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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* "TO PRECLUDE DEFENDANTS FROM OFFERING EXPERT TESTIMONY FROM ANY OF THEIR IDENTIFIED WITNESSES OTHER THAN THEIR THREE [*sic*] RETAINED EXPERTS"

(PLAINTIFFS' MOTION *IN LIMINE* NO. 8)

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This Memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz and Gary Gilmer (the "Individual Defendants" and, collectively with Household, the "Household Defendants" or "Defendants"), in opposition to Plaintiffs' Motion *In Limine* No. 8 "to Preclude Defendants from Offering Expert Testimony From Any of Their Identified Witnesses Other Than Their Three [*sic*] Retained Experts" ("Plaintiffs' Moving Brief").

PRELIMINARY STATEMENT

Continuing with their theme of lobbing ambiguous motions *in limine* at the Court in an effort to obscure the real issues, Plaintiffs have filed their Motion *In Limine* No. 8 seeking to preclude Defendants from offering any expert testimony other than the testimony of their retained experts. This sounds simple enough on its face, but in reality it is not. What Plaintiffs are really doing is attempting to relitigate months of motion practice before Magistrate Judge Nolan where they unsuccessfully sought to attack Defendants' timely expert disclosures, including Defendants' detailed disclosures of each witness expected to provide testimony at trial that could be said to fall within the purview of this Court's ruling regarding Rule 702 testimony in *Sunstar, Inc*. v. *Alberto-Culver Company, Inc*., 2006 U.S. Dist. LEXIS 85678, at *20 (N.D. Ill. Nov. 16, 2006) (Guzman, J.). That Plaintiffs could offer their brief on this subject without once citing this Court's decision in *Sunstar* itself demonstrates the lengths to which Plaintiffs are prepared to go in the interest of obscuring the debate. But there is no obscuring the fact that these issues were briefed numerous times and at great length before Magistrate Judge Nolan, that she ruled against Plaintiffs, that she encouraged Plaintiffs to appeal the issue to this Court more than a year ago and that Plaintiffs declined the invitation. Plaintiffs' motion should be denied.

FACTUAL BACKGROUND

In compliance with this Court's October 25, 2007 Scheduling Order, on December 10, 2007, Defendants provided Plaintiffs with a Notice Concerning Expert Testimony ("Defendants' Notice") pursuant to Rule 26(a)(2) which listed Defendants' five retained experts, as well as 23 persons who Defendants then believed might be called to give testimony at trial "as to matters as to which they have specialized knowledge and whose testimony may, at least in part, fall within the purview of the Court's ruling in *Sunstar, Inc*. v. *Alberto-Culver Company, Inc*., 2006 U.S. Dist. LEXIS 85678 (N.D. Ill. Nov. 16, 2006)." (A copy of Defendants' Notice is at-

tached as Exhibit 33 to the Declaration of Thomas J. Kavaler in Opposition to Plaintiffs' Motions *In Limine* Nos. 1, 3-10 ("Kavaler Decl").) Defendants' Notice stated that "[n]one of [the 23] witnesses has been retained or specially employed to provide expert testimony in this case and none is an employee of any entity whose duties regularly involve giving expert testimony."

Consistent with the maxim that "no good deed goes unpunished," Plaintiffs responded to Defendants' Notice by writing a letter to Magistrate Judge Nolan complaining about Defendants' disclosures and seeking more detailed descriptions of the substance and bases for the proposed "expert" testimony of the 23 listed witnesses. On January 16, 2008, Magistrate Judge Nolan issued a Minute Order requiring Defendants to "provide a more detailed summary of each witness's potential testimony into areas of specialized knowledge that may fall within the purview of *Sunstar*." (Minute Order, Dkt. 1166 (Jan. 16, 2008)). On January 25, 2008 Defendants complied with that Order, submitting expanded summaries for each of the designated witnesses. (*See* Kavaler Decl. Ex. 34).

