

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

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
)	<u>CLASS ACTION</u>
Plaintiff,)	
)	Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)	
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)	
Defendants.)	
)	
_____)	

**OPPOSITION TO DEFENDANTS’ CROSS-MOTION PURSUANT TO FED. R. CIV. P.
37(c) TO EXCLUDE DECLARATIONS OF BRANCH SALES MANAGERS**

I. INTRODUCTION

From the very inception of this case, plaintiffs' allegations have placed the predatory lending practices of Household International, Inc.'s ("Household") Branch Sales Managers directly at issue. Indeed, plaintiffs' complaint is replete with allegations that Household's senior management caused the Branch Sales Managers to engage in predatory lending practices. It was therefore obvious to everyone, including defendants, that the Branch Sales Managers were in possession of relevant and discoverable information. Nevertheless, at no point during the two-year discovery period did defendants so much as ask to depose a single Branch Sales Manager. To this day, even though plaintiffs provided defendants with a witness list in October 2008 containing the names of several Branch Sales Managers, defendants have never sought to depose a single Branch Sales Manager.

Engaging in a particularly revealing bit of procedural gamesmanship, defendants now claim that their own failure to seek discovery from the Branch Sales Managers effectively prohibits plaintiffs from presenting testimony from those witnesses. Defendants rest their argument on procedural technicalities – *i.e.*, the claim that plaintiffs did not amend their initial disclosures to add the names of the seven declarants – never mentioning that these witnesses were repeatedly identified in the course of over 15 fact witness depositions taken by plaintiffs. Indeed, as discussed below, one of the declarants (Seth Callan) complained loudly about Household's predatory lending practices in a September 2, 2002 *Forbes* magazine article produced by defendants to plaintiffs. The fact that defendants chose not to depose these former Household employees does not, of course, preclude plaintiffs from relying on their testimony.

For the reasons set forth herein, defendants' cross-motion to exclude the declarations should be denied in its entirety.

II. ARGUMENT

A. The Branch Sales Manager Declarations Are Properly Used to Support Plaintiffs' Spoliation Motion

Throughout their motion, defendants perpetuate a disingenuous fiction that plaintiffs acted in bad faith by "concealing" the identities of "secret" declarants. Defendants hope to turn this fiction into fact by merely repeating their unsupported allegations of bad faith throughout their motion. In fact, plaintiffs did not even identify the vast majority of the declarants until the summer and fall of 2008. Plaintiffs disclosed the identity of these witnesses to defendants shortly thereafter. Thus, plaintiffs' prompt disclosure of the declarants' identities conclusively refutes defendants' suggestion that plaintiffs deliberately concealed this information.

Defendants' primary argument is not that the Branch Sales Manager declarations are improper in form or substance, but rather that they should be excluded because defendants never deposed the declarants. In essence, defendants contend that because they have failed to depose the Branch Sales Managers, their testimony should be essentially barred from this case. Their self-serving attempt to effectively silence material witnesses should be rejected.

Although plaintiffs did not discover the identities of the Branch Sales Managers until after formal discovery had closed (and then promptly disclosed the identities of these declarants to defendants), that does not mean that defendants were unable to take their depositions. Indeed, defendants have presented the Court with no evidence whatsoever that the declarants ever refused a request to be deposed. That is because there was no such request. Defendants simply never asked. To the contrary, defendants now admit that they affirmatively chose *not* to depose these witnesses: "Defendants never asked for depositions of these witnesses." Declaration of Landis C. Best in Support of Defendants' Cross-Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Declarations ("Best Decl."), ¶15.

Defendants' failure to seek such discovery exposes their motion for the opportunistic gambit that it is. Having failed to even ask to depose the Branch Sales Managers, defendants now ask the Court to assume that they would have refused to be deposed and close the case to their testimony which, not surprisingly, directly refutes defendants' assertions that Household's predatory lending practices were isolated and limited to certain narrow geographic regions.

