

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
JAN 05 2004 10
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

-----X
:
LAWRENCE E. JAFFE PENSION PLAN, on :
behalf of itself and all others similarly situated, :
:
Plaintiff, :
:
vs. :
:
HOUSEHOLD INTERNATIONAL, INC., et al., :
:
Defendants. :
:
-----X

No. 02-C-5893 (Consolidated)
Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

DOCKETED
JAN 20 2004

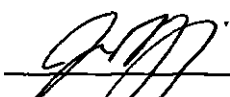
NOTICE OF MOTION

TO: Counsel on the attached service list

⁸²⁰
PLEASE TAKE NOTICE that on January 5, 2004 at 9:30 a.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Guzman, or any judge sitting in his stead, in the Courtroom usually occupied by him, Room 1219, at the Dirksen Federal Building, Chicago, Illinois, and shall then and there present the attached Motion for Leave to File Supplemental Authority, a true and correct copy of which is hereby served upon you.

Dated: January 5, 2004

Respectfully submitted,

By: 

David F. Graham
Julie K. Zeglis
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000
(312) 853-7036 (fax)

132

*Attorneys for Defendants
Goldman, Sachs & Co. and Merrill Lynch,
Pierce, Fenner & Smith, Inc.*

Of Counsel:

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
(212) 455-2502 (fax)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
JAN 05 2004
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

-----x
:
LAWRENCE E. JAFFE PENSION PLAN, on :
behalf of itself and all others similarly situated, :
:
Plaintiff, :
:
vs. :
:
HOUSEHOLD INTERNATIONAL, INC., et al., :
:
Defendants. :
:
-----x

No. 02-C-5893 (Consolidated)
Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

DOCKETED
JAN 20 2004

MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

Defendants Goldman, Sachs & Co. and Merrill Lynch, Pierce, Fenner & Smith, Inc. ("the Defendant Banks") respectfully move this Court to grant them leave to file newly decided, supplemental authority in support of their Motion to Dismiss the Corrected Amended Consolidated Class Action Complaint [D.E. 95] ("Motion to Dismiss"), which was filed with this Court on May 13, 2003. In support thereof, the Defendant Banks state as follows:

1. On December 18, 2003, Judge Lynch of the Southern District of New York issued an opinion in In re Global Crossing, Ltd., No. 02 Civ. 910 (GEL) (S.D.N.Y. Dec. 18, 2003) ("Global"). A true and correct copy of this opinion is attached hereto as Exhibit A.
2. The Global opinion addresses a number of arguments which were raised by the Defendant Banks in their Memorandum of Law in Support of Their Motion to Dismiss the Corrected Amended Consolidated Class Action Complaint ("Memorandum" or "Mem.") and in

132

the Bank Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss [D.E. 113] ("Reply").

3. First, among the various issues addressed in briefing the Defendant Banks' Motion to Dismiss is whether the plaintiffs have adequately pled that the Defendant Banks' fairness opinions were false (and thus form a basis for liability under Section 11 and Section 12(a)(2) of the Securities Act). Plaintiffs have claimed that the Defendant Banks' fairness opinions were false because the transaction was purportedly not "fair" in light of allegedly inaccurate Household financial statements. The Defendant Banks have noted, however, that their opinions were quite limited in scope and did not extend to the accuracy of such Household information. To the contrary, the Defendant Banks' opinions "expressly disclosed that: (1) they had relied on the accuracy and completeness of all financial and other information provided to them; (2) they had assumed that the financial forecasts were reasonably prepared on a basis reflecting the best currently available judgments and estimates; and (3) they had not made an independent evaluation or appraisal of the assets and liabilities of Beneficial or Household." (Mem. at 8). The Defendant Banks have argued that, because these assumptions and limitations were "part of the opinion and suppl[ied] the context for evaluating its truthfulness," plaintiffs' allegations regarding the accuracy of Household's financial statements simply have no bearing on whether the fairness opinions – which expressly assumed the truth of the financial statements provided to the Defendant Banks – were themselves false. (Id.). Therefore, in the absence of any allegations "that the Opinions regarding the fairness of the Exchange Ratio, *based solely on the information that Household and Beneficial provided to [the Defendant Banks], were false or misleading in any respect,*" the complaint fails to state a claim against the Defendant Banks. (Id. (emphasis added); see also Reply at 8-9).

