

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**LEAD PLAINTIFFS' OPPOSITION TO THE HOUSEHOLD DEFENDANTS' MOTION
TO COMPEL DISCOVERY PURSUANT TO RULE 26(A)(1)(C) AND THIS COURT'S
ORDERS, OR IN THE ALTERNATIVE FOR A RECOMMENDATION OF
PRECLUSION**

I. INTRODUCTION

This Motion is a waste of the Court's and the parties' time and should be summarily denied.¹ Defendants' Motion is simply another attempt to delay this action. Aside from substantive defects, this Motion should be rejected as premature just as the Honorable Ronald A. Guzman did a month ago when he summarily denied defendants' motion to dismiss plaintiffs' case which was also based solely on the initial report of lead plaintiffs' damage expert, Professor Daniel R. Fischel. *See* Docket No. 1125.

Defendants' Motion is not a motion to compel, but rather a premature substantive attack on the 27-page Report of Daniel R. Fischel with 57 exhibits, which opines on investors' losses due to defendants' fraud (*i.e.*, damages) **and** loss causation. Professor Fischel is one of the leading defense experts on securities damages in the country, but agreed to be retained by lead plaintiffs in this case. Professor Fischel's extensive report and opinions address damages recoverable by class members due to fraud and loss causation in light of *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005). *See* Professor Fischel's report, attached hereto as Ex. A. As discussed below, lead plaintiffs have disclosed all damage theory information required by Federal Rule of Civil Procedure ("Rule") 26(a)(1)(C). Since Professor Fischel does not opine on aggregate damages (*i.e.*, x billion in damages for all class members) but instead quantifies damages per share for each day of the class period, there will necessarily be a claims process following a verdict in the class' favor which will determine which class members will be eligible to recover and in what amount. At that stage, the issues now being raised by defendants and perhaps others not yet raised will be adjudicated.

¹ "Motion" refers to the Household Defendants' Motion to Compel Discovery Pursuant to Rule 26(A)(1)(C) and this Court's Orders, or in the Alternative for a Recommendation of Preclusion, filed October 5, 2007, Docket No. 1136.

Moreover, as expert discovery is still ongoing, defendants can and should address any alleged defects in their own expert reports. Professor Fischel's rebuttal report can respond to any alleged defects and defendants can question him at his deposition. After this process is complete, defendants can bring a motion if further information is required (which seems unlikely), or a *Daubert* motion to exclude his testimony (which is what this motion is truly). This is the normal process and should be followed in this case. This Court should summarily deny this Motion and allow expert discovery to be completed pursuant to the existing schedule just as Judge Guzman did last month.

II. ARGUMENT

A. Lead Plaintiffs Have Satisfied Their Rule 26(a)(1)(C) Obligation

Lead plaintiffs have complied with their discovery obligations pursuant to Rule 26(a)(1)(C). At the Court's direction, lead plaintiffs submitted an eight-page damages statement on September 7, 2004 that described their theory of damages. *See* Lead Plaintiffs' Submission Pursuant to the Court's August 30, 2004 Hearing ("Lead Plaintiffs' Damages Statement"), ¶¶12-15, Docket No. 177, attached hereto as Ex. B. As stated in Lead Plaintiffs' Damages Statement, damages are "the difference between the price of the stock and its value on the date of the transaction if the full truth were known." *Id.* ¶13; *Associated Randall Bank v. Griffin, et al.*, 3 F.3d 208, 214 (7th Cir. 1993); *see also Caremark Inc. v. Coram Healthcare Corp.*, 113 F.3d 645 n.6 (7th Cir. 1997). Over defendants' objection, this Court upheld Lead Plaintiffs' Damages Statement as sufficient in the September 20, 2004 Order ("Order"). *See* Docket No. 180.

Professor Fischel's extensive expert report supplements the damages statement and meets the requirements of *Dura* by isolating damages due *only* to defendants' fraud and quantifying damages for each day of the class period which provides the input for the out-of-pocket measure of damages – "the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no fraudulent conduct" – *Stone v. Kirk, et al.*, 8 F.3d 1079, 1092 (1993) (citation

omitted). Lead Plaintiffs' Damages Statement at 6. In his report and the relevant exhibits, which defendants inexplicably do not provide the Court but which lead plaintiffs attach here,² Professor Fischel demonstrates how partial disclosures and leakage of information about the fraud during the class period resulted in losses due to the fraud (*i.e.*, damages) to all class members and identifies the specific amounts attributable to the disclosures and leakage. *See* Ex. A ¶¶34-42, Exs. 53 and 56. Professor Fischel calculates the amount of artificial inflation for each day of the class period, which is the damages caused by defendants' fraud, and quantifies this amount on a per share basis consistent with the principles of loss causation established in *Dura* and the case law. *See Kaufman v. Motorola, Inc.*, No. 95 C 1069, 2000 U.S. Dist. LEXIS 14627, at *6 (N.D. Ill. Sept. 19, 2000) ("Therefore, assuming liability, an adequate remedy may be fashioned by having the jury determine a per share damage loss and requiring the filing of claims by each shareholder who claims that he, she or it has been damaged.").

Professor Fischel's opinion clearly meets the loss causation requirements of *Dura, supra*. Professor Fischel does not just provide only that the purchase price was inflated on the date of purchase which is not enough under *Dura*. Instead, Professor Fischel also provides the link to loss causation by establishing that the later partial disclosures of the fraud caused the inflation in Household's stock price to dissipate and uses an event study and regression analysis to "take out" non-fraud factors that caused Household's stock price to decline and only considers fraud related declines in his quantification. *See* Ex. A ¶¶12-42. Using these fraud related declines from

² Ironically, defendants did provide Judge Guzman with a copy of Ex. 53 in support of their motion to implement. *See* Declaration of Thomas J. Kavalier in Support of the Household Defendants' Motion for Implementation of this Court's February 28, 2006 Order, Docket No. 1122. Lead plaintiffs attach hereto not only Ex. 53 (quantification of inflation using specific disclosures), but also Ex. 56 which is quantification including leakage which Professor Fischel finds is another measure of damages for each day of the class period. Lead plaintiffs will provide the remainder of the exhibits should the Court wish.

November 15, 2001 through the end of the class period on October 11, 2002, Professor Fischel is able to quantify how much Household's stock was inflated on each day of the class period which is exactly how loss causation is established. The court in *Dura* did not opine on exactly how loss causation would be established – “[A] plaintiff prove that the defendant’s misrepresentation (or other fraudulent conduct) proximately caused the plaintiff’s economic loss. We need not, and do not, consider other proximate cause or loss-related questions.” *Dura*, 544 U.S. at 346. What is clear is that Professor Fischel’s opinion examines loss causation in detail, and quantifies damages on a per share basis for each day of the class period by excluding the non-fraud price declines mentioned by the *Dura* court that can cause a later price loss. *Id.* at 342-43.³

Professor Fischel does not attempt to estimate the **number** of damaged investors which is necessary to reach an aggregate damages number. Instead, if plaintiffs are successful at trial, the total amount ultimately paid by defendants will be based on the number of valid claims filed. Any issues with respect to administering individual claims such as “in and out” traders can be handled at that time with input from the parties and their experts, if necessary. Professor Fischel’s report not only establishes class-wide investor losses but also provides the mathematical means for determining each individual investor’s loss based upon that investor’s stock transactions and data, which will be provided by each investor at the claims stage. Defendants already have this data with respect to lead plaintiffs, which was provided in 2004. *See* Order at 3.

³ Professor Fischel does not mention *Dura* or any legal opinion in his report and is not required to do so. Lead plaintiff expects defendants to make a big deal out of this like they did with the fact that the word “damages” was not in Professor Fischel’s report. Of course “economic loss” is the equivalent of damages and Professor Fischel clearly has opined on the per share damages for each day of the class period. *See* Ex. A (Exs. 53 and 56). Likewise, Professor Fischel’s report and opinion clearly addresses the issue of loss causation in §III of his report which is entitled “The Relationship Between Plaintiffs’ Allegations and Investors’ Losses,” which examines the fraud related declines, and §IV which quantifies the fraud related declines. *See* Ex. A at 6-26.

