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) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

PLAINTIFFS' RESPONSE TO DEFENDANTS' UPDATE REGARDING OBJECTIONS TO CERTAIN CLAIMS INCLUDED IN THE REPORT OF CLAIMS ADMINISTRATOR GILARDI & CO. LLC

Judge Guzman ordered defendants to provide "a claim-by-claim explanation or analysis of the basis for their objections." Dkt. No. 1798 at 1. Although defendants failed to even approach this standard, plaintiffs provided volumes of evidence and detailed legal and factual support for the challenged claims. Defendants sought permission to file an "update" of the parties' meet-and-confer results, but predictably dedicated almost all of their efforts to rearguing their invalid objections. Even with a second bite at the apple, defendants still have not complied with the Court's February 3, 2012 Order. In any event, as detailed herein, defendants' new arguments are as unavailing as their old ones. The objections are ripe for immediate adjudication, and they should be overruled.

A. Authority of Third Parties to File Claims: Defendants challenge claims submitted on behalf of beneficial owners by 13 custodian banks and third-party filing services (the "Filers"), contending that they lack authority to file those claims. As plaintiffs demonstrated in their March 28, 2012 submission, each of the Filers has affirmed – through sworn declarations and other evidence – that it has the authority to file these claims. Dkt. No. 1802 at 2-11; Dkt. Nos. 1804-1805 at Exs. A-1-a to A-13-b. Faced with this uncontroverted evidence, defendants now contend that each of the 8,283 class members must come forward and submit proof of its Filer's authority to file claims. Defendants are incorrect and their objection should be overruled.

There is no authority supporting the drastic remedy defendants seek. Custodian banks, investment advisors and third-party filers routinely file claims for their customers, utilizing the same procedure that was used in this case.[1] *Id.*, ¶¶2-3. Their fiduciary and contractual obligations require

[1] These entities have years of experience overseeing the claims process, and can navigate the process more efficiently and at lower cost than individual investors can, making it economically feasible for victims to recover their losses. Supplemental Affidavit of James C. Tharin in Support of Claims Submitted by Chicago Clearing Corporation ("Tharin Aff."), ¶3 filed concurrently herewith. If third-party filers and "respective bank trust departments, investment advisors or other representatives must go to the owners to obtain documentation of authority specific to this case (which would effectively duplicate general authority already granted), the cost of doing so would likely exceed the value of many claims and materially diminish the value of all others." *Id.*, ¶7.

them to do so. Dkt. No. 1802 at 2-11; Dkt. Nos. 1804-1805 at Exs. A-1-a to A-13-b; Tharin Aff., ¶3; *see also Kagan v. Wachovia Sec., LLC*, No. 09-5337 SC, 2010 WL 2730464 (N.D. Cal. July 7, 2010) (recognizing that a fiduciary relationship exists between the beneficial owner of securities and the nominee or record owners, which could be breached by a failure to notify beneficial owners of class action settlement). Despite decades of this common practice involving hundreds-of-thousands of claims, defendants could not find a ***single instance*** where a court denied a claim because of the beneficial owner's failure to prove an agency relationship with the institution that filed on its behalf.[2]

The Proof of Claim, which forms the entire basis for defendants' objection, does not support their position. Instead, in the "Claimant Identification" section, the Proof of Claim reads:

> Executors, administrators, guardians, conservators, and trustees must complete and sign this claim on behalf of persons represented by them and their authority must accompany this claim and their titles or capacities must be stated.

Dkt. No. 1766-2 at Ex. B.

The Proof of Claim does not even contemplate, let alone require, proof of authority from every beneficial owner. Instead, the Proof of Claim requires only that the Filers themselves supply their authority to file claims, which is precisely what the Filers did by supplying the sworn declarations, letters and other evidence described in detail and attached to Plaintiffs' Opposition. Dkt. No. 1802 at 2-11; Dkt. Nos. 1804-1805 at Exs. A-1-a to A-13-b. Proper authorization has been provided and defendants "have been apprised of the claim amount and the party on whose behalf the claim is being made." Dkt. No. 1775 at 2. Nothing more is required.

