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 Honorable Jorge L. Alonso

PLAINTIFFS' MOTION *IN LIMINE* TO REQUEST THAT THE COURT APPLY EVIDENTIARY RULINGS FROM THE FIRST TRIAL TO THE RETRIAL

PLAINTIFFS' MOTION *IN LIMINE* NO. 3

I. INTRODUCTION

Prior to the first trial in this case, Judge Guzmán ruled on more than a dozen *in limine* motions, motions to exclude expert testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and Fed. R. Evid. 702, and made numerous evidentiary rulings in connection with the parties' final Pretrial Order. During the trial, Judge Guzmán also allowed into evidence certain testimony and exhibits previously excluded by the Court's *in limine* rulings as a result of defendants' "tactical" decision to open the door to such evidence. Defendants subsequently argued in their post-trial motion that Judge Guzmán's erroneous evidentiary rulings resulted in an unfair trial. Judge Guzmán rejected defendants' argument outright, which defendants did not challenge on appeal.

Judge Guzmán's prior *in limine, Daubert* and evidentiary rulings should apply to the upcoming retrial of this case. Indeed, those decisions are the law of the case, which gives rise to the presumption "that earlier rulings will stand," which may be overcome only for "compelling reasons." *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997).[1] The evidence is also clearly relevant to the issues that must be retried. As set forth below, because defendants cannot demonstrate any compelling reason to revisit Judge Guzmán's prior rulings, plaintiffs' motion should be granted.

II. ARGUMENT

A. Summary of Judge Guzmán's Prior *In Limine, Daubert* and Evidentiary Rulings

Prior to the first trial in this case, the parties filed over a dozen motions *in limine* and motions to exclude expert testimony.

Plaintiffs filed seven motions *in limine*, as well as other motions to exclude the testimony of defendants' three expert witnesses. Plaintiffs' miscellaneous motion *in limine* sought various forms of relief (Dkt. No. 1336) which the Court granted in large part.[2] Specifically, the Court ruled that:

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[1] Plaintiffs believe, however, that the Court should reconsider Judge Guzmán's ruling with respect to the SEC Consent Order now that defendants have been found liable for false statements and omissions about Household's reaging. *See* §II.C., *infra*.

[2] Plaintiffs also filed motions to exclude the expert testimony of defendants' three expert witnesses. *See* Dkt. Nos. 1345, 1346 and 1341. Because those witnesses are not listed on defendants' current trial witness list, they are not addressed by this motion.

(1) plaintiffs were entitled to the same number of peremptory challenges as defendants combined; (2) plaintiffs were permitted to examine witnesses identified with defendants by leading questions; (3) defendants were precluded from introducing live testimony from persons unavailable to plaintiffs and introducing deposition testimony of persons in their control;[3] (4) percipient witnesses to whom Rule 615 applied would be excluded from the courtroom; (5) counsel would be barred from communicating with witnesses about the witness' trial testimony after the witness was sworn in and before the witness' testimony was complete, and from discussing other witnesses' trial testimony with witnesses who had yet to start or finish testifying; and (6) evidence of and reference to a former partner and the Lexecon/Milberg Weiss settlement was irrelevant and would be precluded.[4] *See* Dkt. No. 1505.

Defendants also filed seven motions *in limine*, including an "omnibus" motion seeking to exclude 14 separate categories of evidence. The Court denied, either in whole or part, many of defendants' motions. With respect to defendants' "omnibus" motion *in limine*, the Court ruled that many of the categories of evidence defendants sought to exclude would be admissible at trial. Specifically, the Court: (1) denied defendants' motion as to documents that merely referred to Household's Offer of Settlement and/or the SEC Consent Decree and denied defendants' motion to bar evidence of Household's amendment of its 2001 Form 10-K, although the Court ruled that the SEC Consent Decree was inadmissible under Fed. R. Evid. 408; (2) denied defendants' request to

[3] The Court ruled that defendants were precluded from calling Robert O'Han as a witness unless defendants produced him to testify during plaintiffs' case-in-chief. The Court denied plaintiffs' motion as to Ned Hennigan and Kenneth Walker on the grounds that they were former Household employees who lived outside the Court's jurisdiction and, therefore, the Court could not order Household to produce them. *See* Dkt. No. 1505 at 3.

