United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 5893	**DATE**	3/11/2009
CASE TITLE	Lawrence E. Jaffe Pension Plan vs. Household International Inc.		

DOCKET ENTRY TEXT

For the reasons set forth in this Order, the Court denies plaintiffs' first motion in limine [doc. no. 1335], grants in part and denies in part plaintiffs' second motion in limine [doc. no. 1336], grants plaintiffs' fourth motion in limine [doc. no. 1339], and grants plaintiffs' seventh motion in limine [doc. no. 1342].

Docketing to mail notices.

Courtroom Deputy Initials:	LC/LM

Plaintiffs' First Motion in Limine

Plaintiffs ask the Court to bar defendants from presenting evidence that their challenged loan practices were disclosed in prospectuses they filed with the SEC in connection with the sale of securitized assets because defendants did not identify the prospectuses in their interrogatory answers as facts on which their second affirmative defense is based. (*See* First Am. Answer, Second Aff. Defense ("[E]ach member of the purported plaintiff class knew or should have known the financial condition of Household and the risks associated with the lines of business in which it participated, and failing to consider these risks . . . each such member of the purported plaintiff class assumed the risk that he or she might be damaged by acquiring Household securities.").)

Even if defendants should have identified the prospectuses, an issue the Court does not decide, that omission would support a preclusion sanction only if plaintiffs were prejudiced by it. *See* Fed. R. Civ. P. 37(c). They were not. The securitization prospectuses were filed with the SEC and describe the asset pools, *i.e.*, the Household loans, that secured the debt. (*See, e.g.*, Kavaler Decl. Opp'n Pls.' Mots. Limine 1, 2-10, Ex. 30, Excerpt HRSI Funding Inc [sic] II Prospectus.) To the extent these publicly-filed documents contain disclosures material to their claims, plaintiffs are presumed to have known about them. *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) ("A reasonable investor is presumed to have information available in the public domain . . . ."). Given that presumption, any failure by defendants to identify the prospectuses as a basis for their second affirmative defense is harmless. Plaintiffs' motion is, therefore, denied.

Plaintiffs' Second Motion in Limine

Peremptory Challenges

In their second motion in limine, plaintiffs ask, among other things, to be given the same number of peremptory challenges as defendants. Defendants do not object to the request, and the Court grants it.

Leading Questions

Plaintiffs ask permission to use leading questions to examine the following current or former Household employees that they intend to call as witnesses: William Aldinger, Gary Gilmer, David A. Schoenholz, Thomas Detelich, Clifford Mizialko, Carin Rodemoyer, Dan Anderson, James Connaughton, Curt Cunningham, Stephen Hicks, Peter Alan Sesterhann, Lisa Sodeika, Joseph Vozar, Kenneth Robin, Megan Hayden-Hakes, Kay Nelson, Walter Rybak, Kathleen Kelly Curtin, Thomas Schneider, Celeste Murphy, Daniel Pantelis, Richard J. Peters, Stephen Hicks and Craig Streem.

Defendants do not object to the request with respect to: (1) the individual defendants, William Aldinger, Gary Gilmer and David A. Schoenholz; (2) defendants' current employees, Thomas Detelich, Clifford Mizialko, Carin Rodemoyer, Dan Anderson, James Connaughton, Curt Cunningham, Stephen Hicks, Peter Alan Sesterhann and Lisa Sodeika; (3) or former employees Joseph Vozar and Kenneth Robin. Thus, the Court grants plaintiffs' request with respect to those witnesses.

However, defendants object to the request with respect to former employees Megan Hayden-Hakes, Kay Nelson, Walter Rybak, Kathleen Kelly Curtin, Thomas Schneider, Celeste Murphy, Daniel Pantelis, Richard J. Peters, Stephen Hicks and Craig Streem because plaintiffs have not shown that they are hostile or identified with Household. *See* Fed. R. Evid. ("Rule") 611 ("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 record shows that Hayden-Hakes and Streem were Household spokesmen who made some of the alleged misrepresentations underlying this suit. (*See* Kavaler Decl. Supp. Defs.' Mot. Preclude Pls. Advancing Certain Statements, Ex. 5, Household International False Statements.) Further, plaintiffs assert, without contradiction, that Nelson was Household's Controller, Kelly Curtin was its General Counsel, and Rybak was its Vice President of Consumer Lending during the class period. Plaintiffs do not say what positions Schneider, Murphy, Pantelis, Peters and Hicks occupied, but defendants admit that their counsel is representing them, and all of the other former

Household employees whom plaintiffs seek to lead, in this suit. (*See* Defs.' Mem. Law Partial Opp'n Pls.' Misc. Mots. Limine [Second Mot. Limine] at 7.) Given these facts, the Court finds that all of these witnesses are identified with defendants for the purposes of Rule 611. Thus, the Court grants plaintiffs' motion.

Production of Witnesses O'Han, Hennigan and Walker

Plaintiffs ask the Court to preclude defendants from calling as witnesses Ned Hennigan, Robert O'Han and Kenneth Walker, listed on defendants' "may call" list, unless defendants produce them to testify during plaintiffs' case-in-chief. The Court grants the motion as to O'Han, who is currently employed by Household, and thus, under its control. However, plaintiffs must pay half of the expenses O'Han reasonably incurs to travel to Chicago or, if he is required to make two separate trips, all of the expenses he reasonably incurs to travel to Chicago to testify in plaintiffs' case.

