

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 5893	DATE	3/13/2009
CASE TITLE	Lawrence E. Jaffe Pension Plan vs. Household International, Inc. et al.		

DOCKET ENTRY TEXT

For the reasons provided in this Minute Order, the Court denies plaintiffs’ motion requesting evidentiary sanctions for the Household Defendants’ (“Household”) destruction of evidence [doc. no. 1268], grants in part and denies in part defendants’ cross-motion pursuant to Federal Rule of Civil Procedure (“Rule”) 37(c) to exclude declarations of branch sales managers [doc. no. 1284], and grants in part and denies in part defendants’ motion pursuant to Rule 37(c) to exclude testimony of plaintiffs’ previously concealed trial witnesses [doc. no. 1325].

■ [For further details see text below.]

Docketing to mail notices.

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I. Defendants’ Motion Pursuant to Rule 37(c) To Exclude Declarations of Branch Sales Managers and Motion Pursuant to Rule 37(c) To Exclude Testimony of Plaintiffs’ Previously Concealed Trial Witnesses

Plaintiffs offer the declarations of seven former branch managers in support of their motion for evidentiary sanctions. In addition, plaintiffs list these former managers as well as two additional ones as potential trial witnesses. Defendants move to exclude the declarations of the seven branch managers and the testimony of the nine branch managers pursuant to Rule 37(c).

Rule 37(c) provides that “[i]f a party fails to provide information or identify 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 . . . unless the failure was substantially justified or harmless.” Fed. R. Civ. P. 37(c); *see* Fed. R. Civ. P. 37(b)(2)(A)(ii) (stating that the Court may prohibit “the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence.”). “[T]he sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation . . . was either justified or harmless.” *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). To determine whether a violation is justified or harmless, a court considers: “(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).

It is undisputed that plaintiffs did not identify any of the nine branch manager witnesses in their initial disclosures pursuant to Rule 26(a) and did not supplement their responses to include them. It is also undisputed that plaintiffs did not name any of the former branch managers in response to defendants’

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interrogatory that requested identification of all persons who are “not affiliated with Household believed by Plaintiffs to have knowledge of any alleged predatory lending practices,” and plaintiffs did not supplement their response to the interrogatory.

First, plaintiffs opine that they did not violate Rule 26(a) or (e) because the interrogatory requesting identification of all persons who are “not affiliated with Household believed by Plaintiffs to have knowledge of any alleged predatory lending practices” did not require plaintiffs to identify former branch managers because these managers were, at one time, affiliated with Household. The Court disagrees.

The plain language of the interrogatory clearly required plaintiffs to identify all persons not affiliated with Household. The nine branch managers are not affiliated with Household because Household no longer employs them and their interests may not be aligned with Household’s interests.

Second, plaintiffs argue that their violation of Rule 26(a) and (e) is substantially justified because they did not learn of the identities of the nine former branch managers until shortly before they disclosed their identities in October 2008.

This is not true with regard to Seth Callen. In fact, plaintiffs quoted Seth Callen in their amended complaint that was filed on March 13, 2003 and therefore they knew his identity at that time. However, the amended complaint also made defendants aware that Callen was a branch manager with knowledge relevant to the issues in this case. Thus, the old “no harm, no foul” adage applies. Plaintiffs are not barred from relying on Callen’s declaration or testimony.

This is not true with regard to John Timmons because plaintiffs obtained his declaration on October 22, 2007, and accordingly, plaintiffs are barred from relying on his declaration or testimony.

This is also not true with regard to Curtis Howrey because plaintiffs obtained his declaration on November 28, 2007, and thus, plaintiffs are barred from relying on his declaration or testimony.

This is not true with regard to Robert Kuhn because plaintiffs obtained his declaration on July 27, 2008, without disclosing his identity until three months later and accordingly, plaintiffs are barred from relying on his declaration or testimony.

This is not true with regard to John Buwalda because plaintiffs obtained his declaration on September 3, 2008, without disclosing his identity until almost two months later and therefore, plaintiffs are barred from relying on his declaration or testimony.

Accordingly, plaintiffs are barred from relying on declarations and testimony of Timmons, Howrey, Kuhn and Buwalda. The Court further finds that the length of the delay in disclosing these managers’ identities to Household shows wilfulness on plaintiffs’ part. Thus, plaintiffs’ noncompliance with Rule 26(a) and (e) was neither justified nor harmless.

With regard to Chantel Dorsey, Robert Feifer, Kimberly McNeal and Jessie Valverde, plaintiffs have established that they were substantially justified in not complying with Rule 26(a) and (e) because they have provided sufficient evidence that they did not know their identities until the same month in which they disclosed their identities to defendants. Further, with regard to Callen, Dorsey, Feifer, McNeal and Valverde, plaintiffs have established that their noncompliance with Rule 26(a) and (e) was harmless. Defendants may interview any of these five branch managers before trial, and they may have already done so.