[4] Plaintiffs also filed several other motions *in limine*, which the Court granted in large part. *See* Dkt. Nos. 1338, 1339, 1340, 1342, 1343. As a result of the Court's rulings on those motions, defendants were (1) barred from calling both of their predatory lending expert witnesses to testify at trial and forced to select just one expert on predatory lending to testify at trial (Dkt. No. 1507); (2) precluded from offering evidence that they relied on the advice of counsel in making any of the alleged misstatements and from showing that Household's lending practices were approved by counsel (Dkt. No. 1505 at 4); (3) precluded from arguing that they fully disclosed to Arthur Andersen and KPMG all information about Household's business model, products, financial results, and the regulatory, legislative, political and litigation risks to which the Company was subjected and from introducing evidence concerning the adequacy of Household's Class Period litigation reserves (Dkt. No. 1511); and (4) precluded from referencing post-Class Period allegations of voter fraud against ACORN (Dkt. No. 1505). It does not appear defendants plan to raise these issues in the retrial.

preclude plaintiffs from introducing federal and state regulators' reports of examination and related documents, ruling that the regulatory documents were relevant; (3) denied defendants' request to preclude evidence of complaints in other litigation and individual customer complaints; (4) denied defendants' request to bar Elaine Markell from testifying, holding that Ms. Markell, a lay witness, was allowed to testify to facts she personally experienced and observed; (5) ruled that the Dennis Hueman video was admissible; (6) denied defendants' request to exclude the deposition of Charles Cross taken in a separate consumer fraud case; (7) denied defendants' request to bar any evidence and testimony relating to Andrew Kahr; (8) denied defendants' motion to preclude plaintiffs from making any reference to "Project Whiskey," the code name given to the potential Wells Fargo merger, along with documents related to the potential merger; and (9) denied defendants' motion to bar reference to Household's 2002 restatement. *See* Dkt. No. 1516.

Defendants' "omnibus" motion *in limine* also sought to exclude settlement-related evidence, including Household's settlements in civil lawsuits and regulatory agency actions, settlement-related refunds, and settlement-related policies. Although the Court barred some evidence relating to Household's civil and regulatory settlements and other settlement-related information, it ruled that "the timing and disclosure of certain settlements" would be admissible "to prove that they affected the price of Household's stock." Dkt. No. 1516 at 6. As discussed below, the admissibility of settlement-related evidence was later revisited during the trial.

Additionally, at the beginning of its Order on defendants' "omnibus" motion *in limine*, the Court specifically warned defendants that "with regard to any exhibit omitted in support of this omnibus motion in limine or labeled with an identifier that was not included in the appendix, ***the Court deems any argument based on the motion waived because the exhibit and/or label should have been included in the appendix for the Court's consideration***." Dkt. No. 1516 at 1 (emphasis added). Defendants failed to include certain exhibits in the appendix to their omnibus motions; as a result, defendants waived their objections to those exhibits, which were admitted at trial. *See, e.g.*, PX 550, attached as Ex. 2 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Motions *in Limine* ("Brooks Decl."), filed herewith.

In addition to their "omnibus" motion *in limine*, defendants also sought to exclude all of plaintiffs' expert witnesses.[5] With respect to plaintiffs' expert, Charles Cross, a former bank regulator for the State of Washington Department of Financial Institutions, defendants argued that Cross's opinion that Household engaged in nationwide predatory lending practices was an unsupported extrapolation from unreliable sources. Dkt. No. 1358-3. Defendants also argued that Cross's opinions regarding individual complaints were not relevant to issues in the case and his opinions were the result of his biased mission to find violations. *Id.* The Court denied defendants' motion and allowed Cross to testify as an expert witness. *See* Dkt. No. 1514.

Additionally, during the Pretrial Conference, the Court made a number of rulings on the admissibility of evidence submitted with the parties' Final Pretrial Order, resolving evidentiary objections to the parties' exhibits and deposition designations. *See, e.g.*, Pretrial Conf. Tr. 221-303; 307-448, attached as Ex. 3 to the Brooks Decl. The parties also met-and-conferred to reach agreement on certain evidentiary objections, many of which were ultimately withdrawn.

