UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE EVIDENCE RE: DEFENDANTS' TRUTH ON THE MARKET DEFENSE AND DEFENDANTS' STOCK TRADING PURSUANT TO FED. R. CIV. P. 37

PLAINTIFFS' MOTION *IN LIMINE* NO. 1

I. INTRODUCTION

Plaintiffs seek to preclude the introduction of certain evidence by defendants Household International ("Household"), William F. Aldinger, David A. Schoenholz and Gary D. Gilmer (collectively "defendants") that was not produced or identified during discovery. At issue are documents relating to debt securitizations done by a subsidiary of Household – Household Finance Corp. These documents, which are defendants' own documents, were not produced during fact discovery in response to plaintiffs' document requests. Additionally, they were not identified in response to plaintiffs' interrogatories. Defendants can have no justification for their failure to identify or produce these documents. Moreover, defendants' conduct has worked a substantial prejudice on plaintiffs. Accordingly, pursuant to Fed. R. Civ. P. 37, defendants may not now use these documents nor introduce any testimony based on these documents, including but not limited to, testimony from their retained experts, Robert E. Litan and Roman Weil.

II. FACTUAL BACKGROUND

At issue are Household documents relied upon by defendants' experts, Messrs. Litan and Weil, that were not produced during discovery nor referenced in response to plaintiffs' interrogatories.

The documents relate to Household's various debt securitizations. Defendants did not produce the securitization documents during discovery in response to plaintiffs' various document requests to all defendants, including the following requests from plaintiffs' first request for production of documents:

> Request No. 7: All documents and communications concerning or relating to Household's lending practices and policies related to loans secured by real property (as described in the Complaint) including, but not limited to correspondence, analyses, statistics, presentations, training materials, public statements, memoranda and notes.
>
> Request No. 10: All documents and communications concerning Household's policies and practices relating to loan delinquencies, charge-off and reaging of loans,

> including all documents provided to or received from Andersen or KPMG regarding loan delinquencies, charge-off and reaging of loans.

Plaintiffs' First Request for Production of Documents to Household Defendants, attached hereto as Ex. A, at 8-9.

In addition, plaintiffs propounded interrogatories concerning defendants' affirmative defenses and plaintiffs' interrogatories were typical contention interrogatories calling for defendants to set forth the facts, documents and witnesses supporting their affirmative defenses, including truth on the market. Defendants in their interrogatory responses, which were amended four times, did not identify the securitization documents as revealing the truth to the market. Instead, in the "fact" response, the Fourth Amended Responses reference only the SEC Form 10-Ks filed by Household; Feb. 8, 2006 Fourth Amended Responses at 15 & nn.5-6, attached hereto as Ex. B. Additionally, the "document" response does not reference the securitization documents. *Id.* at 19-20. However, defendants first identified their use of these documents in their expert reports ***after*** discovery and their intent to use the securitization documents to support their affirmative defense that the market was aware of 1) defendants' predatory lending practices and 2) defendants' reaging and other credit concealment practices. *See, e.g.*, Expert Report of Robert Litan Report, Appendix 1; Expert Report of Roman L. Weil at 24-25 & n.55.

Significantly, during expert discovery, Magistrate Judge Nolan directed each party to update their interrogatory responses as necessary to reference their expert reports. Defendants provided amended responses for many of plaintiffs' interrogatories on December 10, 2007, but did not provide amended responses to the affirmative defense interrogatories, not even to identify their experts, Messrs. Litan and Weil, as witnesses in support of this affirmative defense.

Because of the scope of this case, plaintiffs engaged in significant factual discovery. They propounded numerous document requests and interrogatories and deposed 66 fact witnesses. However, plaintiffs did so without being on notice of that defendants would assert that the debt

securitizations allegedly supported the truth on the market defense. Accordingly, plaintiffs did not have the ability to probe the accuracy and reliability of the underlying documents and did not devote time at the depositions to exploring these matters.

III. LEGAL ARGUMENT

Defendants' attempted use of these documents during expert discovery after concealing them for over four years of fact discovery is contrary to the federal rules. There can be no justification for defendants' failure to disclose their own documents previously and so they should not be permitted to use them at trial. Fed. R. Civ. P. 37(c)(1). Under Rule 37(d)(1)(A)(ii), discovery sanctions are also appropriate for failing to respond to interrogatories, including the exclusion of evidence. *Saunders v. City of Chicago*, 320 F. Supp. 2d 735, 738 (N.D. Ill. 2004). Because the securitization documents were not provided to plaintiffs during discovery nor identified in response to plaintiffs' interrogatories, this evidence and all related testimony should be excluded from trial pursuant to Fed. R. Civ. P. 37(d)(1)(A)(ii).

This court has the power to exclude testimony or evidence. Fed. R. Civ. P. 37(b)(2)(B). Rule 37(c)(1) states that if a party fails to provide information or the identity of a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.

