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**	Nan R. Nolan
CASE NUMBER	02 C 593	**DATE**	2/27/2008
CASE TITLE	Lawrence E Jaffe vs. Household International Inc, et al		

DOCKET ENTRY TEXT

For the reasons set forth below, Defendants' Motion to Compel Plaintiffs to Supplement their Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1)(A)(iii) [Doc. 1178] is denied.

■[For further details see text below.]

Notices mailed by Judicial staff.

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This is yet another installment in the parties' continuing battle over the issue of damages. A brief recap is useful. Plaintiffs submitted an expert report from Professor Daniel R. Fischel on August 15, 2007. After reviewing objections from Defendants' expert, Dr. Mukesh Bajaj, the court ordered Plaintiffs to supplement the report to identify their proposed method of calculating damages, including a statement as to (1) whether Plaintiffs intend to use a netting or transactional approach for class members who profited from some trades but suffered losses from others; (2) Plaintiffs' proposed method of calculating damages on behalf of class members who sold their stock during the negative inflation period identified in Professor Fischel's report; (3) whether Plaintiffs intend to claim damages for inflation already present in the stock price on the first day of the Class Period; and (4) the estimated aggregate damages claimed by the class as a whole. (Minute Order of 10/17/07, Doc. 1144, at 5.) The court also ordered Plaintiffs to clarify which of two tables (Exhibits 53 and 56) prepared by Professor Fischel "will be used for each type of investor (e.g., will Exhibit 56 apply only to in-and-out investors while Exhibit 53 will apply to other investors?)" (*Id*. at 4.)

In response to this Order, Plaintiffs submitted an October 24, 2007 Supplemental Statement on Damages that largely answered these questions. Defendants, however, submitted a detailed affidavit from Dr. Bajaj identifying several remaining deficiencies. On November 20, 2007, the court largely rejected Defendants' position, but instructed Professor Fischel to respond to Dr. Bajaj's criticisms and provide a regression analysis showing the date on which there was zero inflation in the stock price. (*See* Minute Order of 11/20/07, Doc. 1159.)

Professor Fischel subsequently submitted a Rebuttal Report Dated February 1, 2008, addressing the alleged deficiencies identified by Dr. Bajaj. In that report, Professor Fischel stated that it is not possible to perform a regression analysis to determine when there was zero inflation in the stock price. The same day, Plaintiffs submitted a Further Supplement to their Prior Statements Regarding Damages, confirming that they

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intend to use a matching, as opposed to netting approach for calculating damages.

Still unsatisfied, Defendants have now filed another motion to compel Plaintiffs to identify the pre-Class Period date on which there was zero inflation in the stock price. Defendants argue that they need this information in order to (1) establish that Plaintiffs' claims are time-barred by the statute of repose; and (2) rebut Plaintiffs' claim that alleged artificial inflation can be attributed to particular frauds.

Analysis

The court is not persuaded that Plaintiffs must provide pre-Class Period damages information so that Defendants can establish their affirmative defense that the claims are time-barred by the statute of repose. Plaintiffs have identified specific misrepresentations in the market on July 22, 1999, a few days before the July 30, 1999 Class Period start date, and on August 16, 1999, a couple weeks after that date. Plaintiffs allege that the two misrepresentations each independently caused Household's stock price to be inflated by the full amount. (Pl. Resp., at 8-9.) *See Ray v. Citigroup Global Markets, Inc.*, 482 F.3d 991, 995 (7th Cir. 2007) (under a fraud-on-the-market theory, "plaintiffs must show . . . that the defendants' alleged misrepresentations artificially inflated the price of the stock.")

The district court did shorten the Class Period in February 2006, finding claims arising from misstatements made between October 23, 1997 and July 29,1999 time-barred by the statute of repose. (Memorandum Opinion and Order of 2/28/06, Doc. 434.) As a result, Plaintiffs initially identified numerous alleged misstatements that Defendants made between October 23, 1997 and July 29, 1999, that are no longer actionable. (*See, e.g.,* Doc. 50, at 70-87.) Defendants are free to utilize those statements as evidence that some or all of the inflation Plaintiffs attribute to the July 22 and/or August 16, 1999 statements actually entered the stock price as far back as October 23, 1997. The court sees no basis, however, for requiring Plaintiffs to prove Defendants' affirmative defense.

