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

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated,	)	Lead Case No. 02-C-5893 (Consolidated)
Plaintiff,	)	CLASS ACTION
v.	)	Judge Ronald A. Guzmán
HOUSEHOLD INTERNATIONAL, INC., *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR
A PROTECTIVE ORDER LIMITING DISCOVERY OF CLASS MEMBERS

Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz, and Gary Gilmer respectfully submit this response to Plaintiffs' Motion for Protective Order ("Plaintiffs' Motion"), filed on January 25, 2011.

Plaintiffs' Motion should be denied because the discovery sought is appropriate and consistent with the discovery that this Court authorized at the January 5, 2011 status hearing and by Order dated January 14, 2011 (Docket No. 1724). At base, Plaintiffs' Motion is simply a motion seeking reconsideration of the Court's January 5 ruling and January 14 Order. Plaintiffs, however, present no valid reason for the Court to reconsider those rulings or to preclude the straightforward discovery requests issued to large institutional investors with multiple millions of dollars potentially at issue.

In accordance with this Court's directive that discovery be completed by May 24, 2011, Defendants have structured discovery to obtain necessary information regarding the trading activities of major institutional investors during the class period and the basis of those trading activities in order to obtain information relevant to rebutting the presumption of reliance, on an

individual basis, under *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Such discovery is precisely what the Court authorized in its January 5 ruling and January 14 Order.

ARGUMENT

I. Plaintiffs' Motion Is a Motion for Reconsideration of the Court's January 5 Ruling and January 14 Order.

Plaintiffs assert that "Defendants' Phase II discovery is well outside the scope of discovery envisioned by the Court's *November 22, 2010 Order*." (Pls.' Mem. at 12 (emphasis added).) Plaintiffs Motion, however, ignores the fact that this Court expressly modified its November 22 Order to allow Defendants "120 days to conduct discovery as stated in open court." (Docket No. 1724.) In open court, this Court gave Defendants 120 days, until May 24, 2011, "to delve into *whatever issues of reliance they wish to address*." (Jan. 5 Tr. (attached as Exhibit A) at 20:11–13 (emphasis added).) The Court specifically authorized discovery of major institutional holders by means of interrogatories and depositions. (*Id*. at 22:10–13; 26:1–16.) The Court subsequently memorialized its January 5 oral ruling in an Order dated January 14, 2011.

Plaintiffs do not even acknowledge the Court's January 5 ruling or January 14 Order in their Motion. Moreover, the positions they advance are contrary to those addressed by the Court in its January 5 ruling. For example, Plaintiffs argue that, "in the first instance," discovery should be limited to written discovery adhering to the interrogatory in their Proof of Claim form or otherwise requesting only whether the institution had non-public information. (Pls.' Mem. at 1–2.) Plaintiffs assert that "Only a 'yes' answer should allow defendants to engage in further discovery to determine if price paid [played] no part in the decision-making process and the class member did not rely on the integrity of the market." (*Id.*) These issues, as to both content and sequencing, were expressly resolved by the Court at the January 5 hearing. At the January 5 hearing, the Court ruled, based upon the Defendants' position that the interrogatory was not

"sufficient," that Defendants were authorized to "do some *more discovery* while we're getting an answer to that very important question and notifying the class." (Jan. 5 Tr. at 6:16–23 (emphasis added)). Moreover, when the problems of sequencing were raised by Defendants with respect to the discovery period, this Court stated:

> But that's easily taken care of, isn't it? You can ask the very same question *or any question you want in your interrogatories and in your discovery, your 30(b)(6) deposition. You don't have to wait for the response to the notices.* You set up your own sequence in discovery, don't you? That's what it's about.

(Jan. 5 Tr. at 22:10–15. (emphasis supplied)).

Plaintiffs present no valid reason for the Court to reconsider its January 5 ruling and January 14 Order. *See, e.g., Bell v. Leavitt*, No. 06 C 3520, 2007 U.S. Dist. LEXIS 11675, at *3 (N.D. Ill. Feb. 16, 2007) (Guzman, J.).

