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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION PURSUANT TO FED. R. CIV. P. 37(C) TO EXCLUDE TESTIMONY OF PLAINTIFFS' PREVIOUSLY CONCEALED TRIAL WITNESSES

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This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., William F. Aldinger, David A. Schoenholz, and Gary Gilmer (collectively, the "Defendants"), in support of their motion for an Order excluding the testimony of nine previously undisclosed witnesses.[1] This exclusion is compelled by Rules 26 and 37 of the Federal Rules of Civil Procedure.[2]

INTRODUCTION

Plaintiffs' proposed trial witness list includes nine former branch-level employees of Household, selectively picked from among thousands of current and former employees of Household's nationwide branch-based consumer lending network. Plaintiffs unjustifiably failed to disclose the existence of these secret witnesses to Defendants during the course of discovery or during many months thereafter, in violation of their obligation to supplement their initial disclosures and other discovery responses in a timely manner. This concealment mandates exclusion of those witnesses as a discovery sanction.

This motion relies upon the same factual basis and authorities as Defendants' previous Cross-Motion to exclude declarations. (*See* Defendants' Memorandum in Support of Defendants' Cross-Motion to Exclude the Declarations of Plaintiffs' Previously Concealed Trial Witnesses, Docket No. 1285 ("Cross-Motion Mem.")). To conserve the Court's time,

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1 On January 20, 2009 Defendants filed a cross-motion seeking to exclude the declarations of seven of these nine witnesses offered by Plaintiffs in support of their Motion Requesting Evidentiary Sanctions. (*See* Defs.' Cross-Motion Pursuant to Fed. R. Civ. P. 37(c) to Exclude Decls. of Pls.' Previously Concealed Witnesses, Docket No. 1284 ("Defendants' Cross-Motion")). Defendants' Cross-Motion was directed toward only the seven declarations offered by Plaintiffs, but this similar motion addresses the anticipated *trial* testimony of all nine concealed witnesses. Defendants submit this motion in order to comply with the Court's directive to file such a motion on January 30, 2009 along with the parties' motions *in limine* (*see* Tr. of December 16, 2008 Conf. at 21-23).

2 Non-Class Action Defendants Joseph A. Vozar and Household Finance Corporation ("HFC") join in this motion and object to the testimony of previously undisclosed witnesses. Mr. Vozar and HFC do not waive, but on the contrary, each expressly reserves and intends to preserve, the right to amend, supplement or re-assert objections to the testimony of previously undisclosed witnesses to the extent that Plaintiffs at any future time propose to introduce such testimony against Mr. Vozar and/or HFC.

Defendants have attached the filed version of the Cross Motion Memorandum as Exhibit A hereto and have provided citations to that brief rather than repeating the same arguments and authorities herein.[3]

As set out in Defendants' Cross-Motion Memorandum, Plaintiffs did not identify any of these secret witnesses in their initial disclosures pursuant to Rule 26(a). Nor did they name any of them in response to Defendants' interrogatory that specifically requested identification of all persons who are "not affiliated with Household believed by Plaintiffs to have knowledge of any alleged predatory lending practices." And even though Plaintiffs obtained a *Jaffe*-captioned declaration from at least one of these individuals before the most recent amendment of their interrogatory answers in February 2008, and obtained declarations from several of the others in the ensuing months, they continued to conceal these individuals' identity for almost two years after the close of fact discovery in this matter. The first time Plaintiffs notified Defendants that they intended to rely upon *any* information from these individuals was on October 31, 2008, when Plaintiffs listed them as "will call" witnesses on their draft Witness List. This strategic concealment directly contravenes Rule 26(e). (Ex. A at 4-7)

Under Rule 37, a party that has failed to make a timely disclosure of the identity of a witness as required by Rule 26(a) or (e) "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or *at a trial*." Fed. R. Civ. P. 37(c)(1) (emphasis added). Because Plaintiffs' violation is neither justified nor harmless, "the sanction of exclusion is automatic and mandatory." *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). The time to disclose such individuals has long since passed. Fact discovery ended almost two years ago, and expert discovery has been complete for over nine months. Defendants should not be subjected to ambush with testimony from these witnesses at trial, when Plaintiffs wholly

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[3] If the Court has granted Defendants' Cross-Motion, Defendants respectfully request that this motion be granted for the same reasons -- Rule 37(c) applies to testimony, whether offered on a motion or offered at trial. If the Court has denied Defendants' Cross-Motion, Defendants respectfully request that the Court grant this motion to exclude *trial* testimony for the additional reasons set out herein, including the heightened prejudice arising from the appearance of surprise witnesses at trial before the jury. If the Court has not yet decided Defendants' Cross-Motion, Defendants respectfully refer the Court to the memorandum of law attached as Exhibit A hereto.

failed to meet their obligation to disclose them to Defendants at an appropriate time during five years of discovery. (Ex. A at 7-9)

Plaintiffs' belated disclosure cannot be considered substantially justified where Plaintiffs themselves *chose* not to conduct such an investigation during the four years of discovery in this action. The time for Plaintiffs to locate and identify witnesses was at the time they prepared their Amended Complaint or, at minimum, during fact discovery, when Defendants would be able to discover the nature and basis of their positions, test the validity of their testimony through additional depositions or otherwise, investigate possible bases for bias or mistake closer to the events at issue, and assemble evidence necessary to counter their anecdotal accounts. Plaintiffs' admitted decision to defer this part of their investigation until *after* the completion of discovery[4] is therefore a cause — not a justification — for their violation of the Federal Rules. By deferring their investigation, Plaintiffs cynically ignored the Court-imposed discovery deadlines in this case and condoning such conduct would render meaningless the express procedural requirements of Rule 26 and the carefully-framed orders of this Court as to the proper timing and sequencing of fact development in this case. (Ex. A at 9-12).

The prejudice from this violation is not "harmless" and cannot be readily cured. With respect to these individuals' expected *trial* testimony, Defendants were also unable to alert their expert witnesses to the proposed testimony of these individuals so that the experts could evaluate such material and frame an appropriate response, demonstrating prejudice to Defendants (beyond the prejudice identified in Defendants' Cross-Motion Memorandum). Furthermore, at least one of Plaintiffs' experts has drawn broad conclusions based on isolated statements of former employees and individual customers (without mentioning any of these previously concealed witnesses by name). Defendants were not able to depose Plaintiffs' experts regarding these new witnesses, and have no way of knowing whether or how their input has or will affect the conclusions of Plaintiffs' experts. Defendants have had no opportunity to examine these individuals to explore the basis for the prejudicial (and hearsay) statements offered in their declarations. Instead, Defendants have been forced to investigate the allegations of the nine

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[4] *See* Declaration of Landis C. Best in support of Defendants' Cross-Motion, dated January 19, 2009, Docket No. 1286 ("Best Decl.") at ¶ 14, Ex. 9.

concealed witnesses within a severely constricted timeframe and without the benefit of the discovery process — a situation that is inherently and incurably prejudicial to Defendants. (Ex. A at 12-14)

Furthermore, the testimony of these witnesses should also be excluded under Fed. R. Evid. 402 and 403. Plaintiffs' overwhelming reliance on non-representative and statistically insignificant allegations of consumer abuse is a transparent effort to incite prejudice against Household and mask their increasingly evident inability to make out a claim of federal securities fraud. The prejudice from Plaintiffs' deliberate election to keep Defendants in the dark cannot be "fixed" at this late stage. As one court in this Circuit noted regarding a similar violation: "[A]t the heart of Rule 37's automatic sanction provision is the recognition that precious time and resources of both opposing counsel and this Court are wasted when faced with unjustified delay. And such waste, when significant enough, constitutes its own kind of harm." *Saudi v. Valmet-Appleton, Inc.*, 219 F.R.D. 128, 134 (E.D. Wis. 2003). Here, as in that case, the only appropriate remedy is the sanction of exclusion under Rule 37.

