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,	)	
	)	**No. 02 C 5893**
Plaintiffs,	)	
	)	
v.	)	**Hon. Ronald A. Guzmán**
	)	
Household International, Inc., et al.,	)	
	)	
Defendants.	)	

Order

Plaintiffs move the Court for a protective order pursuant to Federal Rule of Civil Procedure 26(c)(1)(D). Plaintiffs seek an order limiting defendants' discovery demands to: (1) interrogatories and document requests that address whether institutional class members had any material non-public information or otherwise knew of the fraud and still purchased Household stock; (2) only allowing depositions of, and discovery of trading strategies or models from, the institutional class members who indicate in their responses to interrogatories and document requests that they had material non-public information or otherwise knew of the fraud and still purchased Household stock knowing the price was inflated; (3) prohibiting defendants from seeking discovery regarding reliance issues such as the truth on the market defense already rejected by the jury; (4) prohibiting any discovery regarding any firewall policy separating analysts and investment decisions; and (5) limiting the relevant period for discovery to March 22, 2001 through October 11, 2002. Plaintiffs also seek similar restrictions regarding deposition questions.

The motion is prompted by defendants' rather expansive discovery requests. It appears that defendants have served 98 class members and all 3 named plaintiffs with identical Rule 30(b)(6) deposition notices, requests for production of documents and interrogatories.

The issue presented is not new to this case. It was a topic of discussion at the March 2009 pretrial conference. As the Court put it then:

> The problem, of course, is that if a class action is going to mean anything, it's going to mean that we don't have to bring before the court every single investor in this case on any issue including the issue of reliance. On the other hand, a claim of a constitutional right to challenge the presumption of reliance to a jury if taken to its logical extreme, would require giving the defendant the right to bring in every single investor, which would, of course, destroy the entire concept of a class action. So how we balance those concerns is a question.

(3/12/09 Hr'g Tr. 34.) Defendants' discovery requests and plaintiffs' motion for a protective order now require the court to resolve this issue.

Discovery, of course, is not without limits. Federal rule of Civil Procedure 26(c) allows the court to limit discovery to protect the parties or persons from, among other things, undue burden or expense. Moreover, discovery from non-named class members is not warranted as a matter of course. In allowing some such discovery, the Seventh Circuit stated:

> If discovery from the absent member is necessary or helpful to the proper presentation and correct adjudication of the principal suit, we see no reason why it should not be allowed so long as adequate precautionary measures are taken to insure that the absent member is not misled or confused. While absent class members should not be required to submit to discovery as a matter of course, if the trial judge determines that justice to all parties requires that absent parties furnish certain information, we believe that he has the power to authorize the use of the Rules 33 and 34 discovery procedures.

Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 & n.2 (1985) (stating that generally, "an absent class-action plaintiff is not required to do anything"); *Clark v. Universal Builders*, 501 F.2d 324, 340-41 (7th Cir. 1974). Indeed, one of the principal advantages of class actions over massive joinder or consolidation would be lost if all class members were routinely subject to discovery. Manual for Complex Litigation, Fourth, § 21.41.

Plaintiffs object to the interrogatories, requests to produce and deposition notices because, in their view, the proposed discovery items seek information meant to relitigate the truth on the market defense and/or information that is neither relevant nor likely to lead to admissible evidence. For example, Interrogatory 3 states: "Identify all Documents that You reviewed or relied upon in making any decision to engage in any Transaction with respect to Household Securities." Plaintiffs responded:

> Objectionable to the extent it calls for publicly available information. Defendants litigated truth-on-the-market at trial and should not be given a second bite at the apple. Further, class members should not have to respond further, if they answer "no" to the claim form-type question. A response to this Interrogatory should be deferred until a class member answers "yes" to the claim form-type question.

Because the jury has already determined that the publicly available information was insufficient to dissipate the effect of defendants' fraudulent statements, *i.e.*, rejected the truth on the market defense, it is highly unlikely that this inquiry will lead to evidence of class members who chose to purchase knowing that the price of the stock was fraudulently inflated. Moreover, responding to defendants' many detailed interrogatories and production requests about hundreds or thousands of individual transactions that took place nearly a decade ago would impose an unacceptably onerous burden on unnamed class members. As a result, it is very likely that having to respond to the requests will discourage eligible unnamed class members from making claims. This issue is more directly and simply addressed by the question each party claiming damages will have to answer under oath in

responding to the class notice/claims form.[1] The answers to that question will allow defendants to determine whether there are any purchasers to whom the presumption of reliance does not apply without imposing a high burden on unnamed class members or discouraging eligible members from making claims.

Because the truth on the market defense has already been fully litigated and rejected, the likelihood that any individual purchaser concluded from his or her knowledge of publicly available information that the price of the stock was fraudulently inflated is small. The same is not true, however, for decisions based upon non-publicly available information. Requests for disclosure of any non-publicly available information relied upon by individual purchasers would be more likely to uncover admissible evidence and would not pose as great a burden on the respondents. If the interrogatories and requests to produce are limited to this issue, are phrased in such a manner as to go directly to the issue and do not impose an unnecessary burden on the unnamed class members, the Court will allow them.

Requests that are improperly tailored, however, will be prohibited. For example, a request to produce all documents relating to any information regarding pricing or market analyses considered in each of hundreds of transactions, would be unnecessarily burdensome. The same is true for discovery requests relating to trading strategies utilized during the damages period. If still available, such information would not likely require inquiry into thousands of individual transactions while still allowing defendants to identify the existence of a consideration that might be reasonably likely to lead to admissible evidence of non-reliance.

Plaintiffs contend that defendants' burdensome discovery requests are intended to harass class members and deter them from filing claims. (Mem. Law Supp. Pls.'Mot. Protective Order 2.) Plaintiffs' argument is a common one in discovery disputes, although it is more often the defendants complaining of plaintiffs' unnecessary requests. And indeed, one of the considerations articulated by the *Brennan* Court in allowing discovery was that it found nothing in the record to suggest that the discovery procedures were being used as a tactic to take undue advantage of the class members or as a stratagem to reduce the number of claimants. But the Court need not reach the conclusion as to defendants' intention that plaintiffs urge. It is sufficient that in this case the request for a protective order is supported, in addition to the reasons given above, by defendants' own prior representations to this Court. As far back as the pretrial conference of March 12, 2009, Ms. Patricia Farren, counsel for the defendants, while discussing the desirable parameters of the second phase of the proceedings, informed the Court that it was not defendants' intention to "drag in every pension fund in the country" to be deposed. In fact, she pointed out:

> [I]f we deposed 10 entities . . . we would capture information on 50% of the stock ownership of this Company. . . . [T]he institutional investors who owned the lions

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[1]Part III of the claim form requires each claimant to answer the following question: "If you had known at the time of your purchase of Household stock that defendants' false and misleading statements had the effect of inflating the price of Household stock and thereby caused you to pay more for Household stock than you should have paid, would you still have purchased the stock at the inflated price that you paid?"

> share of Household stock were big major sophisticated banks and other funds . . . . We could capture information about 50% of stock ownership by deposing only 10 of them. We could capture 60% by deposing only 15 of them. It may be that one or two sample depositions will tell us what we need to know and whether this is a worthwhile defense or not.

(3/12/09 Hr'g Tr. 27.) Ms. Farren repeated this assertion a few minutes later: "[A]s I said, Your Honor, we could encompass 60% of the ownership by looking at only 15 large institutional investors." (*Id.* 32.) Finally, Ms. Farren drove the point home one more time, virtually telling the Court just what defendants needed to do in discovery in order to prepare to rebut the presumption of reliance:

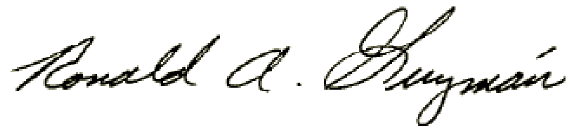
> But we don't have any intention, your honor, of dragging every small investor in here. We need to know what the 15 big institutional investors – what they did, whether or not they can prove reliance on an individual basis, whether we can – I should put it correctly. Whether we can rebut the rebuttable presumption of reliance as to them by simply finding out the facts that were denied during fact discovery.

(*Id.* 33) (emphasis added).

It could not be clearer from these statements that defendants, after careful consideration and investigation, determined that the depositions of 10 to 15 large institutional investors would be sufficient to prepare to rebut the presumption of reliance. And, it was with this premise in mind, that the Court, in response to defendants' requests to reconsider, allowed them to move ahead with discovery even before any responses to the reliance interrogatory were returned. With good reason, the Court fully expected that defendants would proceed to prepare to depose 10, or at most 15, of the large institutional investors. Yet now, these same defendants tell us that they never committed to any such limited number of depositions, but actually require the deposition of nearly 100 investors.[2] The difference is, to say the least, substantial. Yet, defendants do not explain how or why 15 became 98.

The Court finds the defendants' first representations to be reasonable. Therefore, defendants will be allowed a maximum of 15 depositions prior to the return of the claim forms.

SO ORDERED **ENTER: January 31, 2011**



RONALD A. GUZMAN
U.S. District Judge

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[2]Whether defendants "committed" to a certain number of depositions is irrelevant. The point is they told the Court that 10 to 15 depositions are what they needed and even stated the reasons for this determination.