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)
Plaintiffs,	)	
v.	)	Hon. Ronald A. Guzman Magistrate Judge Nan R. Nolan
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	
Defendants.	)	

NOTICE OF FILING

To: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE THAT, on September 15, 2004, we caused to be filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois, the ***Response of Defendants to the Lead Plaintiffs' Submission Pursuant to the Court's Order of August 30, 2004***, a copy of which is attached and served upon you.

Dated: September 15, 2004

Respectfully Submitted,

ARTHUR ANDERSEN LLP

By: _____
One of the Attorneys for Arthur Andersen LLP

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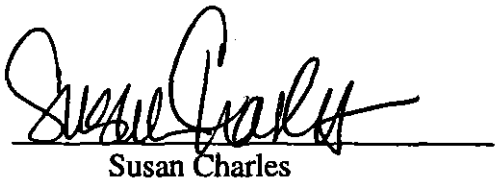
CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on September 15, 2004, I caused copies of the foregoing Notice of Filing to be served upon the persons on the attached service list by electronic mail.



Susan Charles

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

RESPONSE OF DEFENDANTS TO LEAD PLAINTIFFS' SUBMISSION PURSUANT TO THE COURT'S ORDER OF AUGUST 30, 2004

At the August 30, 2004 hearing, the Court confirmed that discovery should proceed at this time only as to class issues and that merits discovery should await the conclusion of class discovery. As a result, the Court held that defendants were not entitled at this time to a complete response on the issue of damages pursuant to Federal Rule 26(a)(1). However, the Court also ruled that defendants are entitled to know the plaintiffs' theory of damages with respect to the issue of class certification.[1] Put another way, defendants are entitled to have an understanding of the plaintiffs' damages theory for class certification purposes. Accordingly, the Court ordered the plaintiffs to provide a complete statement of their theory of damages as part of class discovery. The Court also made clear that it did not want a failure to disclose plaintiffs'

[1] Plaintiffs reiterate their mantra that they should not be required to provide any further computation of damages because all they otherwise have is privileged. That argument is without merit. As stated in *Unicure v. Thurmon*, 97 F.R.D. 7, 12 (W.D. N.Y. 1982), the plaintiff "should be able to provide basic information concerning its claim for damages without having an expert or conducting any discovery of its own." This principle applies fully to securities cases. *See King v. E.F. Hutton & Co. Inc.*, 117 F.R.D. 2 (D.D.C. 1987).

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damages theory to create any surprise in the briefing on the motion for class certification, thereby delaying the case by requiring additional briefing.

In their Submission, plaintiffs do nothing more than parrot the Complaint (and their motion for class certification, which provides no information whatsoever) and argue, contrary to this Court's direction, that what is in the Complaint sufficiently details their theory of damages as to the class. *See* Submission at pp. 2-3. Plaintiffs' position is that they can rest on their Complaint in arguing for class certification – a position that already has been rejected by the Seventh Circuit. The Court should order plaintiffs to disclose their methodology for calculating damages or, in the alternative, preclude plaintiffs from saying anything else with respect to damages in their reply briefs on the motion for class certification.

I. Lead Plaintiffs' Assertions That They Have Outlined Their Theory Of Damages In Their Complaint And Their Opening Brief On Class Certification, And Therefore Need Do No More, Is Contrary to Seventh Circuit Law.

Plaintiffs' Submission spends several pages touting the allegations of their Complaint. Plaintiffs argue that the Complaint has provided detailed factual allegations underlying their theory and that Judge Guzman sustained the allegations of the complaint.[2] Hence, they argue that they need not do more. *See* Submission at ¶ 8.

All that the Complaint alleges, however, is that the market for Household securities was inflated. The Complaint does not say how much it was inflated, whether the amount of the inflation changed over time (under plaintiffs' theory it must have changed over time), when each alleged nondisclosure had some effect on the stock price and how much of an effect (and, tellingly, the Household stock price did not change when the restatement was announced), or

[2] Plaintiffs' motion for class certification does no more than parrot the Complaint.

otherwise provide any basis allowing the defendants to determine how it is that plaintiffs seek to make this a uniform issue for all of the class through a damages model.

In addition, and perhaps even more important, under *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), it is totally improper for the plaintiffs (or the Court) to rely upon the allegations of a complaint in determining whether to certify a class. As stated by the Seventh Circuit:

> The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. . . . Before deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23. . . . And if some of the considerations under Rule 23(b)(3) . . . overlap the merits . . . then the judge must make a preliminary inquiry into the merits.

Szabo, 249 F.3d at 675. Further, as stated by the Fourth Circuit in *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 366-67 (4th Cir. 2004):

> We must not lose sight of the fact that when a district court considers whether to certify a class action, it performs the public function of determining whether the representative parties should be allowed to prosecute the claims of absent class members. Were the court to defer to the representative parties on this responsibility by merely accepting their assertions, the court would be defaulting on the important responsibility conferred on the courts by Rule 23 of carefully determining the class action issues and supervising the conduct of any class action certified.

In sum, it is improper to rely upon the allegations of the Complaint to determine whether this purported class should be certified. The Court should order plaintiffs to produce the information which is missing from their Complaint, including plaintiffs' damages methodology and those facts necessary to support their assertion that the market price for Household securities was inflated and by how much over the entire class period.

II. Individualized Damages Issues Can Lead To Denial Of Certification And Plaintiffs' Damage Theory Is Highly Germane To That Issue In This Instance.