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Lastly, the Court finds the probative value of the branch managers' declarations and testimony is not substantially outweighed by any prejudice. These branch managers have personal knowledge and experience with defendants' lending policies. To the extent that defendants object to any particular statement of a branch manager, they may raise the objection at trial.

For these reasons, the Court grants in part and denies in part defendants' motion pursuant to Rule 37(c) to exclude the declarations of branch sales managers and motion to exclude testimony of plaintiffs' previously concealed trial witnesses.

II. Plaintiff's Motion Requesting Evidentiary Sanctions for Household Defendants' Destruction of Evidence

Plaintiffs move for numerous adverse inference jury instructions and an order precluding defendants from cross-examining plaintiffs' expert Catherine Ghiglieri in connection with plaintiffs' proof of certain facts in this case. For the following reasons, the Court denies the motion.

Plaintiffs base their motion in part on Household's prelitigation destruction of evidence related to Household consultant Andrew Kahr. In an Order dated January 25, 2007, Magistrate Judge Nan R. Nolan denied plaintiffs' motion for such an inference. (Order of 1/25/2007.) Because plaintiffs failed to file objections to Judge Nolan's ruling and have not established cause for their failure to do so, they have waived the issue. The Court will not give plaintiffs a second bite at the apple on a motion that has already been addressed and denied.

Plaintiffs also base their motion on Household's prelitigation destruction of other documents, including sales and marketing materials related to Household's predatory lending scheme. Because plaintiffs do not point to any discovery order that has been violated, the Court cannot award sanctions pursuant to Rule 37. "The rule's plain language limits its applicability to situations where a court order has been violated." *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 (7th Cir. 1994). Because Household's destruction of these documents occurred prior to the filing of the complaint in the instant case, doing so did not violate an order of the Court.¹

In addition, "a federal court has the inherent power to sanction for conduct which abuses the judicial process." *Barnhill v. United States*, 11 F.3d 1360, 1367 (7th Cir. 1993). "This power is 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Id.* (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). Examples of the court's inherent powers include the power to control admission to its bar and to discipline attorneys who appear before it, to punish for contempt for disobedience of court orders, to vacate fraudulently-obtained judgments, to bar from the courtroom a criminal defendant who disrupts a trial, to assess attorney's fees and to dismiss a case for failure to prosecute. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991). "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *see Chambers*, 501 U.S. at 44.

Plaintiffs have failed to provide any binding authority for the proposition that the Court's inherent authority permits it to sanction destruction of evidence prior to a defendant's being provided actual notice of the particular plaintiff's intention to file suit, and the Court finds none. The Court respectfully disagrees with *Smith v. Borg-Warner Auto. Diversified Transmission Products Corp.*, No. IP 9801609-C-T/G, 2000 WL 1006619, at *6 (S.D. Ind. July 19, 2000), which states that a court may sanction prelitigation spoliation under

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its inherent authority and cites *Chambers* and *Roadway Express*, neither of which involved prelitigation spoliation.

In fact, in *Chambers*, the Court took special care to note that “[a]lthough the fraudulent transfer of assets took place before the suit was filed, it occurred after Chambers was given notice, pursuant to court rule, of the pending suit.” 501 U.S. at 55 n.17. Thus, the *Chambers* Court stated that “the sanctions imposed on Chambers were aimed at punishing not only the harm done to NASCO, but also the harm done to the court itself.” *Id.*

In contrast to *Chambers*, in the instant case, sanctions are inappropriate because Household’s purported destruction occurred prior to Household’s having notice of the allegations contained in the instant complaint. As defendants correctly note, the original complaint in this lawsuit, which was filed on August 19, 2002, alleged that during the Class Period (October 23, 1997 through August 14, 2002), plaintiffs were damaged by Household’s false and misleading statements regarding the way it had accounted for its MasterCard/Visa co-branding and affinity card relationships, as well as a credit-card marketing agreement with a third party, *not its false and misleading statements regarding its sale of purported predatory loans*, which is a wholly separate claim based on a different set of facts. Plaintiffs did not add the predatory loan allegations until they amended the complaint in March 2003.

In essence, plaintiffs ask the Court to sanction Household for the pre-litigation destruction of documents because it was obvious to Household that the instant litigation was inevitable due to its negotiations with community-based organizations and its being the subject of state investigations based on borrower complaints although plaintiffs themselves did not realize that they had a claim based on predatory lending until half a year after the filing of the original complaint. This the Court declines to do.

Contrary to plaintiff’s arguments otherwise, in order to issue sanctions for conduct under its inherent power, this Court must find that the judicial process *in this case* has been abused. To hold otherwise would be to exercise authority where Congress gave none. Accordingly, the Court denies plaintiffs’ motion requesting evidentiary sanctions for Household’s destruction of evidence.

1. Further, plaintiffs do not argue that the destruction of these documents violates any provision of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 *et seq.*, and they have thus waived any such argument.