

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

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

**DEFENDANTS' RESPONSE TO PLAINTIFFS'  
OPPOSITION TO PRESENTMENT OF DEFENDANTS'  
CROSS-MOTION PURSUANT TO FED. R. CIV. P. 37(C) TO  
EXCLUDE DECLARATIONS OF PLAINTIFFS'  
PREVIOUSLY CONCEALED WITNESSES**

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Defendants respectfully submit this memorandum in advance of the January 22, 2009 presentment of Defendants' Cross-Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Declarations of Plaintiffs' Previously Concealed Witnesses. Defendants oppose Plaintiffs' request to vacate the January 22, 2009 presentment for the following reasons:

*First*, Defendants' Cross-Motion properly seeks to exclude the declarations from consideration on Plaintiffs' Motion Requesting Evidentiary Sanctions ("Plaintiffs' Motion"). This exclusion is automatic and mandatory under Rule 37(c), which prohibits a party from using a "witness to supply evidence *on a motion*" if the identity of that witness has not been disclosed as required by Rule 26(a) or (e). *See* Fed. R. Civ. P. 37(c)(1) (emphasis added). The motion does not address the exclusion of Plaintiffs' concealed witnesses for purposes of trial testimony. As stated on the first page (n.1) of Defendants Memorandum in Support of their Cross-Motion:

Defendants acknowledge the discussion before this Court regarding the presentment of motions to exclude trial testimony of previously concealed witnesses, and the Court's preference that such motions be filed on January 30, 2009, along with the parties' motions *in limine*. (Tr. of December 16, 2008 Conf. at 21-23). As counsel for Defendants prepared their opposition to Plaintiffs' Motion for Evidentiary Sanctions, it became apparent that Plaintiffs' Motion relies in substantial part upon the declarations of these concealed witnesses. Therefore, Defendants have been put in the position of making this motion to exclude declarations now, setting aside the question of whether testimony from these individuals should be excluded at trial under Rule 37.

*Second*, Defendants were forced to request exclusion or risk a waiver of their argument under Rule 37(c) that the affidavits could not be considered on Plaintiffs' Motion for Evidentiary Sanctions. Plaintiffs are attempting to use the declarations obtained from these newly-disclosed witnesses to block Defendants from defending "predatory lending" allegations on the merits, on what is in effect a motion for summary judgment relieving Plaintiffs of their burden of proving certain factual issues at trial. With Plaintiffs' request for draconian

evidentiary sanctions at stake, Defendants did not want to risk a potential waiver of their legitimate arguments under Rule 37(c).

*Third*, setting aside the distinction between exclusion of testimony on a motion or at trial, Plaintiffs cannot demonstrate any prejudice from the presentment of Defendants' Cross-Motion. Instead, Plaintiffs have the benefit of receiving Defendants' arguments ten days before other motions *in limine* are to be filed.

*Fourth*, Defendants agree that the preparation of the Final Pretrial Order and motions *in limine* and other materials due on January 30 is important. Defendants have spent considerable time analyzing and responding to Plaintiffs prior list of 3216 proposed trial exhibits, over 50 "will call" witnesses and approximately 2000 pages of proposed deposition designations -- which Plaintiffs have only in the past week begun to narrow for purposes of trial. Plaintiffs are represented by sophisticated counsel, including local counsel in Chicago, and can surely afford to attend presentment on Defendants 14-page Cross-Motion.

*Fifth*, the simple solution to any scheduling conflict on the part of Plaintiffs' counsel would have been to pick up the phone and ask for a briefing schedule on the motion. Counsel for Plaintiffs did not bother to do so. Rather, the relief Plaintiffs seek -- striking the motion's presentment -- seems designed to thwart Defendants' right to oppose this evidence on Plaintiffs' motion entirely. The Federal Rules do not countenance such a result.

## CONCLUSION

For all of the foregoing reasons, Defendants respectfully urge the Court to deny Plaintiffs' request to vacate the January 22, 2009 presentment of Defendants' Cross-Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Declarations of Plaintiffs' Previously Concealed Witnesses.

Dated: January 20, 2008  
New York, New York

Respectfully submitted,  
CAHILL GORDON & REINDEL LLP

By: /s/ Thomas J. Kavalier

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