Plaintiffs do not challenge the selection of the entities to whom discovery has issued or raise concrete concerns regarding any particular institution. Consistent with Defendants' representations that they did not intend "to seek discovery from small individual investors and that their true interest was to inquire of the large institutional investors" (Jan. 5. Tr. at 19:24–20:15), discovery has been sent *only* to large institutional investors with potential multi-million dollar claims. During the meet and confer process, Defendants repeatedly asked Plaintiffs' counsel to identify *any* particular institutional investor to whom discovery requests were sent as to which there was a problem so that the problem could be addressed. (See 1/24/11 Rakoczy Letter, attached as Exhibit B.) Plaintiffs' counsel would not do so.[1]

[1] Plaintiffs *imply*, but do not specifically object, that serving discovery on the five named plaintiffs and 96 other institutional investors is excessive. (Pl. Mem. at 1). Defendants served discovery requests on plaintiffs and those institutional investors which, based on publicly available information such as Forms 13-F filed with the SEC, had significant holdings in Household stock during the relevant period that could potentially involve multi-million dollar claims. (This is less than 0.0003% of the more than 350,000 potential class members slated to receive Notice).

II. Plaintiffs' Objections to Defendants' Narrowly Tailored Discovery Requests to Major Institutional Investors Are Without Merit.

Defendants narrowly tailored their discovery requests in accordance with the Court's January 5 directives, and with the specific objectives of: (1) identifying which of the top institutional holders of Household stock purchased Household stock for their own accounts; and (2) determining information in their possession, custody, or control relevant to rebutting the *Basic* presumption of reliance as to those institutional investors. Defendants' discovery requests (copies of which are attached to Plaintiffs' Memorandum and excerpted therein at 6–10) consist of only six interrogatory questions, five document requests, and eight topics for Rule 30(b)(6) depositions. The discovery requests were delivered to the respective general counsels of the institutional investors, with copies sent to Plaintiffs' counsel simultaneously. These large institutions have in-house counsel and, typically, independent outside counsel who address such discovery matters. To date, none of the institutions that have contacted Defendants' counsel regarding the requests have objected to the discovery.

The objections set forth in Plaintiffs' Motion for Protective Order fall into four broad categories. *First*, Plaintiffs contend that an institutional class member should not be required to respond to this purportedly "burdensome" discovery unless and until it answers "yes" to a question similar to the interrogatory question posed in Plaintiffs' Proof of Claim form. *See, e.g.*, Objection to Interrogatory No. 3; Objection to Document Requests Nos. 2, 3; Objection to Subjects of Examination Nos. 2, 3, 4, 7, 8 (Pls.' Mem. at 6–10.) As discussed above, the Court already has specifically addressed this issue, based upon Defendants' arguments in their Motion for Reconsideration of the Court's November 22 Order regarding the legal insufficiencies of Plaintiffs' interrogatory question. Defendants asserted, among other bases, that "[i]t is inconceivable that in a non-class action, a court would permit a large and sophisticated

investment company to possibly recover tens or hundreds of millions of dollars without being required to respond to basic discovery regarding the essential elements of plaintiffs' claim, without the defendants being afforded an opportunity to depose the plaintiff and those who advised the plaintiff regarding the company's investments, and without ever requiring a jury to render a complete verdict on all elements after being presented with relevant evidence. A class action is simply a procedural device that is not meant to be—and cannot be—used to deprive defendants of their substantive rights. *See* 28 U.S.C. § 2072(b)." Defs.' 12/20/10 Mem. of Law at 13. This Court granted Defendants' Motion in part and authorized Defendants' to pose additional questions regarding reliance "in your interrogatories and in your discovery, your 30(b)(6) depositions" and to "set up your own sequence in discovery." (Jan. 5 Tr. at 22:10–15).