At trial, the Court allowed certain evidence to be admitted, despite its previous order excluding such evidence, because defendants opened the door. Specifically, as discussed above, prior to trial defendants moved *in limine* to preclude any reference to federal and state regulatory examinations, civil complaints, the AG investigatory findings, and Household's settlements in civil lawsuits and regulatory agency actions, including the $484 million settlement with the State Attorneys General. *See* Dkt. No. 1349-2. The Court granted defendants' motions, in part. Dkt. No. 1516. The Court allowed the admission of the AG investigatory findings and civil complaints because they were relevant and the probative value of the evidence was not outweighed by the danger of unfair prejudice. However, the Court granted the motion as to the civil and regulatory settlements themselves. *See* Dkt. No. 1516 at 4-6. The Court further held that plaintiffs were entitled to prove loss causation through the use of public disclosures about the settlement, using only

[5] Defendants filed motions to exclude the testimony of Catherine Ghiglieri (Dkt. No. 1358-2) and Harris Devor (Dkt. No. 1358-4). Defendants' motion to exclude Ghiglieri was denied (Dkt. No. 1515) and their motion with respect to Devor was denied in part (Dkt. No. 1528). Defendants have not re-raised any challenges to Ghiglieri and Devor, nor could they credibly do so, as the Court has already ruled that their opinions are admissible.

that "information sufficient to identify the date, time, means and nature of the disclosure" which the Court recognized could "be introduced into evidence without requiring the introduction of any actual settlement documents or any documents or testimony concerning allegations that were settled or the settlement terms or negotiations." *Id*. During the pre-trial conference, the Court clarified that settlement-related evidence would come in if defendants opened the door. *See* Pretrial Conf. Tr. 824:11-825:3.

During their cross-examination of plaintiffs' expert, Ghiglieri, defense counsel elicited testimony concerning the State AG settlement and its amount on three separate instances. *See* Dkt. No. 1551 at 6 ("It was not until cross-examination that testimony regarding the terms of the settlement was elicited."). Rather than object to Ghiglieri's testimony, "ask for sidebar or request that the Court take any corrective action," defense counsel made an admittedly "tactical" decision to proceed with the examination. *See* Dkt. No. 1551 at 3-7. As a result, the Court ruled that "[w]hatever objections there might have been to Ms. Ghiglieri's answers [] have clearly been waived." *Id*. at 7.

If the door was not open by the time Aldinger testified, it was blown off its hinges afterwards, as defense counsel examined Aldinger in detail about the motivation behind the decision to settle with the State AGs, the events leading to the settlement and Aldinger's involvement therein. Trial Tr. 3330:22-3349:7, attached as Ex. 4 to the Brooks Decl. Immediately after Aldinger's testimony, plaintiffs' counsel requested permission to use two previously excluded settlement-related exhibits. *See* Plaintiffs' Trial Exs. 681; 516, attached as Exs. 5-6 to the Brooks Decl. While defendants tried to claim that they had "done nothing" to open the door, the Court disagreed, ruling that "with respect to the Attorney Generals' settlement . . . that door has been opened." *See* Trial Tr. 3385:1-3386:14.[6]

[6] *See also* Trial Tr. 3372:9-3373:5 ("Look, your client just testified for about 20 minutes as to the negotiations that went on in reaching the settlement agreement . . . [t]hey now have a right to rebut that. They have a right to bring out evidence to rebut what your client said about how the negotiations went down and what his motivation was for . . . reaching that settlement."); Trial Tr. 3371:20-23 ("[Y]ou can't bring [evidence of the settlement] out and then say, 'Oh, because of [the Court's] prior ruling, they cannot now rebut the evidence you brought forth.'").