Finally, the authorities defendants cite relate to patently different circumstances and stages of litigation. *See Matthews v. Commonwealth Edison Co.*, No. 93 C 4140, 1995 WL 478820, at *3 (N.D. Ill. Mar. 24, 1995) (Guzman, M.J.) (excluding witness from testifying during plaintiff's *case in chief*); *CIVIX-DDI, L.L.C. v. Cellco P'ship*, 387 F. Supp. 2d 869, 884-85 (N.D. Ill. 2005) (St. Eve, J.) (excluding witness declaration from consideration on *summary judgment*; *Dunkin' Donuts, Inc. v. N.A.S.T., Inc.*, 428 F. Supp. 2d 761, 770-71 (N.D. Ill. 2005) (Shadur, J.) (refusing to consider post-discovery affidavit of witness on motion for *summary judgment* as to evidence of damages for failure to disclose damages information pursuant to Rule 26(a)(1)(C)); *Advanced Cleanroom Techs. v. Newhouse*, No. 00 C 6623, 2002 WL 206960, at *4-*5 (N.D. Ill. Feb. 11, 2002) (Coar, J.) (excluding damages claims where claims raised after defendant filed motion for *summary judgment*); *Lyman v. St. Jude Medical S.C., Inc.*, No. 05 C 122, 2008 WL 2224352, at *7-*8 (E.D. Wis. May 27, 2008) (precluding defendants from calling witnesses *at trial*); *Saudi v. Valmet-Appleton, Inc.*, 219 F.R.D. 128, 133-34 (E.D. Wis. 2003) (witnesses excluded *from trial* where plaintiff failed to comply with disclosure obligations); *Scranton Gillette Commc'ns, Inc. v. Dannhausen*, No. 96 C 8353, 1998 WL 566668, at *3 (N.D. Ill. Aug. 26, 1998) (Urbom, J.) (excluding plaintiff from presenting witnesses *at trial* where not disclosed until filing of pretrial order); *Ty, Inc. v. Publications Int'l, Ltd.*, No. 99 C 5565, 2004 WL 421984, at *3 (N.D. Ill. Feb. 17, 2004) (Zagel, J.) (excluding witnesses from testifying *at trial*); *Boynton v. Monarch*, No. 92 C 140, 1994 WL 463905, at *2-*3 (N.D. Ill. Aug. 25, 1994) (Kocoras, J.) (witnesses not disclosed by

plaintiff until pretrial order prevented from testifying *at trial*); *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742-43 (7th Cir. 1998) (excluding expert witnesses from testifying *at trial* due to failure to submit reports in timely fashion); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95 C 0673, 1996 WL 680243, at *10 (N.D. Ill. Nov. 21, 1996) (Ashman, M.J.) (precluding defendants from introducing *at trial* evidence not timely disclosed); *Kemper/Prime Indus. Partners v. Montgomery Watson Americas, Inc.*, No. 97 C 4278, 2004 WL 725223, at *5 (N.D. Ill. Mar. 31, 2004) (Guzman, J.) (barring plaintiff from presenting evidence of damages *at trial*).

In short, defendants' cases deal with circumstances where the witness was offered at trial or in support of a summary judgment motion, and none arose from consideration of declarations in support of a spoliation motion. Such cases have nothing to do with the circumstances present here, where defendants have made no showing that any of the declarants were unavailable. Nor are defendants' cases applicable where plaintiffs have complied fully with their discovery obligations as they have done here.

B. Defendants Had Full Knowledge of the Declarants Through Discovery

In a particularly desperate attempt to exclude relevant evidence that happens to be extremely unfavorable to them, defendants claim that they were unfairly surprised by the fact that the Branch Sales Managers would submit declarations refuting defendants' assertions regarding widespread predatory lending practices and branch-wide intentional destruction of evidence. Defendants argue that Branch Sales Manager declarations should be excluded because the declarants were not named in plaintiffs' initial disclosures. But Rule 26(e) does not require disclosure of the obvious; formal disclosure is required only "if the additional or corrective information *has not otherwise been made known to the other parties during the discovery process* or in writing." Fed. R. Civ. P. 26(e)(1)(A) (emphasis added).

Although defendants now ignore the plain language of Rule 26, they made clear almost three years ago that neither party need disclose the names of witnesses contained in documents produced in the litigation. In response to a letter from plaintiffs' counsel asking defendants to supplement their initial disclosures, defense counsel wrote:

I refer you to various individuals who have been identified to date, or who may be identified in the future, in deposition testimony, in responses to Plaintiffs' interrogatories and requests for admission, and in *documents produced in response to Plaintiffs' and Defendants' document requests*.