STATEMENT OF FACTS

Defendants refer the Court to the detailed statement of facts set out in Defendants' Cross-Motion. (Ex. A at 4-7). In summary:

- Plaintiffs did not identify any of the nine individuals in their Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1), although they listed over 300 other non-party individuals and organizations. (Best Decl., Exs. 1, 2).
- Plaintiffs have not supplemented their initial disclosures at any time since 2004. (Best Decl. ¶ 3).
- Plaintiffs did not request emails for any of the nine individuals, although they requested the files of 291 other current and former employees. (Best Decl. ¶ 20).
- Plaintiffs failed to identify any of the nine individuals in their responses to Defendants' Interrogatory No. 46, which required Plaintiffs to "[i]dentify any person not affiliated with Household believed by Plaintiffs to have knowledge of any alleged 'predatory lending practices.'" (*See* Best Decl., Ex. 3 at 2, Ex. 4 at 45-47; Ex. 5 at 63-66).
- Although Plaintiffs objected to the Interrogatory No. 46 as "vague and ambiguous", they responded to the interrogatory multiple times identifying multiple individuals — a clear signal that they understood the request. (*See* Best Decl., Ex. 4 at 45-47; Ex. 5 at 63-66).

- One of the individuals (Seth Callen) was quoted in a news article quoted by Plaintiffs in their Amended Complaint. (*See* January 28, 2009 Dowd Decl., Ex. B, Docket No. 1311-3; Amended Complaint at ¶ 56). Yet Plaintiffs did not disclose Mr. Callen as an individual with relevant knowledge.
- Plaintiffs obtained a declaration from at least one of the nine (Curtis A. Howrey), on November 28, 2007, yet failed to disclose Mr. Howrey (or any of the others) in their February 2008 response to Interrogatory No. 46. (Best Decl., Ex. 5 at 63-66)
- On October 31, 2008, almost two years after the Court-ordered fact discovery cut-off, Plaintiffs finally disclosed the identity of their nine secret branch-level witnesses, all of whom were listed as "will call" witnesses for trial.[5] (*See* Best Decl., Exs. 6, 7). These undisclosed witnesses constitute almost one-third of Plaintiffs' proposed live trial witnesses.
- In November 2008, the parties corresponded about Plaintiffs' previous concealment and refusal to withdraw the newly-disclosed witnesses. (Best Decl., Exs. 9, 11) Plaintiffs refused to remove the nine individuals. (*Id.*)
- During a November 25, 2008 meet and confer, Counsel for Plaintiffs asserted that Defendants were not prejudiced by the late disclosure, and claimed work product protection in refusing to disclose when, in relation to the close of discovery, Plaintiffs had discovered the existence of the witnesses. (*See* Best Decl. ¶¶ 13-15).
- Counsel for Plaintiffs also asserted that even pretrial depositions of the nine witnesses would not be appropriate or justified under the circumstances. (*Id* ¶ 15).

ARGUMENT

I. AUTOMATIC AND MANDATORY EXCLUSION IS REQUIRED BECAUSE PLAINTIFFS' UNJUSTIFIED CONCEALMENT OF TRIAL WITNESSES CONSTITUTES CLEAR PREJUDICE TO DEFENDANTS

Defendants refer the Court to the detailed arguments set out in Defendants' Cross-Motion. (Ex. A at 4-7). In summary:

Under Rule 37, a party that has failed to make a timely disclosure of the identity of a witness as required by Rule 26(a) or (e) "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, *or at a trial*, unless the failure was substantially

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5 The nine proposed witnesses are John Buwalda, Seth Callen, Chantel Dorsey, Robert Feifer, Curtis Howrey, Robert Kuhn, Kimberly McNeal, John Timmons and Jessie Valverde.

justified or is harmless." Fed. R. Civ. P. 37(c)(1) (emphasis added). The Court of Appeals has confirmed that absent such a showing by the proponent of the evidence, "the sanction of exclusion is automatic and mandatory." *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). Plaintiffs cannot demonstrate that their failure to disclose the previously concealed witnesses is substantially justified or harmless to Defendants.

Plaintiffs' attempt to introduce the surprise testimony of previously concealed witnesses many months after the close of fact and expert discovery, and only after Defendants have reached an advanced stage in their preparation for trial, is precisely the sort of belated disclosure that requires exclusion under Rule 37(c) in this Circuit. *See Matthews v. Commonwealth Edison Co.*, No. 93 C 4140, 1995 WL 478820 at *3 (N.D. Ill. March 24, 1995) (Guzman, M.J.) (excluding proposed fact witness from testifying **during plaintiff's case in chief** where plaintiff failed to disclose the witness during discovery and witness was not deposed); *Lyman v. St. Jude Medical S.C., Inc.*, No. 05-C-122, 2008 WL 2224352 at *7-8 (E.D. Wis. May 27, 2008) (excluding **trial testimony** of four fact witnesses not named in initial disclosures, deposed during discovery, or identified as likely to have discoverable information); *Scranton Gillette Communs.*, 1998 WL 566668 at *3 (excluding plaintiff from presenting witnesses **at trial** where plaintiff claimed to have discovered them after fact discovery but did not show "diligence in searching for them"); *Ty, Inc. v. Publications Int'l, Inc.*, No. 99 C5565, 2004 WL 421984 at *2 (N.D. Ill. Feb. 17, 2004) (Zagel, J.) (excluding six fact witnesses from testifying **at trial** where proponent's choice "not to name these . . . witnesses when discovery was open or shortly thereafter" required exclusion under Rule 37).

