (explaining that Fed. R. Evid. 611(c) "was thus designed to enlarge the categories of witnesses automatically regarded as adverse, and therefore subject to interrogation by leading questions without further showing of actual hostility"). Indeed, this principle is so widely recognized that defendants in securities fraud class actions such as this one routinely stipulate that "Plaintiffs' counsel may use leading questions during their case-in-chief to examine [defendants'] current or former employees." *See, e.g.*, *In re Forest*

Hancock Mut. Life Ins. Co., 416 F.2d 829, 830-33 (6th Cir. 1969) (non-employee insurance agent identified with interests of John Hancock).

[2] Evidently recognizing the weakness of their argument, defendants concede that plaintiffs are permitted to examine two former Household employees – Joseph Vozar and Kenneth Robin – with leading questions. *See* Defendants' Memorandum of Law in Partial Opposition to Plaintiff's Miscellaneous Motions *in Limine* ("Defs' Opp.") at 4. Defendants make no effort to explain why these two former employees should be treated differently from the other former Household executives who plaintiffs seek to examine with leading questions pursuant to Rule 611(c).

Laboratories, Inc. Sec. Litig., No. 05-CV-2827, Stipulation and Order Concerning Plaintiffs' Omnibus Pretrial Motion at 3 (S.D.N.Y. Apr. 30, 2008) (attached hereto as Ex. A).

Unable to escape this controlling authority, defendants misstate the facts in their opposition brief, claiming that plaintiffs seek a "ruling that ***all*** current or former officers or employees of Household should automatically be deemed 'identified with' Defendants." Defs' Opp. at 4 (emphasis added). Not so. In fact, plaintiffs have specifically identified a limited number of current and former executives at Household who are identified with defendants and thus should be examined by plaintiffs with leading questions. *See* Plaintiffs' Motion *in Limine* No. 2 at 3 n.1. These witnesses include some of the highest ranking executives at Household during the Class Period, including Household's former Controller (Kay Nelson), Household's Vice President and General Counsel (Kathleen Kelly Curtin) and Household's Vice Preceisent of Consumer Lending (Walter Rybak). These witnesses are clearly "identified with" defendant Household and thus subject to plaintiffs' examination by leading questions. *See Chonich*, 874 F.2d at 368 (observing that defendants' former employees were "identified with" defendants and subject to examination by leading questions where the former employees "had been very high officials at [defendant organization] during the period in question").[3]

For example, defendants pretend that Megan Hayden-Hakes – Household's Director of Corporate Communications who actually made several of the statements that plaintiffs allege are false and misleading – is not "identified with" Household. But Hayden-Hakes was among those charged by defendants, directly or indirectly, to violate the federal securities laws. Under these

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[3] For this reason, defendants are plainly incorrect that plaintiffs' request would require the Court to determine that the Branch Sales Managers are also "identified with" Household for purposes of Rule 611(c). On the contrary, plaintiffs have ***not*** listed any of the Branch Sales Managers – ***none of whom are represented by defense counsel*** – as current or former employees who are "identified with" Household or otherwise sought leave to examine those witnesses with leading questions.

circumstances, Hayden-Hakes and the other witnesses enumerated by plaintiffs "clearly qualified as 'witness(es) identified with an adverse party' for purposes of Rule 611(c)." *Ellis*, 667 F.2d at 613 Thus, "if the witness' acts or omissions are the predicate for a party's claim or defense, . . . then that witness is ordinarily sufficiently identified with an adverse party and may be called as an adverse witness and interrogated by leading questions." *Harris v. Buxton T.V., Inc.*, 460 So. 2d 828, 833 (Miss. 1984) (construing Miss. R. Civ. P. 43(b)(3) which contains language identical to the sentence in Fed. R. Evid. 611(c) at issue here).[4]

Without explanation or support, defendants insist that the undisputed fact that they represent ***each*** of these former Household employees "should not be granted any special weight in this case." Defs' Opp. at 7. To the contrary, defendants' representation of these former Household employees is evidence of the "ongoing relationship" that Household has with these witnesses. *See Stahl*, 775 F. Supp. at 1398. Although the witnesses are no longer employed by Household, they are clearly identified with defendant, both through their previous employment and their "ongoing relationship" with Household. *Id.* Use of leading questions on direct examination of these witnesses is therefore appropriate.

