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, **Plaintiff,** **v.** **HOUSEHOLD INTERNATIONAL, INC.,** et al., **Defendants.**	**Lead Case No. 02 cv 5893** **Judge Ronald A. Guzmán** **Magistrate Judge Nan R. Nolan**

ORDER

Many custodian banks and other third-party claim filers have submitted their master claim forms attaching information about individual client's transactions. However, at the April 7, 2011 status conference and in their accompanying motion, Plaintiffs informed the Court that certain custodian banks have expressed concerns regarding the difficulty of obtaining answers to the claim form question from their clients. The Court has asked the parties to submit their respective positions on how best to proceed in view of concerns expressed by the claimants. In response, Gilardi & Company ("Gilardi"), the claims administrator, has identified the clients of third-party claim filers who appear, at least preliminarily, to have an allowed loss under the Plan of Allocation. Plaintiff has provided the following detail regarding these third-party claims.

	CLAIMS	AMOUNTS OF ALLOWED LOSS
Total Number of Claims Submitted by third-party filers:	27,939	
Claims with no Allowed Loss:	15,433	
Claims with Allowed Loss of $1-$250,000:	11,760	$233,245,777
Claims with Allowed Loss of $250,001-$500,000:	326	$116,247,924
Claims with Allowed Loss of $500,001-$1,000,000:	204	$142,376,093
Claims with Allowed Loss of $1,000,001+:	216	$756,487,276
Total Number of Claims with Allowed Loss:	12,506	$1,248,357,070

Only 38 entities, custodian banks and third-party filing services filed multiple claims as of May 2, 2011. As can be seen from the table above, of 27,939 claims filed, 12,506 have been determined to generate an allowed loss under the Plan of Allocation totaling $1,248,357,070.00. The vast majority of the claims generating allowed loss, 11,760, are for less than $250,000.00. The remaining 746 of these claims (6% of all claims with allowable losses) account for $1,050,111,293.00 or 81.3% of the total allowable loss.

Based upon conference calls with representatives of the Bank Depository User Group (a trade association of custodian banks and financial institutions), plaintiff reports that certain of the custodian banks responsible for the filing of the above summarized claims have expressed concerns regarding the difficulty of obtaining answers to the claim form question from their clients. More particularly, it appears that these banks estimated it would take a great deal of effort and in excess of 12 months to reach out to each and every class member with an allowable claim and that such an effort is likely to result in a low percentage of responses. Typically, most custodian banks, according to the Bank Depository User Group, do not have direct contact with

clients. Therefore, the custodial banks lack knowledge regarding what person, group or department of each of their clients has the information to respond to the claim form question, and thus, to whom the interrogatory should be directed. In order to ascertain this information, the custodian bank would first have to find out who in the bank's own organization is responsible for dealing with that particular client. To do this might first require the bank to separate the accounts by geographic region as well as by type, *i.e.*, corporate, institutional, or private wealth account. Then, the person responsible for dealing with that particular type of client in that particular region would have to be contacted and educated in order to enable or him/her to make the appropriate inquiry of the appropriate client representative in order to obtain the desired information. Of course, this assumes that the particular person with relevant knowledge, whether an employee or an outside investment adviser, is still available and can be located. . When done thousands of times such a process, the association believes, will become not only expensive, but perhaps more important to us, prolonged.

Defendant's response is essentially that the process should be no more difficult than that which is followed when custodian banks send out checks or notices to their clients. While such an approach might be expected to bring about an acceptable result when sending out a check or a notice, *i.e.*, when the aim is merely to impart information, it is much less likely to do so when the aim is to elicit information. In the latter situation, it will be necessary to first pinpoint who within the particular client institution actually has the information being sought. Unless that is done, the result will likely be a large number of inadequate responses. To answer the interrogatory included in the claim questionnaire requires particularized knowledge of an event or multiple events over

particular period of time that occurred years ago. Sending such an inquiry without first ascertaining who, or what group or department within an institution, is likely to have such particularized knowledge would likely result in a huge waste of time and resources. Time, of course, is extremely important. The court has previously voiced its concern that the longer the process takes the less likely it is that the defendants will actually have sufficient assets available to satisfy any final judgment that might result from what has already been a long, difficult and expensive process.

The Federal Rules of Civil Procedure specifically recognize and provide for limitations on discovery:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C). These explicit limitations represent a recognition that judges have an obligation to limit discovery in order to avoid the abuses of redundancy and disproportionality in

all cases.1

This is especially true in class action cases. In general, post-certification discovery of unnamed class members should be conditioned upon a showing that it serves a legitimate purpose. In setting limits the court should consider the availability of obtaining the information from other sources and the burden upon the class members, *e.g.*, whether the proposed discovery will require class members to obtain legal counsel or technical advice from an expert or undertake extensive efforts to obtain information not readily available to them. The court should consider limiting the number of class members to whom interrogatories may be directed, and/or limiting the discovery to a questionnaire proposed and submitted by the court, rather than the litigants. One of the principal advantages of a class-action lawsuit would be entirely lost if all class members were routinely subjected to discovery. (Ann. Manual for Complex Lit. § 21.41 (4th ed.). Some courts have held that such discovery is simply not available in class actions. This court has previously assessed these factors and crafted what it considers to be a reasonable approach to discovery in this case; taking into account both the defendant's need for discovery and the class members; need to be protected from extensive discovery processes that might discourage the filing of claims and delay the proceedings for years to come. From the description given by the Bank Depository User Group, it has become clear that the burden placed on class members by the interrogatory which the court has previously approved is significant, as would be

1 Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility, 1984, pp. 32–33

the time involved in obtaining responses from all possible class members with allowable claims. The burden, and most likely the time required to respond, will be greater for the 11,760 smaller claims - these claimants are much more likely to be discouraged from following through on a claim if it requires a burdensome response. The 746 large claims are not likely to be discouraged by a discovery request that requires a substantial effort to fulfill. Dealing with a smaller number of claims will, of course, increase the speed and the likelihood of a meaningful response.

That only a small minority of the claims would account for more than 80% of allowable losses is not entirely surprising. Indeed, defendants have known this for some time; for they represented to the court on multiple occasions – even before the trial - that this would be so:

> This does not mean that Defendants intend to seek discovery of every absent class member irrespective of size. . . . This process would be focused by the concentration of the largest claimants within a small number of large institutional investors. . . . Defendants have no incentive to waste time and money on examining small shareholders.

(Defendants' Post-Verdict Submission Dkt. No. 1623 at 8.)

> [I]t is not Defendants' intention to pursue discovery against every absent class member, as and noted, the large concentrations of Household stock in the hands of a relatively few large Class Period shareholders will permit considerable streamlining.

(*Id.* at 16.)

> [I]f we deposed ten entities . . . we would capture information on 50 percent of the stock ownership of this Company. . . . [T]he institutional investors who owned the lion's share of Household stock were big major sophisticated banks and other funds

> . . . . We could capture information about 50 percent of stock ownership by deposing only 10 of them. We could capture 60 percent 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."

(March 12, 2009 Hrg. Tr. at 27.)

> [A]s I said, Your Honor, we could encompass 60 percent of the ownership by looking at only 15 large institutional investors.

(*Id.* at 32.)

> 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. at 33.

Subsequent events, specifically the statistics of claims filed cited above, have proven defendants' assertions to be correct. We now know that discovery of 80% of the claimed losses can be achieved by addressing only 6% of the claims. This, coupled with the other avenues of discovery the court has already approved, constitutes a reasonable approach to balancing the needs of the defendants for discovery with the need to protect class members from discouragement and the need to move this already 9 year-old case towards a conclusion.

The Court approves the use of Plaintiffs' proposed one page notice with the following modification. The following text shall be deleted. "(A "No" answer to this question means you may be entitled to share in the recovery . A "Yes" answer to this question means you may be subject to additional requests for information and may or may not recover any money.)" The

claims administrator is authorized to prepare the customized one-page notice for each claimant and provide the forms to the third-party filers for dissemination to their claimants. The third-party claims filer will be instructed to send the notice to each entity and individual that has a claim with an allowed loss in excess of $250,000.00 and obtain an answer to the question and the signature of the person who provided the answer and submit the executed notices to Gilardi, as they are received. The Court concurs with Lead Plaintiffs suggestion that the third-party filers should be given 90 days from receipt of the one-page notice form to obtain executed forms.

Dated: May 31, 2011

SO ORDERED **ENTER:**

RONALD A. GUZMÁN
District Judge