Given Defendants' inability to conduct timely discovery relevant to Plaintiffs' proposed new witnesses, permitting their testimony would result in exactly the kind of "trial by ambush" that Rules 26 and 37 preclude. (Ex. A at 12-14). In addition to the reasons set forth in Defendants' Cross-Motion Memorandum, exclusion of these surprise witnesses' testimony at trial is justified because Plaintiffs' expert witnesses have relied on similar information. The opinion testimony of Plaintiffs' purported expert Catherine Ghiglieri consists almost entirely of sweeping conclusions drawn from a small and statistically insufficient number of anecdotal reports and hearsay allegations similar to those contained in the declarations of the previously undisclosed branch-level witnesses. If Ms. Ghiglieri should incorporate the substance of these untested and anecdotal declarations into her trial testimony, Defendants will be deprived of any

fair means to test and challenge her conclusions (assuming, of course, that they survived challenge under *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which is not the focus of the instant motion). This Court has recognized that a last-minute disclosure of expert information is prejudicial where it leaves defendants with no meaningful opportunity to assess and respond to the new material. *Finwall v. City of Chicago*, 239 F.R.D. 504, 507 (N.D. Ill. Aug. 10, 2006) (Manning, J.) (noting that such delay causes harm "both to the defendants and to the court"). In addition, Defendants' expert witnesses spent hundreds of hours reviewing Plaintiffs' discovery responses and other information in this case for purposes of preparing responsive expert reports and testimony. The time and cost alone of replicating that process in order to integrate the potential testimony of the nine concealed individuals also constitutes prejudice.

It does not avail Plaintiffs to argue that even though they were unable to identify the nine surprise witnesses amongst thousands of Household employees until well after the close of discovery, Defendants should have been able to identify these witnesses with ease before the discovery cutoff. (Ex. A at 11-12). Nor are Plaintiffs aided by the argument that Defendants, in response to Plaintiffs' request for supplemental disclosures, referred Plaintiffs to documents produced in the course of discovery that may have, somewhere amongst millions of pages, included the names of the witnesses Plaintiffs now belatedly seek to have testify at trial. A general statement by Defendants referring to documents that may or may not contain names of potential witnesses cannot justify Plaintiffs' failure affirmatively to identify specific witnesses to Defendants, as Rule 26 requires. It is Plaintiffs, not Defendants, who now seek to call witnesses who were never deposed or identified as required by Rule 26. Nor can Plaintiffs be heard to argue that their Rule 26 violations are somehow justified because Defendants did not seek to depose these nine surprise witnesses. Defendants could not have possibly taken depositions of the entire pool of 1400 Household Branch Service Managers from which Plaintiffs' nine surprise witnesses are selectively drawn, nor any randomly selected subset thereof.

Allowing additional document requests and fact or expert depositions to redress Plaintiffs' violation would not cure this prejudice because reopening discovery would unfairly compound the burden of this litigation on Defendants and the Court (even if Plaintiffs were ordered to pick up the tab), threaten to delay the long-awaited day of reckoning on Plaintiffs' insubstantial claims, and be an inadequate substitute for timely disclosure and follow up in any

event. Defendants note that in similar circumstances, courts in this Circuit have agreed that this costly "remedy" is no remedy at all and cannot cure the prejudice. *See Ty, Inc.*, 2004 WL 421984 at *4 ("[W]e are well past the discovery cutoff in this case, and I will not permit PIL to use the new witness designations as a backdoor method for reopening discovery."); *Finwall*, 239 F.R.D. at 507 ("[l]ate disclosure is not harmless within the meaning of Rule 37 simply because there is time to reopen discovery"); *Saudi*, 219 F.R.D. at 134 (rejecting plaintiffs' argument that new depositions and deadlines could cure their belated discovery of fact witnesses, and noting that if plaintiffs were correct, "the Court could never impose a Rule 37(c) sanction."); *Lancelot Investors Fund, L.P.* v. *TSM Holdings, Ltd.*, No. 07 C 4023, 2008 WL 1883435 at *5 n.6 (N.D. Ill. April 28, 2008) (Cole, M.J.) (Rule 26(e) "most assuredly does not excuse a party's lack of diligence and allow it to ignore the Court's deadlines, [and] reopen discovery . . .") (citations omitted). However, if the Court allows these surprise witnesses to testify at trial, Defendants request that the Court re-open discovery to allow depositions of these nine individuals, and an additional deposition of Plaintiffs' retained expert, Ms. Ghiglieri, to explore her consideration of any information provided by these individuals. Defendants request that Plaintiffs be ordered to pay for any such discovery.

II. IRRELEVANT, HEARSAY TESTIMONY OF PLAINTIFFS' UNDISCLOSED BRANCH LEVEL WITNESSES SHOULD BE EXCLUDED UNDER FED. R. EVID. 402 AND 403

As shown above, allowing the testimony of these undisclosed witnesses would be highly prejudicial to Defendants. Defendants have no way of predicting the exact contours of these individuals' trial testimony, but the declarations filed by seven of them consist of branch-level, statistically invalid anecdotes. The vast majority of their statements are not only inadmissible hearsay under Fed. R. Evid. 802, but should be excluded under Rules 402 and 403. Plaintiffs' overwhelming reliance on non-representative and statistically insignificant allegations of consumer abuse is a transparent effort to incite prejudice against Household and mask their increasingly evident inability to make out a claim of federal securities fraud. Defendants do not intend to burden the Court with an extensive rebuttal of Plaintiffs' gratuitous and deeply flawed effort to infer an alleged corporate policy of predatory lending from evidence of misbehavior or mistakes by a microscopic subset of branch-level personnel (apparently including these witnesses -- which constitute only 9 of the more than 1,400 branch sales managers during the Class Period). Given the complete lack of proof that Household or any Individual Defendant

instigated, tolerated, or failed to take corrective action about potentially misleading or abusive treatment of customers, and given indisputable proof that mistakes or infractions were exceptions, not the rule, the probative value (if any) of Plaintiffs' selective and untested anecdotes is vastly outweighed by the attendant prejudice and risk of confusion.

If this sample information had any relevance at all to the disposition of claims of securities fraud by a corporation and its senior management, it would be outweighed by its likelihood of generating undue confusion, prejudice and a waste of this Court's time. *See Sims* v. *Mulcahy*, 902 F.2d 524, 531 (7th Cir. 1990) ("Exclusion of evidence under Rule 403 is also important to avoid significant litigation on issues that are collateral to those required to be tried."); *United States* v. *Pitt-Des Moines, Inc.*, 168 F.3d 976, 992 (7th Cir. 1999) (affirming district court's exclusion under Rule 403 of evidence of individual violation because it would require a mini-trial that "could distract and confuse the jury from the main issues of the case").

Moreover, putting Defendants to the burden of rebutting statistically insignificant anecdotes with counter-information at the branch or customer level would be a pointless and protracted waste of trial time. *See, e.g., U.S.* v. *Mikos*, No. 02 CR 137, 2003 WL 22922197, at *4 (N.D. Ill. Dec. 9, 2003) (Guzman, J.) (excluding "anecdotal" expert testimony that extrapolated from a small number of bullet lead samples that were not gathered in an "approved scientific manner so as to be considered as representative of the bullet population as a whole"); *Muzzey* v. *Kerr-McGee Chemical Corp.*, 921 F. Supp. 511, 519 (N.D. Ill. 1996) (Bucklo, J.) (excluding anecdotal expert reports that did not establish a causal link and noting that "[s]uch anecdotal evidence, based on a few cases without systematic comparison or data collection, may be an incentive for more careful investigation but may also reflect rumor and speculation rather than fact"); *BASF Corp.* v. *Old World Trading Co., Inc.*, No. 86 C 5602, 1992 WL 232078, at *4 (N.D. Ill. 1992) (Leinenweber, J.) ("anecdotal evidence, unless accompanied by testimony that such evidence was statistically significant, was irrelevant and would consume too much time.").