This Court considers four factors in determining whether to exclude documents and testimony under this rule: 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, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003). These factors support exclusion here.

We start with the last factor, bad faith. Defendants have no justification for not producing their own documents during fact discovery. Despite being defendants' own documents, none of

these documents were produced by defendants during fact discovery. Defendants also failed to identify them in response to specific interrogatories. Defendants did not even amend their February 8, 2006 responses to plaintiffs' First Set of Interrogatories to identify Messrs. Litan and Weil as witnesses on this issue. This constitutes bad faith and warrants exclusion. *Saunders*, 320 F. Supp. 2d at 738. *United States v. Dunn*, No. 04 C 50472, 2007 WL 1100757, at *4-*5 (N.D. Ill. April 12, 2007) (finding bad faith where party had personal knowledge of potential witnesses and did not disclose them until the last day of fact discovery).

This conduct caused substantial prejudice. By excluding these documents from fact discovery, defendants limited plaintiffs' factual discovery into this issue. As a result of defendants' failure to produce these documents or identify them in response to discovery, plaintiffs devoted their discovery efforts, including document requests, interrogatories and depositions, to other issues. There has been substantiated prejudice to plaintiff.

This prejudice to plaintiffs cannot be cured. On this issue, defendants' failure to identify the securitization documents as "support" for their truth on the market affirmative defense is particularly egregious. In this case, the certified class is investors in equity securities, not debt securities. Accordingly, plaintiffs focused their discovery on equity securities and the related SEC disclosures, Forms 10-K, 10-Q and 8-K. For example, plaintiffs deposed Morgan Stanley as to the equity analyst's reports but not those from debt side. Given this, there would be substantial work necessary to prepare to rebut any truth on the market defense predicated upon debt security disclosures, even if probative on that defense. *See Dunn*, 2007 WL 1100754, at *4 (noting that reopening fact discovery would impose additional expense and delay). And when combined with defendants' failure to produce the stock trading documents, this prejudice becomes overwhelming.

Further, the longer the parties get from the events from which the claims arose, the more likely it is that witnesses will have died or their memories will have faded, inhibiting the plaintiffs

from gathering any substantive information to rebut the proffered expert testimony. These issues could have been avoided completely by complying with plaintiffs' discovery requests.

Fourth, for the reasons discussed above, allowing defendants to present these documents will disrupt the trial. Indeed, defendants have consistently sought to delay the trial and forcing a "re-do" of factual discovery would achieve that goal.

In these circumstances, the Seventh Circuit has upheld the exclusion of the testimony of witnesses or the introduction of documents that were not disclosed during discovery. *See, e.g.*, *Jardien v. Winston Network Inc.*, 888 F.2d 1151, 1156 (7th Cir. 1989) (affirming district court's exclusion of evidence where defendant did not reveal the names of the employees it sought to introduce despite plaintiff's interrogatories that should have elicited the information); *see also Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004). Case law in this District, likewise, supports exclusion. *Neuma Inc. v. Wells Fargo & Co.*, 515 F. Supp 2d 825, 835 (N.D. Ill. 2006) (excluding affidavit where witness was not disclosed during discovery and failure to disclose was not harmless); *Barner v. City of Harvey*, No. 95 C 3316, 1998 WL 664951, at *5 (N.D. Ill. Sept. 18, 1998) (excluding an affidavit, the substance of which should have been disclosed in response to plaintiff's interrogatories); *I&M Rails Link, LLC. v. Northstar Nav. Inc.*, No. 98 C 50359, 2001 WL 460028, at *3 (N.D. Ill. Apr. 27, 2001) (prohibiting the use of exhibits and expert testimony at trial pursuant to Rule 37 for failing to comply with disclosure rules and omitting the names of witnesses in response to interrogatories).

IV. CONCLUSION

The primary purpose of discovery, such as document requests and interrogatories, is to help determine the existence, identity, and location of witnesses, documents and other tangible evidence as a prerequisite to planning further discovery. *Portis v. City of Chicago*, No. 02 C 3139, 2005 WL 991995, at *3 (N.D. Ill. Apr. 15, 2005); *see also Schmude v. Tricam Ind.*, 550 F. Supp. 2d 846, 853

(E.D. Wis. 2008). Defendants' failure to produce their own documents in response to plaintiffs' document requests and to identify these documents in their interrogatory responses concealed the issues defendants now want to raise at trial and establishes defendants' bad faith. Because of the prejudice to plaintiffs, defendants should be denied the opportunity to introduce these documents and related testimony into evidence at trial.

DATED: January 30, 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 30, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE EVIDENCE RE: DEFENDANTS' TRUTH ON THE MARKET DEFENSE AND DEFENDANTS' STOCK TRADING PURSUANT TO FED. R. CIV. P. 37**.

The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of January, 2009, at San Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE