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-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' INTERROGATORY NOS. 56 AND 64

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This reply memorandum is respectfully submitted in further support of the Household Defendants' Motion to Compel Responses to Defendants' Interrogatory Nos. 56 and 64 (the "Interrogatories").[1]

INTRODUCTION

Both Interrogatories that are the subject of this motion are the subject of prior orders of this Court rejecting Plaintiffs' objections. Plaintiffs did not appeal these orders. Their opposition presents nothing new, and reflects only counsel's willingness to object to ordered discovery with the same arguments a second time. This strategy should not be rewarded. It should be penalized.

Interrogatory No. 64 is a follow-up to Nos. 31-33 and simply asks:

> "For each Disclosure identified in response to Interrogatory Nos. 31-33, set forth the 'truth' that you contend was revealed to the market by the Disclosure."

(Owen Aff., Ex. 7 at 2). A good faith response would have set forth the relevant "truth" revealed by each disclosure Plaintiffs previously identified. The relevant "truth" allegedly contained in a corrective disclosure is not a difficult concept. The Supreme Court used the term and explained its significance in *Dura*.[2] The "relevant truth" has also been discussed by this Court in previously rejecting Plaintiffs' arguments. (*See* Sept. 19, 2006 Order, Owen Aff., Ex. 11 at 5) ("Plaintiffs do not need experts to identify the public disclosures they believe contributed to the 'relevant truth' leaking out and becoming known in the marketplace.").

Instead of explaining what previously misrepresented truth was revealed, Plaintiffs seek a do-over of the Court's prior orders, arguing for the second time: (1) that Interrogatory 64 is compound and an "improper follow-up" (Plaintiff's Brief ("PB") at 4) , (2) that the "truth" is an issue for experts (PB at 6), (3) that the concept of "truth" is "hopelessly vague and ambiguous" (PB at 2), and (4) that their disagreement with an anticipated legal argument relieves them of the duty to

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1 "Interrogatories" refers to Household Defendants' Interrogatories Nos. 56 and 64 served on December 22, 2006 and January 31, 2007, respectively. (See Affidavit of David R. Owen dated May 4, 2007 ("Owen Aff."), Ex. 1 and 7.)

2 *See Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 342, 347 (2005) ("*Dura*") (loss causation requires a showing that the "share price fell significantly after the truth became known")

respond. (PB at 5 & n.3). Each of these positions is without merit, and has been previously rejected by the Court including in connection with Interrogatory Nos. 30-33, to which No. 64 "follows-up." (*See* Owen Aff., Ex. 11).

Plaintiffs' opposition to Interrogatory No. 56 tracks almost exactly the argument they raised the last time they objected to No. 56. This Court has already rejected Plaintiffs' position and ordered Plaintiffs to identify the "the percentage or number of Household loans that included improperly imposed or undisclosed prepayment penalties". (Owen Aff., Ex. 4 at 3). There is no dispute Plaintiffs did not comply as ordered by reviewing identified documents and evidence they purport to rely on and quantifying their claims. Instead, they repeat the same tired arguments and assert that their admitted reason for their refusal to comply (that the ordered numbers "would dramatically understate what we contend the problem was") is just a "manipulation" of Defendants. (PB at 8)

If Defendants are to obtain any meaningful discovery in this case, Plaintiffs' dissatisfaction with the implications of their answer cannot be accepted as an excuse for not responding to Defendants' question asked — much less a basis to disregard an express Order to do so.

ARGUMENT

A. Plaintiffs Must Identify The Previously Misrepresented "Truth" That Each Corrective Disclosure Revealed To the Market (Interrogatory No. 64)

Loss causation requires proving that a defendant's "share price fell significantly after the truth became known." *Dura* at 342, 347. The "relevant truth" must either "correct" a prior misrepresentation or reveal a previously concealed material fact to the public. As the Seventh Circuit has ruled twice this year, if the claimed corrective disclosure does not actually reveal the prior misrepresentations, a decline in share price will not be attributed to the fraud. *Tricontinental Industries, Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, 843 (7th Cir. 2007) ("*Tricontinental*"); *Ray* v. *Citigroup Global Markets, Inc.*, 482 F.3d 991, 995 (7th Cir. 2007) ("*Ray*") (holding that loss causation requires plaintiffs to establish that "the value of the [defendant's] stock declined just when the alleged misrepresentations were revealed").

Plaintiffs' non-responsive and repetitive answer to Interrogatory No. 64 does not indicate what relevant "truth" was revealed to the public. Instead, it states (14 times) the boilerplate contention: "This disclosure revealed partial information about Household's true financial and operating condition. . . ." (Owen Aff., Ex. 8 at 8-11). Plaintiffs' explanation for this vacuous response consists entirely of arguments that the Court has already considered and rejected.

1. Plaintiffs Cannot Re-Argue Issues That The Court Has Already Decided Against Them

Plaintiffs contend that Interrogatory No. 64 is an "improper follow-up" to Interrogatories Nos. 31-33 and that it should be counted as 14 separate questions. (PB at 6) The Court has already rejected this position in it March 9, 2007 Order denying Plaintiffs' motion to quash Interrogatory No. 64 and holding that it is a proper follow-up to Interrogatories Nos. 31-33. (Owen Aff. Ex. 12 at 2) ("Plaintiffs' position [is] unfair and unfounded. . . . The court has reviewed the interrogatories and is satisfied that Nos. 63, 64, 74, 75 and 76 are proper follow-up questions"). Any new objections Plaintiffs now assert are waived.[3]

Plaintiffs again argue that discovery of loss causation issues and what "truth" was revealed to the market is an issue for expert testimony. (PB at 6) Plaintiffs made this exact same argument in opposition to Interrogatories Nos. 31-33, which Interrogatory No. 64 references. The Court rejected Plaintiffs' position, holding that the province of experts is that of market effect and impact, not whether a disclosure revealed any "truth".

> "The court agrees with Defendants that Plaintiffs do not need experts to identify the public disclosures they believe contributed to the 'relevant truth' leaking out and becoming known in the marketplace."

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[3] Plaintiffs continued objection to the numbering of every interrogatory served in this litigation is the most shameless example of Plaintiffs' seeking to relitigate any issue that is resolved against them. The Court has repeatedly refused to adopt Plaintiffs' attempt to divide each interrogatory into its smallest component parts and Judge Guzman has overruled Plaintiffs' objections to this Court's decision on counting issues. As the Court has stated "[A]n interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be considered a single question." (Nov. 10, 2005 Order, Owen Aff., Ex. 10 at 2n (citations omitted)). The fact that Plaintiffs have chosen to identify 14 different disclosures that allegedly revealed the "truth" does not create 14 different "themes" and does not transform Interrogatory No. 64 into 14 different questions.

(Sept. 19, 2006 Order, Owen Aff., Ex. 11 at 5) The Court has already ruled on this precise issue.

Trotting out the same argument, Plaintiffs again conflate distinct issues regarding loss causation and actual damages. Expert testimony is used in securities fraud cases in connection with establishing the damages actually caused. *See, e.g., Law* v. *Medco Research, Inc.,* 113 F.3d 781, 786 (7th Cir. 1997).[4] Defendants' Interrogatory No. 64 only seeks facts relating to the revelation of the "relevant truth." As the Court noted above in its prior ruling on this argument, setting forth what truth revealed particular misrepresentations to the market requires no specialized expertise.

2. Plaintiffs Must Identify the Previously Misrepresented "Truth" That Each Disclosure Revealed

Plaintiffs assert that the meaning of the word "truth" in Interrogatory 64 is "hopelessly vague and ambiguous". (PB at 2-3) Plaintiffs' asserted ignorance is disingenuous. Plaintiffs' own brief quotes the words "truth" and "relevant truth" from the text of the *Dura* opinion itself. (PB at 4 (quoting *Dura*)). Plaintiffs cannot seriously contend that the term is too vague to warrant a substantive response.[5]

The concept of a relevant "truth" is also at the heart of various recent Seventh Circuit rulings applying the principles quoted from *Dura*. *See, e.g., Ray,* 482 F.3d at 994*; Tricontinental*, 475 F.3d at 842-45 (noting that factual revelations about defendant's 1998 and 1999 financial statements did not correct a claimed fraud relating to a 1997 financial statement). Even a cursory search of the case law revealed over 50 cases that discuss the revelation of the "truth" in the context of loss causation. *See, e.g., Glaser* v. *Enzo Biochem, Inc.,* 464 F.3d 474, 477 (4th Cir. 2006) ("*Dura*

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[4] Under this mode of analysis, given the date on which a plaintiff alleges the fraud was disclosed to the market, the expert opines on whether the stock price subsequently moved "abnormally," which could be an indication that the alleged disclosure of the fraud *caused* the decrease in stock price. *See Endo* v. *Albertine*, 863 F. Supp. 708, 723-724 (N.D. Ill. 1994).

[5] Plaintiffs' assertions that Defendants refused to provide any clarification as to what Interrogatory No. 64 seeks and that their amendment was made in good faith (PB at 2-3) are also false. Directly following the April 16, 2007 meet and confer, Defendants stated in an email of April 19, 2007 that "it is Defendants' position that any proper response to Interrogatory No. 64 must state the misrepresentation that was truthfully corrected and/or the concealed fact that was truthfully revealed by each disclosure identified in response to Interrogatories Nos. 31-33." (*See* Affidavit of David R. Owen dated May 18, 2007 ("Owen Reply Aff."), Ex. 1 at 1)

requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of a misrepresentation about the stocks was revealed . . . .").

Plaintiffs' opposition to the substantive legal basis for this discovery — discussed at length in Defendants' opening brief — appears only in a single footnote that asserts such cases to be "irrelevant." (*See* PB at 5 n.3) Plaintiffs argue that a corrective disclosure need not "on its face, specifically identify or explicitly correct a previous representation" in order to reveal the claimed fraud. (*Id*. quoting *In re Motorola Securities Litigation*, No. 03 C 287, 2007 U.S. Dist. LEXIS 9530, at *118 (N.D. Ill. Feb. 8, 2007)). The argument appears to reflect Plaintiffs' acknowledgement that many of the 14 disclosures they identified ***do not*** "on [their] face specifically identify or correct a previous representation." With regard to many if not all of the identified 14 "corrective disclosures," Defendants agree. That is precisely Defendants' point.[6]

If, as Plaintiffs contend, the "corrective" nature of the claimed corrective disclosure is not readily apparent from the disclosure itself, it stands to reason that Plaintiffs must provide the explanation that Interrogatory No. 64 explicitly seeks. If this were not the case, any disclosure on any subject would suffice to correct any fraud. That is clearly not the law.

The Seventh Circuit has specifically held that "*Dura* stresses that . . . there must be 'a ***causal connection*** between the material misrepresentation and the loss'". *Tricontinental*, 475 F.3d at 843 (emphasis supplied) As recently as last month, the Seventh Circuit affirmed summary judgment

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6 Defendants do not presently raise the question of whether Plaintiffs' 14 corrective disclosures can ultimately satisfy cases like *Ray* and *Tricontinental*. Nor do Defendants presently challenge any of Plaintiffs various misunderstandings of the substantive Seventh Circuit law on this subject. The only question that is relevant to this motion is whether Defendants are entitled to discovery in this area. When the merits of a claim or defense are contested on a discovery motion "discovery should not be denied because it relates to a claim or defense that is being challenged as insufficient." *Union Carbide Corp.* v. *State Board of Tax Commissioners*, 161 F.R.D. 359, 366 (S.D. Ind. 1993) (citation and internal quotation marks omitted) (granting motion to compel discovery despite opposing party's objection that the information sought was irrelevant because the moving party was misinterpreting the applicable statute) quoting, 8 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2008, at p. 44 (1970). ("A party may base interrogatories on its theory of the case." *Id*. at 255). Plaintiffs proffered and the Court rejected this exact argument — that Plaintiffs should not have to respond to Defendants' discovery requests because they are based on a "misstatement of the law" regarding loss causation and *Dura* — when ordering Plaintiffs to respond to Interrogatories Nos. 30-33.

for defendants when plaintiffs failed to provide any evidence that defendant's stock declined following the revelation of the "truth" regarding a prior misrepresentation. *Ray*, 482 F.3d at 994. The *Ray* court held that

> "Plaintiffs similarly have not introduced enough evidence to go forward on a fraud-on-the-market theory. The record affirmatively contradicts the assertion that the value of the [defendant's] stock declined just ***when the alleged misrepresentations were revealed***. That is what Dura required them to show, and they did not."

Id. at 995 (emphasis supplied). *See, e.g., Glaser* v. *Enzo Biochem, Inc.*, 464 F.3d 474, 477 (4th Cir. 2006) ("*Dura* requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of a misrepresentation about the stocks was revealed . . . .").[7]

The legal sufficiency of Plaintiffs' corrective disclosures will be addressed at summary judgment and trial. For now, the question is: What truth do you contend each of the fourteen disclosures revealed? Merely repeating that *something* corrective was disclosed is not a good faith answer.