Still claiming to be unsatisfied, Plaintiffs demanded that Defendants provide the equivalent of Rule 26 expert reports for each of Defendants' designated *Sunstar* witnesses. On January 31, 2008 Magistrate Judge Nolan issued another Minute Order. Although Magistrate Judge Nolan recognized that expert reports would not be appropriate from these non-retained "experts," she instructed Defendants to provide for each of the 23 designated witnesses "a detailed statement of the specific opinions any non-retained experts may offer at trial, and the bases for those opinions." That is, of course, exactly what Rule 26 requires be included in an expert report. *See* Fed. R. Civ. Proc. 26(a)(2)(B)(i). Defendants were given seven days to comply. (Minute Order, Dkt. 1172 (Jan. 31, 2008)).

In response to the January 31 Minute Order, Defendants urged Magistrate Judge Nolan to reconsider, demonstrating that the equivalent of expert reports were not required of non-retained experts under well-established law, clarifying that the witnesses were occurrence witnesses, albeit occurrence witnesses with specialized knowledge, and explaining that it was simply not possible to provide the information contemplated by the January 31 Minute Order for each of the 23 listed witnesses in the span of seven days. And Defendants explained why.

All of the 23 witnesses in question participated in events and transactions that Plaintiffs have put at issue in their Amended Complaint in this action; indeed, all but one have been deposed, several for more than one day. Before reviewing the decision in *Sunstar* (which was issued near the end of a multi-year fact discovery period in this case and after many of the subject depositions were completed) and considering the amendments to Rule 701 as interpreted in *Sunstar*, Defendants would not have anticipated identifying any of these witnesses in our Notice. That is because we do not intend to elicit expert testimony from these witnesses in the classic sense. We only intend to elicit from any of them who may be called at trial testimony as to *what* they did in real time, *why* they did it and *why* they thought what they did was right. But, as we understand the ruling in *Sunstar*, if an otherwise traditional fact witness may be asked to testify to what could be characterized as an opinion (*e.g.*, why they accounted for a particular financial transaction as they did and why they believed it was correct to do so), if that testimony is based on specialized knowledge (*e.g.*, knowledge of accounting rules and methodologies in the example), then they were required to be disclosed on the date set for Rule 26 expert disclosures, in this case December 10, 2007. That is precisely what Defendants did in their December 10, 2007 Notice.

We note in this regard that in its January 31, 2008 ruling the Court inferred that Defendants "appear to be hedging their bets; i.e., they have generically identified the 23 witnesses as non-retained 'experts' just in case they later decide to elicit expert opinions from them after hearing Plaintiffs' case-in-chief." January 31, 2008 Order, at 2. We regret any lack of clarity on our part that may have led the Court to believe that Defendants intended to unfairly preserve an ability to elicit any "new opinions" from these witnesses in response to Plaintiffs' case-in-chief. That is not the case. Any of these witnesses whom Defendants elect to call will be asked to testify only about events and transactions and formation of judgments that occurred in real time (*i.e.* the time of the events in question), matters that were all fair game during their depositions, and as to which not a single witness was ever instructed not to answer a single question. Defendants simply want to ensure that witnesses whom we would ordinarily have considered fact witnesses but who employed specialized knowledge in the course of their normal duties will not be precluded from testifying about what they did, and also *why they did it* and *why they believed it was the right thing to do*.

The Court's Order of January 31, 2008 goes on to require that as to each witness identified on Defendants' Notice, Defendants should disclose any "opinion" the witness may be asked to testify about and the bases for those opinions. It would be exceedingly burdensome to comply with such a requirement at this stage of the case, and it is certainly not possible to determine and summarize all the possible testimony of the 23 listed witnesses that might be deemed to be "opinion" testimony under *Sunstar* and then to articulate the bases for each of those opinions in the seven-day time period contemplated by the Court. The difficulty arises from the sheer ordinariness of the witnesses' potential testimony about what they did, and how and why they did it, during the Class Period. Requiring Defendants to disclose each of the opinions formed by each of these wit-

nesses in the course of the events at issue in this case and the bases for those opinions would require Defendants first to outline the possible trial testimony of these witnesses now (anticipating all details of Plaintiffs' case in advance and without the benefit of decisions on in limine motions or any narrowing of the case on summary judgment) and then to isolate and identify what portions of that testimony might be considered an "opinion" based on specialized knowledge and then catalogue the bases for each of those opinions. This will require us to take the broadest view of each witness's possible testimony as we do not know how the Plaintiffs may choose to narrow their case for trial, what questionable categories of evidence may be excluded or which of Plaintiffs' claims might survive summary judgment. This is an enormous undertaking, which would correspond substantially with Defendants' ultimate preparation for any trial of this action.