Plaintiffs argue that the presence of individualized damage issues is irrelevant to the Court's analysis of whether to certify a class. Once again, plaintiffs err. In fact, even the Seventh Circuit decisions cited by the plaintiffs to support their position actually stand for the proposition that issues relating to damages are germane to both manageability and to predominance and can well be the basis for a denial of class certification in a particular case. For example, in *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*, 309 F.3d 978, 986 (7th Cir.2002), cited by the plaintiffs, the United States Court of Appeals for the Seventh Circuit plainly indicated that differences in the amount of damages does not *necessarily* prohibit class treatment in every case – meaning quite simply that issues relating to damages can require a denial of class certification in *some* cases.

The fact that the presence of individualized damages is relevant to the issue of class certification is not surprising. As stated by the United States Supreme Court in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977), a class may not satisfy the requirements of Rule 23(a)(4) if the class representative does not "possess the same interest and suffer the same injury as the class member." Given this directive by the United States Supreme Court, there can be no doubt that issues of damages are germane to the determination of whether a class should be certified. Without understanding the nature and type of damage at issue, a court can not determine whether the proposed class representatives possess the same types of interests and injuries as the purported class members and cannot determine if the requirement of predominance is met.

In this case, damage issues are relevant to class certification for two reasons. First, while "[i]ndividual damage issues do not automatically prevent class certification . . .where other factors indicate that common questions may not predominate, it is appropriate to consider the cumulative impact of separate damage issues." *Gilbert v. Woods Marketing, Inc.,* 454 F.Supp. 745, 750 (D. Minn. 1978). Plaintiffs must, therefore, provide damages information because individualized damages information is relevant to class certification in light of the other matters counseling against certification.

Second, to avoid manageability issues, plaintiffs must show a common method of calculating individualized damages pursuant to a damage "model." *See, e.g., In re Industrial Gas Antitrust Litigation,* 100 F.R.D. 280, 304-305 (N.D.Ill. 1983) (denying class certification). Plaintiffs must provide a methodology for proving damages as part of their class discovery because, absent such a method, individual issues will make any class unmanageable. Further, contrary to plaintiffs' suggestions, there cannot be a determination of damages on a class wide or fluid basis. *Id.*

III. Plaintiffs Must Show A Common Damage Methodology In Order To Proceed On Their Section 10(b) Claim.

Plaintiffs correctly state that they are limited to an out-of-pocket measure of damages in this case. It is also correct, as plaintiffs tacitly admit, that the failure of the market to react to a disclosure demonstrates that the alleged misstatement was not material at all. *See, e.g., Robbins v. Koger Properties, Inc.,* 116 F.3d 1441 (11th Cir. 1997). Plaintiffs use these principles to argue that class certification will not be affected by damage issues on the Section 10(b) claim because the determination of damages is "often" a mechanical task if there is a "formula determined on a common basis for the class." *See* Submission at ¶ 15. As plaintiffs confess, "once this valuation

has been made, the application of the formula to the class is a fairly mechanical task." *Id.; See O'Keefe v. Mercedes-Benz USA, LLC,* 214 F.R.D. 266, 292 (E.D.Pa. 2003)("Where the parties or the court can calculate the individual damages by an objective formula, the damages will not prevent certification."). The problem with the plaintiffs' argument, however, is that they have failed to provide this Court and the defendants with the formula which can be used to make such a mechanical calculation and, without proof that such a formula exists, class certification is not proper. *See, e.g., Newton v. Merrill Lynch,* 259 F.3d 154, 187-190 (3rd Cir. 2001).

The situation before this Court is not dissimilar to the one presented in *Wilcox Development Co. v. First Interstate Bank of Oregon,* 97 F.R.D. 440 (D. Oregon 1983). There, the district court recognized that issues of damages alone would not preclude class certification if the matter of calculating damages could be characterized as virtually a mechanical task. The district court nonetheless denied certification because, as here, while plaintiffs assured the court that they would develop a formula, no such formula was provided, and the Court concluded that absent such a formula class certification was not appropriate. This was the same conclusion that Judge Getzendanner reached in *In re Industrial Gas Antitrust Litigation.*

Given the above case law, plaintiffs either must provide the formula or mathematical calculation that can be used to calculate damages now, or be precluded from providing it in response to the defendants' response to the motion for class certification.

IV. Plaintiffs Suffer From Similar Problems On Their Section 11 Claim.

Plaintiffs discussion of their Section 11 claim is, to say the least, confusing. For example, while plaintiffs state that their Section 11 claim is based on statements made in the

market which allegedly inflated the price of the publicly traded securities,[3] liability under Section 11 is limited to statements made in the registration statement (and, as to accountants, may be further limited to those portions of the registration prepared or certified by them). *See, e.g., Huddleston v. Herman,* 459 U.S. 375, 381-82 at fn. 11 (1977). Nonetheless, in contrast to Section 10(b), Section 11 does provide an alternative statutory damage calculation. Plaintiffs, however, do not specify which methodology they intend to use here. More important, Section 11 provides for a causation defense which raises the same types of problems that are set forth above with respect to the Section 10 (b) claim, and thereby necessitates a model for a calculation of damages.

Conclusion

There is no doubt that, under controlling law, issues as to damages can create impediments to class certification. If plaintiffs intend to use a model or computation to avoid predominance or manageability problems, then they should have provided that model as part of their Submission outlining their theory of damages. They should do so now or be precluded from later providing such a theory in connection with this case.

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[3] *See* Submission at ¶ 16.

Dated: September 15, 2004

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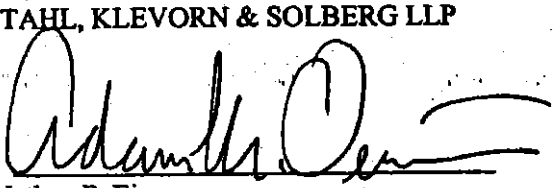
By: 

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