4. The court in Global dismissed the plaintiffs' Section 11 claim against Donaldson, Lufkin & Jenrette ("DLJ") based on reasoning identical to that advanced by the Defendant Banks in their Memorandum and Reply (and summarized in ¶ 5, above).¹ In Global, DLJ was alleged to be liable due to its having provided a fairness opinion, the same theory advanced against the Defendant Banks here. Finding that the complaint failed to allege the falsity of DLJ's fairness opinion, the Global court explained that DLJ's "statement is quite clear that it is offering only its opinion of the fairness of the exchange ratio, *based on the financial information provided by [Global Crossing]*." Global at 32 (emphasis added). Given this limited scope of DLJ's opinion, the Global court held that the complaint's allegations regarding the falsity of the underlying financial information and DLJ's lack of "reasonable investigation" into that information did not in any way establish that DLJ's opinion (which expressly disclaimed any such investigation or independent evaluation of the financial information) was itself false. Id. at 32-33. The court concluded that because Plaintiffs failed to allege "that DLJ knew that the information provided by [Global Crossing] was false, or that it misstated in any way its opinion that the exchange ratio was fair based on that information," its allegations of falsity rang hollow. Id. at 33. The Global court's conclusion is directly applicable to the instant case, where the allegations against the Defendant Banks are remarkably parallel.

5. Second, the Global opinion is also directly relevant to another issue addressed by the parties in briefing the Motion to Dismiss, *i.e.*, whether plaintiffs' claim under Section 11 of the Securities Act is barred by the statute of limitations set forth in Section 13 of

¹ Another portion of the court's opinion in Global rejects an argument similar to one made by the Defendant Banks in its Memorandum and Reply here, *i.e.* that DLJ was not subject to Section 11 because it was not a "person whose profession gives authority to a statement made by him." See Global at 30-31; Mem. at 11. However, the court nonetheless dismissed the plaintiffs' claims for the reasons described herein.


that Act. In that regard, the Defendant Banks argued that § 804 of the Sarbanes-Oxley Act does not apply to plaintiffs' Section 11 claims and that, therefore, those claims must be dismissed as time-barred under the applicable Section 13 statute of limitations. (See Mem. at 5; Reply at 3-5).

6. In Global, the court held that the one-year/three-year statute of limitations set forth in Section 13 of the Securities Act – not the enlarged statute of limitations period in Section 804 of the Sarbanes-Oxley Act – continues to provide the applicable statute of limitations period for Section 11 claims. Global at 8-10. The court rejected the exact argument advocated by plaintiffs here and held that the clear and unambiguous language of Section 804 expressly limits its application only to those claims involving “fraud, deceit, manipulation, or contrivance,” and therefore extends the statute of limitations period for securities *fraud* claims only. Id. at 8. The court specifically determined that Section 804 does not apply to Section 11 claims, like plaintiffs' here, because such claims are based on negligence. Id. The Global court's decision on this point is in accord with the other courts that have decided this issue. See Mem. 3-4 (citing cases); Mot. for Leave to Cite Recent Authority in Support of the Household Defs.' Mot. to Dismiss the Corrected Amended Consolidated Class Action Complaint [D.E. 127] (citing In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2003 WL 22738546 (S.D.N.Y. Nov. 21, 2003)).

7. Wherefore, the Defendant Banks respectfully request that the Court consider this recent authority in deciding the Defendant Banks' Motion to Dismiss the plaintiffs' complaint.

Dated: January 5, 2004

Respectfully submitted,

By:  _____

David F. Graham
Julie K. Zeglis
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000
(312) 853-7036 (fax)

*Attorneys for Defendants
Goldman, Sachs & Co. and Merrill Lynch,
Pierce, Fenner & Smith, Inc.*

Of Counsel:

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
(212) 455-2502 (fax)

**SEE CASE
FILE FOR
EXHIBITS**