Defendants fare no better with their argument that "[p]laintiffs should not be permitted to use leading questions on the direct examination of any former Household employee under Rule 611(c), absent a showing that a particular witness is evasive or hostile." Defs' Opp. at 7. "***Rule 611(c) permits the use of leading questions on direct examination of a 'witness identified with an adverse***

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[4] Defendants' contention that "any arguments based on the individual employees' status are waived and may not be raised in a reply brief" is silly. Defs' Opp. at 5 n.7. In their opening brief, plaintiffs obviously raised this issue by identifying the current and former employees who they seek to examine using leading questions and stating: "Many of the witnesses plaintiffs may call served in a variety of positions at Household, reported directly to the individual defendants and participated in events that led to this action and several governmental investigations." *See* Plaintiffs' Motion *in Limine* No. 2 at 4.

party' without any requirement of a showing of hostility." *United States v. Duncan*, 712 F. Supp. 124, 126 (S.D. Ohio 1988) (emphasis added). According the Seventh Circuit, Rule 611(c) was "designed to enlarge the categories of witnesses ***automatically*** regarded as adverse, and therefore subject to interrogation by leading questions without further showing of actual hostility." *Ellis*, 667 F.2d at 612-613 (emphasis added) (citing Advisory Committee Notes to Federal Rule of Evidence 611(c)); *Haney v. Mizell Memorial Hospital*, 744 F.2d 1467, 1478 (11th Cir. 1984) (where the witness was identified with a party, "the district court misread Rule 611(c) when it refused to allow [the opposing party] to lead him until actual hostility was established").

Similarly without merit, defendants maintain that, if plaintiffs are permitted to use leading questions on direct examination of former Household employees, then they "should be allowed to use leading questions on cross examination of any witness called by Plaintiffs in their case in chief, including current and former employees of Household." Defs' Opp. at 7. In *Shultz v. Rice*, 809 F.2d 643 (10th Cir. 1986), the Tenth Circuit ruled on the issue of whether, under Fed. R. Evid. 611(c), defense counsel could ask leading questions of the defendant, after the defendant had been called as a witness by his opponent. The *Schultz* court found that defense counsel's use of leading questions on cross-examination of the defendant "is precisely that characterized in the [advisory committee's] note to [Rule 611(c)] as '***cross examination in form only and not in fact***,' and therefore, should not have been allowed as a matter of right." 809 F.2d at 654 (emphasis added); *see Perkins v. Volkswagen of America, Inc.*, 596 F.2d 681, 682 (5th Cir. 1979) (error for trial court to rule that employee of defendant would be plaintiff's witness if plaintiff called him). Whereas Rule 611(c) permits plaintiffs to ask defendants' current and former employees leading questions on direct examination, it does not allow defendants to "cross examine" their own current and former employees by leading questions.

In short, the current and former Household employees identified by plaintiffs – all of whom are represented in this action by defendants' attorneys – are "identified with" defendants under Rule 611(c). As such, plaintiffs should be permitted to use leading questions during their case-in-chief to examine defendants' current or former employees.

C. Defendants Should Be Precluded from Introducing Live Testimony from Persons Unavailable to Plaintiffs and Introducing Deposition Testimony of Persons in Their Control

As a matter of fairness, defendants should be required to produce Ned Hennigan, Robert O'Han and Kenneth Walker for plaintiffs' case-in-chief if defendants intend on having these witnesses testify live. The Court has the authority under Rule 611(a) of the Federal Rules of Evidence to "'exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence'" and not allow these three witnesses to testify live in defendants case. *See Niebur v. Town of Cicero*, 212 F. Supp. 2d 790, 806 (N.D. Ill. 2002) (citation omitted) (court order upheld to preclude witness from testifying after party failed to honor reasonable request for production of witness subject to their control and forcing opponent to use deposition).

In *Maran Coal Corp. v. Societe Generale de Surveillance S.A.*, No. 92 Civ. 8728 (DLC), 1996 U.S. Dist. LEXIS 172 (S.D.N.Y. Jan. 10, 1996), the court ordered that defendants had to produce two witnesses for plaintiffs' case or be precluded from calling them as live witnesses in their own case. *Id.* at *7. Both witnesses were ***foreign*** witnesses that clearly were not within subpoena power of the court. The court pointed out that defendants' position (similar to defendants' position here) was "gamesmanship" that "will not assist the ascertainment of truth and will needlessly consume the jury's time." *Id.* at *5. In *Maran*, one witness was a retired former consultant for the defendant and the other witness was a current employee of defendants' affiliate. *Id.* at *6. The court found that if the defendants are able to produce them as trial witnesses, they

should not be allowed to wait until their own case to call them and they should produce them in plaintiffs' case. *Id.*

In this case, defendants have listed these three witnesses on their "may call" trial witness list and clearly can produce them as trial witnesses. In fact, they have not offered them as deposition witnesses because they can produce them at trial. Two of the three witnesses were top salespeople that reported directly to defendant Gilmer and were involved in the "blitz purge." The third was in charge of Household's QAC. The witnesses were material witnesses in the case. *See Societe Generale*, *supra*.

In footnote 10 of their brief, defendants state that they have no intention to ask these individuals to travel to Chicago. Defendants should be forced to make a final decision rather than their "current" position. This statement also shows that defendants control these witnesses despite the fact that they are outside the Court's jurisdiction. Defendants represent them and can request that they appear at the trial. O'Han is a current employee who is clearly within the defendants' control. *Schwartz v. Marriot Hotel Services, Inc.*, 186 F. Supp. 2d 245, 250 (E.D.N.Y. 2002) (employees can testify in any venue by virtue of employment relationship); *Merrick Bank Corp. v. Cardsystems Solutions, Inc.*, No. 08-Civ.-00674 ERW, 2008 U.S. Dist. LEXIS 99403, at *10 (E.D. Mo. Dec. 8, 2008) (in transfer of venue case the court noted that companies have the incentive and power to compel employee witnesses' cooperation even beyond the 100-mile marker). Although some former employees may no longer be under defendants' control, it is clear that Mr. Walker and Mr. Hennigan have agreed to come to Chicago to testify, or else defendants would not have included them on their trial witness list.

The Court may utilize Rule 611, in the interests of fairness and economy, to require defendants to make these three witnesses available for live examination on receiving a reasonable request or else order that defendants cannot call them live in their case.

The Court should also preclude defendants from offering the video testimony of Louis Levy since he is within their control. Defendants clearly represent Mr. Levy and have made no showing that Mr. Levy is "unavailable" under Fed. R. Evid. 804(a)(5) to come to trial. No evidence or declaration has been submitted which makes this showing. *Moore v. Mississippi Valley State University*, 871 F.2d 545, 552 (5th Cir. 1989) (excluding deposition testimony since "the burden is on the offering party to supply such justification" and "plain assertion that [the witness] was unavailable" is insufficient). The fact that plaintiffs designated deposition testimony of Mr. Levy does not change the analysis. The designations were done out of precaution that defendants would not produce Mr. Levy for trial.

D. Percipient Witnesses Should Be Excluded from the Courtroom

Defendants apparently concede that percipient witnesses should be excluded from the courtroom until after both sides have rested. Plaintiffs have no objection to defendants' request that percipient witnesses be permitted to be present at closing arguments. However, defendants further request that percipient witnesses, who have not yet testified, be permitted to discuss the ***trial*** testimony of other witnesses with the Company's attorneys and the Company representative should be denied.

The "purpose of the sequestration rule is to prevent the shaping of testimony and to discourage fabrication, inaccuracy and collusion." *In re Scarlata*, 127 B.R. 1004, 1012 (N.D. Ill. 1991), *aff'd*, 979 F.2d 521 (7th Cir. 1992); *see also Hill v. Porter Mem. Hosp.*, 90 F.3d 220, 223 (7th Cir. 1996); *United States v. Williams*, 136 F.3d 1166, 1168 (7th Cir. 1998). The sequestration rule would be of little value if defense counsel or Household's designated representative were free to tell percipient witnesses, who had not yet testified, what was transpiring inside the courtroom or to provide them with summaries of witness testimony from the trial. Plaintiffs understand that defense counsel will continue to prepare witnesses during trial, but they and Household's designated

representative should not be permitted to discuss the trial testimony of other witnesses with witnesses waiting to testify. In short, defendants' proposed exception to the sequestration order would swallow the rule.