It is evident that, based on seven of the nine witnesses' declarations at issue in Defendant's Cross-Motion, Plaintiffs hope to take the same *gestalt* approach to trying to prove federal securities fraud, eschewing proof of fraud, materiality, scienter and loss causation as to particular misstatements by particular Defendants and throwing numerous prejudicial-sounding anecdotes at the wall in the hope that some will stick. Absent exclusion of this testimony, a jury could well be confused by Plaintiffs' legally insufficient "penumbra of fraud" approach, and literally hundreds of minitrials would be required if unadjudicated consumer and branch-level anecdotes, rather than Company policy, were allowed to become the focus of the trial.

CONCLUSION

For the foregoing reasons, the Court should enter an Order excluding the testimony of Plaintiffs' nine previously undisclosed witnesses.

Dated: January 30, 2009
New York, New York

Respectfully submitted,

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EXHIBIT A

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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' CROSS-MOTION PURSUANT TO FED. R. CIV. P. 37(C) TO EXCLUDE DECLARATIONS OF PLAINTIFFS' PREVIOUSLY CONCEALED WITNESSES

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TABLE OF AUTHORITIES

This memorandum is respectfully submitted on behalf of Defendants Household International, Inc., William F. Aldinger, David A. Schoenholz, and Gary Gilmer (collectively, the "Defendants"), in support of their cross-motion for an Order excluding the declarations of Plaintiffs' seven previously concealed witnesses and excluding the contents of those declarations from consideration on Plaintiffs' Motion Requesting Evidentiary Sanctions ("Plaintiffs' Motion").[6] This exclusion is compelled by Rules 26 and 37 of the Federal Rules of Civil Procedure.[7]

INTRODUCTION

Plaintiffs' motion for evidentiary sanctions relies, in substantial part, upon the declarations of seven former branch-level employees of Household, selectively picked from among thousands of current and former employees of Household's nationwide branch-based consumer lending network. Plaintiffs unjustifiably failed to disclose the existence of these secret declarants to Defendants during the course of discovery or during many months thereafter, in violation of their obligation to supplement their initial disclosures and other discovery responses in a timely manner. This concealment mandates exclusion of those declarations as a discovery sanction.

Because Plaintiffs are using the declarations obtained from these newly-disclosed witnesses in an attempt to block Defendants from defending "predatory lending" allegations on

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6 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.

7 Non-Class Defendants Joseph A. Vozar and Household Finance Corporation ("HFC") join in this motion and object to the proposed declarations of previously undisclosed witnesses. Mr. Vozar and HFC do not waive, but on the contrary, each expressly reserves and intends to preserve, the right to amend, supplement or re-assert objections to the proposed declarations of the previously undisclosed witnesses to the extent that Plaintiffs at any future time propose to introduce such declarations against Vozar and HFC.

the merits, the *bona fides* of Plaintiffs' proffer should be scrutinized with the same rigor, and based on the same standards, that would apply if Plaintiffs had surfaced these witnesses for the first time in summary judgment practice or at trial. Those standards mandate the exclusion of testimony from these witnesses for any purpose — "*on a motion*, at a hearing, or at a trial." Fed. R. Civ. P. 37(c)(1) (emphasis added).

Plaintiffs did not identify any of these secret declarants in their initial disclosures pursuant to Rule 26(a). Nor did they name any of them in response to Defendants' interrogatory that specifically requested identification of all persons who are "not affiliated with Household believed by Plaintiffs to have knowledge of any alleged predatory lending practices." And even though Plaintiffs obtained a *Jaffe*-captioned declaration from at least one of these individuals before the most recent amendment of their interrogatory answers in February 2008, and obtained declarations from several of the others in the ensuing months, they continued to conceal these individuals' identity for almost two years after the close of fact discovery in this matter. The declarations, attached as Exhibits 93-99 to Plaintiffs' Motion, are offered in support of Plaintiffs' request for draconian sanctions based on their allegations that spoliation of supposed predatory lending materials occurred years before they asserted their securities fraud claims in this case. Merits of Plaintiffs' motion aside, Plaintiffs' submission signals their clear intent — if the Court were to allow it — to try their fraud claim on the basis of individual customer grievances and low-level employee anecdotes, rather than on the intent and propriety of policies established by senior management. The first time Plaintiffs notified Defendants that they intended to rely upon *any* information from these individuals was on October 31, 2008, a few weeks before Plaintiffs filed their motion for evidentiary sanctions, when Plaintiffs listed them as "will call" witnesses on their draft Witness List. This strategic concealment directly contravenes Rule 26(e).

Under Rule 37, a party that has failed to make a timely disclosure of the identity of a witness as required by Rule 26(a) or (e) "is not allowed to use that information or witness to supply evidence *on a motion*, at a hearing, or at a trial." Fed. R. Civ. P. 37(c)(1) (emphasis added). Because Plaintiffs' violation is neither justified nor harmless, "the sanction of exclusion is automatic and mandatory." *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). The time to disclose such individuals has long since passed. Fact discovery ended almost two years ago, and expert discovery has been complete for over nine months. Defendants should

not be subjected to ambush with such declarations, on the threshold of trial, on what is in effect a motion for summary judgment on factual issues that Plaintiffs bear the burden of proving at trial.

In related meet and confer exchanges, Plaintiffs offered no justification for their failure to disclose the names of these individuals beyond asserting they did not discover that these witnesses possessed knowledge of relevant facts until after the end of fact discovery.[8] Even taking them at their word, Plaintiffs' belated disclosure cannot be considered substantially justified where Plaintiffs themselves *chose* not to conduct such an investigation during the four years of discovery in this action. The time for Plaintiffs to locate and identify witnesses was at the time they prepared their Amended Complaint or, at minimum, during fact discovery, when Defendants would be able to discover the nature and basis of their positions, test the validity of their testimony through additional depositions or otherwise, investigate possible bases for bias or mistake closer to the events at issue, and assemble evidence necessary to counter their anecdotal accounts. Plaintiffs' admitted decision to defer this part of their investigation until *after* the completion of discovery (*see* Best Decl., ¶ 14, Ex. 9) is therefore a cause — not a justification — for their violation of the Federal Rules. By deferring their investigation, Plaintiffs cynically ignored the Court-imposed discovery deadlines in this case and condoning such conduct would render meaningless the express procedural requirements of Rule 26 and the carefully-framed orders of this Court as to the proper timing and sequencing of fact development in this case.

