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,	)	
Plaintiffs,	)	**No. 02 C 5893**
v.	)	**Judge Ronald A. Guzmán**
HOUSEHOLD INTERNATIONAL INC., et al.,	)	
Defendants.	)	

ORDER

The parties have filed position papers on the status of discovery and the notification and claims filing process previously ordered by the Court. With this order the Court addresses the main issues raised by the submissions, including challenges to certain claims and defendant's request for an extension of discovery.

The defendants raise several issues with respect to the claims filing process. Apparently, claims are being submitted by third parties without proof of authorization. The Proof of Claim form instructed claimants' representatives (executors, administrators, guardians, conservators and trustees) to include with the claim proof of their authority to submit the claim on behalf of the parties they represent. Many of the custodian banks that submitted claims on behalf of purported clients, defendants argue, failed to do so, and, thus, these third party claims are fatally deficient. As an example, defendants point to over $100 million worth of claims submitted by Northern Trust Company on behalf of Putnam Investment Management and mutual funds managed by Putnam. It seems that

Putnam's attorney has declared that Northern Trust has no authority to file claims for Putnam, that Northern Trust often files duplicate claims for Putnam and other of its clients and that Putnam intends to file its own claims. Defendants also described a similar filing without authorization by Bank of New York Mellon Asset Servicing on behalf of an Oppenheimer Fund. According to an attorney for the representatives of the Oppenheimer Fund, Bank of New York Mellon Asset Servicing's authorization was no longer current. Defendants give other examples as well. They conclude by asserting that claims filed without the required evidence of the filer's alleged authority "should be summarily rejected." Def 's Status Report In Connection with the June 15, 2011 Status Hearing (DOC #1764) at 8.

The Court disagrees. The purpose of the claims submission process is to identify the true victims of the fraudulent conduct the jury has determined the defendants committed and allow such victims a fair and reasonable opportunity to present their claims for redress. If, for example, a claim is filed by a custodian whose authorization to file on behalf of a victim has lapsed, but the victim desires to file substantially the same claim, there is no harm in accommodating the victim's desire to file its claim either independently through another custodian or to ratify the claim already filed. The defendant will already have been apprised of the claim amount and the party on whose behalf the claim is being made and will have the opportunity to verify or disprove the substance of the claim through the claims adjudication process. The Court sees no reason to summarily reject all such claims because of what is likely no more than confusion or overlap in authorization. Whether any particular claim is ultimately deemed invalid

because authority to file was lacking, proof of transactions was insufficient, or for some other reason is a determination to be made by the magistrate judge during the claims adjudication process to the extent that a conflict remains after the claims administrator has performed its function.

Defendants also complain of duplicate claims. Again, the validity of any one claim must be determined through the claims adjudication procedure. It should, however, surprise no one that some custodians, in an effort to insulate themselves from any potential liability for failure to act, will file claims on behalf of clients or prior clients when technical authorization may not exist. Such duplicate claims can usually be easily reconciled through the claims adjudication process.

Defendants also request an extension of the discovery period. Plaintiffs object. On November 22, 2010, following the initial phase of the trial, the Court outlined a discovery procedure to address defendants' right to rebut the presumption of reliance. The process consisted of an interrogatory in every claims form to be answered by every claimant in order to determine whether the claimant would have purchased Household stock even if it had known, at the time, that the price of the stock was inflated by defendants' false and misleading statements. As to any claimant who answered yes, defendants would then be allowed to conduct additional discovery in order to prove that price played no part in the decision to purchase the Household stock. This protocol, as explained in the order, was meant to resolve the tension between the defendants' right to

rebut the presumption of reliance which had been established by the jury's finding in the initial phase trial and the purpose behind Federal Rule of Civil Procedure 23.

Thereafter, defendants filed a motion for reconsideration claiming that limiting discovery to those who answered "yes" to the interrogatory unfairly limited their ability to discover the evidence necessary to rebut the presumption. While not agreeing with much of the defendants' argument, the Court nevertheless allowed an additional 120 days of discovery of class members without regard to whether the claimant answered “yes” or “no” to the interrogatory.

Defendants then proceeded to serve lengthy and detailed interrogatories on all of lead plaintiffs and no less than 98 other institutional investors and, apparently, sought to depose all such investors. In its order of January 31, 2011 (DOC #52894) the Court expressed surprise at the expansive nature of the discovery undertaken by the defendants. Such discovery ran contrary to every representation previously made by the defendants to the Court regarding the scope of discovery they required or intended in preparation for the second phase of the proceedings. Weighing the arguments from both sides, the Court granted in part plaintiffs’ request for a protective order limiting some aspects of defendants’ proposed discovery. In particular the Court determined that the defendants would be limited to a maximum of 15 depositions prior to the return of the claim forms.

Before the Court is defendants' current request for an extension of the discovery period. Defendants first argue that because they were required to conduct discovery

before the "identity and trading patterns of most actual claimants became known," they served discovery on the institutions that were shown by SEC filings to be the largest record holders of Household stock during the class period. But, defendants explain, the public filings proved to be poor "proxies" for identifying actual investors or estimating their possible losses because many of the largest institutional holders held Household stock solely as nominees for affiliates or unidentified beneficial holders or the institutional investors employed outside investment advisors and were not themselves the actual decision makers with regard to investment decisions.

But this is not what defendants previously represented to the Court. As the Court has previously pointed out in great detail, prior to the commencement of the trial of phase one, the defendants repeatedly represented to the Court that they knew who the major investors, not the major *holders* but the major *investors*, were. Further, they explicitly assured the Court that because these major investors held such a large percentage of the Household stock, they were the only investors defendants would need to investigate. In fact, they assured the Court that the depositions of 10 or so such investors would immediately tell them whether there was any basis upon which to dispute the presumption of reliance afforded by the fraud on the market theory.

Defendants also made the same representations to the jury throughout the trial. From lead counsel's opening statement to closing arguments defendants hammered away at the "fact" that their largest “investors” (who they explicitly named) were among the world’s largest and most sophisticated institutional investors who could not possibly have

been fooled into investing in Household stock by the alleged misrepresentations. After making such representations both to the Court, for the purposes of defining the parameters of the discovery they would require, and then to the jury, for the purpose of rebutting the plaintiffs' class-wide liability case, defendants now simply execute an about face and represent exactly the opposite as a basis for demanding extended and expanded discovery.

The Court has difficulty crediting these new assertions. The evidence at trial showed that defendants embarked upon a course of action intended to increase the market price of Household stock (and the value of their own stock options) during the relevant time period. The trial evidence also showed that during that period, institutional investors met privately with Household management. (See Def.'s Status Report in Connection with the June 15, 2011 Status Hearing (DOC # 1764, at 12) (alleging that institutional investors who employed active management strategies met privately with members of Household management and relied upon these private discussions in making their investment decisions.)) A reasonable assumption is that Household management was only conducting such private meetings with those persons in charge of making the actual investment decisions for select large investors. Defendants had to have known who the actual investment decision makers of their largest investors were or they could not have planned for and held such private meetings.

Despite their pre-trial assurances about the scope of discovery, a mere three weeks after the jury reached its verdict, before any discovery had been taken, before any

claims had been filed or investigated, before any of the Rule 30(b)(6) depositions cited as support for the need for more discovery, defendants suddenly claimed that "[i]t is not possible to predict at the outset how many depositions or other discovery may be required." (Defs.' Recommendations for Phase Two Proceedings (Docket No. 1623) at 19.) Given the timing of this posture change, it is highly unlikely that it was driven by any new knowledge about the identity of the primary decision makers. Rather the logical inference is that it was driven by a new strategy.[1] Discovery has now, suddenly, become a complicated and massive undertaking without which, defendants argue, their "constitutional right to obtain evidence to rebut the presumption of reliance as to *every member* of the class" will be trampled. (Defs.' June 15, 2011 Status Report (DOC #1764), at 11, n 7. (emphasis added.) The Court finds this statement especially surprising since prior to the jury verdict defendants had represented to the Court that they had no intention of taking discovery from every small investor in Household stock. Under the circumstances the Court is not convinced that defendants were mistaken when they earlier represented to the Court and the jury that they knew who the key decision makers were.

Even if we were to assume that defendants' new assertions are entirely accurate, an expansion of discovery would be appropriate only if defendants had been diligent thus far. Quite the contrary is true. In the Court's order of November 22, 2010 (Doc. # 1703, at 9-10) defendants were given leave to proceed with full discovery as to Wells Fargo. Yet they inexplicably delayed and failed to follow up on inadequate responses to their discovery requests for almost four months; waiting until a few days before the discovery

[1] In their June 15, 2011 status report (DOC #1764) defendants cite to various Rule 30(b)(6) depositions (Vurtis Investment Partners, International Union of Operating Engineers Local 132, Oppenheimer), in which representative witnesses testified they were not the actual investment decision-makers. It is noteworthy that defendants announced the radical change in their discovery posture long before any of these depositions were taken.

cutoff date to file a motion to compel. In four months defendants failed to take a Rule 30(b)(6) deposition or elicit any meaningful discovery of any kind from Wells Fargo, a major potential claimant in this case whose reliance upon the market price they had good reason to doubt. When queried in Court, no satisfactory explanation was given for such foot dragging. If allowed to continue at that pace, it would take defendants some 20 years to finish discovery on the "newly discovered" 98 major investors. While such a time frame might be satisfactory to the defendants, it is not acceptable to the Court.