B. Plaintiffs Must Comply With The Court's March 14, 2007 Order To Quantify the Fraud They Allege (Interrogatory No. 56)

Plaintiffs' opposition to responding to Interrogatory No. 56 regurgitates the same objections and excuses that Plaintiffs proffered the first time Defendants moved to compel a response

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[7] These cases explicitly reject the sufficiency of purported "corrective disclosures" that supposedly reveals an unmentioned "part" of some larger claimed fraud. *See, e.g., Tricontinental*, 475 F.3d at 843. Dismissing plaintiff's claims based on misrepresentations made in the company's 1997 financial statement, the *Tricontinental* court held that the corrective disclosure identified by plaintiff — which corrected statements made in the 1998 and 1999 financial statements — was insufficient because it did not "ma[k]e 'generally known' any problems or irregularities in the 1997 audited financial statement." *Id*. As here, Plaintiffs unsuccessfully argued that 1997, 1998 and 1999 financial statements were all "part" of the same "on-going scheme to over-represent revenue" that led to the correction of the 1998 and 1999 financials. *Id*. at 842. The court disagreed, stating that a plaintiff must connect the alleged corrective disclosure to a specific misrepresentation, not simply to some generalized claim of ongoing fraud. *Id*. at 843 ("Tricontinental had to allege that PwC's 1997 audit contained a material misrepresentation which caused Tricontinental to suffer a loss when ***that*** material misrepresentation 'became generally known.'") (emphasis supplied). Plaintiffs' responses refuse to provide any information that could even be evaluated by the Court to test its sufficiency as the Court did in *Tricontinental*. If Plaintiffs claim that a disclosure only corrected part of a misrepresentation or revealed only part of an omitted fact then they should be required to specify that part.

to Interrogatory No. 56. The Court has already overruled each of these objections. Plaintiffs are now in violation of the Court's explicit Order to identify "the percentage or number of Household loans that included improperly imposed or undisclosed prepayment penalties" (Owen Aff., Ex. 4 at 3) Any objection to this Order should have been directed to Judge Guzman. Plaintiffs' decision to ignore the Court's Order should be sanctioned. All other objections have been waived.

The thrust of Plaintiffs' opposition brief addressing Interrogatory No. 56 is that the evidence they have is insufficient to "calculate the precise number" of loans containing improper prepayment penalties. (PB at 7-10) Nevertheless, the response continues vaguely to assert that the number — whatever it might be — is "substantial." (Owen Aff., Ex. 5 at 130)

This exact argument was presented to and rejected by the Court the first time Defendants were forced to compel a response to this Interrogatory. (Owen Aff., Ex. 4 at 2-3 (rejecting Plaintiffs' argument that "they are unable to provide such detail because 'defendants have successfully resisted branch-level discovery")) Indeed, entire paragraphs of Plaintiffs' brief appear to have been copied from Plaintiffs' original objections to this Interrogatory. (*Compare* PB at 9-10 *with* Owen Aff., Ex. 3 at 128) Plaintiffs' repetition of overruled objections to the Interrogatory are irrelevant and should not even be considered by this Court. Since March 14, 2007 Plaintiffs have been under a Court Order to provide this information and Defendants are now relying on that Order to compel a response. Plaintiffs have provided no argument as to why the Court should vacate its previous Order — and none exists.

Plaintiffs' response to Interrogatory No. 56 states that their review of the "documents produced in this litigation, including government reports and customer complaints, indicate that a substantial percentage and/or number of Household loans included prepayment penalties which were not disclosed or which were actively concealed". (Owen Aff., Ex. 5 at 130) Relying on this contention, the Court stated in quoting Defendants' brief that "these reports can be quantified and distinguished from Household's reported performance, and it is Plaintiffs' burden to do so." (Owen Aff., Ex. 4 at 3) Plaintiffs admit that they ***can*** quantify these complaints as ordered by the Court but will not do so because they now claim that a summation of these "government reports and customer complaints" would "dramatically understate what we contend the problem was." (PB at 8) Plaintiffs cannot have it both ways. If Plaintiffs' review of these documents "indicate[d] that a substantial

percentage and/or number" of loans were illegal then Plaintiffs must share the quantification that supports that conclusion as ordered by the Court. Moreover, the fact that Plaintiffs contend that this number would "dramatically understate[] what [they] contend the problem was" suggests that Plaintiffs can identify how pervasive "[they] contend the problem was".[8] How else would Plaintiffs know that the summation of complaints would understate their contention?

Plaintiffs claim that their statement that they cannot "calculate the precise number of loans" which included improper prepayment penalties itself complies with the Court's Order. However, the part of the Order from which Plaintiffs quote is from Defendants' brief, stating "[i]f plaintiffs have no idea whether the alleged illegality occurred 1% or 100% of the time then they should acknowledge as much." (Owen Aff., Ex. 4 at 3) Plaintiffs have not done this. Rather, they continue to maintain that a "substantial number and/or percentage" of loans were illegal. (Owen Aff., Ex. 5 at 130) Plaintiffs have not argued that they have no idea how pervasive the alleged illegality was, only that they will not tell Defendants, apparently because the number they derived from the millions of pages of discovery is not as high as they might wish. If Plaintiffs now wish to concede that they have no position or evidence regarding the pervasiveness of the alleged illegality then Defendants will accept that position. Regardless, Plaintiffs should be barred from introducing any evidence at summary judgment or trial to prove that any illegal or improper practices were "widespread" or "substantial", or in any way quantifiable.

Finally, Plaintiffs assert that they should be excused from their responsibility to provide a number or percentage in response to Interrogatory No. 56 since they "identified more than a dozen ways to distinguish between proper and improper prepayment penalties" in response to Interrogatory No. 57. (PB at 2)) Plaintiffs' logic is flawed. Interrogatory No. 57 asked for the basis upon which Plaintiffs distinguish the legal from the allegedly illegal. Interrogatory No. 56 which is the subject of this motion seeks a quantification, and is explicitly different from No. 57 in form and purpose. In its March 14 Order, the Court ordered new responses to both No. 56 and No. 57. (Owen

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[8] Throughout Plaintiffs' response and opposition brief, Plaintiffs repeatedly state that they cannot provide a "precise" number or percentage. "Precision" is a burden that Plaintiffs have manufactured in order to avoid responding at all. So long as there is a reasonably plausible explanation for the actual numbers they provide, absolute precision is clearly unnecessary.

Aff., Ex. 4 at 3) In fact, the Court specifically distinguished the two interrogatories in its Order, noting that Plaintiff must identify "(1) the percentage or number of Household loans that included improperly imposed or undisclosed prepayment penalties, and (2) unless Plaintiffs allege that 100% of the prepayment penalties were unlawful, the basis for distinguishing between these improper prepayment penalties and any prepayment penalties that were lawful."

Plaintiffs' compliance with the latter does not obviate their obligation to comply with the former. To the contrary, the fact that Plaintiffs identified additional allegedly illegal practices only begs the original question, "how frequently do Plaintiffs contend that these practices took place?"[9] That is the information that Plaintiffs were ordered to provide in connection with Interrogatory No. 56.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Defendants' motion to compel be granted and that the Court:

(a) order Plaintiffs to respond forthwith to Interrogatory No. 64 by specifying the relevant "partial information" contained in the 14 corrective disclosures and explaining what "truth" the relevant information revealed about the alleged misrepresentations of Defendants;

(b) order Plaintiffs to comply forthwith to the Court's March 14, 2007 Order to answer Interrogatory No. 56, and/or make a recommendation that the Court grant Defendants' motion pursuant to Fed. R. Civ. P. 37(b)(2)(B) and 37(d) to bar Plaintiffs from introducing any evidence that a "substantial" or otherwise material number or percentage of Household's loans were improper or violated state or federal laws; and

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[9] In response to Interrogatory No. 57 Plaintiffs claim (for the first time) that "[p]repayment penalties that contained a provision that called for the imposition of a prepayment penalty at any time within the first 5 years of the loan' were improper." (PB at 9) However, to this date, it is ***completely legal*** in most jurisdictions to impose prepayment penalties for loans refinanced within five years of origination. It is because of nonsensical assertions such as this that substantive and full responses to these interrogatories are necessary.

(c) grant Defendants' motion, pursuant to Fed. R. Civ. P. 37(b)(2) and 37(d), for sanctions and order Plaintiffs to pay the reasonable expenses, including attorney's fees, incurred in bringing this motion.

Dated: May 18, 2007
New York, New York

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