The prejudice from this violation is not "harmless" and cannot be readily cured. Assuming that such discovery at the branch level would be relevant, Defendants have been denied the ability to conduct fact discovery related to these former branch-level employees' observations, their bias and myopic focus, and their lack of connection to senior management's knowledge base. Because of Plaintiffs' deliberate concealment, Defendants were unaware during the discovery period of any need to locate and prepare affirmative and rebuttal testimony

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[8] Plaintiffs' carefully worded denial speaks volumes — they have not denied that they knew of these individuals, or even that they had been in contact with them, before the end of fact discovery, only that they did not know that their knowledge was "relevant." (*See* Declaration of Landis C. Best, dated January 19, 2009 ("Best Decl."), Ex. 9). If Plaintiffs mean to suggest that these individuals have knowledge of facts that have only recently become relevant to the disputed issues in this lengthy litigation, there is no credible basis for any such contention.

on point — a task that would have been less difficult two to four years ago, when memories were less remote and before the retirement of knowledgeable supervisors. Defendants have had no opportunity to examine these individuals to explore the basis for the prejudicial (and hearsay) statements offered in their declarations. Instead, Defendants have been forced to investigate and respond to the allegations contained in the declarations within a severely constricted timeframe and without the benefit of the discovery process — a situation that is inherently and incurably prejudicial to Defendants. The prejudice from Plaintiffs' deliberate election to keep Defendants in the dark cannot be "fixed" at this late stage. As one court in this Circuit noted regarding a similar violation: "[A]t the heart of Rule 37's automatic sanction provision is the recognition that precious time and resources of both opposing counsel and this Court are wasted when faced with unjustified delay. And such waste, when significant enough, constitutes its own kind of harm." *Saudi v. Valmet-Appleton, Inc.*, 219 F.R.D. 128, 134 (E.D. Wis. 2003). Here, as in that case, the only appropriate remedy is the sanction of exclusion under Rule 37.

STATEMENT OF FACTS

On June 25, 2004 Plaintiffs served Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1), and on August 20, 2004 they served Amended Initial Disclosures. (Best Decl., Exs. 1, 2). The initial disclosures listed over 300 non-party individuals and organizations "likely to have discoverable information that plaintiffs may use to support their claims," including dozens of current and former employees of Household.[9] Plaintiffs did not list any of the seven declarants in either the initially-served disclosures or in the amended version served two months later.

During 2005 and 2006, Defendants searched for and produced relevant, non-privileged emails from the files of 291 current and former employees requested by Plaintiffs, including 129 agreed-upon custodians and 162 additional custodians pursuant to Magistrate

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[9] Plaintiffs' initial disclosures also stated that that Plaintiffs believed there were additional 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." Plaintiffs also stated that their "investigation is continuing and plaintiffs will supplement the information contained in the Amended Initial Disclosures as additional information becomes available to plaintiffs." (*See* Best Decl., Ex. 2, at 67). Yet Plaintiffs have not supplemented their initial 2004 disclosures at any time since. (Best Decl. ¶ 3)

Judge Nolan's Oct. 31, 2005 Order. (Best Decl. ¶ 20). Plaintiffs did not request emails for any of the seven declarants. (*Id.*)

On December 22, 2006, Defendants served Lead Plaintiffs with Interrogatory No. 46, which required the latter to "[i]dentify any person not affiliated with Household believed by Plaintiffs to have knowledge of any alleged 'predatory lending practices.'" (*See* Best Decl., Ex. 3 at 2). The precise purpose of this interrogatory was to discover, after years of discovery, any former customers or employees that Plaintiffs believed had information that would support their allegations that Household had engaged in practices that they labeled as "predatory." After initially disclaiming knowledge of any such persons, Plaintiffs later amended this response multiple times, most recently on February 1, 2008. Plaintiffs' five amended responses identified only state Attorneys General, state and federal regulators and agencies and Plaintiffs' retained experts as persons not affiliated with Household believed by Plaintiffs to have knowledge of "Household's alleged predatory lending practices." (*See* Best Decl., Ex. 4 at 45-47; Ex. 5 at 63-66). None of Plaintiffs' seriatim responses to Interrogatory 46 listed any of the seven declarants — even though by the time of their most recent amendment in February 2008, Plaintiffs had already obtained a declaration from at least one of them (Curtis A. Howrey), dated November 28, 2007, bearing the caption of this action, and focusing exclusively on anecdotes and opinions about alleged "predatory lending" from his former vantage as a Household branch-level employee.

On October 31, 2008, almost two years after the Court-ordered fact discovery cut-off, Plaintiffs finally disclosed the identity of their seven secret declarants and two other proposed branch-level witnesses, all of whom were listed as "will call" witnesses for trial. (*See* Best Decl., Exs. 6, 7).[10] Even though only four weeks have been allocated for the upcoming trial

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10 The sudden appearance of nine undisclosed former employees is not the only example of Plaintiffs' willingness to play fast and loose with the discovery rules. Plaintiffs' October 31 and November 12, 2008, "will call" trial witness lists also included James Bernstein (*See* Best Decl. Ex. 6, 7), a former Minnesota state bank regulator who now works as a consultant to, *inter alia*, advocacy groups and law firms pursuing class action claims based on alleged mortgage fraud. Yet almost a year ago, Plaintiffs affirmatively withdrew Mr. Bernstein from their belated list of witnesses who may give trial testimony as to observations or conclusions based on technical or specialized knowledge within the purview of this Court's decision in *Sunstar, Inc.* v. *Alberto-Culver Co.*, Nos. 01 C 736, 01 C 5825, 2006 U.S. Dist. LEXIS 85678 (N.D. Ill. Nov. 16, 2006) (Guzman, J.) ("*Sunstar*"). In reliance on Plaintiffs' withdrawal, Defendants did not take Mr.

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in this matter, Plaintiffs' Witness List identified thirty live "will call" witnesses, nine of whom — nearly one-third of their proposed live trial witnesses — were never disclosed to Defendants during the course of discovery or thereafter.

In November 2008, the parties corresponded about Plaintiffs' previous concealment of the newly-disclosed witnesses. Plaintiffs argued that their failure to disclose the witnesses was excused because (a) their initial disclosures had "notified" Defendants that Plaintiffs believed there were additional individuals within the Household organization likely to have discoverable information; (b) Plaintiffs "did not discover that these witnesses had knowledge of defendants' predatory lending practices until after fact discovery closed"; (c) the individuals' names appeared somewhere in the five million pages of documents produced by Defendants; and (d) Plaintiffs were not required to disclose these individuals in response to Interrogatory 46 because they considered former employees to be "affiliated with Household" and therefore beyond the scope of the question. (*See* Best Decl., Ex. 9). Based on these disingenuous premises, Plaintiffs refused to remove the nine belatedly identified individuals from their Revised Witness List. (*Id.*, Ex. 11).[11]

At a subsequent meet-and-confer on the same subject on November 25, 2008, Counsel for Plaintiffs argued that Defendants could not show prejudice from the late disclosure

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Bernstein's deposition — although they took the deposition of every other "expert" identified by Plaintiffs.