By way of example, nine of the witnesses on the list have specialized knowledge of accounting. Of those nine, three are current or former employees of Household, four are outside auditors of Household and two are outside directors. By definition, auditors analyze and reach judgments (necessarily "opinions") about how, for example, financial transactions should be accounted for. Those judgments are informed, and necessarily explained, by reference to their specialized knowledge in accounting. Such individuals would have brought their specialized knowledge to bear in countless judgments and decisions made in the course of performing their duties during the almost three-year Class Period. To require Defendants to outline the trial testimony they may seek to elicit from these witnesses now, then isolate all "opinions" they might possibly be asked to explain and then articulate the bases for those judgments is a very daunting, time-consuming and expensive task. The same of course is true for witnesses with specialized knowledge in other fields, fields which were not only disclosed in Defendants' Notice but were already known to Plaintiffs as a result of the enormous amount of discovery they have received to date.

Defendants accept that identifying these witnesses is the consequence of the 2000 amendments to Rule 701 as interpreted by the Court in *Sunstar*. However, the distinction between retained experts and transaction witnesses who were not retained to give expert testimony remains. Retained experts are new; they are asked to opine post-litigation about specific issues presented by the case; their appointed tasks are unknowable to an adversary; the scope of their inquiries is clearly defined. In contrast, the testimony of on-the-ground, real time witnesses is not cabined by requests of counsel; such witnesses aren't given any subjects by counsel and asked to opine on them; the scope of their testimony is defined instead by what relevant actions they took or related judgments they reached during the subject time period. The decision of those who drafted the Federal Rules to require that opinions and their bases be expressly articulated for retained experts only and not for other witnesses implicitly recognizes the inherent differences between these categories and the extreme difficulty, burden and unfairness that would inhere by the adoption of a different rule.

(Kavaler Decl. Ex. 42, Defendants' Status Report, Dkt. 1173 (Feb. 6, 2008) at 4-8.) (emphasis in original, internal footnotes omitted)

On February 7, following a telephonic status conference on the issue, Magistrate Judge Nolan withdrew her January 31st Minute Order, stating: "Defendants will provide Plaintiffs with a stipulation regarding the 23 witnesses on their Notice Concerning Expert Testimony, as stated in open court. As a result, Defendants need not submit summaries of the 23 witnesses' 'expert' testimony as contemplated by the court's January 31, 2008 Order." (Minute Order, Dkt. 1176 (Feb. 7, 2008).) The only reference to this Order in Plaintiffs' Moving Brief is a vague citation conveniently buried in a footnote. (*See* Plaintiffs' Moving Brief at 2n.)

Efforts to enter into a stipulation ensued but were complicated by the fact that Plaintiffs had never timely disclosed *any* of their witnesses whose testimony might fall within the purview of *Sunstar*. Although expert discovery was nearly complete at this point, in an effort to encourage the parties to stipulate to the admissibility of testimony that might, in whole or in part, fall within the purview of this Court's decision in *Sunstar*, Magistrate Judge Nolan permitted Plaintiffs the opportunity to submit their own list of witnesses who might offer such testimony. On February 27, 2008 — six months after this Court's Scheduling Order required it — Plaintiffs served their Amended Notice Concerning Expert Testimony, listing 32 witnesses of their own, including Charles Cross, a former examiner at the Washington Department of Financial Institutions who was not retained by Plaintiffs in this action and who had not been previously identified or deposed. Plaintiffs' amended list also incorporated by reference all 23 of Defendants' disclosed witnesses. (Kavaler Decl. Ex. 35).[1]

After several more weeks of debate, the parties returned to Magistrate Judge Nolan to discuss one outstanding issue, the status of Mr. Cross, the only witness on Plaintiffs' newly amended list not previously deposed. As Magistrate Judge Nolan stated at this conference, part of the reason she had withdrawn her earlier order directing Defendants to provide

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[1] Plaintiffs amended this list again on March 10, 2008, still reserving the right to elicit expert opinion testimony from the 23 individuals listed on Defendants' timely notice as well as 29 others. (Kavaler Decl. Ex. 36).

