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' REPLY IN FURTHER SUPPORT OF THEIR MOTION *IN LIMINE* NO. 6

Defendants' five "may call" fact witnesses (Aldinger, Schoenholz, Gilmer, Streem, and Ancona) should be precluded from offering opinion testimony regarding market or industry trends.[1] Such testimony is impermissible under FRE 701 because it would require the application of specialized knowledge, which removes it from the ambit of FRE 701. At the same time, defendants failed to comply with the disclosure requirements under Fed. R. Civ. P. 26(a)(2)(C), and are thus precluded from offering the testimony under Rule 702. Defendants' response betrays both defendants' intent to elicit such testimony and their misunderstanding of Rule 701's express limitations, leading to plaintiffs' well-founded concern that defendants will seek to elicit impermissible opinion testimony at trial.

"A witness can qualify as both a fact and expert witness . . . ." *United States v. Christian*, 673 F.3d 702, 708 (7th Cir. 2012). "Thus, the Rules do 'not distinguish between expert and lay ***witnesses***, but rather between expert and lay testimony.'" *Id.* at 709 (emphasis in original).[2] Significantly, "'[l]ay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.'" *Id.*

Defendants claim that "first-hand knowledge and observations" form the basis for the witnesses' opinions on "trends in the market or industry that were affecting Household" (Defs' Opp. at 2) (Dkt. No. 2165), but nowhere do they explain how this could be done by "'an untrained layman'" "'perceiving the same acts or events.'" *United States v. Conn*, 297 F.3d 548, 554 (7th Cir.

[1] William Aldinger was Household's CEO and thus was the executive officer ultimately responsible for all of Household. Trial Tr. at 2982:2-18. (All relevant excerpts from the 2009 trial transcript are attached as Ex. 2 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Replies in Further Support of Their Motions *in Limine* ("Brooks Decl.")). David Schoenholz was Household's Chief Financial Officer ("CFO") and was responsible for the company's external financial reporting as well as overseeing the Internal Audit Department, the treasury, and investor relations activity. Trial Tr. at 1877:20-25; *id.* at 1878:23-26; *id.* at 1879:9-1880:2. Gary Gilmer was the Vice President of Consumer Lending at Household (Defs' Opp. at 1), making him the head of the department and responsible for the department's approximately 1,400 branches. Trial Tr. at 970:13-25. Craig Streem was the Vice President of Corporate Relations and Communications (Defs' Opp. at 1), and managed Household's relations with investors and the media. Streem Depo., Exhibit 1 (Brooks Decl., Ex. 3). Edgard Ancona was the Treasurer at Household and was responsible for Household's funding, interest rate risk management, capital management, and corporate strategy/development. Ancona Depo. Tr. at 24:1-16 (Brooks Decl, Ex. 4).

[2] Unless otherwise noted, all emphasis is added and citations are omitted.

2002). While "a business owner or officer is allowed to testify without being qualified as an expert" if "that testimony is tied to his or her personal knowledge," an opinion that is instead "based on [] special experience" "falls within the purview of Rule 702." *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v. Titan Int'l, Inc.*, 533 F.3d 555, 560-61 (7th Cir. 2008). Put slightly differently, "those who have special knowledge of the business and its operations," like defendants' live "may call" witnesses here, "may not make inferences from the data but must testify only as to the facts known to them." *R.I. Spiece Sales Co., Inc. v. Bank One, N.A.*, No. 1:03-CV-175-TS, 2005 WL 3005484, at *1 (N.D. Ind. Nov. 9, 2005).

Defendants do not cite a single case in which a court admitted lay opinion testimony regarding market or industry trends,[3] as courts consider such testimony to be in the realm of experts and subject to the more stringent requirements of Rule 702.[4] Thus, if defendants intended to offer such testimony, they were required to provide the necessary disclosures under Fed. R. Civ. P.

[3] The first case cited by defendants, *W. Indus., Inc. v. Newcor Canada, Ltd.*, 739 F.2d 1198 (7th Cir. 1984), was regarding "an alleged trade custom," not trends in the market or a specific industry. *Id.* at 1203. Further, that case predates the 2000 amendment to Rule 701, which "was designed to make clear that courts must scrutinize witness testimony to ensure that all testimony based on scientific, technical or other specialized knowledge is subjected to the reliability standard of Rule 702." *Conn*, 297 F.3d at 553. The second case cited by defendants, *Cent. States, S.E. and S.W. Areas Pension Fund v. Transport Serv. Co.*, No. 00 C 6181, 2009 WL 424145 (N.D. Ill. Feb. 17, 2009), also had nothing to do with an analysis of market or industry trends, and instead involved a summary judgment affidavit simply explaining how the plaintiffs' exhibits were created through "data entry" and the "merg[ing] [of the data] into one spreadsheet to create summary charts." *Id.* at *3. The cases cited in that decision illustrate that lay opinion testimony based on "industry experience" is limited to topics like "the facts underlying projections," damages quantification "limited to first-hand knowledge obtained as a bookkeeper," simple arithmetic and comparisons, and the degree of a particular project's completion. *See id.* at *5.