11 Defendants also requested that Plaintiffs remove Mr. Bernstein from their witness list because Plaintiffs had previously withdrawn his name from their belated *Sunstar* list in order to avoid his deposition. (Best Decl., Ex. 10 at 2). Plaintiffs refused to delete Mr. Bernstein, stating that it was "irrelevant whether he appears on Plaintiffs *Sunstar* disclosure." (*Id.* at Ex. 11). On January 15, 2009, Plaintiffs provided another revised witness list deleting Mr. Bernstein — notwithstanding Plaintiffs' previous refusal to withdraw him as a trial witness list due to their concealment of his significance during discovery. (*Id.*, Ex. 12). Two days later, counsel for Plaintiffs sent an email stating they had "inadvertently" left James Bernstein off of the January 15 witness list. (*Id.*, Ex. 13). This bizarre about-face calls into question whether Plaintiffs ever had a good faith basis to list either Bernstein or the seven secret declarants as trial witnesses. As with Plaintiffs recent reduction of their massive list of 3216 trial exhibits by over 40 percent, these dramatic reversals of position are further evidence of Plaintiffs' gamesmanship and lack of good faith in the pretrial process, and only the first step along the path towards a realistic trial program.

(although it was not Defendants' burden to do so), and claimed work product protection in refusing to disclose when Plaintiffs had discovered the existence of the witnesses and when, in relation to the close of discovery, their "continuing factual investigation" had begun. (*See* Best Decl. ¶¶ 13-15). Counsel for Plaintiffs also asserted that even pretrial depositions of the nine witnesses would not be appropriate or justified under the circumstances. (*Id* ¶ 15). Although this discussion took place only one day before Plaintiffs filed the declarations of seven of the previously-undisclosed branch-level employees in support of their Thanksgiving eve "spoliation" motion, they did not give advance notice of that motion or disclose that it would include a year-old declaration from one of the individuals whose concealment was being discussed. The latter omission, which coincided with Plaintiffs' invocation of work product to defeat any discussion of when they had identified these witnesses, reinforces the inescapable conclusion that Plaintiffs are not acting in good faith.

ARGUMENT

Rule 26(a) of the Federal Rules of Civil Procedure requires a party, at the outset of litigation, to provide opponents with "the names and, if known, the addresses and telephone number of each individual likely to have discoverable information that the disclosing party *may* use to support its claims or defenses . . . identifying the subjects of the information, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i) (emphasis added). Rule 26(e) creates an ongoing duty to timely supplement or amend initial disclosures and interrogatory responses when a party "learns that in some material respect the disclosure or response is incomplete or incorrect, and 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). The duty to supplement is ongoing throughout discovery and need not be triggered by additional solicitation from another party, such as a motion to compel disclosure. *See Scranton Gillette Communs., Inc. v. Dannhausen,* No. 96 C 8353, 1998 WL 566668 at *1 (N.D. Ill. Aug. 26, 1998) (Urbom, J.).

Under Rule 37, a party that has failed to make a timely disclosure of the identity of a witness as required by Rule 26(a) or (e) "is not allowed to use that information or witness to supply evidence *on a motion*, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1) (emphasis added). The Court of Appeals has confirmed that absent such a showing by the proponent of the evidence, "the sanction of

exclusion is automatic and mandatory." *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998).[12] District courts are to consider four factors when determining whether the failure to disclose was either substantially justified or harmless: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *David v. Caterpillar*, 324 F.3d 851, 857 (7th Cir. 2003). Because Plaintiffs cannot demonstrate that their failure to disclose the previously concealed witnesses is substantially justified or harmless to Defendants, Rule 37 mandates that the testimony of the witnesses be excluded "on a motion, at a hearing, or at a trial." Fed. R. Civ. P. 37(c)(1).

Plaintiffs' attempt to introduce the surprise declarations of previously concealed witnesses many months after the close of fact and expert discovery, and only after Defendants had reached an advanced stage in their preparation for trial, is precisely the sort of belated disclosure that requires exclusion under Rule 37(c) in this Circuit. *See Matthews v. Commonwealth Edison Co.*, No. 93 C 4140, 1995 WL 478820 at *3 (N.D. Ill. March 24, 1995) (Guzman, M.J.) (excluding proposed fact witness from testifying during plaintiff's case in chief where plaintiff failed to disclose the witness during discovery and witness was not deposed); *Civix-DDI, L.L.C.* v. *Cellco P'ship*, 387 F. Supp. 2d 869, 884 (N.D. Ill. 2005) (St. Eve, J.) (striking from consideration on summary judgment the declarations of witnesses not disclosed in initial disclosures where plaintiff offered no justifiable reason for failure to disclose witnesses during discovery); *Dunkin' Donuts, Inc. v. N.A.S.T., Inc.*, 428 F. Supp. 2d 761, 770-71 (N.D. Ill. 2005) (Shadur, J.) (refusing under Rule 37 to consider post-discovery damages affidavit of witness on motion for summary judgment where party failed to disclose damages information under Rule 26(a)); *Advanced Cleanroom Technologies v. Newhouse*, No. 00 C 6623, 2002 WL 206960 at *4-5 (N.D. Ill. Feb. 11, 2002) (Coar, J.) (same); *Lyman v. St. Jude Medical S.C., Inc.*, No. 05-C-122, 2008 WL 2224352 at *7-8 (E.D. Wis. May 27, 2008) (excluding four fact witnesses not named in initial disclosures, deposed during discovery, or identified as likely to

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[12] Rule 26(e)'s duty to supplement and Rule 37's exclusion sanction apply to both initial disclosures and interrogatory responses. *See* Fed. R. Civ. P. 37(c) advisory committee's 2000 note.

have discoverable information); *Scranton Gillette Communs.*, 1998 WL 566668 at *3 (excluding witnesses not disclosed until filing of pretrial order).