lengthier summaries was that Plaintiffs had deposed the witnesses identified by Defendants in their timely filed Notice. "One of the reasons we did not have you summarize the testimony is I thought there were eight-hour depositions of everybody, so there wasn't a surprise. I know -- I mean I remember they made some objections but the other side basically knew what the testimony was because these people are either defendants or occurrence witnesses." (Kavaler Decl. Ex. 37, Mar. 13, 2008 Tr. 7:13-18).[2] Shortly after this status conference, Magistrate Judge Nolan issued an order permitting Defendants to depose Mr. Cross "as soon as possible" which Defendants promptly did. Putting an end to this four month saga, Magistrate Judge Nolan encouraged the parties to enter into a stipulation on the *Sunstar* issue after the deposition concluded. Alternatively, Magistrate Judge Nolan instructed that the parties could seek appropriate relief from this Court. (Minute Order, Dkt. 1206 (Mar. 13, 2008).) Having accomplished their presumed goal of sneaking Mr. Cross onto their expert disclosure notice six months late, Plaintiffs declined to enter into any stipulation on the *Sunstar* issue and filed no appeal. Apparently their position now is that, aside from Mr. Cross, none of the other dozens of witnesses they added to their amended expert disclosure notice will offer testimony that could be said to fall within the purview of *Sunstar*. Their about face complete, Plaintiffs now move to preclude Defendants from introducing any "expert" testimony from any witness other than a retained expert. Plaintiffs' gamesmanship has truly reached a new level.

As for Mr. Cross, Plaintiffs have indicated on their witness list that they intend to elicit "expert" testimony from him — notwithstanding that he was disclosed six months too late in the guise of their *Sunstar* disclosures — and ask that his qualifications be read aloud to the jury in their statement of Expert Qualifications. (*See* Kavaler Decl. Exs. 38 and 39). Plaintiffs

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[2] Plaintiffs now misleadingly attempt to argue (again) that they were precluded from exploring "expert" testimony at the depositions of a number of these witnesses, despite Judge Nolan's clear finding that Defendants' few objections to questions seeking ***present day opinions*** did not prevent Plaintiffs' from exploring the "real time" opinions and judgments of these "occurrence" witnesses. (Plaintiffs' Moving Brief at 2). It is beyond dispute that none of the witnesses was instructed not to answer any question concerning opinions formed during the course of the witness's duties during the events in questions. Plaintiffs were always free to ask those types of questions, and in many instances did. (Kavaler Decl. Ex. 42, Defendants' Status Report, Dkt. 1173 (Feb. 6, 2008)).

have not provided an expert report for Mr. Cross, who in fact testified that he is not serving and would not be willing to serve as an expert witness for Plaintiffs in this action. (*See* Kavaler Decl. Ex. 7 at 102:18-21).

Defendants have also asked that the qualifications of their four retained experts who will be testifying at trial be read aloud to the jury. In response to Plaintiffs' demand that Mr. Cross's qualifications be read to the jury as well, Defendants provided the Court with the qualifications of each of their 17 witnesses whose testimony could be said to fall within the purview of *Sunstar* (each of whom were among the 23 disclosed in Defendants' timely filed Notice of Expert Disclosure). (*See* Kavaler Decl. Ex. 40). In submitting these qualifications, Defendants explained: "Defendants submit these statements of qualifications only because Plaintiffs have submitted a statement of qualification for Charles Cross, who was belatedly disclosed by Plaintiffs as a witness whose testimony may draw on 'specialized knowledge' within the purview of the Court's ruling in *Sunstar, Inc.* v. *Alberto-Culver Company, Inc.*, 2006 U.S. Dist. LEXIS 85678 (N.D. Ill., Nov. 16, 2006). ***Defendants believe it is unnecessary to read a statement of qualifications for Mr. Cross or for any witness other than the parties' retained expert witnesses. Should the Court adopt Plaintiffs' view that such statements are appropriate, however, Defendants respectfully request that the following statements of qualifications be read to the jury***." *Id.* (emphasis added).

According to Plaintiffs, by conditionally including the qualifications of the 17 lay witnesses in response to Plaintiffs' insistence that Mr. Cross's qualifications be read to the jury, Defendants are now required to provide the equivalent of seventeen Rule 26 expert reports to Plaintiffs, notwithstanding Magistrate Judge Nolan's non-appealed ruling of a year ago to the contrary.

ARGUMENT

Given the lengthy procedural background detailed above, Plaintiffs' filing of this particular motion *in limine* is particularly egregious. Plaintiffs' position is that Defendants were required by Magistrate Judge Nolan's withdrawn January 31, 2008 Minute Order to detail each opinion formed by each of the 23 lay witnesses identified on Defendants' Notice during the Class Period and the bases for each such opinion and, not having done so, Defendants should be

precluded from eliciting from the 17 of those witnesses now identified on Defendants' witness lists any testimony that is informed by their specialized knowledge. This is an obviously manufactured position; if Plaintiffs truly believed that Magistrate Judge Nolan had imposed such an obligation on Defendants, they would not have been shy about mentioning it over the course of the last year. Instead, a year after this issue was resolved by the Magistrate Judge and having failed to appeal any of her rulings on this subject, Plaintiffs belatedly seek to appeal them now in the guise of a motion *in limine*. Such behavior should not be countenanced.

We demonstrate below that having failed to appeal Magistrate Judge Nolan's rulings in a timely fashion, Plaintiffs cannot attack them now. We then demonstrate that Magistrate Judge Nolan's ultimate ruling was, in any event, correct. Finally we dispose of Plaintiffs' frivolous argument based on LR 16.1.1.

A. Because Plaintiffs Did Not Timely (Or Ever) Appeal Magistrate Judge Nolan's Rulings, They Are Barred From Attacking Them Now

Plaintiffs are correct that in her January 31, 2008 Minute Order Magistrate Judge Nolan instructed Defendants to provide for each of the 23 lay witnesses identified in Defendants' Notice, "a detailed statement of the specific opinions any non-retained experts may offer at trial, and the bases for those opinions." (Minute Order, Dkt. 1172 (Jan. 31, 2008).) What Plaintiffs strain to hide from this Court is that Magistrate Judge Nolan withdrew that requirement one week later and thereafter confirmed that she had done so because Plaintiffs had had the opportunity to and did depose each of those occurrence witnesses on any matter relevant to this case (including any opinions or judgments formed during the Class Period).[3] If Plaintiffs felt aggrieved by Magistrate Judge Nolan's ultimate ruling, the time to appeal it was last year.

Federal Rule of Civil Procedure 72(a) governs a District Judge's oversight of objections to non-dispositive rulings by a Magistrate Judge. *See, e.g.*, *Telewizja Polska USA, Inc.* v. *Echostar Satellite Corp.*, No. 02 C 3293, 2007 WL 3232498, at *1 (N.D. Ill Oct. 30, 2007)

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[3] One of the 23 witnesses, John Nichols, had not been deposed by Plaintiffs. Mr. Nichols does not appear on any party's witness list for trial.

(Guzman, J.); *Oates* v. *Moore*, No. 98 C 772,1999 WL 782068, at *1 (N.D. Ill. Sept. 27, 1999) (Plunkett, J.). Rule 72(a) states in part: "A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to." Fed. R. Civ. P. 72(a); *American Hardware Mfrs. Ass'n* v. *Reed Elsevier Inc.* No. 03 C 9421, 2007 WL 1610455, at *6 (N.D. Ill. Feb. 13, 2007) (Moran, J.) ("The Federal Rules of Civil Procedure require that any objections to a magistrate judge's order be filed within ten days of the order."); *THK America, Inc. v. NSK, Ltd.*, 157 F.R.D. 651, 655 (N.D. Ill. 1994) (Norgle, J.).

Having failed to timely appeal Magistrate Judge Nolan's ruling, despite having been urged by her to do so,[4] Plaintiffs are precluded from seeking relief from it now.

B. **Magistrate Judge Nolan's Ruling Was, In Any Event, Correct**

Although Magistrate Judge Nolan's ruling is no longer subject to attack, her decision not to require Defendants to serve the equivalent of Rule 26 expert reports for each of the lay witnesses identified in Defendants' Notice was, in any event, correct.

Plaintiffs contend that Defendants have failed to satisfy the disclosure requirements of Fed. R. Civ. P. 26(a)(2) because they did not provide Plaintiffs with the substance of the opinions of the 17 non-retained "experts" who have been listed as witnesses for Defendants and who were long ago identified as likely to offer testimony falling within the purview of this Court's ruling in *Sunstar*. This is precisely the information that, according to Fed. R. Civ. P. 26(a)(2)(B), must be included in a written report for a ***retained*** or ***specially employed expert*** or an employee of a party whose "duties . . . regularly involve giving expert testimony." However, none of the 17 individuals on Defendants' Notice who has been identified as a trial witness falls into either of these categories. Rather, all were designated because they have specialized knowledge that "may come into play when they testify as to why matters were conducted by [Defen-

[4] Judge Nolan made this option perfectly clear to Plaintiffs at the March 13th status conference: "But you still have an opportunity if you don't -- If you want to object and you want to say we cannot do this stipulation, it's not too late, as far as I'm concerned, if you want to go to Judge Guzman you could go to Judge Guzman." (Kavaler Decl. Ex. 37, Mar. 13, 2008 Tr. 9:4-12).

dants] as they were" and because Defendants wanted to "avoid a potential dispute that their testimony involves expertise of an expert not designated." *Cinergy Communications Co.* v. *SBC Communications, Inc.*, No. 05-2401-KHV-DJW, 2006 U.S. Dist. LEXIS 80397 at *5-6 (D. Kan. Nov. 2, 2006). Any "opinions" expressed by these individuals would "result [from] their involvement in the underlying facts of this case and their own observations and actions," *Osterhouse* v. *Grover*, No. 3:04-CV-93-MJR, 2006 U.S. Dist. LEXIS 30904 at *16-17 (S.D. Ill. May 17, 2006), as to matters as to which they have knowledge based on the scope of their employment.

What Plaintiffs seek is in direct contravention of the explicit language of Rule 26(a)(2)(B) and the rulings of numerous federal courts applying this provision. *See, e.g., Zurba* v. *United States*, 202 F.R.D. 590, 591 (N.D. Ill. 2001) (Kennelly, J.) ("The requirement of a written report in Rule 26(a)(2) applies only to experts retained or specially employed to provide such testimony."); *Cicero* v. *The Paul Revere Life Ins. Co.*, 98 C 6467, 2000 U.S. Dist. LEXIS 7165, at *4-5 (N.D. Ill. Mar. 22, 2000) (Kocoras, J.) ("Rule 26(a)(2)(B) only requires a witness 'who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony' to provide a report."); *Sircher* v. *City of Chicago*, No. 97 C 6694, 1999 U.S. Dist. LEXIS 11869 (N.D. Ill. July 27, 1999) (Shadur, J.) (same); *Garza* v. *Abbott Laboratories*, No. 95 C 3560, 1996 U.S. Dist. LEXIS 12506 (N.D. Ill. Aug. 27, 1996) (Castillo, J.) (same). Defendants' Notice (*see* Kavaler Decl. Ex. 33) and their subsequent submission expanding on the Notice (*see* Kavaler Decl. Ex. 34) have already gone far beyond the plain language of Fed. R. Civ. P. 26(a)(2)(A), which for non-retained experts requires nothing more than disclosure of "*the identity* of a witness [they] may use at trial . . . ." Fed. R. Civ. P. 26(a)(2)(A) (emphasis added).

C. Plaintiffs Cannot Bootstrap Their Untimely Appeal By Invoking LR 16.1.1

In an effort to find another procedural hook on which to hang their untimely appeal of Magistrate Judge Nolan's ruling, Plaintiffs seek refuge in LR 16.1.1 detailing the form of the Final Pretrial Order. The argument goes something like this:

This Court's Pretrial Order Form states that parties must submit "stipulations or statements setting forth the qualifications of each expert witness in such form that the statement

can be read to the jury at the time the expert witness takes the stand." A footnote to this requirement notes that in the cases of multiple experts: "Only one F.R. Evid. 702 witness on each subject for each party will be permitted to testify absent good cause shown. If more than one F.R. Evid. 702 witness is listed, the subject matter of each expert's testimony shall be specified." L.R. 16.1.1. According to Plaintiffs, because Defendants provided a description of the qualifications of each of their 17 lay witnesses who had been disclosed on Defendants' Notice for inclusion in the Pre-Trial Order, they were also required to detail there what Magistrate Judge Nolan ruled they did not have to detail before. The argument is too clever by half and conveniently ignores that Defendants expressly advised in the Pre-Trial Order that they did not believe that the qualifications of these 17 lay witnesses should be read to the jury but only provided suggested language as a conditional matter because Plaintiffs insisted that the qualifications of Mr. Cross be read to the jury.