This demonstration by Professor Fischel fully complies with lead plaintiffs' obligations with respect to initial disclosure as articulated by this Court in the September 20, 2004 Order. In that Order, the Court confirmed that "[d]efendants have received the basic information [required by the initial disclosure requirement of Rule 26(a)(1)(C)] – they know plaintiffs' general theory of damages (and likely should have known the theory without a written submission)" Order at 3. The Court went on to note that the determination of damages for individual class members "is often a mechanical task" based on class-wide factors established via expert testimony. Order at 2 (citation omitted). Professor Fischel's expert report identifies those class-wide factors and provides the means to undertake the "mechanical task" of determining the damages sustained by individual class members. Order at 2.

Professor Fischel's report opines on the artificial inflation in Household's stock price due to the fraud, *and* also provides the causal link (loss causation) discussed in *Dura*. See, e.g., Ex. A, §III at 6-18, entitled "The Relationship Between Plaintiffs' Allegations and Investors' Losses." Professor Fischel quantifies the damages or losses due to fraud by use of an "event study" (see Ex. A at 18-26) that isolates company specific information that ties partial disclosures of the fraud and leakage of the fraud to calculate the losses caused by defendants' fraud. If Household's stock price dropped because of factors not related specifically to Household (*i.e.*, other market factors), he does not include those price drops. See, e.g., Ex. A at 18. Professor Fischel's approach is consistent with *Dura*.

Defendants' real complaint is that lead plaintiffs' damage theory submission is incomplete because they cannot determine if "in and out" traders will recover. Motion at 4 and 6. This issue, and any other issues for which defendants' experts undoubtedly will fault Professor Fischel, can be addressed if necessary in his rebuttal report and likely will be adjudicated during the claims process.

Moreover, defendants cite no contrary case law applicable to this case. Indeed, most of defendants' Motion consists of argument of counsel unsupported by any authority, legal or factual.⁴

In sum, lead plaintiffs have complied with Rule 26(a)(1)(C) and this Court's September 20, 2004 Order.

B. Defendants' Motion Cannot Be Based Upon Interrogatory Nos. 2 and 15

Defendants purport to base this Motion as a need for supplemental responses on two interrogatories, Interrogatory Nos. 2 and 15. This is a sham. Defendants do not submit as exhibits either the interrogatories or the responses and defendants' memorandum only cursorily refers to these interrogatories in a "them too" fashion. Motion at 3 n.3 and 7.

There are also substantive flaws. As to Interrogatory No. 2, it was propounded during the class certification stage to individual lead plaintiffs and seeks their individual damages and witness information. Interrogatory No. 2 requests each lead plaintiff to, "[w]ith respect to each category of damages alleged in the Complaint, set forth the computation thereof, and identify witnesses with knowledge or information concerning those damages or the computation thereof." However, such individual class member information has no bearing on the class-wide issues currently before the Court and indeed, cannot be sought pursuant to this Court's April 18, 2005, November 13, 2006 and January 29, 2007 Orders regarding individual class member discovery. Docket Nos. 225, 762, 935 (deferring individual class member issues until after determination of class-wide issues). Not surprisingly, defendants have disclaimed seeking such individual class member data. *See* September

⁴ Where they do cite some case law, it is inapposite. For example, neither *Design Strategy, Inc. v. Davis, et al.*, 469 F.3d 284 (2d Cir. 2006), nor *Memry Corp. v. Kentucky Oil Tech., N.V., et al.*, No. C04-03843 RMW (HRL), 2007 WL 39373 (N.D. Cal. Jan. 4, 2007), nor *First Nat'l Bank of Chicago v. Ackerley Commc'ns, Inc.*, No. 94 Civ. 7539 (KTD), 2001 WL 15693 (S.D.N.Y. Jan. 8, 2001), cited by defendants for the Rule 26(a)(1)(C) standard, involve a securities class action.

24, 2007 letter from David Owen, attached hereto as Ex. C. Thus, putting aside other pending objections to this interrogatory, supplementation to Interrogatory No. 2 is inappropriate at this time.

Defendants never raised the issue of supplementing Interrogatory No. 15 during the meet and confer on these issues. Interrogatory No. 15 states: “Identify any loss Plaintiffs contend they suffered as a result of any alleged ‘illegal predatory lending’ practice, procedure, or other activity identified in response to Interrogatory 9.” Yet, lead plaintiffs did supplement this interrogatory by referring to Professor Fischel’s report, which discusses predatory lending in the context of loss causation and damages. *See* Ex. A ¶¶12-21.