Plaintiffs efforts to revisit the Court's January 5 ruling on this issue should be rejected. Plaintiffs are attempting to dictate exactly what discovery Defendants may take—including the very wording of Defendants' interrogatories—and to control how, when, and if Defendants may conduct the discovery authorized by this Court. There is no basis to allow a party, in effect, to draft the content of the opposing party's discovery requests and control the sequencing of the opponent's discovery. If there were, Defendants could have insisted, for example, that Plaintiffs be limited in the first instance to a single interrogatory asking each Defendant if he or it defrauded Household investors, with additional discovery being confined to only those Defendants who answered the question "yes." Plaintiffs' attempt to prevent Defendants from obtaining any meaningful evidence to rebut the presumption of reliance as to major institutional investors with potential multi-million dollar claims is improper and should be rejected.

Second, Plaintiffs contend that discovery of class members must be limited to discovery about a class member's possession of material *non-public* information about Household. *See, e.g.*,

Objection to Interrogatory No. 4; Objection to Document Requests Nos. 3, 4; Objection to Subjects of Examination Nos. 1, 3, 5, (Pls. Mem. at 6–10.) Plaintiffs argue that by seeking to determine both public and non-public information on which major institutional class members relied Defendants are attempting to re-litigate issues of class-wide reliance that were decided by the Phase I jury. (Pls. Mem. at 2, 10.) As an initial matter, the premise that any issue regarding the element of reliance was determined by the jury in Phase I is incorrect (as the jury instruction conference made clear).[2] Regardless, Plaintiffs' assertion that discovery must be limited to a class members' possession of *non-public* information to rebut individual reliance is refuted by *Basic* itself.

The Supreme Court held in *Basic* that "[*a*]*ny showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 (1988) (emphasis added). The plurality opinion provided three "examples" of ways in which the presumption of reliance might be rebutted (*id.*), and a

[2] The final jury instructions included no instruction about reliance or rebuttal of the presumption of reliance (Docket No. 1614), and the jury verdict contains no findings whatsoever as to the element of reliance. (*Id.* No. 1611.) Furthermore, at the jury instruction conference on April 24, 2009, Plaintiffs sought to submit a "truth on the market" instruction to the jury. Defendants objected on the grounds that it would shift the burden of proof and that Defendants were not asserting a class-wide "truth on the market" rebuttal defense to the element of reliance, but rather the market disclosure issues for the Phase I trial went to the issue of materiality. Counsel for Defendants stated: "If we get to a second phase in the case, we will have every opportunity and every right to rebut the presumption of reliance on an individual basis, and we will do that; but we are not asserting that defense at this stage of the trial" (Trial Tr. (relevant pages attached hereto as Exhibit C) at 3920: 11–15.) The Court agreed stating: "Well, I mean the issue is there because you have to prove materiality, you have to prove falsity, you have to prove those things, so the issue's always there; but just because the issue is there doesn't mean that there's a, the truth instruction is to be given on the defense of truth on the market. I mean that would require an instruction in every case then really. I --- I think the defendant's are correct. I don't think this -- I don't think this comes in. I think what we have here is a question of fact for the jury to determine on the issue of materiality. . . . It's denied." (*Id.* at 3920:18–3921:5.)

concurring opinion provided several additional illustrations. *Id.* at 251 (White, J. concurring in part and dissenting in part).[3]

Plaintiffs argue that Defendants are limited in Phase II to rebutting reliance by establishing "that a class member 'traded or would have traded despite his ***knowing*** the statement was false,' and therefore, did not rely on the integrity of the market." (Pls.' Mem. at 1). Even were Plaintiffs correct that Defendants are restricted to proving that an individual class member traded or would have traded despite understanding a representation to be false, nothing in *Basic* supports Plaintiffs' contention that the means of making such a demonstration must be limited to establishing access to *non-public* information. It is entirely possible, for example, that a particular investor may have disbelieved Household's statements that it was not engaged in predatory lending practices *even if* the investor possessed only public information about Household. This is particularly true in the case of major institutional investors, which are likely to have detailed knowledge of the companies in which they invest, including knowledge about the industry in general and other companies in the industry, and which employ staffs of analysts to review and make investment recommendations and decisions based on both public and any available non-public information.