Defendants also argue that they need more time to follow up on discovery which has uncovered evidence that rebuts the presumption of reliance. In this respect they point to The Vanguard Group, one of the industry leaders in indexing, which answered the reliance question "yes." Having received a "yes" response, defendants were authorized, under the Court's ruling, to follow up with further discovery. But the record reflects that they simply failed to do so. After receiving the affirmative response, defendants then spent months taking written discovery, did not notice a Rule 30(b)(6) deposition until April and then, inexplicably, withdrew it. Though they had ample time, they never took Vanguard's deposition, foregoing an opportunity to gather evidence to support or refute their theory that index traders would not have relied on market prices in deciding to purchase Household stock. This is not diligence in pursuing discovery.

Defendants also claim the need to conduct further discovery regarding private meetings between investors and Household management to prove that certain claimants received material nonpublic information. They reference statements by various

institutional investors regarding the importance of their private meetings with Household management. But as plaintiffs' point out, and defendants admit, all such deponents asserted that they did not receive any insider information at such meetings. Furthermore, individual defendants were themselves present at any such meetings and would have personal knowledge of all that was said during such meetings. To conduct further discovery in this regard, defendants merely have to query themselves, an exercise that does not require the Court's discovery processes.

In addition, these meetings are not something recently discovered which must now be further investigated by even more discovery. Defendants have known for a long time that such meetings took place, well before the trial of this case. This is evident because some defendants and defense witnesses were obviously prepared to and did testify at trial, under oath, that they were very careful in this regard, and did not disclose any material nonpublic information in their presentations and discussions with investors. To prepare truthful testimony in this regard would require defendants to review and refresh their recollections as to what was actually said during all such meetings. Again, the Court f has difficulty crediting defendants' assertion that they need more time to conduct discovery. In this context, it seems that four months would be more than sufficient time to conduct discovery as to this issue, if indeed, any discovery is required at all.[2]

[2] Defendants emphasize that several investors considered the "insights" gained by such meetings of great importance and the resulting analyses they developed were not available to the public. The inference being that subsequent determinations to purchase Household stock were therefore based on non-public information. But basing a determination to purchase stock on analytical manipulation of public information and/or privately held conclusions about the likely effect of public information is not the equivalent of basing a decision on material non–public information.

Next, defendants posit that their discovery has disclosed that some institutional investors disavowed any belief in, or reliance on, the efficient market hypothesis. Why this forms a basis for the need for further discovery is unclear. The issue is whether any investor would have purchased the Household stock even if he had known that its price had been artificially inflated by defendants' false and misleading statements. Defendants have stipulated that Household stock traded in an efficient market. That being the case, only purchasers who paid no attention to the market price did not rely on defendant's false and misleading statements as reflected in the market price of the stock. Did any of the investors who proclaimed they did not believe in the efficient market theory state that they would have purchased the Household stock even if they had known that its market price had been artificially inflated by defendants' false and misleading statements? Defendants make no such assertion. They have been given the opportunity to inquire, if they failed or intentionally determined not to make this inquiry, they cannot now come before the Court asking for more time to do what they could have done within the time frame allowed by the Court's ruling.

Defendants have apparently now served some form of written discovery on 130 institutions and they have taken 12 depositions. They have withdrawn and revised discovery requests, inexplicably failed to follow up on obvious avenues of discovery and have cancelled depositions. Meanwhile, this nine year old case continues without resolution for either side. At some point, getting a case to a final conclusion becomes paramount. The lawsuit is worthless to the plaintiffs and damaging to the defendants if it goes on for so long that the relief granted is, by virtue of the workings of time, dissipated

and the parties involved both come out losers. One of the biggest harms of class action lawsuits, defendants often argue, is the resource drain that such lawsuits inevitably cause even before any determination of liability. In such situations undue delay can place the defendants in a position of peril which damages their ability to move forward with their business. Plaintiffs, on the other hand, argue that, after a determination of class-wide liability such as we have here, such delay works to their extreme detriment. They have no way of ensuring that defendant's ability to pay any damages they are awarded is not being dissipated; leaving them with a worthless judgment that took nine years and a tremendous expenditure of resources to obtain.

For the reasons given above, with the exception of the discovery of Wells Fargo which has already been addressed by minute order, defendants' request for an extension of time to conduct further discovery is denied.

Dated: August 16, 2011

SO ORDERED **ENTER:**

Ronald A. Guzmán

RONALD A. GUZMAN
District Judge