The Filers' declarations are legally sufficient to establish authority. In securities fraud cases,

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[2] By way of example, over the past 28 years, "[Chicago Clearing Corporation ("CCC")] has filed 163,000 claims on behalf of its customers in 461 class actions," using the same documentation as it used here. Tharin Aff., ¶5. "To date CCC has obtained payment in 280 cases for more than 15,000 individual claimants . . . pursuant in each instance to court-approved distribution procedures. ***No court has ever denied compensation to a . . . claimant represented by CCC on the grounds asserted by Defendants in their Updated Objections*** . . . ." *Id*.

courts routinely hold that declarations provided by investment managers and other fiduciaries are enough to establish that they have authority to ***bring suit*** on behalf of beneficial owners. Proof or ratification from the beneficial owner is not required. As the court in *Kaplan v. Gelfond*, 240 F.R.D. 88, 95 (S.D.N.Y. 2007) noted, "courts have relied on declarations stating that the investment manager or adviser was the attorney-in-fact with the authorization to bring suit to recover investment losses." *Id*. Based solely on the fund manager's declaration that it was authorized to act on behalf of the five funds – "and given that [the] proffer to the contrary [was] inconclusive at best" – the court concluded that the advisor had the "capacity to sue on behalf of the funds." *Id*.[3] In short, absent compelling evidence to the contrary, the authority of a manager or other fiduciary to act on behalf of a beneficial owner can be established through a declaration by that manager. Here, defendants' "proffer to the contrary" is even less than "inconclusive" – it is nonexistent. *Gelfond*, 240 F.R.D. at 95.

Defendants' objection is based on the far-fetched premise that thousands of claimants who suffered hundreds of millions of dollars in losses as the result of defendants' securities fraud do not want their money. Defendants base this argument on two deponents who said that their custodian banks' authority had lapsed; however, these class members actually sought recovery and filed their own claims. Defendants disingenuously argue that Judge Guzman held that "unratified" claims are to be sorted out by the Magistrate Judge. Dkt. No. 1817 at 3 n.2. To the contrary, Judge Guzman

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[3] *See also Ezra Charitable Trust v. Rent-Way, Inc.*, 136 F. Supp. 2d 435, 440-42 (W.D. Pa. 2001) (holding a fund manager had standing to sue based on its declaration); *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 255 (S.D.N.Y. 2003) (the same); *In re Able Labs. Sec. Litig.*, 425 F. Supp. 2d 562, 572 (D.N.J. 2006) (holding fund administrator agent with authority to act based on a "certification" from the manager and oral representations in court); *Dutton v. Harris Stratex Networks, Inc.*, No. 08-755-JJF, 2009 U.S. Dist. LEXIS 48455, at *10-*11 (D. Del. June 5, 2009) (holding plaintiff had authority to litigate securities fraud class action on behalf of others based on his own declaration); *Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 486-87 (E.D. Pa. 2007) (holding that an investment manager had standing to bring securities claims based on "certification").

wrote that the existence of duplicative claims was "no reason to summarily reject all such claims because of what is likely no more than confusion or overlap in authorization." Dkt. No. 1775 at 2. The Court anticipated that the claims administrator would weed out duplicative claims, thereby dealing with the issue of which of the two claims was authorized, noting, "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 a conflict remains after the claims administrator has performed its function***." *Id.* at 2-3. Gilardi has now performed that function and weeded out the duplicates, thereby resolving any conflict about which claim is authorized. And defendants' attempt to conflate the concept of duplicative claims with the concept of whether custodians and other third-party filers are authorized to file claims at all should be rejected.[4]

Hundreds of claimants have ratified the claims that the Filers submitted for them, providing additional compelling evidence of the Filers' authority. In the May 31, 2011 Order, the Filers were instructed to send an additional notice to each beneficial owner with estimated losses greater than $250,000 to obtain a signed answer to the claim form question. Dkt. No. 1763 at 8. The supplemental claim forms explicitly stated: "***A claim has been submitted on your behalf by either your custodian bank or a third-party claim-filing service***." Dkt. No. 1766-2 at Ex. E. In response, hundreds of beneficial owners whose claims were submitted by the Filers signed and returned the form. Not a single beneficial owner indicated that it did not want a recovery.

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[4] Judge Guzman already rejected the same objection defendants make here:

> [Defendants] conclude by asserting that claims filed without the required evidence of the filer's authority "should be summarily rejected."
>
> ***The Court disagrees***. The purpose of the claims submission process is to ***identify the true victims*** . . . and allow such victims a fair and reasonable opportunity to present their claims for redress.

Dkt. No. 1775 at 2.

Moreover, none of the beneficial owners opted out of the class, further contravening defendants' supposition that they do not want their money. In 2006, notice was sent to 440,164 potential class members. *Id*., ¶3. On January 24, 2011, a Notice of Verdict in Favor of the Plaintiff Class and the Proof of Claim Form was sent to potential class members and to brokerages, custodian banks, electronic filers and other institutions with instructions to forward the materials to beneficial owners; and Summary Notice was published in *USA Today*. *Id.*, ¶¶3-7, 11. Following this extensive notice, ***none*** of the beneficial owners whose claims defendants challenge opted out of the class or gave ***any*** indication that they did not want their authorized representatives to pursue their claims. In sum, all of the evidence supports the logical conclusion that the Filers have authority to file the challenged claims and that beneficial owners want their money.

The cases defendants rely on do not alter this conclusion. Defendants do not cite a single case analogous to the circumstances here, where agents are asserting authority ***for the benefit of their principals.*** Instead, every case defendants rely on involves a third party attempting to hold a principal liable for the acts of a purported agent ***to the detriment of the principal***. *See, e.g.*, *Opp v. Wheaton Van Lines*, 231 F.3d 1060 (7th Cir. 2000) (arguing plaintiff was not entitled to a recovery because of the actions of its purported agent); *Davis Cos. v. Emerald Casino, Inc*., No. 99 C 6822, 2003 U.S. Dist. LEXIS 16039, at *15-*16 (N.D. Ill. Sept. 10, 2003) (alleging breach of contract and arguing defendant son was the agent of defendant father). Because the Filers are performing claims filing services for the benefit of their clients, defendants' cases are completely inapplicable.

Further, in each case defendants cite, the court declined to find an agency relationship because there were no words or conduct from the principal, or any other circumstantial evidence from which an agency relationship – either actual or apparent – could be inferred. *See, e.g.*, *Opp*, 231 F.3d at 1064-65 (finding no evidence that agent had actual authority where plaintiff testified that

he did not, and the record contained no testimony establishing an agency relationship).[5]

In contrast, a principal's conduct may establish an agent's authority. *Opp*, 231 F.3d at 1064; *U.S.C.C. Mgmt. Co. v. Ogden Allied Sec. Servs., Inc*., No. 90 C 1389, 1991 U.S. Dist. LEXIS 18535 (N.D. Ill. Dec. 12, 1991). Unlike the cases cited by defendants, here, the conduct of the class members (*i.e.* principals) gave the Filers (*i.e.* agents) both implied and apparent authority to file claims on their clients' behalf. The Filers' authorization to file claims on behalf of their clients in connection with the services they offer is implied by the nature of the agency relationship between the beneficial owners and the Filers. *See Opp*, 231 F.3d at 1064 ("'An agent has implied authority for the performance or transaction of anything reasonably necessary to effective execution of his express authority.'"). As set forth in *Restatement (Third) of Agency* §1.03:

> [A]n agent is sometimes placed in a position in an industry or setting in which holders of the position ***customarily have authority of a specific scope***. Absent notice to third parties to the contrary, placing the agent in such a position ***constitutes a manifestation that the principal assents to be bound by actions by the agent that fall within that scope***. A third party who interacts with the person, believing the manifestation to be true, ***need not establish a communication made directly to the third party by the principal to establish the presence of apparent authority*** . . . .

Indeed, the Filers customarily file claims to recover money on behalf of their clients for securities class action cases as part of the services that they provide to clients and even have a

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[5] *See also Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co.*, 376 F.3d 664 (7th Cir. 2004) (where the agreement formalizing the agency relationship explicitly limited the authority, and finding the agent did not have actual authority to bind the principal); *Steinberg v. Entrust Midwest LLC*, No. 10 C 332, 2011 U.S. Dist. LEXIS 7293, at *11 (N.D. Ill. Jan. 25, 2011) (Guzman, J.) (no evidence of actual authority where the parties' contract expressly prohibited defendant from taking any action on plaintiff's account without direction from plaintiff); *Anetsberger v. Metropolitan Life Ins. Co.*, 14 F.3d 1226 (7th Cir. 1994) (agent did not have authority to waive contractual provision because the agreement policy explicitly delineated those who could and there was no other evidence demonstrating the agent's authority); *Malcak v. Westchester Park Dist.*, 754 F.2d 239 (7th Cir. 1985) (verbal assurances to plaintiff by one commissioner were not binding on the Board because plaintiff had notice of the lack of authority; an operating manual expressly stated that Board members had no such authority and plaintiff was aware that one commissioner's acts were without authority unless authorized by the Board). Defendants' reliance on *Moriarty v. Glueckert Funeral Home*, 155 F.3d 859, 864-65 (7th Cir. 1998) is also unavailing. While the court discussed the basic law of agency, its analysis turned on the "unequivocal intent to be bound" principle in the multi-employer association context.

fiduciary obligation to do so. The uncontroverted declarations submitted by the Filers' evidence this implied authority, as each affirmed that they are "authorized to transact all duties necessary in the filing and processing of class action claims" on behalf of customers.[6] *See Steinberg*, 2011 U.S. Dist. LEXIS 7293, at *9 ("[i]mplied [actual] authority may be found in the parties' relationship, their actions and other relevant circumstances").

B1. Claims Filed by Beneficial Owners that Defendants Allege Are Without Supporting Documentation of Their Transactions: Defendants raised broad, unsupported objections. Plaintiffs responded with detailed evidence supporting these claims. Dkt. No. 1802 at 13-24 (§I.B.1.a-d). Defendants have provided no additional legal or factual arguments for their remaining objections. The record has not changed; the objections should be overruled.

B2. Claims Filed by Third-Party Services Without Supporting Documentation of the Beneficial Owners' Transactions: Plaintiffs responded with detailed evidence to defendants' unsupported objections. In response, defendants withdrew 63 objections. As to the remaining claims, defendants provide three generic explanations for their objections: (1) "does not appear to be holder of trading records"; (2) "does not correspond to claim amount"; and (3) "remains contested because no affidavit was provided." Dkt. No. 1817. Defendants' new explanations do not buttress their objections, but simply create the illusion that some further inquiry is required. Even a quick

[6] Defendants also challenge the documentation submitted by CCC, contending that its Agency and Assignment Agreements only authorize CCC to file claims in settled cases. Defendants' narrow reading of the Agency and Assignment Agreements should be rejected. The agreements explicitly allow CCC to recover damages for their clients in securities-related litigation. Given the fact that most securities cases settle, it is not surprising that the agreements do not speak to the rare instances in which damages are recovered after trial. Notably, defendants have failed to identify any material difference between a securities fraud "settlement" and this contested process. Defendants also argue that, with one exception, the "intermediate nominees" that authorized CCC to file claims do not possess the authority to file claims on behalf of the beneficial owners. This contention is incorrect. The majority of CCC's clients are bank trust departments, investment advisors, brokers, or other representatives of the beneficial owners. Tharin Aff., ¶3. The beneficial owners specifically hired these entities to handle such matters on their behalf, and they have a regulatory and fiduciary obligation to file these claims. *Id*.

review exposes defendants' attempt to create an issue where none exists:

(1) "does not appear to be holder of trading records": Defendants provide this explanation as to 14 sets of claims. Dkt. No. 1817 at 6-7. The largest set of claims are those filed by RiskMetrics with a collective allowed loss of $20,923,927 for 12,009 claims submitted by Merrill Lynch Broadridge. Dkt. No. 1802 at 33-34 (§I.B.2.a.(2)). Plaintiffs responded to these objections by submitting the cover letter that accompanied the transactional data for these claims, the letter authorizing RiskMetrics to file for Merrill Lynch, a sample of Merrill Lynch's agreement with its clients demonstrating its authority to file, and the declaration of Robert B. Kroner, Jr. attesting to the accuracy of the data provided. *Id*. Although not required by the Proof of Claim form, Mr. Kroner's declaration lays a business record foundation for the data underlying these claims. Mr. Kroner attests that the data was obtained from Merrill Lynch's internal data system maintained in the normal course of its business. Dkt. No. 1806 at Ex. B-2-a-2-b. In light of this evidence, defendants' bald assertion that the affidavit is insufficient because it "does not appear to be holder of trading records" is unfounded. This objection and similar objections should be rejected.