B. The Prior *In Limine, Daubert* and Evidentiary Rulings Should Apply to the Retrial

All of the Court's prior *in limine, Daubert* and evidentiary rulings, including all rulings made in connection with the final Pretrial Order, should apply at the retrial, as those rulings are the law of the case and good cause does not exist to revisit them. As the Seventh Circuit has explained, "[t]he law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 605 (7th Cir. 1987); *Roboserve, Inc. v. Kato Kagaku Co.*, 121 F.3d 1027, 1031 (7th Cir. 1997) (observing that when a case is reversed and remanded "the trial judge would be required to adhere on remand to the rulings that he had made before the case was first appealed, provided of course that they had not been set aside by the appellate court"). The doctrine also "reflects the rightful expectation of litigants that a change of judges mid-way through a case will not mean going back to square one" and gives rise to a presumption "that earlier rulings will stand" which may be overcome only for "compelling reasons (such as new controlling law or clear error)." *Best*, 107 F.3d at 546; *Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686, 692 (7th Cir. 2005) (same); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982) (emphasizing that "a court ordinarily will not reconsider its own decision made at an earlier stage of the trial or on a prior appeal, absent clear and convincing reasons to reexamine the prior ruling").

Here, the Court's *in limine, Daubert* and evidentiary rulings from the first trial should apply at the retrial, as defendants can point to no new controlling law or clear error that warrants revisiting Judge Guzmán's prior rulings. Indeed, defendants challenged many of Judge Guzmán's *Daubert* and evidentiary rulings in their post-trial motion, arguing that the testimony of plaintiffs' experts Ghiglieri, Cross and Devor should have been excluded and claiming that the Court allowed plaintiffs to improperly rely on evidence regarding Household's settlement with the state AGs. *See* Dkt. No. 1867 at 52-60 (arguing that the aggregate impact of erroneous evidentiary rulings resulted in an unfair trial). The Court rejected defendants' claims of error outright, and defendants elected not to challenge the Court's evidentiary rulings on appeal. *See* Dkt. No. 1887 at 5.

Because defendants cannot overcome the presumption that the Court's prior rulings are the law of the case, the *in limine*, *Daubert* and evidentiary rulings from the first trial should apply with equal force at the retrial. *See, e.g.*, *Mays v. Springborn*, No. 01-cv-1254, 2014 WL 1420232, at *1-*2 (C.D. Ill. April 11, 2014) (declining to re-examine *in limine* ruling from first trial where defendants failed to point to a "manifest error or change in the law so as to justify re-examination" of the prior judge's ruling); *CERAbio, LLC v. Wright Med. Tech., Inc.*, No. 03-C-092-C, 2006 WL 641466, at *10-*11 (W.D. Wis. Mar. 10, 2006) (concluding that the court's rulings on defendants' motions *in limine* prior to the first trial, which defendants did not challenge on appeal, would apply to the re-trial under the law of the case doctrine).[7] The Court's evidentiary rulings with respect to the prior final Pretrial Order should also remain undisturbed, as no good cause exists to justify revisiting those rulings. *Janopoulous v. Harvey L. Walner & Assocs.*, No. 93 C 5176, 1995 WL 107170, at *2 (N.D. Ill. Mar. 7, 1995) ("No amendment to the final pretrial order will be permitted absent a showing of (1) good cause and (2) minimal prejudice to the other party."). Thus, all of the prior evidentiary rulings on the parties' exhibits and deposition designations should apply and defendants should be precluded from re-raising any challenges to, or unilaterally modifying, those rulings.[8]

Additionally, evidence from the first trial is clearly relevant to the issues to be determined at the retrial. *See Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985) (holding that "the parties shall have an opportunity to present to the second jury whatever evidence . . . from the liability phase of the trial may be regarded as relevant in any way to the question of damages"). Accordingly, all

[7] *See also Bright Harvest Sweet Potato Company, Inc. v. H.J. Heinz Co.*, No. 1:13-cv-00296-BLW, 2016 WL 552455, at *2 (D. Id. Feb. 10, 2016) (applying motion *in limine* ruling from first trial to the second trial); *Apple Inc. v. Samsung Electronics Co. Ltd.*, No. 5:11-cv-01846-LHK (N.D. Cal. Sept. 1, 2015), at 3 (ruling that "[t]he Court's prior rulings on the parties' *Daubert* motions, motions *in limine*, discovery disputes, and evidentiary objections will remain in effect as law of the case" in a damages-only retrial following remand from the Federal Circuit Court of Appeals), attached as Ex. 7 to the Brooks Decl.; *Watts v. UPS*, No. 1:03-cv-00589, 2013 WL 4776976, at *7-*8 (S.D. Ohio Sept. 5, 2013) (declining to disturb evidentiary rulings from the first trial).