Letter of June 8, 2006 from Ira Dembrow, Esq. to Luke Brooks, Esq., Dowd Decl., Ex. A.¹

Here, the Branch Sales Managers' central role in this case was obvious from the face of plaintiffs' own complaint. *See, e.g.*, [Corrected] Amended Consolidated Class Action Complaint ("Complaint"), ¶59 ("[B]ranch managers were instructed by Household corporate headquarters to tell customers that, in effect, they were cutting their interest rate to 7% by participating in the EZ Pay Plan when, in reality, the interest rate was substantially higher."); ¶93 ("Household District Managers almost immediately beg[a]n to pressure branch managers to engage in dishonest lending practices."); ¶96 (defendant Gilmer oversaw the dissemination of EZ Pay Plan sales documents to branch managers); ¶251 (quoting analyst report discussing compensation plan for branch managers).

In particular, the identities of the declarants are contained in documents produced by defendants themselves in this litigation. In fact, one of the declarants, Seth Callen, is quoted in a September 2, 2002 *Forbes* magazine article, in which he stated: "***Household was a 'pressure cooker,' which at times led to deceptive tactics.***" *See* Dowd Decl., Ex. B.² Given that the declarants

¹ "Dowd Decl." refers to the Declaration of Michael J. Dowd in Support of Opposition to Defendants' Cross-Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Declarations of Branch Sales Managers, filed concurrently herewith.

² In fact, plaintiffs quoted the *Forbes* article in their amended complaint (Complaint, ¶56) and defendants produced the article in discovery. *See* Dowd Decl., Ex. B.

were identified in defendants' own documents, plaintiffs were under no duty to make separate disclosure of the existence of these witnesses, and defendants cannot possibly show that any non-disclosure prejudiced them in the least.

Nor can defendants credibly claim that they failed to understand the import of the Branch Sales Managers when they were discussed at length in 15 separate depositions, including depositions that took place more than six months before the fact discovery period expired.³ Under these circumstances, defendants' suggestion that they were somehow prejudiced by plaintiffs' failure to identify the Branch Sales Managers in an amendment to initial disclosures is simply specious.

Further, although plaintiffs had not yet identified specific individuals, plaintiffs advised defendants of the relevance of the Branch Sales Managers in their initial disclosures served on August 20, 2004:

[P]laintiffs believe that there are Regional Sales Managers (RSM), District Sales Managers (DSM), Branch Sales Managers (BSM), Senior Account Executives, Account Executives (AE), Sales Assistants, as well as trainers, collections people, underwriters, and other individuals within the Household organization whose identities are not known to plaintiffs at this time, who are likely to have discoverable information relating to one or more of the subjects outlined in the Complaint.

See Best Decl., Ex. 2 at 67.

Defendants' half-hearted argument that they sought the identities of the declarants in Interrogatory No. 46 issued on December 22, 2006 deserves short shrift. First, defendants' Interrogatory No. 46 did *not* ask plaintiffs to identify former Household employees, such as the Branch Sales Managers. Rather, defendants' convoluted interrogatory asked for the identities of

³ *See Allcock Tr. at 337:19-21, 233:10-24; Bangs Tr. at 123:19; Bley Tr. at 252:14, 254:2-13, 261:24-263:13, Creatura Tr. at 112:2-113:4; Cross Tr. at 58:5-19; Davis Tr. 62:10; Detelich Tr. at 158:9-159:2; Hennigan Tr. at 4:13, 5:7-16; 47:23-24, 68:20-21, 182:1-6; Hueman Tr. at 25:2-5, 40:5-7; Kauffman Tr. at 131:24-132:3; O'Han Tr. at 19:22-20:7; 42:15-19, 61:7, 66:16-20; 175:20-21, 253:6; Robin Tr. at 126:18-22; Sodeika Tr. at 17:13-18, 104:23-24; Walker Tr. at 68:5-13, 93:5, 128:20-24.*

“any person *not affiliated with Household* believed by Plaintiffs to have knowledge of alleged ‘predatory lending practices.’” *See* Best Decl., Ex. 3. Plaintiffs specifically objected to this interrogatory as “vague and ambiguous with respect to the terms ‘any person not affiliated with Household’” and did not include former employees in their response because such people are clearly affiliated with Household. *See* Best Decl., Ex. 4. At no time did defendants move to compel a different response. Second, even if defendants’ interrogatory had asked for the names of former Household employees (instead of an opaque reference to a “person not affiliated with Household”), plaintiffs had not yet identified any of the declarants in late-2006 and thus could not have provided the names to defendants in response to an interrogatory.

