**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF ILLINOIS**

**EASTERN DIVISION**

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

**LEAD PLAINTIFFS' RESPONSE TO PRESENTMENT OF DEFENDANTS' MOTION TO COMPEL DISCOVERY DIRECTED TOWARDS ABSENT CLASS MEMBERS**

## I. INTRODUCTION

Lead Plaintiffs Glickenhaus & Co., PACE Industry Union Management Pension Fund, and International Union of Operating Engineers Local No. 132 Pension Plan ("Plaintiffs"), and Aberdeen Asset Managers Ltd., Bessemer Group Incorporated, I.G. Investment Management, Ltd., Kentucky Teachers' Retirement System, Legal & General Group PLC, Mason Street Advisors, LLC, Millennium Partners, LP, Ramsey Quantitative Systems, Inc., and West Virginia Laborers' Trust Fund oppose defendants' motion to compel documents and further interrogatory responses. Defendants' motion is directed toward 11 entities, but any decision will impact at least 26 other entities that defendants have served with similar discovery. In addition, in the past two weeks, defendants served another 77 institutions with party and non-party discovery that is even broader than the discovery at issue. Defendants "revised" discovery requests are clearly overbroad and violate the Court's January 31, 2011 Order ("Order") since they seek any internal analysis or internal communications by class members concerning publicly available information about Household. The Court was clear that "[r]equests that are improperly tailored, however, will be prohibited." January 31, 2011 Order at 3 [Dkt. No. 1737]. As the Court stated:

> 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***.

*Id.* (emphasis added). Defendants have moved to compel further responses to Interrogatory No. 4 and Document Request No. 4. These requests ask for any "non-public" reports regarding Household. The absent class members have responded that they did not have any non-public

information about Household. However, defendants now seek any ***internal*** or private analysis of Household performed by these class members based on public information, which is not discoverable under the Court's Order. In effect, defendants' requests attempt to characterize an institution's private analysis of public information as "non-public" information. In fact, the Court rejected defendants' argument at the January 27th hearing and in the Order, making it clear that only ***non-public information*** relied upon by class members is discoverable. Rather than seek a second protective order, the absent class members and Lead Plaintiffs objected to the revised discovery in the hope that defendants would withdraw their overbroad discovery and serve discovery in compliance with the Court's order.

Defendants' interrogatories fail to even ask the most basic question, and the question most relevant to rebutting the presumption of reliance – did class members buy Household stock knowing it was inflated by defendants' false statements? (*i.e.*, the claim form question). A class member could only know the stock was inflated by having access to material non-public information. The Court was clear at the January 27th hearing that this type of narrow request would be appropriate. Instead, defendants have demanded that class members search for documents over 10 years old for any internal analysis or communications regarding publicly available information about Household. Yet, as the Court stated repeatedly at the January 27th hearing, all public information is incorporated or "rolled" into the price. Jan. 27, 2011 Tr. at 17, 22, 26. In fact, if the class member's trading strategy relied on price (which incorporates all public information), reliance cannot be rebutted. *See* Court's Nov. 22, 2010 Order at 4-5. Defendants' request for documents and information about a class member's private analysis of public information, or its communications about public information, is irrelevant and should be disallowed since it is not likely to lead to admissible evidence, especially in light of the fact that defendants' truth-on-the-market defense was already rejected on a class-wide basis at trial.

## II. ARGUMENT

### A. Defendants' Discovery Is Still Overbroad

Defendants served an initial round of discovery on 98 absent class members. Lead Plaintiffs moved for a protective order to limit the scope of the discovery. On January 31, 2011, the Court granted the protective order limiting the scope of discovery. In early February 2011, defendants served revised discovery on 101 entities. Defendants have withdrawn some of their party discovery requests because they improperly served many investment advisors that are not class members. However, approximately 37 institutions still have outstanding discovery disputes with defendants on this discovery. Defendants' revised discovery remains overbroad. *See* Defendants' Exs. A and B to their motion to compel. In late March 2011, defendants served even broader party and third party discovery on 76 additional entities. Although defendants repeatedly told the Court that they only needed discovery of the top "10 to 15" institutions, they have served discovery on well over 100 institutions (and counting).

After losing the truth-on-the-market defense at trial, defendants can only rebut the presumption of reliance for class members by showing a class member knew material non-public information about Household and knew that defendants' public statements were false, yet still purchased Household stock because of other unrelated concerns. Defendants cite to *Basic Inc. v. Levinson*, 485 U.S. 224, 249 (1988) but fail to focus on the key part of the quote – that the investor ***knew*** the price had been manipulated by defendants' false statements yet still bought or sold because of an unrelated concern. *Id.* The Court opined that defendants could seek discovery on this issue. *See* Jan. 27, 2011 Tr. at 19. Yet, defendants do not even ask this simple question: did the class member know the price had been manipulated by defendants' false statement and still buy the stock for other reasons? Instead, defendants have asked a number of interrogatory and document requests that focus on internal analysis of publicly available information or communications with Household

about public information. These requests are improper since Household's stock price incorporated all public information.[1]

Defendants' citation to the deposition testimony of plaintiff's expert, Professor Daniel Fischel, does not advance their position. Fischel's testimony only supports the proposition that an article or analyst report can provide new information to market participants by analyzing publicly available information which will then be reflected in the price of the stock. However, that situation is quite different than an investor who knows non-public information about a company, permitting that investor to trade without relying on the integrity of the market price.

### B. There Is No Evidence That Class Members Aberdeen and Ramsey Quantitative Did Not Rely on the Integrity of the Market Price of Household Stock

Defendants point to the trading strategy of Ramsey Quantitative, as described in Ramsey's discovery responses, as somehow showing its knowledge of the fraud. However, defendants never even asked Ramsey the key question – did they have material non-public information about defendants' fraud and still buy Household stock? Ramsey's strategy of identifying "mispricing of securities" is different than knowing of a fraud and buying the stock. "Mispricing of securities" means an investor believes a stock is undervalued based on its growth prospects. The investor is still

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[1] Defendants cite *Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190 (2d Cir. 2008) and *Sutton v. Bernard*, No. 00 C 6676, 2001 WL 897593, at *6 (N.D. Ill. Aug. 9, 2001) for the noncontroversial proposition that access to internal reports and analyses can provide a basis for an inference as to state of mind. Defs' Brf. at 4-5 n.6. Both *Teamsters* and *Sutton* involved allegations that defendants' access to internal reports or data based on ***non-public information*** that contradicted their public statements was circumstantial evidence of scienter. *Teamsters Local 445 Freight Division*, 531 F.3d at 196 (failing to specifically identify the reports or statements containing the alleged contradictory information); *Sutton*, 2001 WL 897593, at *6 (allegations that defendants closely monitored the company's business via internal reports constituted circumstantial evidence of scienter). Here, however, defendants' discovery requests improperly seek internal reports that discuss ***publicly available*** information. Because the jury already rejected defendants' truth-on-the-market defense, discovery of respondents' internal reports based on publicly available information should not be permitted.

relying on the price of the stock. Discovery of a private analysis of public information by Ramsey or others is not relevant under *Basic* as long as these entities relied, in part, on price.

Defendants' argument regarding Aberdeen's investment philosophy is also misplaced. As long as Aberdeen relied upon price, it relied on the integrity of the market. Aberdeen's subjective belief reflected in any private analysis based on public information is irrelevant if their trading strategy relied upon price. Aberdeen's reference to "inefficiency of the markets" simply refers to finding undervalued stocks by "identifying good quality stocks cheaply and holding for the long term" as described in its investing philosophy. *See* Defs' Brf. at 8. There is no evidence that Aberdeen did not rely upon price in its investing strategy.

### C. The Relevant Time Period for Discovery Should Be Limited to March 22, 2001 through October 11, 2002

The jury found that defendants violated the federal securities laws with respect to statements made from March 23, 2001 to October 11, 2002, and found no liability for statements made prior to March 23, 2001. *See* Docket No. 1611. Despite this fact, defendants' discovery defines the relevant period as "July 30, 1999 through October 11, 2002." In light of the jury's finding, however, absent class members should not be required to produce documents from July 30, 1999 through March 21, 2001. Demanding that class members search for and produce documents more than a decade old – when those documents no longer have any relevance to this case – would impose an undue burden on them. This is exactly the type of undue burden and annoyance that Fed. R. Civ. P. 26(c)(1) was designed to prevent. Plaintiffs, therefore, request that the Court limit the relevant time period for defendants' discovery to March 22, 2001 through October 11, 2002.

## III. CONCLUSION

Defendants' motion should be rejected in its entirety.

DATED: April 5, 2011

Respectfully submitted,

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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 Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 W. Broadway, Suite 1900, San Diego, California 92101.

2. That on April 5, 2011, declarant served by electronic mail and by U.S. Mail to the parties the following documents: LEAD PLAINTIFFS' RESPONSE TO PRESENTMENT OF DEFENDANTS' MOTION TO COMPEL DISCOVERY DIRECTED TOWARDS ABSENT CLASS MEMBERS.

The parties' e-mail addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of April 5, 2011, at San Diego, California.

Mo Maloney