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-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION PURSUANT TO 28 U.S.C. § 1292(b)

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This memorandum is respectfully submitted on behalf of defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, "Household" or "defendants") in support of their motion pursuant to 28 U.S.C. § 1292(b) for certification and amendment of the Court's April 26, 2006 Memorandum Opinion and Order ("Mem. Op." or "Order").

INTRODUCTION

As the first Supreme Court case to construe the Private Securities Litigation Reform Act ("PSLRA"), *Dura Pharmaceuticals, Inc.* v. *Broudo*, 125 S. Ct. 1627 (2005) ("*Dura*"), is an inescapably important decision for both plaintiffs and defendants in securities fraud cases. Although several Circuit Courts have considered the effect of *Dura* on the pleading requirements of such cases, the Seventh Circuit has yet to evaluate the significance of *Dura* to Seventh Circuit law. The utility of an interlocutory appeal is especially evident in the context of *Dura* because that decision articulated the pleading standards and legal requirements that must be met at the threshold of a securities fraud case to warrant the tremendously expensive and time consuming discovery process inherent in such cases.

As this Court is well aware, this process imposes a very heavy burden on both defendants and the courts. In this case, for example, the time period for fact discovery has already been extended (for a total of four months so far) and the Magistrate Judge has indicated an intention to extend it again. Almost three and a half million pages of hard-copy documents—and counting—have been produced, along with over half a million pages of electronic records. New discovery requests are regularly forthcoming from plaintiffs, who have served hundreds of interrogatories and requests to admit and announced their wish (which we oppose) to take at least 100 party and third party depositions. There have already been 25 discovery motions to the Magistrate Judge and seven motions to this Court. Discovery of lead plaintiffs has been postponed by the Magistrate Judge, but will inevitably resume. And the case is just in the fact discovery stage. Expert discovery and comprehensive summary judgment motions will follow, as well as other pre-trial

and *in limine* motions as needed, prior to any lengthy and expensive trial. These efforts will necessarily be broad-based and voluminous, covering every aspect of plaintiffs' prolix complaint. Forthcoming motions will require thousands of hours on both sides to prepare and brief, and impose a commensurate burden on the Court.

The Supreme Court's recent pronouncement speaks directly to what is happening here. Simply put, a case involving alleged securities fraud may not proceed past the pleading stage unless plaintiffs can articulate a causative connection between the misconduct they allege and a material harmful impact on the price of a defendant's securities. Although this Court has concluded that *Dura* did not raise the pleading bar for loss causation in this Circuit, we respectfully submit that this controlling subject is open to substantial disagreement—even among different courts in this Circuit—and that its early resolution by the Seventh Circuit could materially advance the resolution of this action. Given the importance of this issue of first impression and the enormous resources being and yet to be consumed by the ongoing prosecution of these claims, certification of the Court's Order pursuant to 28 U.S.C. 1292(b) would be both appropriate and efficient, and would serve the interests of both the parties and the Court.

ARGUMENT

Interlocutory review is appropriate when an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In order for a district court to certify an interlocutory appeal "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz* v. *Board of Trustees of the University of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000).

On June 30, 2005, defendants filed their motion to dismiss pursuant to *Dura* (the "*Dura* Motion"), asserting that plaintiffs' Complaint[1] fails to properly plead loss causation. (*See Dura* Motion at 8.) On April 26, 2006, the Court issued its Order denying the *Dura* Motion. The Court concluded that "*Dura* did not change the controlling law in this circuit," Mem. Op. at 5, and that plaintiffs sufficiently pleaded loss causation because "[p]laintiffs further allege that '[a]s a direct and proximate result of these defendants' wrongful conduct, plaintiffs and other members of the class suffered damages in connection with their purchases of Household securities during the Class Period.'" Mem. Op. at 6, *citing* AC at ¶ 350. The Court's Order on the *Dura* Motion satisfies the requirements of §1292(b) in every respect.

1. The Impact of *Dura* in the Seventh Circuit is a Question of Law

A "question of law" is a question that addresses the meaning of a statutory or constitutional provision, regulation or common law doctrine. *Ahrenholz*, 219 F.3d at 676-77. A "pure" question of law appropriate for certification is one that stands substantially free from factual context. *Id.* The Seventh Circuit has typically had little objection to the certification of issues raised by a motion to dismiss for failure to state a claim because there is no evidentiary record to consider. *See, e.g., Boim* v. *Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002).