Because Henningan and Walker are former Household employees who live outside the its jurisdiction, the Court cannot order Household to produce them. The Court will also not dictate the order in which the parties present their evidence. However, given the amount of evidence the parties wish to present and the four-week period allotted for trial, the Court strongly encourages the parties to cooperate with respect to the presentation of witnesses. Moreover, if the Court discovers that any party has made efforts to thwart another party's access to a third-party witness or has misrepresented its connection to or contacts with any such witness, the Court will not hesitate to impose sanctions.

Louis Levy's Testimony

Plaintiffs ask the Court to bar defendants from offering Louis Levy's testimony by deposition. Plaintiffs contend that Levy, who is a former Household director, is under defendants' control and, thus, must testify in court. Defendants say Levy is unavailable within the meaning of Rule 804 because he is no longer affiliated with Household, lives outside the Court's jurisdiction and "has not committed to appear at trial." (Defs.' Resp. Partial Opp'n Pls.' Second Mot. Limine at 11); *see* Rule 804(a)(5) (stating that a witness is unavailable if he "the proponent of [his] statement has been unable to procure [his] attendance . . . by process or other reasonable means")). Defendants have not, however, offered any evidence to support those assertions. Accordingly, plaintiffs' motion is granted without prejudice to defendants' offering proof of Levy's unavailability.

Witness Sequestration

Plaintiffs ask the Court to exclude from the courtroom percipient witnesses to whom Rule 615 applies until after the parties rest their cases. Defendants do not object to this request, and the Court grants it.

Communication Between Counsel and Witnesses

As clarified in their reply brief, plaintiffs seek an order barring the following communications between counsel and witnesses: (1) discussions of a witness' trial testimony with him/her after he/she is sworn and before his/her testimony is completed; and (2) discussions of other witnesses' trial testimony with a witness who has yet to start or finish testifying. This clarification moots defendants' objection to a total ban on counsel's communications with witnesses, and banning only these communications will serve the purposes of Rule 615 without impeding the parties' trial preparations. Thus, the Court grants plaintiffs' clarified request and orders *all* counsel to refrain from the communications set forth above.

Evidence About Lerach and Lexecon/Milberg Weiss Settlement

Plaintiffs ask the Court to bar evidence that William Lerach, who initially served as plaintiffs' lead counsel, was convicted in 2007 of conspiring to obstruct justice by paying people to be named plaintiffs in shareholder derivative suits. (*See* Newville Decl. Opp'n Pls.' Mot. Limine No. 2, Ex. 4, Plea Agreement, Ex. A, Statement Facts.) Because that evidence is irrelevant to the issues in this suit, the Court grants the motion.

Plaintiffs' motion to bar evidence of the settlement between Lexecon and Milberg Weiss, to which defendants do not object, is also granted.

Plaintiffs' Fourth Motion in Limine

Plaintiffs ask the Court to bar defendants from presenting evidence to show that Household's lending practices were approved by counsel because they withheld the documents evidencing such communications from discovery by asserting the attorney/client privilege. Having done so, plaintiffs say, defendants cannot offer evidence that they relied on advice of counsel to defend against plaintiffs' claims.

Defendants insist that they are not invoking the advice-of-counsel doctrine: "[T]here is not currently, nor has there ever been, any suggestion that any Defendant relied on undisclosed advice of counsel in making a statement alleged by Plaintiffs to be misleading." (Defs.' Mem. Law Resp. Pls.' Mot. Limine Exclude Documents Testimony Refer Advice Counsel at 5); *see S.E.C. v. Enters. Solutions, Inc.*, 142 F. Supp. 2d 561, 576 (S.D.N.Y. 2001) ("To invoke [the advice-of-counsel] principle, a defendant must show that he (1) made complete disclosure to counsel, (2) sought advice as to the legality of his conduct, (3) received advice that his conduct was legal, and (4) relied on that advice in good faith."). Given that representation, plaintiffs' motion to bar defendants from offering evidence that they relied on the advice of counsel in making any of the alleged misstatements is granted.

Defendants do, however, seek to offer evidence that the employees who made the alleged misstatements did so knowing that Household's legal department "reviewed all lending practices . . . for compliance with applicable laws," to show that they acted in good faith. (Defs.' Mem. Law Resp. Pls.' Mot. Limine Exclude Documents Testimony Refer Advice Counsel at 4 (quotation omitted).) Though an inference of good faith is not compelled by such evidence, if the subject employees can show that they had personal knowledge of the work performed by Household's legal department, they can testify about that knowledge and the assumptions they made about Household's lending practices because of it. If those employees cannot show that they had such personal knowledge, they can testify about any assumptions they made about Household's lending practices, simply because it had a legal department. If defendants present such evidence, however, plaintiffs may: explore the basis for, and depth of, any witness' knowledge about the work of the legal department; challenge the reasonableness of any assumptions any witness made because of that knowledge or because they knew the Household legal department existed; and argue that any employees' failure to seek legal advice, though they knew it was available, supports an inference of bad faith.

Plaintiffs' Seventh Motion in Limine

Plaintiffs ask the Court to bar defendants from referring at trial "to the unsubstantiated post-class period allegations of voter fraud against Association of Community Organizations for Reform Now." Defendants do not object to this request, and the Court grants it.