Defendants believe that the requirement to list the "subject matter of each witness' expert testimony" applies only to retained experts who will provide "classic" expert testimony. It would be impossible for Defendants to indicate the substance of the anticipated trial testimony of nearly all of Defendants' fact witnesses, including the three Individual Defendants, particularly when much of their testimony will respond to Plaintiffs' case-in-chief. Defendants do not believe that this type of disclosure is contemplated by the Local Rules.

Defendants' Statement of Expert Qualifications to be Read to the Jury therefore contains the names and qualifications of their four testifying retained experts only. (Kavaler Decl. Ex. 40). Because Plaintiffs have chosen to list the qualifications of Mr. Cross on their own Statement of Expert Qualifications to Be Read to the Jury, Defendants took the same approach with their non-retained experts, listing their qualifications on a separate Statement of Qualification of Witnesses Who May Offer Testimony Based on Specialized Knowledge. (Kavaler Decl. Exs. 39, 40). Defendants made their position clear on this issue by noting on this statement: "Defendants submit these statements of qualifications only because Plaintiffs have submitted a statement of qualification for Charles Cross, who was belatedly disclosed by Plaintiffs as a witness whose testimony may draw on 'specialized knowledge' within the purview of the Court's ruling in *Sunstar, Inc.* v. *Alberto-Culver Company, Inc.*, 2006 U.S. Dist. LEXIS 85678 (N.D. Ill., Nov. 16, 2006). Defendants believe it is unnecessary to read a statement of qualifications for Mr.

Cross or for any witness other than the parties' retained expert witnesses. Should the Court adopt Plaintiffs' view that such statements are appropriate, however, Defendants respectfully request that the following statements of qualifications be read to the jury." *Id.*

Plaintiffs' effort to pursue their untimely appeal of Magistrate Judge Nolan's ruling under the guise of LR 16.1.1 is unpersuasive.

CONCLUSION

While Defendants are not planning to elicit expert testimony in the "classic" sense from the 17 witnesses at issue, they have taken considerable effort to give Plaintiffs every notification under the Federal Rules and Local Rules that these witnesses may offer opinions based on specialized knowledge. Plaintiffs should not be able to manipulate this good faith endeavor to now restrict the testimony Defendants' witnesses seek to offer at trial, especially while simultaneously offering Mr. Cross as an expert when he was not timely disclosed as required by these Rules. For the foregoing reasons, the Court should deny Plaintiffs' Motion *In Limine* #8 and enter the following Proposed Order, attached as Exhibit A Hereto:

> Plaintiffs' Motion *In Limine* No. 8 is denied. Defendants may elicit testimony from any of the 17 witnesses identified on their Notice Concerning Expert Disclosures ("Notice") concerning any judgments or opinions formed by them during the Class Period that were based on those areas of specialized knowledge or expertise disclosed in the Notice.

Dated: February 10, 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

[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM OFFERING EXPERT TESTIMONY FROM ANY OF THEIR IDENTIFIED WITNESSES OTHER THAN THEIR THREE [*sic*] RETAINED EXPERTS

The Court has considered Plaintiffs' Motion *In Limine* to Preclude Defendants From Offering Expert Testimony From Any of Their Identified Witnesses Other than Their Three [*sic*] Retained Experts (Plaintiffs' Motion *In Limine* No. 8) and Defendants' opposition thereto.

IT IS HEREBY ORDERED that Plaintiffs' Motion *In Limine* No. 8 is denied. Defendants may elicit testimony from any of the 17 witnesses identified on their Notice Concerning Expert Disclosures ("Notice") concerning any judgments or opinions formed by them during the Class Period that were based on those areas of specialized knowledge or expertise disclosed in the Notice.

Entered: _____, 2009

_____
Hon. Ronald A. Guzman

United States District Judge