Given the nature of plaintiffs’ allegations, it is absurd for defendants to suggest that they did not know that the Branch Sales Managers held relevant information or that these Branch Sales Managers might agree to submit declarations to the Court. Yet, defendants never sought to discover which former Branch Sales Managers had personal knowledge concerning plaintiffs’ claims. Defendants ignored this issue entirely. The plain language of Rule 26 imposed no requirement on plaintiffs to formally supplement their disclosures with information that defendants knew or had been made known to them during the discovery process.⁴

C. Plaintiffs’ Spoliation Motion Is Not Dependent on the Declarations

Even putting aside the declarations, plaintiffs’ spoliation motion provides the Court with overwhelming evidence of defendants’ widespread document destruction. Thus, plaintiffs’ spoliation motion is not dependent on the declarations; plaintiffs’ motion and documentary evidence

⁴ Even if defendants’ claim of prejudice were true, the extraordinary sanction of excluding the Branch Sales Manager declarations is not warranted where any prejudice to defendants is easily cured by allowing defendants to depose the declarants. *See, e.g., L-3 Commc’ns Corp. v. OSI Sys., Inc.*, 02 Civ. 9144(PAC), 2006 WL 988143, at *4-*5 (S.D.N.Y. Apr. 13, 2006) (concluding that failure to disclose witnesses was harmless so long as defendants were provided with an opportunity to depose the witnesses); *Lobato v. Ford*, No. 05-cv-01437-LTB-CBS, 2007 WL 2593485, at *9 (D. Colo. Sept. 5, 2007) (same).

standing alone are more than sufficient to support spoliation sanctions. Through e-mails and other internal Household documents accompanying plaintiffs' spoliation motion, plaintiffs have established: (i) that defendants engaged in a campaign in May and June 2001 to purge the branch offices of "effective rate" forms; (ii) senior management's knowledge of and consent to the destruction; and (iii) the destruction of key documents related to this action. Contrary to defendants' assertion, plaintiffs' spoliation motion does not rely "in substantial part" on the declarations. Memorandum of Law in Support of Defendants' Cross-Motion at 1. As plaintiffs' own motion makes clear, the declarations simply corroborate and are offered in "further support" of the overwhelming documentary evidence presented by plaintiffs. Lead Plaintiffs' Motion and Memorandum Requesting Evidentiary Sanctions for Household Defendants' Destruction of Evidence at 31.

Moreover, none of the declarations that defendants seek to exclude addresses defendants' 2002 destruction of memoranda authored by Household consultant Andrew Kahr. That destruction, directed by defendant David Schoenholz, is established by internal documents, including a memorandum authored by defendant Schoenholz (withheld by defendants until after the close of discovery), citing Providian's legal troubles arising from memoranda Kahr wrote for that company, and directing that "*all copies of all Andrew Kahr memoranda (both paper and electronic versions) be collected by the Office of General Counsel and thereafter destroyed.*" Declaration of Azra Z. Mehdi in Support of Lead Plaintiffs' Motion Requesting Evidentiary Sanctions for Household Defendants' Destruction of Evidence, Ex. 30 (emphasis added).

As the Court observed during the December 2, 2008 hearing, plaintiffs' motion does not rely on the declarations of former employees who were instructed to shred and delete incriminating documents: "Who are these witnesses? Because frankly your motion seems to me to be based upon e-mails and memos that are internal to the defendant corporation" December 2, 2008 Hearing

Tr. at 16:3-5. Instead, plaintiffs' request for sanctions is based on Household e-mails and internal memoranda. As the Court remarked: "E-mails were sent by the CFO or the CEO or the CFO of lending services or whatever division it happens to be saying destroy these documents; they're unauthorized." *Id.* at 18:17-19. Thus, even if the declarations are precluded, the overwhelming evidence of defendants' improper destruction of relevant evidence supports plaintiffs' spoliation motion.

III. CONCLUSION

For the foregoing reasons, defendants' cross-motion pursuant to Fed. R. Civ. P. 37(c) to exclude declarations should be denied.

DATED: January 28, 2009

Respectfully submitted,

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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 January 28, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **OPPOSITION TO DEFENDANTS’ CROSS-MOTION PURSUANT TO FED. R. CIV. P. 37(c) TO EXCLUDE DECLARATIONS OF BRANCH SALES MANAGERS.**

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of January, 2009, at San Diego, California.

/s/ Teresa Holindrake
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