Furthermore, inquiry into what information—public or non-public—a *particular* investor relied is the opposite of an attempt to re-litigate "class-wide" issues of reliance. The fact that the Phase I jury concluded that available public information did not negate the falsity or materiality of certain of Defendants' statements reveals nothing about what any particular investor knew or

[3] Although Plaintiffs suggest that there are only three ways to rebut the presumption of reliance (Pls.' Mem. at 1), *Basic* makes clear that the three ways of rebutting the presumption described therein are simply *non-exclusive examples*. *Basic*, 485 U.S. at 248–249.

believed or used as a basis for investment decisions. Defendants are entitled to *discovery* of this information.

Third, Plaintiffs object that certain of Defendants' discovery requests are "irrelevant." *See, e.g.*, Objection to Interrogatories Nos. 1, 5; Objection to Document Request No. 5, Subject of Examination No. 6. (Pls. Mem. at 6–10.) For many of the same reasons, Plaintiffs are incorrect.

Information about an institutional investor's trading strategies (Interrogatory No. 1) is relevant because certain trading strategies are not based on reliance on the integrity of the market price. *See, e.g.*, *Fraud on the Market Meets Behavioral Finance*, 31 Del. J. L. 455, 496 ("Momentum traders invest in response to the last change in price. . . They do not rely on any other information") (giving examples of trading models that rebut the presumption of reliance on the integrity of the market price).

Information about persons who prepared research reports on Household for the institutional class member (Interrogatory No. 5) is relevant to the issue of what information the class member had and relied upon in deciding to invest in Household stock. And information about an institution's "firewall" policy (Document Request No. 5; Subject of Examination No. 6) is potentially relevant in at least two situations: (1) where the research arm of an entity learned facts from any source that led it to conclude, or form a view based on public information, that Household's stock price had been artificially inflated by fraud; or (2) where one part of an entity obtained (as a result of, for instance, conducting due diligence in connection with a proposed securitization) non-public information that caused it to conclude that Household's stock price had been artificially inflated by fraud. In either case, it would be essential to know whether that

information passed within the entity to the part of the entity where stock trading decisions were made.

Finally, Plaintiffs seek to limit the relevant time period for discovery to March 22, 2001, through October 11, 2002, the period during which the jury found liability for Defendants' statements, rather than the class period of July 30, 1999, through October 11, 2002. (Pls.' Mem. at 11.) There is no rule or reason why the discovery period should be co-extensive with this limited period. It is entirely possible, and indeed likely, that a class member may have possessed and relied upon information about Household that pre-dated March 22, 2001, and that bears on the issue of whether that class member reasonably relied on Defendants' subsequent statements. Limiting the discovery period to the class period is perfectly reasonable.[4]

CONCLUSION

Because the discovery Defendants propounded to a limited subset of major institutional investors comports with the Court's directives at the January 5 status and the Court's January 14 Order, and because the discovery requests are narrowly tailored to elicit information relevant to making "[a]ny showing that severs the link between the alleged misrepresentation and either the

[4] Plaintiffs also assert that class members should have the option to produce documents rather than answering interrogatories. (Pls.' Mem. at 6.) There is no need for a protective order to obtain this relief. Fed. R. Civ. P. 33(d) specifically allows production of documents if the answer to an interrogatory can be ascertained from the documents.

price received (or paid) by the plaintiff, or his decision to trade at a fair market price," *Basic*, 485 U.S. at 248, the Court should deny Defendants' Motion for Protective Order.

Dated: January 26, 2011

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CERTIFICATE OF SERVICE

Mark E. Rakoczy, an attorney, hereby certifies that on January 26, 2011, he caused true and correct copies of the foregoing Defendants' Response to Plaintiffs' Motion for Protective Order to be served via the Court's ECF filing system on the following counsel of record in this action:

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