Nor must Plaintiffs provide the requested pre-Class Period damages information to help Defendants rebut Plaintiffs' theory of loss causation. Plaintiffs have identified the misrepresentations they believe led to the artificial inflation at issue in this case. (*See* Minute Order of 11/20/07, Doc. 1159.) If Defendants believe the truth as to some or all of those misrepresentations was already revealed to the market before the Class Period began, and therefore not actionable, they may present such an argument and identify such revelatory disclosures.

Citing several cases addressing class certification and appointment of a lead plaintiff, Defendants argue that Plaintiffs' proposed use of a first-in-first-out ("FIFO") method of calculating damages "is not consistent with existing authority" and requires them to identify the date of zero inflation. (Def. Reply, at 5.) In *In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943 (N.D. Ill. 2001), for example, the court denied a plaintiff's application to be lead plaintiff where its transaction-based loss calculation was "only a mirage created by [the plaintiff's] adoption of a FIFO . . . approach to its dealings in the stock." *Id.* at 945. As the court explained, the plaintiff was an active trader during the class period, and its "class period sales at inflated prices caused it to derive unwitting benefits rather than true losses from the alleged securities fraud." *Id*. *See also In re Organogenesis Sec. Litig.*, 241 F.R.D. 397, 401-03 (D. Mass. 2007) (under last-in-first-out ("LIFO") method, lead plaintiff did not suffer a loss during the class period and could not represent a class of investors); *Johnson v. Dana Corp.*, 236 F.R.D. 349, 353 (N.D. Ohio 2006) (adopting LIFO method over FIFO method in determining a proper lead plaintiff).

In a subsequent opinion, the *Comdisco* court elaborated on its position in response to an article criticizing its adoption of the LIFO approach. The court posited the following:

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> Consider an Investor A with accumulated holdings of 10,000 shares of XYZ Corporation that were acquired when everything was on the up and up in terms of corporate disclosures, and that represent the investor's long-term commitment to the company's prospects. Assume further that unknown to Investor A but during what later turns out to be a plaintiffs' class period – a time when the nondisclosure of adverse information caused the stock price to be too high in terms of real value – Investor A both buys and sells an aggregate of 5,000 shares of XYZ stock in various transactions before the stock price later falls out of bed, and that such class-period transactions leave Investor A neither out of pocket nor in pocket when the expenditures for and the proceeds of those transactions are aggregated. Is there any real question that Investor A, who has thus retained the same long-term stake in XYZ that preceded the class period, has sustained neither gain nor loss from the transactions during the class period?

In re Comdisco, No. 01 C 2110, 2004 WL 905938, at *2-3 (N.D. Ill. Apr. 26, 2004). The court went on to state that in determining an adequate lead plaintiff, "the focal point of inquiry must begin . . . with purchases or sales – or both – *during* th[e] class period. And in turn that focus calls for a primary concentration on class period transactions, which is consistent with LIFO rather than FIFO treatment." *Id*. at *3 (emphasis in original).

The most obvious distinction between these cases and the situation presented here is that the parties are not arguing over appointment of a lead plaintiff. The cases do suggest that pre-Class Period transactions may be relevant in determining the proper accounting method – i.e., FIFO, LIFO, or something else – but this is a matter for the district court and does not require further discovery. As *Comdisco* makes clear, the relevant inquiry under either approach ultimately focuses on stocks purchased and/or sold *during* the Class Period. As noted, to the extent Defendants believe that some or all of the inflation Plaintiffs attribute to the July 22 and August 16 statements entered the stock price sufficiently prior to July 30, 1999 to be time-barred, or that the truth about the statements came out before the Class Period, they are free to present those arguments.

Defendants' motion to compel is denied.