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MICHAEL W. DOBBINS
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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, *- against -* HOUSEHOLD INTERNATIONAL, INC., ET. AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION PURSUANT TO THE PSLRA TO STAY DISCOVERY PENDING DISPOSITION OF THEIR MOTION TO DISMISS PURSUANT TO THE SUPREME COURT'S RECENT DECISION IN *DURA PHARMACEUTICALS, INC.* v. *BROUDO*

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This memorandum is submitted on behalf of all Defendants except Arthur Andersen, L.L.P., namely Household International, Inc. and Household Finance Corp. and its former officers and directors William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (referred to collectively herein as "Household" or "Defendants") in support of their motion pursuant to the PSLRA to stay discovery pending disposition of their motion to dismiss based upon *Dura Pharmaceuticals* pursuant to Federal Rule of Civil Procedure 12(b)(6).

Preliminary Statement

The United States Supreme Court's recent unanimous decision in *Dura Pharmaceuticals, Inc., et al.* v. *Broudo*, 125 S. Ct. 1627 (Apr. 19, 2005) ("*Dura*") clarified and changed the law surrounding pleading and proof of loss causation in securities fraud class actions. This recent pronouncement, unavailable at the time of Defendants' initial motion to dismiss,[1] is the basis for Defendants' current motion to dismiss the Amended Complaint.[2]

Given *Dura's* substantive change to the legal standard required to plead loss causation, a stay of discovery is entirely appropriate while this Court considers the merits of Defendants' pending motion to dismiss. Congress has stated that "discovery should be permitted in securities class actions only after the court has sustained the legal sufficiency of the complaint."

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1 Prior to the Supreme Court's decision in *Dura*, the Household Defendants moved to dismiss on other grounds. *See Jaffe* v. *Household*, No. 02 C 5893 (N.D. Ill. Mar. 19, 2004) (order granting in part Defendants' motion to dismiss).

2 Defendants refer to the Memorandum of Law in Support of Household Defendants' Motion to Dismiss Pursuant to the Supreme Court's Recent Decision in *Dura Pharmaceuticals, Inc.* v. *Broudo*, filed concurrently with this motion, for a full explanation of Plaintiffs' failure properly to plead the elements of loss causation required by *Dura*.

S. Rep. 104-98, 1995 WL 372783 (1995).[3] To that end, the Private Securities Litigation Reform Act ("PSLRA") provides that "[i]n any private action arising under this title . . . all discovery and other proceedings *shall* be stayed during the pendency of *any* motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B) (emphasis added). This provision is generally intended to avoid the high costs associated with discovery, frivolous lawsuits, and the long-proscribed "fishing expeditions." *Powers* v. *Eichen*, 961 F. Supp. 233, 235 (S.D. Cal. 1997).

Under the plain language of the PSLRA, therefore, discovery in this case should be stayed automatically pending disposition of Defendants' motion to dismiss based on *Dura*. As discussed herein, however, this Court need not look solely to the automatic stay provisions of the PSLRA to stay discovery. Instead, as detailed below, the Court may rely upon its own sound discretion to stay discovery pending disposition of Defendants' pending motion.

Argument

A. An Automatic Stay of Discovery Pending Disposition of Defendants' Motion to Dismiss is Appropriate Under the Plain Language of the PSLRA

The PSLRA, by its plain language, provides that in securities actions like this, "all discovery and other proceedings *shall* be stayed during the pendency of *any* motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B) (emphasis added). Because there is no danger of prejudice to Plaintiffs here by a stay of discovery

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[3] An appendix of all unreported authorities referenced herein has been submitted herewith.

pending disposition of Defendants' motion to dismiss based on *Dura*, the PSLRA's automatic stay provision should apply.

B. *A Stay of Discovery is Appropriate on a Successive Motion to Dismiss*

Courts have granted stays of discovery on successive motions to dismiss. *See In re Salomon Analyst Litigation*, 2005 WL 550847 (S.D.N.Y. 2005); *In re Southern Pacific Funding Corp. Securities Litigation*, 83 F. Supp. 2d 1172, 1175, n. 1 (D. Or. 1999) (staying discovery already under way pending disposition of defendants' successive motions to dismiss filed after the issuance of two Ninth Circuit decisions which affected the court's previous denial of defendants' motion to dismiss plaintiffs' securities fraud complaint for failure to meet the pleading requirements of Fed. R. Civ. P. 9(b)); *Faulkner* v. *Verizon Communications, Inc.*, 156 F. Supp. 2d 384, 406 (S.D.N.Y. 2001) (permitting defendants to file a second motion to dismiss and imposing a second stay pending determination of that second motion). *Cf. Powers* v. *Eichen*, 961 F. Supp. 233 (S.D. Cal. 1997) (imposing second stay on discovery during the pendency of defendants' motion for reconsideration of a previous order denying defendants' motion to dismiss).

The Southern District of New York's recent decision in *In re Salomon Analyst Litigation*, 2005 WL 550847 (S.D.N.Y. 2005) ("*Salomon*"), is analogous to this case. Like this Court, the *Salomon* court was faced with a second motion to dismiss based on an intervening change in controlling law relevant to a securities fraud dispute. *Id.* at *1. As here, the *Salomon* defendants had first moved to dismiss based, *inter alia*, on the plaintiffs' failure adequately to plead loss causation. *Id.* at *1. After that motion was denied, the *Salomon* defendants brought renewed motions to dismiss based on the Second Circuit's subsequent ruling in *Lentell* v. *Merrill Lynch*, 396 F. 3d 161 (2d Cir. 2005), a decision which "elaborated and clarified the Circuit's case law with respect to loss causation." *Salomon*, 2005 WL 550847 at *1. As with *Dura* here, *Len-*

tell was decided shortly after the *Salomon* court denied the *Salomon* defendants' first motion to dismiss. *Id.*

The *Salomon* court stated that because a change in controlling law might "affect the viability of plaintiffs' complaints," it was "reasonable to afford the parties an opportunity to brief the implications" of the new decision. *Id.* at *2. Specifically addressing the fact that the *Salomon* defendants were moving to dismiss for the *second* time, the court noted that where, as here, "the successive motion . . . is neither frivolous nor advanced solely to delay the proceedings, but [rather] was occasioned by an intervening appellate decision . . . . revisiting the court's analysis of the issue of loss causation" is warranted. *Id.* at *1-2 (emphasis in original). Accordingly, the court held that "in view of the policy of the PSLRA to deny discovery until a complaint has been authoritatively sustained by the court, it [was] appropriate to extend the stay under [such] circumstances." *Id.*[4] In the present case, of course it is *Dura* which has now become the controlling law on loss causation—subsequent to a partial denial of Household's first motion to dismiss—and the same principles should thus apply to stay discovery while *this* Court considers Defendants' dispositive motion based on *Dura's* clarification of the law of loss causation.

The *Salomon* court rejected the plaintiffs' argument that a second stay after a second motion to dismiss would invite abuse, noting that "[s]ome judicial discretion to evaluate the desirability of a renewed stay appears to be necessary." *Id.* The *Salomon* court based its grant of a stay on "the policy of the PSLRA to deny discovery until a complaint has been authoritatively

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[4] The *Salomon* court did not address the prior commencement or non-commencement of discovery in that case in its decision to stay discovery a second time. In *In re Southern Pacific Funding Corporation Securities Litigation*, one of the cases expressly relied upon by *Salomon*, however, the court explicitly stayed discovery in an identical situation after discovery had already begun. *See* 83 F. Supp. 2d 1172, 1175 n.1 (D. Or. 1999).

sustained by the court," rather than the PSLRA's express provision that such a stay be automatic. *Id.* at *2. The *Salomon* court categorized this result as an "appropriate . . . exercise of the Court's discretion" and, accordingly, explained that "there is no need to decide whether the filing of a successive motion, or even of any non-frivolous motion, after a court has already denied the merits of an earlier motion to dismiss would trigger an automatic stay under the PSLRA." *Id.* Under this reasoning, therefore, this Court need not address whether a stay issued pending disposition of Defendants' successive motion to dismiss here is automatic *per se*. Where, as here, a discovery stay is warranted because disposition of the underlying substantive motion in question is likely to eliminate or radically redefine the parameters of discovery based on a recent change in governing law, this Court may grant such a stay in its own sound discretion.

Conclusion

For the foregoing reasons, this Court should stay discovery in this case pursuant to the PSLRA pending disposition of Defendants' pending motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) based on the United States Supreme Court's recent decision in *Dura*.

Dated: June 30, 2005
Chicago, Illinois

Respectfully submitted,

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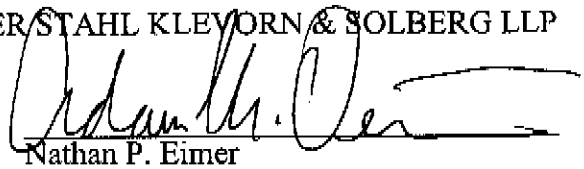
By: 

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