III. PLAINTIFFS' CONCEALMENT OF WITNESSES MANDATES AUTOMATIC EXCLUSION UNDER RULE 37

Plaintiffs bear the burden under Rule 37 to demonstrate that their delay in disclosure was "substantially justified" or "harmless," but Plaintiffs cannot do so. Far from showing "substantial" justification for their delay, Plaintiffs' excuse — that they supposedly learned that these secret declarants had knowledge of Defendants' "predatory lending practices" only after fact discovery had closed — is no justification at all. "The time for diligent investigation into the evidence relevant to a case is during the period allotted for discovery, not during final preparations for trial." *Wright v. Aargo Security Svcs., Inc.*, No. 99 CIV. 9115, 2001 WL 1035139 at *2 (S.D.N.Y. Sept. 7, 2001). If Plaintiffs knew that additional individuals were likely to have discoverable information but needed more time during discovery to explore that information, "the appropriate response would have been to attempt to reach a stipulation with [Defendants], or if unable to do so, then seek leave of the Court." *Saudi*, 219 F.R.D. at 133. Absent sufficient evidence that Plaintiffs undertook a reasonable inquiry during the four-year discovery period yet were unable to discover these seven surprise declarants and determine what knowledge they possessed (an issue Plaintiffs refused to address during the parties' meet and confer, *see* Best Decl. ¶ 14), the failure to make timely disclosure of the individuals cannot be deemed substantially justified. *See Scranton Gillette Communs.*, 1998 WL 566668 at *3 (excluding witnesses plaintiff claimed to have discovered after fact discovery where "plaintiff has not shown diligence in searching for them").[13] As this Court noted in imposing Rule 37 exclusion of belatedly-disclosed witnesses, "[t]he fact of the matter is that PIL chose not to explore these issues when discovery was open. It is inexplicable why PIL did not take whatever discovery it needed in this regard when it had the chance." *Ty, Inc. v. Publications Int'l, Inc.*,

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[13] The fact that these secret declarants were first disclosed as Plaintiffs' trial witnesses strongly suggests that these are not individuals Plaintiffs located outside of discovery merely to support their purported "spoliation" motion. To the contrary, their status as proposed trial witnesses means that Plaintiffs consider their knowledge relevant to the merits of Plaintiffs' claims, thus demonstrating that such information was surely subject to discovery *during* the discovery period.

No. 99 C5565, 2004 WL 421984 at *2 (N.D. Ill. Feb. 17, 2004) (Zagel, J.) (excluding six fact witnesses where proponent's choice "not to name these . . . witnesses when discovery was open or shortly thereafter" required exclusion under Rule 37).

Plaintiffs seek to excuse their nondisclosure by relying on a "placeholder" reservation in their initial disclosures, stating that there might be additional relevant individuals not known to them at that time. But if this empty truism were found to substantially justify nondisclosure, Rule 26(a) and (e) and judicial scheduling orders would be meaningless in every case. Such a unilateral exception would absurdly allow a party to evade discovery obligations simply by holding open the vague possibility that it might locate additional individuals at some point in the future. Defendants were entitled to rely upon the accuracy of Plaintiffs' Rule 26 disclosures in preparing their case during fact discovery. *See Civix-DDI LLC* v. *Cellco*, 387 F. Supp. 2d at 904 n.43 (striking declaration of non-disclosed witness from consideration on summary judgment because defendant "was entitled to rely on the fact that Civix did not disclose Rehfeld as either a fact or expert witness and therefore would not be relying on his testimony at trial"). Plaintiffs listed dozens of current and former Household branch-level employees in their initial disclosures. Yet none of these dozens of former branch-level employees provided a declaration or made the cut for Plaintiffs' live witness list. Despite Plaintiffs' representation that they would "supplement the information . . . as additional information becomes available to plaintiffs", Plaintiffs never supplemented, and never identified any additional individuals. Defendants can only speculate as to why the *only* branch-level employees that provided declarations in support of Plaintiffs' case are the ones that Plaintiffs conveniently located (and deliberately concealed) "after the close of fact discovery."[14]

Plaintiffs' hyper-technical contention that Interrogatory 46 did not apply to former employees of Household is a red herring, and it strains the plain language of the request for the identity of "any person not affiliated with Household believed by Plaintiffs to have knowledge of any alleged 'predatory lending practices.'" Former employees are, by definition, no longer

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[14] Plaintiffs have not disclosed how many former employees they had to interview to find the seven declarants, nor have they disclosed the identity of any former employees who refused to supply a declaration or who had knowledge of facts that contradict the individuals they have now belatedly disclosed.

"affiliated with Household" — especially individuals who have provided declarations on behalf of an adverse party. If Plaintiffs chose to read the phrase "any person not affiliated with Household" as "any person *never* affiliated with Household," they were obliged to clarify and qualify their response at that time. Plaintiffs cannot squeeze justification out of the interrogatory by unilaterally and silently revising the meaning of its words.[15] In any event, the interrogatory has no bearing on Plaintiffs' failure to supplement their Rule 26(a) disclosures as soon as they had identified these former employees as persons with relevant knowledge. (In this regard, Defendants remind the Court that at least one of these declarations was signed approximately three months *before* the last time Plaintiffs supplemented their discovery responses.)

Plaintiffs' argument that Defendants should have been aware that these former employees were individuals that Plaintiffs might use to support their claims or defenses because the name of each of them appears somewhere within the five million pages of documents produced in this case deserves short shrift. Literally thousands of current and former branch-level employees are identified by name in the documents that Defendants produced in response to Plaintiffs' sweeping discovery requests. At any given time, and before even considering routine turn-over, Household's Consumer Lending division had over 13,000 employees and approximately 1,400 sales branches during the Class Period.[16] Defendants cannot possibly be deemed to have been "on notice" that any and all of those thousands of individuals might agree to provide a declaration in support of Plaintiffs' claims, as this Court has recognized even in the context of much smaller factual records. *See Ty, Inc.*, 2004 WL 421984 at *2 ("merely because the names of these witnesses appeared, among hundreds of other names, somewhere in the thousands of pages of documents produced by Ty, does not mean that Ty should have anticipated that PIL would call these individuals as trial witnesses and deposed them accordingly"); *Boynton v. Monarch*, No. 92 C 140, 1994 WL 463905 at *2-3 (N.D. Ill. Aug. 25, 1994) (Kocoras, J.) (the

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15 Plaintiffs have refused to disclose what investigation they undertook to discover these individuals, or when. Plaintiffs' defensive effort to re-interpret the language of Interrogatory 46 strongly suggests that Plaintiffs had early knowledge of these individuals, but deliberately delayed directly contacting them until after the close of fact discovery.

16 As Plaintiffs noted in an attempt to justify their overbroad list of over 60 proposed trial witnesses, Household was "a 33,000 employee company" during the Class Period. (*See* Best Decl. Ex. 9).

mere appearance of a witness's name on documents produced by defense counsel did not give defendant sufficient knowledge of the witnesses' relevance to the case prior to the close of discovery; allowing witnesses to testify would constitute "unfair surprise").

IV. AUTOMATIC AND MANDATORY EXCLUSION IS REQUIRED BECAUSE PLAINTIFFS' BELATED DISCLOSURE OF SURPRISE DECLARANTS CONSTITUTES CLEAR PREJUDICE TO DEFENDANTS

Plaintiffs bear the burden of showing that their belated disclosure will not prejudice Defendants. *See Salgado*, 150 F.3d at 742; *Finwall v. City of Chicago*, 239 F.R.D. 504, 506 (N.D. Ill. Aug. 10, 2006) (Manning, J.). The duty to provide full and complete disclosure of relevant individuals is not a mere formality, but a critical component of the overarching goal of the Federal Rules "to promote liberal discovery in an effort to narrow the issues for trial and to prevent unfair surprise." *Id.* at *1. Rule 26 is designed to prevent "trial by ambush." *Ty, Inc. v. Publications Int'l, Inc.*, No. 99 C5565, 2004 WL 421984 at *2 (N.D. Ill. Feb. 17, 2004) (Zagel, J.). Absent adequate advance disclosure of individuals in possession of discoverable information and the information they are expected to present, opposing parties are hindered in their ability to conduct their own discovery and to prepare for trial. The "fundamental purpose of Rule 37" and its exclusion sanction "is to ensure that the merits of the case can be addressed at trial without any party suffering prejudice at trial as a result of nonfeasance or malfeasance during discovery." *Id.* "[A]t the heart of Rule 37's automatic sanction provision is the recognition that precious time and resources of both opposing counsel and this Court are wasted when faced with unjustified delay." *Saudi*, 219 F.R.D. at 134. Beyond prejudice to Defendants, consideration of declarations of branch-level employees will impose an unjustified burden upon the resources of this Court. As the Court of Appeals noted in upholding a Rule 37(a) exclusion, the Court "has a right, independent of the parties, to conduct trial preparation in a manner that husbands appropriately the scarce judicial resources of that busy district." *Salgado*, 150 F.3d at 742.

Condoning Plaintiffs' eleventh-hour disclosures would irreparably prejudice Defendants. Permitting Plaintiffs to use the declarations of undisclosed witnesses in seeking instructions that would block Defendants from opposing Plaintiffs' allegations on the merits, including permitting Plaintiffs' experts to rely on their statements without cross examination, would prejudice Defendants as severely, if not more severely, than if those suprise witnesses were permitted to testify at trial. "If a party is allowed to withhold the supplementation of its

discovery responses until after fact discovery is closed, the purpose of [Rule 26] is effectively frustrated because the opposing party is denied the opportunity to conduct discovery on the supplemental discovery." *Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, No. 95 C 0673, 1996 WL 680243 at *8 (N.D. Ill. Nov. 21, 1996) (Ashman, M.J.); *see also Boynton v. Monarch*, 1994 WL 463905 at *2-3 (it would constitute unfair surprise to the defendant to admit the testimony of a witness plaintiff disclosed only in the pretrial order — and not in supplemental answers to interrogatories — because defendant had no opportunity to depose the witness); *Saudi*, 219 F.R.D. at 134 (excluding undisclosed fact and expert witnesses; prejudice demonstrated because "the responding party cannot conduct necessary discovery, or prepare to respond to witnesses that have not been disclosed"); *Kemper/Prime Industrial Partners v. Montgomery Watson Americas, Inc.*, No. 97 C 4278, 2004 WL 725223 at *4-*5 (N.D. Ill. March 31, 2004) (Guzman, J.) (excluding under Rule 37 plaintiff's proposed damages evidence due to plaintiff's failure to produce such evidence during discovery; "[I]t is clear that no other sanction would avoid the clear prejudice to Defendant caused by Plaintiff's utter failure of proof."). The passage of time, by itself, makes proof of any fact more difficult. *See Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). Given Defendants' inability to conduct timely discovery relevant to Plaintiffs' secret declarants, consideration of the declarations would result in exactly the kind of "trial by ambush" that Rules 26 and 37 preclude.

Plaintiffs' proposed expansion of the case on the threshold of trial to include concealed former branch-level employees (who did not make company policy) constitutes unfair surprise. Discovery was limited almost exclusively to corporate-level documents and witnesses, and did not extend to the 1,400 branch sales offices.[17] None of the thousands of branch-level employees was deposed. Allowing an evidentiary hearing, additional document requests and fact or expert depositions to redress Plaintiffs' violation would not cure this prejudice because reopening discovery would unfairly compound the burden of this litigation on Defendants and the Court (even if Plaintiffs were ordered to pick up the tab), threaten to delay the long-awaited

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17 For example, Plaintiffs' Sixth Document Request demanded "a sample of all loan documents for loans secured by real property used . . . at any branch, regardless of whether the branch is still operating today . . .". Defendants successfully limited this request to a sample of loan forms for each state. (*See* Best Decl. Ex. 12 at 2).

day of reckoning on Plaintiffs' insubstantial claims, and be an inadequate substitute for timely disclosure and follow up in any event. In similar circumstances, courts in this Circuit have agreed that this costly "remedy" is no remedy at all. *See Ty, Inc.*, 2004 WL 421984 at * 4 ("[W]e are well past the discovery cutoff in this case, and I will not permit PIL to use the new witness designations as a backdoor method for reopening discovery."); *Finwall v. City of Chicago*, 239 F.R.D. at 507 (noting that delay causes harm "both to the defendants and to the court," and that "[l]ate disclosure is not harmless within the meaning of Rule 37 simply because there is time to reopen discovery"); *Saudi*, 219 F.R.D. at 134 (rejecting plaintiffs' argument that new depositions and deadlines could cure their belated discovery of fact witnesses, and noting that if plaintiffs were correct, "the Court could never impose a Rule 37(c) sanction.").

Furthermore, at this late date, when the parties should be focused on narrowing and refining issues for trial, forcing Defendants investigate and respond to secret declarants constitutes clear prejudice. A defendant "should not be put in the position of having to scramble to track down these individuals to see what they may say if called to testify, and then prepare rebuttal evidence or testimony, when it should be focusing its resources on preparing for trial." *Ty, Inc.*, 2004 WL 421984 at *2.[18]

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[18] Defendants reserve the right to demonstrate during the *in limine* process that such branch-level, statistically invalid anecdotes are not only inadmissible hearsay under Fed. R. Evid. 802, but should be excluded under Rules 402 and 403. If this sample information had any relevance at all to the disposition of claims of securities fraud by a corporation and its senior management, it would be outweighed by its likelihood of generating undue confusion, prejudice and a waste of this Court's time. *See Sims* v. *Mulcahy*, 902 F.2d 524, 531 (7th Cir. 1990) ("Exclusion of evidence under Rule 403 is also important to avoid significant litigation on issues that are collateral to those required to be tried."); *United States* v. *Pitt-Des Moines, Inc.*, 168 F.3d 976, 992 (7th Cir. 1999) (affirming district court's exclusion under Rule 403 of evidence of individual violation because it would require a mini-trial that "could distract and confuse the jury from the main issues of the case"). These considerations are especially compelling here given the utter lack of any showing that the proffered testimony of these witnesses come anywhere close to being statistically significant. *See BASF Corp.* v. *Old World Trading Co.*, No. 86 C 5602, 1992 WL 232078, at *4 (N.D. Ill. Sept. 8, 1992) (Leinenweber, J.) (stating that "anecdotal evidence [of customer complaints], unless accompanied by testimony that such evidence was statistically significant, was irrelevant and would consume too much time").

CONCLUSION

For the foregoing reasons, the Court should enter an Order excluding the declarations of Plaintiffs' seven previously concealed witnesses and excluding the contents of such declarations from consideration on Plaintiffs' Motion Requesting Evidentiary Sanctions

Dated: January 19, 2009
New York, New York

Respectfully submitted,

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