[4] *See, e.g., Nemmers v. United States*, 681 F. Supp. 567, 577 (C.D. Ill. 1988), *aff'd*, 870 F.2d 426 (7th Cir. 1989) (stating that "an expert's opinion concerning the movement of wages over a number of years" "is mere speculation" without "well founded evidence of future economic trends or probable salary movements"; *Consulnet Computing, Inc. v. Moore*, No. 04-3485, 2008 WL 375102, at *4 (E.D. Pa. Feb. 11, 2008) (excluding expert opinions on "industry-wide trends in real estate websites" because they were "not the product of a reliable method"); *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002) (expert "testimony explained the general trend of mall stores losing market share to non-mall competitors"); *Scritchfield v. Paolo*, 274 F. Supp. 2d 163, 188 (D.R.I. 2003) (referring to "expert testimony about general market trends"); *Blatt v. Muse Techs., Inc.*, No. 01-11010-DPW, 2002 WL 31107537, at *15 (D. Mass. Aug. 27, 2002) (same).

26(a)(2)(c). Defendants failed to comply with those requirements and do not even address the issue in their response to plaintiffs' motion.

Defendants also fail to show how lay opinion testimony from these witnesses regarding "nonfraud factors affecting Household's stock price [] would be helpful to the jury." Defs' Opp. at 3. These witnesses may only testify "to the facts known to them" and "may not make inferences from the data," *R.I. Spiece Sales Co.*, 2005 WL 3005484, at *1, so any opinions from them on market trends would be "meaningless assertions which amount to little more than choosing up sides," which in turn "require[s] exclusion for lack of helpfulness." *United States v. Wantuch*, 525 F.3d 505, 514 (7th Cir. 2008) (citing Rule 701(b) advisory committee's note to 1972 Proposed Rules); *Cf. Echo, Inc. v. Timberland Machs. & Irrigation, Inc.*, 661 F.3d 959, 965 (7th Cir. 2011) (affirming exclusion of company president's opinion that a division's profits should not have been included in calculating overall sales and gross profits, because it was "supported by nothing but his *ipse dixit*").[5]

[5] Further, defendants mistakenly suggest that the Court wait until defendants try to elicit improper opinion testimony before ruling. Defendants' opposition brief confirms their intent to elicit opinion testimony on market or industry trends, which necessarily would require specialized knowledge, and thus would plainly be expert opinion under FRE 702, requiring timely disclosures under Fed. R. Civ. P. 26(a)(2)(c). Because defendants failed to comply with those disclosure requirements, they now hope to sneak such testimony in through FRE 701. They should be precluded from doing so. *See Brickhouse v. Redstone*, No. 3:12-cv-00593-DRH-PMF, 2014 WL 1453650, at *2-*3 (S.D. Ill. Apr. 14, 2014) (granting motion *in limine* to exclude lay opinion on question of excessive force and finding "that non-expert witnesses may testify as to the facts only"). Thus, it is not premature to preclude inadmissible evidence here because "a motion *in limine* is a tool properly used to prevent the introduction of prejudicial or irrelevant evidence at trial." *CSX Transp., Inc. v. Total Grain Mktg., LLC*, No. 11-cv-0171-MJR-SCW, 2014 WL 642293, at *1 (S.D. Ill. Feb. 19, 2014). Finally, the case defendants cite, *Wielgus v. Ryobi Techs., Inc.*, No. 08 CV 1597, 2012 WL 1853090 (N.D. Ill. May 21, 2012), is inapposite here because the testimony in question was regarding the design or safety of a specific model of saw, *id.* at *7, subjects which lay people could formulate an opinion about solely based on first-hand experience (*e.g.*, whether they found the saw easy to use).

For the forgoing reasons, plaintiffs respectfully request the Court grant Plaintiffs' Motion *in Limine* to Preclude Fact Witnesses from Offering Impermissible Opinion Testimony.

DATED: May 13, 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)

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 May 13, 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 May 13, 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	