Defendants rely on *United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000) in support of their position. There is no question that *Rhynes* is an interesting decision, in which the Fourth Circuit Court of Appeals discusses witness sequestration in detail in the majority opinion, concurring opinions and the dissent. However, *Rhynes* does not forbid a district court from imposing a sequestration order in a civil case that would preclude counsel for either side from discussing the trial testimony of other witnesses with witnesses not yet called to the stand. As an initial matter, the sequestration order imposed by the trial court, and reviewed on appeal in *Rhynes*, did not explicitly forbid communications regarding trial testimony between defense counsel and a percipient witness not yet called – the key fact on which the decision is based. Further, while not ruling on the issue, the *Rhynes* court was concerned with the potential violation of a criminal defendant's Sixth Amendment rights, as well as the remedy imposed by the trial court (exclusion of the witness's testimony).

Nevertheless, *Rhynes* also recognized that a district court has the discretion to enter a sequestration order "that exceeds the scope of Rule 615." *Rhynes*, 218 F.3d at 321 n.13. Therefore, plaintiffs respectfully request that the Court enter a sequestration order which would also preclude counsel from discussing the trial testimony of other witnesses with witnesses who have not yet been called to testify at trial.

E. Counsel Should Not Be Permitted to Discuss the Subject Matter of a Witness's Testimony During Breaks in the Witness's Testimony

There should be an absolute prohibition on counsel speaking with a witness, while the witness is still under oath, about the subject matter of the witness's testimony. Defendants' reliance on *United States v. Santos*, 201 F.3d 953, 965-66 (7th Cir. 2000) is misplaced. *Santos* stands for the

unremarkable proposition that "a flat prohibition against a criminal defendant's conferring with his lawyer during an overnight or otherwise substantial recess violates the ***Sixth Amendment***." *Id.* at 965 (emphasis added). There are no Sixth Amendment concerns in this civil action. As the court held in a case cited by defendants, *Minebea Co. v. Papst*, 374 F. Supp. 2d 231 (D.D.C. 2005): "It should go without saying that no lawyer in this civil case (including in-house counsel) or a lawyer's agent or employee may talk to any witness during his or her testimony – including during recesses, lunch breaks and overnight recesses." *Id*. at 236 n.4.

Therefore, the Court should enter an order prohibiting counsel from discussing the substance of a witness's testimony, once the witness is sworn, until that testimony is completed.

F. Evidence of Mr. Lerach's Conviction and the *Lexecon* Case Should Be Excluded

Incredibly, defendants spend six pages responding to plaintiffs' simple motion regarding the relevancy of Mr. Lerach's conviction and the Milberg Weiss/*Lexecon* case. After analyzing defendants' invective-filled, abusive personal attack on plaintiffs' counsel – it appears that they concede plaintiffs are correct – any such "evidence" on this topic is irrelevant. Therefore, the Court should grant plaintiffs' motion. Fed. R. Evid. 402.

If defendants believe that plaintiffs open the door – and it is a door that cannot be opened since the case is about Household, not plaintiffs' counsel – defendants should raise it with the Court.[5] Until then, defendants concede the evidence is irrelevant and they should keep their bitterness, anger and angst to themselves. The reality is that defendants got sued for securities

[5] Defendants spend much of their brief on this point re-arguing their objections to Plaintiffs' Proposed Jury Instructions. Plaintiffs will leave their response to defendants' objections regarding jury instructions to another day – it is irrelevant to this motion.

fraud.[6] This case survived motions to dismiss and, after six years of litigation, is on the eve of trial. A jury will decide the merits – and defendants' ranting and raving about irrelevant topics should have no place at that trial.

DATED: February 13, 2009

Respectfully submitted,

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[6] Of course, when you materially misstate your financials and are forced to restate them; pay $484 million to Attorneys General because of your predatory loan practices; and amend those financial statements a second time because the SEC found you made additional false statements – in all likelihood, you will get sued.

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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 13, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MISCELLANEOUS MOTIONS *IN LIMINE***.

The parties' e-mail addresses are as follows:

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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 Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE