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,	)	02-cv-5893 (Consolidated)
vs.	)	Judge Ronald A. Guzman
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	
Defendants.	)	

SPECIAL MASTER'S REPORT AND RECOMMENDATION ON DEFENDANTS' CATEGORY D.5., D.6. and D.7. OBJECTIONS

INTRODUCTION

Plaintiffs filed a class action lawsuit against defendants alleging that statements made and facts withheld by the defendants resulted in economic loss by the plaintiffs. In phase one of the case, the jury found that defendants' actions did cause economic harm to the plaintiff class. Phase two of the case involves determining the loss of each of the class members. The Court has referred issues related to claims determinations to the Special Master.

The Special Master held status conferences with the parties on December 18, 2012 and on January 31, 2013, to discuss disputed claim issues. Prior to the January status conference, the parties submitted to the Special Master a spreadsheet that listed four categories of claims (the "**Spreadsheet**"). The categories of claims were those that the parties agreed should be approved ("**List 1**"), those that the parties agreed required a trial as to damages ("**List 2**"), those that the

parties agreed should be denied ("**List 3**"), and those claims to which the defendants have objected and the parties have agreed require a decision by the Special Master ("**List 4**"). The parties continue to work through issues in order to resolve objections, thus moving some claims between the lists. Once List 1, List 2, and List 3 have been finalized and agreed by the parties, and approved by the Special Master, the Special Master will file a Report and Recommendation with the Court seeking approval of those lists.

List 4 contains claims to which the defendants object. Plaintiffs contend that three categories of objections identified on List 4 (the D.5., D.6. and D.7. objections) were waived by defendants because they were not raised timely. *See Plaintiffs' February 18, 2013 Letter to Special Master*, attached as **Exhibit A**, and *Plaintiffs' February 25, 2013 Letter to Special Master* (to be filed under seal). Defendants argue that the objections should not be dismissed as untimely because the newly made objections followed from the Court's September 21, 2012 Order, the Court's December 6, 2012 Order, and the Court's statements at the October 4, 2012 status conference. *See Defendants' February 25, 2013 Letter to Special Master*, attached as **Exhibit B,** and *Defendants' February 18, 2013 Letter to Special Master* (to be filed under seal). The Special Master submits this Report and Recommendation to address whether or not the D.5., D.6., and D.7. objections raised by the defendants should be deemed to have been waived as untimely.

PROCEDURAL HISTORY

On January 11, 2011, in order to determine approved claims and claimants, the Court issued an order approving the proof of claim form to be distributed to class members and providing that the form was required to be returned to claims administrator Gilardi & Co. LLC and postmarked on or before May 24, 2011 (1/11/11 Order, Ex. 2 at 8). The claim form included

a question each claimant was required to answer "yes" or "no": "If you had known at the time of your purchase of the Household stock that defendants' false and misleading statements had the effect of inflating the price of Household stock and thereby caused you to pay more for Household stock than you should have paid, would you have still purchased the stock at the inflated price that you paid?" (the "**reliance question**").

At a status hearing held before the Court on April 7, 2011, plaintiffs raised an issue regarding the difficulty of obtaining the investor clients' answers to the reliance question on the claim form prior to the claim submission deadline of May 24, 2011. After briefing by the parties, the Court entered an order on May 31, 2011, requiring that the third party claim filers be instructed to send a one-page notice to each class member with a claim in excess of $250,000, and obtain an answer to the reliance question along with the signature of the person who provided the answer. (5/31/11 Order, at 8.) The Court based its holding on the difficulty that plaintiffs were experiencing in obtaining an answer to the reliance question by a person with relevant knowledge. (Id. at 3.) In allowing claimants with claims in excess of $250,000 a second opportunity to answer the reliance question, it later turned out that there was some confusion as to whether claimants with claims less than $250,000 were excused from answering the reliance question posed in the original proof of claim form disseminated to class members.

Gilardi filed a report on December 22, 2011, listing the amount of the claims and which claims were approved and rejected. Thereafter on February 3, 2012, the Court entered an order which dictated the schedule for defendants to object to calculation of the amount of claims or the authority of a claimant to file a claim. The Order provides, in pertinent part, as follows:

> That on or before February 27, 2012, defendants shall enumerate those claims listed on Exhibits A and B of the report filed by Gilardi & Co LLC ("Gilardi") on December 22, 2011 to which they object, either in terms of (a) calculation of the amount; (b) submission of the claim without proper authority of the

> actual class member; (c) incompletion, duplication of another claim, or suffers from some mechanical deficiency in the claim submission itself. In connection with each such objection, defendants shall enumerate the claim number of the challenged claim and provide a claim-by-claim explanation or analysis of the basis for their objections.

(2/3/12 Order, at 1.) In accordance with the Order, defendants submitted objections to the claims on February 27, 2012 ("**Defendants' February 2012 Objections**") (Dkt. No. 1800), and plaintiffs responded on March 28, 2012 (Dkt. No. 1802).

Defendants' February 2012 Objections included six overarching categories: (A) Claims Filed by Third Parties Without Evidence of the Third Parties' Authority to File on Behalf of Beneficial Owners; (B) Claims Containing Incomplete or Defective Proofs of Claim; (C) Claims Containing Overstated Claim Amounts; (D) Claims With a "Yes" Answer, or Lacking An Answer, to the Proof of Claim Form's Reliance Question; (E) Untimely Claims; and (F) Claims Filed by Individuals or Entities that Are Not Members of the Certified Class. Although defendants identified authority issues in category A and also the requirement of a response to the reliance question in category D, defendants did not provide objections based on the authority or capacity to answer the reliance question to the claims listed in D.5, D.6, and D.7, at that time.

On April 20, 2012, the case was referred to the Honorable Nan R. Nolan, Magistrate Judge, to continue with the objections process. *Executive Committee Order* (Dkt. No. 1811.) The case was subsequently transferred to Honorable Mary M. Rowland, Magistrate Judge, after the retirement of Magistrate Judge Nolan on October 2, 2012) *Executive Committee Order* (Dkt. No. 1829), and the referral was subsequently withdrawn to facilitate referral of this matter to the Special Master.

At a status conference before Magistrate Judge Nan R. Nolan on April 25, 2012, Magistrate Nolan allowed defendants to file an update regarding their objections to the claims.

(Dkt. No. 1814.) Defendants submitted *Defendants' Update Regarding Objections to Certain Claims Included in the Report of Claims Administrator Gilardi & Co. LLC* on May 9, 2012 (Dkt. No. 1817). In this submission, defendants reiterated objections to claims filed by third parties with losses of $250,000 or less that lacked an answer to the reliance question and stated: "Defendants acknowledge that this category has been previously ruled on by the Court and this objection has been stated for record purposes." (Id. at 10.) Defendants did not raise their D.5., D.6., or D.7. objections at that time.

During the claims adjudication process, the Court also had before it the issue of the presumption of reliance.[1] On September 21, 2012, the Court entered an order which addressed the issue of reliance. In its ruling, among other things, the Court dismissed the claims for which the claimant did not answer the reliance question. (Id. at 12.) The September 2012 Order also clarified, in footnote 2, that: "Claimants who answered 'yes' or 'no' to the claim form question, but explained that they did not make the contested investment decision..." would be deemed not to have answered the claim form question, and thus these claims would be dismissed.[2]

At a status conference on October 4, 2012, plaintiffs asked the Court to clarify whether its September 2012 Order applied to claimants with an allowed loss of $250,000 *or less* who filed through a custodial bank or third party filing service. The Court indicated that its Order was meant to apply to those class members as well. Plaintiffs objected to the Court's ruling, arguing that the Court's prior orders excused those class members from answering the reliance question. Plaintiffs' counsel had interpreted the May 2011 Order to indicate that claimants with claims under $250,000 filed by third party filers were excused from answering the reliance question

[1] In its February 2012 Order setting the claims adjudication schedule, the Court stated: "While the parties are engaged in the [claims adjudication] procedures, the Court will endeavor to issue its ruling on the question of the defendant's rebuttal of the presumption of reliance." (2/3/12 Order, at 1.)

[2] The September 21, 2012, order also appointed Phillip Stenger as Special Master to assist in resolution of disputed claims.

and, as such, had told third party filers that a response to the reliance question for claims under $250,000 was not required. On December 6, 2012, the Court entered an order to clear up the confusion. The December 2012 Order partially vacated the September 2012 Order and provided:

> Given this confusion, the Court vacates the portion of its September 21, 2012, order dismissing class members' claims of less than $250,000.00 that were submitted by a custodian bank or other third party filer. Plaintiffs' counsel has until May 1, 2013 to issue directly to class members the notice and claim form previously sent to them through a custodian bank or other agent. These class members have until June 30, 2013 to complete and return the claim form. Class members who do not return the claim form or return it without answering the claim form question will be barred from recovery.

(12/6/12 Order, at 1.) The December 2012 Order stated, in no uncertain terms, that class members who do not provide responses to the claim form reliance question will be barred from recovery. (Id.)

Thereafter the parties met with the Special Master and agreed to provide the Special Master with a list of claims broken down into claims the parties agreed to (List 1), claims the parties agreed needed a trial as to damages (List 2), claims the parties agreed should be denied (List 3) and claims the parties agreed needed to be decided by the Special Master (List 4). These lists were created by the defendants and contained for the first time three new tabs of objections under List 4, D.5., D.6. and D.7. Plaintiffs objected to the new List 4 objections by the defendants and the parties submitted letters setting forth their positions on this issue to the Special Master. *See* Exhibits A and B.

PLAINTIFFS' WAIVER ARGUMENT

Plaintiffs argue that the three new categories of objections contained in the Spreadsheet should be deemed waived because they were not raised timely. Defendants argue that the new categories of objections are the result of recent orders by the Court and should not be deemed waived.

1. **The D.6. Objections.** Defendants' Category D.6. objections are as to 7,869[3] claims filed by third parties with claim amounts less than $250,000 in which the third party filers did answer the reliance question but it is not apparent that the third party filers had investment discretion and therefore may not have been proper parties to answer the reliance question. In Defendants' February 2012 Objections, under D.4., they objected to 22,667 claims of $250,000 or less which had been submitted by third parties on behalf of the beneficial owners and which did not contain answers to the reliance question. Defendants argue that these objections should be allowed because it was not until the Court's September and December 2012 Orders that it became clear (1) that a claim would only be allowed if the claim form was returned with a definitive "no" to the reliance question, and (2) that the reliance question must be answered by the beneficial owner or the beneficial owner's agent who made the actual investment decision. Defendants also argue that plaintiffs would not be prejudiced in any meaningful way if they sent out the claim forms to those claimants identified on the D.6. list, but that defendants would be significantly harmed if these claimants were allowed to recover without proper answer to the reliance question. Plaintiffs argue that these objections are untimely because they should have been made by February 27, 2012, as required in the Court's February 3, 2012 Order setting the deadlines for filing objections to claims. In particular, plaintiffs argue that these objections should have been raised by defendants as part of their D.4. objections in Defendants' February 2012 Objections.[4] D.4. objections were as to "Claims filed by third parties on behalf of beneficial owners with allowed losses of $250,000 or less without an answer to the Reliance

[3] In the defendants' February 25, 2013, letter to the Special Master, they reference 7,894 claims in this category but the Spreadsheet provided by the parties contains 7,869 such claims and therefore the Special Master will assume the correct number of these objections is 7,869.

[4] Of the 7,894 claims to which defendants have raised a D.6. objection, 6,493 are claims as to which no objections were raised in Defendants' February 2012 Objections. The remaining 1,401 claims are claims as to which defendants raised other objections in their February 2012 Objections, but as to which defendants have now added an additional D.6. objection.

Question." (Dkt. No. 1800 at 15.) Pursuant to the Spreadsheet, the aggregate amount of these 7,869 claims is $125,347,218.

2. **The D.5. Objections.** Defendants' Category D.5. contains objections to 19 claim forms filed by institutional investors where the claims are *greater* than $250,000 where the reliance question was answered by the third party filer but the defendants argue there was not proper indication of proof that the person answering the question was the investment decision maker. (*Defendants' February 18, 2013 Letter [to be filed under seal]*, at 11-15) Plaintiffs argue that these objections are untimely because they should have been made by February 27, 2012, as required in the Court's February 3, 2012 Order setting the deadlines for filing objections to claims. In particular, plaintiffs argue that these objections should have been raised by defendants as part of their D.3. objections in their February 2012 Objections. D.3. objections were as to "Claims filed by third parties on behalf of beneficial owners with allowed losses in excess of $250,000 without an answer to the Reliance Question." (Dkt. No. 1800 at 15.) Pursuant to the Spreadsheet, the aggregate amount of these 19 claims is $19,923,550.

3. **The D.7. Objections.** Defendants' Category D.7. objections are as to seven claims with claim amounts greater than $250,000, where the reliance question is answered "no" but where defendants argue that "there is no indication on the supplemental claim form that the signer had the authority to submit the supplemental claim form and answer the reliance question on behalf of the claimant." (Exhibit B, at 6.) Defendants contend these objections result from the Court's September and December 2012 Orders, where the Court clarified that in order to recover, the person answering the reliance question must be the "actual investment decision-maker, or an authorized representative of the actual decision-maker." (Id.) Plaintiffs argues that these objections are untimely because they should have been made by February 27, 2012, as required

in the Court's February 3, 2012 Order setting the deadlines for filing objections to claims. Plaintiffs argue that these objections should have been raised by defendants as part of their D.3. objections in their February 2012 Objections. Pursuant to the Spreadsheet, the aggregate amount of these seven claims is $4,411,831.

DISCUSSION

In urging the rejection of defendants' recent objections, plaintiffs argue that these objections were raised more than a year after the Court's February 2012 Order instructing defendants to make objections to the claims set forth in the Gilardi Report by February 27, 2012. Plaintiffs further contend that these "new objections" were issues already presented to the Court in defendants' D.3. and D.4. categories of objections in Defendants' February 2012 Objections, and that nothing in the Court's September or December 2012 Orders clarified or expanded on the authority required to answer the reliance question or what is required to have a valid proof of claim. Plaintiffs point out that defendants' D.5., D.6. and D.7. objections were also not included in defendants' May 9, 2012 filing with Judge Nolan (Dkt. No. 1817). Plaintiffs further state that they will be prejudiced by defendants' failure to timely object to these claims, in that if they had known of these objections earlier, they could have already reviewed these files and contacted the claimants for additional support if the evidence was unclear.

Defendants argue that the Court's February 2012 Order, which directed defendants to enumerate their objections to the claims included in the Gilardi Report by February 27, 2012, did not provide that any objections not raised in defendants' February 27, 2012 submission would be waived. Additionally, defendants point out that there has not been any final adjudication of the claims dispute process and, therefore, contend that these objections are not untimely and have not been waived.

Defendants further argue that the process of identifying and resolving objections has been an evolving process, one that is still on-going, and contend that the Court's September and December 2012 Orders and the October 4th Status Conference make it clear that: 1) a claim will be allowed only if it contains a definite "no" answer to the reliance question; and 2) the reliance question must be answered by the beneficial owner or the beneficial owner's agent who made the actual investment decision. Defendants contend that in light of these "clarifications" made in the Court's September and December 2012 Orders, they identified 7,869 claims of $250,000 or less that had been submitted by custodian banks or third party filers and for which an answer to the reliance question had been supplied by the claim filer rather than the beneficial owner or investment decision-maker. Defendants contend that to accept plaintiffs' argument that the claims to which defendants have raised their objections should be permitted to recover, without any requirement on the part of plaintiffs that they attempt to obtain answers to the reliance question from the beneficial owners or investment decision-makers, would be to ignore the plain language of the Court's September and December 2012 Orders. Defendants additionally contend that plaintiffs would not be prejudiced if they were required to send supplemental claim forms to these claimants in accordance with the Court's December 2012 Order, and, in contrast, the prejudice to defendants by allowing recovery by a claimant who has not submitted a claim form with a proper answer to the reliance question would be patent.

D.6. Objections. As to claimants with claims *less than* $250,000 where the reliance question was answered by third party filers (i.e., defendants' D.6. objections), the Court's December 2012 Order requires that the supplemental claim form be sent directly to these class members *to be answered by the class members* (as opposed to being answered by the third party filers) and, as such, plaintiffs' objection to the timeliness of defendants' D.6. objections is

misplaced. Because of the confusion which surrounded class members with claims under $250,000, this result is reasonable. This does not mean that all claims identified on the D.6. list are denied; rather that these claimants should be sent a supplemental claim form and be required to answer the reliance question in compliance with the December 2012 Order. If plaintiffs have not sent the supplemental claim form to the claimants listed in D.6. of the Spreadsheet, they should be permitted a reasonable time to do so.

D.5. and D.7. Objections. Unlike the D.6. objections, the D.5. and D.7. objections relate to claims over $250,000, for which no additional claim form will be sent pursuant to the December 2012 Order. An additional supplemental form was already sent to these claimants pursuant to the May 31, 2011 Order, well before the initial objection deadline. Indeed, the very purpose of the May 31, 2011 Order was to address the difficulty the third party filers were experiencing obtaining a response directly from class members to the reliance question.

To support plaintiffs' claim that defendants' D.5. and D.7. objections are not timely and are waived, plaintiffs cite *Valente v. Pepsico, Inc.*, 89 F.R.D. 352 (D. Del. 1981), as the *Valente* Court held in an analogous situation, albeit without much discussion, that defendants had waived objections by failing to raise them by the time allowed by the Court. Defendants correctly note that the order in *Valente* clearly stated that all Proofs of Claim would be deemed accepted unless challenged within a certain time frame and that the February 2012 Order does not explicitly state that all objections would be waived if not made by the deadline. However, the Court's February 3, 2012 Order is clear and explicit regarding deadlines: "That on or before February 27, 2012, defendants shall enumerate those claims... to which they object..." (2/3/12 Order at 1.)

Here, the danger of prejudice to the class is the delay attendant to going back to the filers of these claims and requesting additional information, which they in turn may have to request

from third parties, causing further delay. "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." (5/31/11 Order at 4.) The delay in raising these objections was considerable, almost a year.

Defendants argue that the Court's September and December 2012 Orders present a new standard and that as a result of these Orders, claimants are only permitted to recover "if the person who answered the reliance question was the actual investment decision-maker, or an authorized representative of the actual decision maker." (Exhibit B, at 6) However, the record shows that the defendants knew that this was the standard in at least May of 2011. In *Defendants' Response to Plaintiffs' Proposed Plan for Obtaining Responses to the Discovery Inquiry on the "Proof of Claim,"* filed on May 13, 2011 (Dkt. No. 1757), defendants make it plain that they knew at that time that the relevant standard required answers to the reliance question by the actual decision makers. For example, they state: "No institution has submitted an affidavit or objection to this Court asserting that it would be an unduly burdensome task to comply with the de minimus and straightforward requirements for obtaining verified and proper proof of claim forms, *with the reliance question answered by the actual decision makers.*" (Id. at 2) (emphasis added). Defendants also note that: "The Court recognized at the April 7 [2011] conference that *'it's actually the person who made the decision to buy or sell is the one'* who has relevant knowledge as to the answer to the Proof of Claim form's reliance question." (Id. at 5, FN 4) (emphasis added).

As a result, defendants' claim that the Court imposed new standards which required them to make objections which they could not have previously made is not supported by the record.

Any issues regarding the sufficiency of the claimants' responses to the reliance question for claims over $250,000 could have been identified by defendants before the February 2012 objection deadline.

SPECIAL MASTER'S RECOMMENDATION

For the reasons stated above, the Special Master recommends as follows:

1. Defendants' 19 Category D.5. and 7 Category D.7. objections should be deemed waived because they were not raised timely; and
2. Defendants' 7,869 Category D.6 objections should not be deemed waived and, if they have not already done so, plaintiffs should send these claimants the second Notice in order to obtain an answer to the reliance question.
3. If defendants have previously raised objections other than those set forth in D.5., D.6. and D.7. to particular claims, those previously raised objections are not affected by this Report and Recommendation.

DATED: May 17, 2013.

/s/ Phillip S. Stenger
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