Given the foregoing, defendants’ Motion is not and cannot be based upon the alleged failure to respond to these interrogatories.

C. Defendants’ Motion Is Premature

As Judge Guzman found with defendants’ motion to implement (really a motion to dismiss), defendants’ Motion is premature and should be denied on this basis alone.

Expert discovery is not complete. This means defendants should, prior to bringing these issues to the Court, point out such issues in their own report, review Professor Fischel’s response to those criticisms in his rebuttal report, and question Professor Fischel at his deposition on these issues. This is the standard practice. If following expert discovery, defendants continue to believe that lead plaintiffs have not complied with Rule 26(a)(1)(C) (which would be highly unlikely), they may raise that issue with the Court after the conclusion of expert discovery. As Judge Guzman noted, there is no benefit in addressing these issues prematurely. *See* September 4, 2007 Transcript of Proceedings at 4, attached hereto as Ex. D (“I guess the bottom line question is why should I do this now? Why not wait until we have all of the facts before us . . .”).

D. Defendants Have No Current Need for This Allegedly Missing Information

Defendants claim without elaboration that the allegedly missing information is necessary to prepare their own expert reports. However, defendants provide no declaration from any expert attesting to this fact. Further, defendants do not and cannot articulate how any allegedly missing information, such as the total class-wide damage amount, could impact their own expert's assessment of Professor Fischel's report.

Defendants' actual conduct shows that this information is not necessary for their expert reports. On September 11, 2007, defense counsel requested a two-month extension of the date to submit their expert reports. The request made no mention of any need for missing information. In an effort to provide defendants the maximum time allowable given the January 14, 2008 status conference date, lead plaintiffs agreed to give defendants a three-week extension even though this meant the time to prepare lead plaintiffs' rebuttal reports would encompass the Thanksgiving holiday. Only after accepting lead plaintiffs' offer on September 13, 2007, did defense counsel then raise this issue with class counsel via letter on September 18, 2007 – over one month after receiving Professor Fischel's report and almost three weeks after filing their "motion to implement" – wherein they so well understood Professor Fischel's report as to "embrace it." *See* Ex. D at 8.

Defendants then delayed in bringing this issue to the Court's attention. It was not mentioned in the September 20, 2007 motion to modify the expert schedule. (Coincidentally, the initial letter demanded supplementation by September 20, 2007.) Moreover, defendants concurred in the cancellation of the October 2, 2007 status conference even though they had on September 27, 2007 informed class counsel via e-mail that defendants would raise this issue with the Court at the status conference. *See* David Owen e-mail dated September 27, 2007, attached hereto as Ex. E ("Defendants will appear in person before Judge Nolan on Tuesday [October 2, 2007] . . .").

Defendants' conduct and their inability to articulate why they need this information for their expert reports show that this issue is not time-sensitive and has no bearing on their ability to submit their expert reports.

E. Request for Preclusion

Defendants seek as an alternative a motion for preclusion. For the reasons alluded to above, such a motion is premature. As Judge Guzman stated, the expert report and discovery record should be complete before consideration of a preclusion motion is proper. *See* Ex. D at 7. Accordingly, defendants can raise this issue with Judge Guzman after the conclusion of discovery. On the current record, any preclusion of testimony would clearly be a reversible error.

III. CONCLUSION

In sum, defendants' Motion should be denied now and further resources should not be wasted. This Motion is but the latest in a series of attempts by defendants to forestall the day they have to submit their expert reports and another set-up to delay trial. Unfortunately, based on the status conference statements defendants filed after the status conference had been cancelled, it is not likely to be the last. This Court should adopt Judge Guzman's approach and reject defendants' Motion.

DATED: October 10, 2007

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DECLARATION OF SERVICE BY E-MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on October 10, 2007 declarant served by electronic mail and by U.S. Mail to the parties: **LEAD PLAINTIFFS' OPPOSITION TO THE HOUSEHOLD DEFENDANTS' MOTION TO COMPEL DISCOVERY PURSUANT TO RULE 26(A)(1)(C) AND THIS COURT'S ORDERS, OR IN THE ALTERNATIVE FOR A RECOMMENDATION OF PRECLUSION.** The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of October, 2007, at San Francisco, California.

s/ Juvily P. Catig

JUVILY P. CATIG