The pleading issue discussed in *Dura* in the context of the PSLRA is a "pure" question of law. *See Ahrenholz*, 219 F.3d at 676-77. Specifically, defendants contended in the *Dura* Motion that *Dura* established stricter pleading requirements than a variety of courts in this Circuit had previously required, such that plaintiffs' boilerplate allegations (virtually identical to those the same lawyer used in *Dura*) are no longer sufficient. Defendants do not seek to challenge the Court's application of the law to any particular set of facts but instead assert that the governing legal standard itself has changed. *See Barner* v. *City of Harvey,* No. 95 C 3316, 2003 U.S. Dist.

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[1] "Complaint" or "AC" refers to Plaintiffs' Corrected Amended Consolidated Class Action Complaint for Violation of the Federal Securities Law.

LEXIS 22843 (N.D. Ill. Dec. 12, 2003). A question of law cannot be more legally "pure" than this. Moreover, as the Court's decision focuses on a particular allegation in the Complaint (Mem. Op. at 6, *citing* AC at ¶ 350), the legal issues raised are particularly straightforward. *See Ahrenholz*, 219 F.3d at 676-77.

2. The Loss Causation Issue is Controlling

A question of law is deemed "controlling" if its resolution is likely to affect the further course of the litigation, even if not certain to do so. *Sokaogon Gaming Enterprise Corp.* v. *Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996); *Johnson* v. *Burken*, 930 F.2d 1202, 1205-06 (7th Cir. 1991). The Seventh Circuit does not require that the term be inflexibly applied. *Sokaogon Gaming Enterprise Corp.*, 86 F.3d at 659. Instead, it is enough that an appeal present a matter that is serious to the conduct of the litigation, either practically or legally. *See Burken*, 930 F.2d at 1206.

If the *Dura* Motion were granted, it would dispose of all claims. The loss causation issue raised by *Dura* is therefore controlling. *See Drnek* v. *City of Chicago*, 205 F. Supp. 2d 894, 900 (N.D. Ill. 2002) (holding that an issue is controlling when the answer to the question will affect whether the party can state a claim); *see also, e.g.*, *Boim*, 291 F.3d at 1008 (certifying order denying motion to dismiss for failure to state a claim). Even if the Seventh Circuit were not to reverse the Order, appellate review may well conserve resources for both the parties and the Court. The burden imposed by this litigation is tremendous and will compound as the litigation continues. Interlocutory review by the Seventh Circuit of the impact of *Dura's* loss causation principles and the application of those principles to this case will focus both fact and expert discovery and potentially facilitate a settlement. *See Burken,* 930 F.2d at 1206 (noting that non-dispositive appellate guidance can also support certification); *Resolution Trust Corp.* v. *Franz*, No. 93 C 2477, 1996 U.S. Dist. LEXIS 4351, at *3-4 (N.D. Ill. Apr. 8, 1996) (concluding that certification "would enhance settlement prospects as well as promote judicial economy.").

3. There is a Difference of Opinion Regarding the Effect of *Dura*

A "difference of opinion on a question of law" that is "contestable" for the purposes of section 1292(b) will be present whenever there are conflicting decisions regarding the controlling issue or where the controlling question is not settled by controlling authority. *Gamboa* v. *City of Chicago*, No. 03 C 219, 2004 U.S. Dist. LEXIS 25105, at *11 (N.D. Ill. Dec. 9, 2004); *see also Ahrenholz*, 219 F.3d at 675. The significance of *Dura* to Seventh Circuit law satisfies this criterion as well.

Since the decision in *Dura*, opinions about its effects have not been uniform. Although the *Dura* decision itself reversed a ruling by the Ninth Circuit, various courts outside the Ninth Circuit have since concluded that the decision made new law that required a heightened scrutiny of loss causation pleadings. Some district courts within the Seventh Circuit have concluded that *Dura* effected such a change in Seventh Circuit law. *See, e.g., Porter* v. *Conseco Inc.*, No. 1:02-cv-01332, 2005 U.S. Dist. LEXIS 15466, at *14-15 (S.D. Ind. July 14, 2005) (holding that "the Supreme Court's decision in Dura Pharmaceuticals has undermined plaintiffs' theory of loss causation as pleaded in the complaint"); *Davis* v. *SPSS, Inc.*, 385 F. Supp. 2d 697, 705 n.1 (N.D. Ill. 2005) (noting that "in the event plaintiff chooses to file an amended complaint, he should consult the Supreme Court's recent analysis in *Dura Pharmaceuticals, Inc.* regarding pleading requirements for loss causation").