(2) "does not correspond to claim amount": It is unclear what defendants intend with this statement. For example, defendants withdraw their objection as to seven of the eight claims filed by RiskMetrics on behalf of Deutsche Asset Management ("DAM"). Dkt. No. 1817 at 6. Defendants thereby concede that the Harrigan Declaration submitted by DAM is sufficient "supporting documentation of the beneficial owner's transaction" – overcoming their original objection. Dkt. No. 1802 at 26 (§I.B.2.a.(1)(b)); Dkt. No. 1806 at Ex. B-2-a-1-b. Nevertheless, defendants maintain their objection as to one DAM claim (claim no. 623337; $1,103,025 loss). It appears defendants disagreed with Gilardi's loss calculation for this claim since it is also objected to in defendants' category C.3. Dkt. No. 1817 at 9. Gilardi calculates the allowed loss as $1,103,025 for this claim. Defendants calculate the loss as $1,102,809 – ***a difference of $215***. Defendants' nitpicking aside, if

defendants wish to maintain their $215 objection to a $1.1 million claim in category C.3 that is their prerogative, but the objection here should be overruled. *Id.*

(3) "remains contested because no affidavit was provided": This objection is incomprehensible. Defendants have provided no authority that an affidavit is required at all.

B3. Unbalanced Claims: Defendants' "update" provides no new support for their objections. These objections should be overruled, as set forth in Plaintiffs' Opposition.[7] Defendants' allusion to Gilardi's "ex parte and undocumented conversations with filers" is nonsensical. Dkt. No. 1817 at 8. Gilardi is a claims administrator and processes claims. At times, part of the process includes contact with claimants. There is nothing sinister about such contact – it happens in every case, as Gilardi made clear in describing the claims process. Dkt. No. 1766-2, ¶15. As to defendants' comments regarding claims filed by the Government of Singapore Investment Corporation ("GIC"), these claims were balanced when originally submitted and are balanced now. Defendants took GIC's deposition and never even asked about any purported imbalance. Defendants should withdraw their objections to the GIC claims.

B4. Claims With Negative Balances and B5. Claims Relating to Investments Other than Household Common Stock: Defendants provide no additional support for their objections, which should be overruled.

C1. Duplicate Claims: There are no remaining disputes.

C2. Claims With No Reported Trading Activity During the Damages Period: Defendants fail to provide any explanation for their six outstanding objections, which should be overruled.

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[7] Defendants assert that plaintiffs concede there are "factual disputes" in this category, as well as categories B.4 and C.3, that require "additional inquiry." Dkt. No. 1817 at 8-9. As Plaintiffs' Opposition noted, the Court can overrule these objections without additional input from the parties since defendants have never filed a detailed claim-by-claim analysis of their objections, as required by this Court's February 3, 2012 Order.

C3. Claims for Which Defendants' Calculations of the Allowed Losses Are Less than Gilardi's Calculations: Defendants have provided no additional details or analysis with respect to their calculations; Gilardi's calculations should be adopted by the Court.

D1. Claims with a Yes Answer to the Reliance Question: This issue should be resolved by Judge Guzman's ruling on the reliance question.

D2. Claims Filed by Beneficial Owners Without an Answer to the Reliance Question and D3. Claims Filed by Third Party on Behalf of Beneficial Owners with Allowed Losses in Excess of $250,000 Without an Answer to the Reliance Question: Defendants have not supplemented their objections, which should be denied as set forth in Plaintiffs' Opposition.

D4. Claims Filed by Third Parties on Behalf of Beneficial Owners with Allowed Losses of $250,000 or Less Without an Answer to the Reliance Question: Defendants concede that they raise this objection solely to preserve the issue on appeal. It should be overruled.

E. Untimely Claims: Defendants argue that claimants should demonstrate excusable neglect. Defendants ignore the January 11, 2011 Order (Dkt. No. 1721) which gives Lead Counsel discretion to accept these claims. Moreover, defendants fail to withdraw the objection as to the class members who have provided evidence of excusable neglect. The objections should be overruled.

F. Claims Filed by Individuals or Entities that Are Not Members of the Certified Class: Other than withdrawing their objections to the claims in category F.3, defendants have failed to provide any support for their objections, which should be overruled.

DATED: May 18, 2012

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

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 May 18, 2012, declarant caused to be served by electronic mail to the parties the following document:

PLAINTIFFS' RESPONSE TO DEFENDANTS' UPDATE REGARDING OBJECTIONS TO CERTAIN CLAIMS INCLUDED IN THE REPORT OF CLAIMS ADMINISTRATOR GILARDI & CO. LLC

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 18th day of May, 2012, at San Diego, California.

s/ Teresa Holindrake
TERESA HOLINDRAKE