[8] Plaintiffs' deposition designations are comprised of the same deposition designations admitted at the last trial, plus defendants' prior designations for completeness and fairness. Defendants now seek to add additional completeness and fairness designations, but cannot demonstrate why the Court should disturb the deposition designations as admitted at the first trial.

evidence, including deposition designations, that was admitted at the last trial should be admissible at the retrial. *See also* Motion *in Limine* No. 1. Plaintiffs' motion should be granted.

C. The SEC Consent Decree Should Be Admissible at the Retrial as the Rationale for its Exclusion No Longer Applies

Before the first trial, defendants moved to preclude plaintiffs from referring to Household's Offer of Settlement and the SEC Consent Decree.[9] *See* Dkt. No. 1330. After finding that defendants had made a "substantial showing that Household's Offer of Settlement and the SEC Consent decree were part of settlement negotiations with regard to whether Household violated SEC regulations when it failed to disclose its practice of reaging accounts," the Court granted defendants' motion, ruling that the SEC Consent Decree was inadmissible under Fed. R. Evid 408. *See* Dkt. No. 1516 at 1-2. In excluding the SEC Consent Decree, the Court discussed the policy concerns underlying Rule 408, observing that "[t]he purpose of Rule 408 'is to encourage settlements. The fear is that settlement negotiations will be inhibited if the parties know that their statements may later be used as ***admissions of liability***.'" *Id*. at 1 (citations omitted, emphasis added). The Court also found that "Plaintiffs have not established that they seek admission of Household's Offer of Settlement and the SEC Consent Decree to prove anything other than ***Household's liability*** with regard to the disclosure of its restructuring and reaging of delinquent accounts." Dkt. No. 1516 at 1-2. In light of the first jury's finding of liability on the issue of reaging, good cause exists to revisit Judge Guzmán's ruling on the admissibility of the SEC Consent Decree.

Indeed, the first jury found defendants liable for violating §10(b) and Rule 10b-5 by making materially false and misleading statements and omissions about Household's reaging and restructuring practices. As a result of the jury's finding of liability on the issue of reaging – a finding upheld by the Seventh Circuit – the policy concerns underlying Rule 408 are no longer at issue.[10] There is no risk that the SEC Consent Decree may "later be used as [an] admission of liability" because defendants have already been found liable for misstatements and omissions about

[9] The SEC Consent Decree is attached as Ex. 8 to the Brooks Decl.

[10] The same reasoning applies to other settlement-related evidence, even if defendants had not opened the door to the admissibility of such evidence at the last trial.

Household's improper reaging and restructuring practices – the very same practices at the heart of the SEC Consent Decree. The probative value of the SEC Consent Decree now outweighs any potential prejudice to defendants, which has been eviscerated by the jury's findings on liability.[11] The SEC Consent Decree provides a succinct, easy-to-understand explanation of Household's reaging practices and the false and misleading statements and omissions defendants made in the Company's SEC filings about those practices. Given that the rationale behind excluding the SEC Consent Decree no longer exists, and there is no risk of unfair prejudice to defendants, the SEC Consent Decree should be admitted in its entirety at trial.

III. CONCLUSION

For the foregoing reasons, the Court's prior *in limine*, *Daubert* and evidentiary ruling should apply at the retrial, including the Court's rulings with respect to evidence submitted with the final Pretrial Order. Additionally, the SEC Consent Decree should be admissible at the retrial.

DATED: April 22, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LUKE O. BROOKS (90785469)
LAWRENCE A. ABEL (129596)
HILLARY B. STAKEM (286152)

s/ Luke O. Brooks
LUKE O. BROOKS

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

[11] Plaintiffs believe that the jury at the retrial should be read a description of the prior proceedings, to include the first jury's findings of liability on defendants' three-pronged fraud. Thus, the jury at the retrial will already be aware that defendants were found to have violated Rule 10b-5 by making false and misleading statements and omissions about the Company's reaging practices. *See* Pretrial Order, Ex. B-3.

ROBBINS GELLER RUDMAN
& DOWD LLP
MAUREEN E. MUELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 22, 2016.

s/ Luke O. Brooks

LUKE O. BROOKS

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: LukeB@rgrdlaw.com

Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)
Service List

Counsel	E-mail address
Stewart Theodore Kusper Giovanni Antonio Raimondi THE KUSPER LAW GROUP, LTD. 20 North Clark Street, Suite 3000 Chicago, IL 60602 (312) 204-7938 Tim S. Leonard JACKSON WALKER L.L.P. 1401 McKinney Street, Ste. 1900 Houston, TX 77010 (713)752-4439	Stewart.Kusper@Kusperlaw.com Giovanni.Raimondi@Kusperlaw.com tleonard@jw.com
Counsel for Defendant David A. Schoenholz	
Dawn Marie Canty Gil M. Soffer KATTEN MUCHIN ROSENMAN LLP 525 West Monroe Street Chicago, Illinois 60661 (312)902-5253	dawn.canty@kattenlaw.com gil.soffer@kattenlaw.com
Counsel for Defendant William F. Aldinger	
David S. Rosenbloom C. Maeve Kendall McDERMOTT WILL & EMERY, LLP 227 West Monroe Street Chicago, IL 60606 (312) 984-2175	drosenbloom@mwe.com makendall@mwe.com
Counsel for Defendant Gary Gilmer	
R. Ryan Stoll Mark E. Rakoczy Andrew J. Fuchs Donna L. McDevitt Patrick Fitzgerald SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 155 North Wacker Drive Chicago, IL 60606 (312)407-0700	rstoll@skadden.com mrakoczy@skadden.com Andrew.Fuchs@skadden.com Donna.McDevitt@skadden.com Patrick.Fitzgerald@skadden.com pclement@bancroftpllc.com zhudson@bancroftpllc.com TKavaler@cahill.com Jhall@cahill.com dbutswinkas@wc.com sfarina@wc.com

Counsel	E-mail address
Paul D. Clement D. Zachary Hudson BANCROFT PLLC 1919 M Street NW, Ste. 470 Washington, DC 20036 (202)234-0090 Thomas J. Kavaler Jason M. Hall CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212)701-3000 Dane H. Butswinkas Steven M. Farina Leslie C. Mahaffey Amanda M. MacDonald WILLIAMS & CONNOLLY LLP 725 Twelfth Street NW Washington DC 20005 202-434-5000 Luke DeGrand Tracey L. Wolfe DEGRAND & WOLFE, P.C. 20 South Clark Street Suite 2620 Chicago, Illinois 60603 (312) 236-9200 (312) 236-9201 (fax)	lmahaffey@wc.com amacdonald@wc.com twolfe@degrandwolfe.com ldegrand@degrandwolfe.com
Counsel for Defendant Household International Inc.	

Counsel	E-mail address
Michael J. Dowd Spencer A. Burkholz Daniel S. Drosman Luke O. Brooks Hillary B. Stakem ROBBINS GELLER RUDMAN & DOWD LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 (619)231-1058 619/231-7423 (fax) Jason C. Davis ROBBINS GELLER RUDMAN & DOWD LLP Post Montgomery Center One Montgomery Street, Suite 1800 San Francisco, CA 94104 (415)288-4545 (415)288-4534 (fax) Maureen E. Mueller ROBBINS GELLER RUDMAN & DOWD LLP 120 East Palmetto Park Road, Suite 500 Boca Raton, FL 33432 (561)750-3000 (561)750-3364 (fax)	miked@rgrdlaw.com spenceb@rgrdlaw.com dand@rgrdlaw.com lukeb@rgrdlaw.com hstakem@rgrdlaw.com jdavis@rgrdlaw.com mmueller@rgrdlaw.com
Lead Counsel for Plaintiffs	
Marvin A. Miller Lori A. Fanning MILLER LAW LLC 115 S. LaSalle Street, Suite 2910 Chicago, IL 60603 (312)332-3400 (312)676-2676 (fax)	Mmiller@millerlawllc.com Lfanning@millerlawllc.com
Liaison Counsel for Plaintiffs	