There is also substantial authority suggesting that *Dura's* pronouncements made new law even in circuits that had explicitly rejected the Ninth Circuit rule rejected in *Dura*. In *Dura*, the Supreme Court cited favorably decisions from the Second, Third and Eleventh Circuits. *Dura*, 125 S. Ct. at 1633. Those Circuits had all previously adopted, *inter alia*, a requirement that a plaintiff allege and prove a corrective disclosure followed immediately by a decline in the price of the firm's stock. *See, e.g., Emergent Capital Investment Management, LLC* v. *Stonepath Group, Inc.*, 343 F.3d 189, 198 (2d Cir. 2003), *cited in Dura*, 125 S. Ct. at 1633; *Semerenko* v. *Cendant*

Corp., 223 F.3d 165, 185-86 (3d Cir. 2000), *cited in Dura*, 125 S. Ct. at 1633; *Robbins* v. *Koger Properties, Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997), *cited in Dura*, 125 S. Ct. at 1633.[2]

Notwithstanding the endorsement in *Dura* of the reasoning contained in these prior decisions, courts in these Circuits have explicitly acknowledged that *Dura* has in fact changed the law in their Circuit. *See In re AOL Time Warner, Inc. Securities & "ERISA" Litigation,* No. 1500, 02 Civ. 5575, 2006 U.S. Dist. LEXIS 17588, at *33 (S.D.N.Y. Apr. 6, 2006) (stating that *Dura* has "shed new light on the standard of loss causation"); *Leykin* v. *AT&T Corp.,* 02 Civ. 1765, 2006 U.S. Dist. LEXIS 12824, at *22 n.7 (S.D.N.Y. Mar. 23, 2006) (holding that plaintiffs' reliance on the court's pre-*Dura* opinion is inappropriate because after *Dura* "that portion of my . . .opinion is no longer good law").

Various Circuit Courts outside the Ninth Circuit have likewise relied upon *Dura* for the requirements that must now be met by securities fraud plaintiffs. *See, e.g., United States* v. *Olis*, 429 F.3d 540, 546 (5th Cir. 2005) (noting that under *Dura* "there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines"); *In re Merck & Co., Securities Litigation*, 432 F.3d 261, 275 (3d Cir. 2005) (stating that the "Supreme Court this year also described loss causation as a separate element in section 10(b) and rule 10b-5 actions"); *D.E. & J Limited Partnership* v. *Conaway*, 133 Fed. Appx. 994, 1000 (6th Cir. 2005).

For example, the identical allegations of loss causation accepted by this Court (Mem. Op. at 6) were recently rejected in a similar post-*Dura* decision of the Sixth Circuit. *D.E. & J*

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[2] As noted in this Court's opinion (Mem. Op. at 5), *Dura* also favorably referenced the decision of the Seventh Circuit in *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990). *Dura*, 125 S. Ct. at 1633. The Supreme Court made clear, however, that the *Bastian* decision, although consistent with the reasoning that led to the conclusion in *Dura*, could not provide the same support as that provided by the other cases cited therein. Accordingly, *Bastian* was explicitly distinguished—twice—from other cases cited therein with a "*cf.*" indicator. *Id.* at 1630 and 1633. The "*cf.*" citation indicates that *Bastian* "supports a proposition different from the main proposition but sufficiently analogous to lend support." The Bluebook: a Uniform System of Citation 23 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

Limited Partnership v. *Conaway*, 133 Fed. Appx. 994, 1000 (6th Cir. 2005).[3] Affirming the dismissal of the plaintiffs' claims—*without leave to replead*—the Sixth Circuit held that such generalized contentions fail to satisfy the requirements of *Dura* because: "if these allegations would suffice here, the mere inclusion of boilerplate language would suffice everywhere and would defeat the requirement that a plaintiff explain *how the loss occurred*." *See Id.* (emphasis added).[4]

The Seventh Circuit has not yet had the opportunity to speak upon the subject. The extent of the impact upon Seventh Circuit law is therefore a matter of first impression and "contestable" for the purposes of section 1292(b). *Drnek*, 205 F. Supp. 2d at 900 (holding that an issue is "contestable" if it is a question of first impression); s*ee Boim,* 291 F.3d at 1007-08 (same); *Barner*, 2003 U.S. Dist. LEXIS 22843, at *14 (this Court favorably citing *Drnek* for the proposition that an issue is contestable when it is a question of first impression.).

In this Circuit, a number of cases had held—prior to *Dura*—that a plaintiff could recover under Rule 10b-5 merely by asserting that the purchase price was "artificially inflated" due to the defendant's misrepresentation. *See, e.g.*, *Danis* v. *USN Communications, Inc.*, 73 F. Supp. 2d 923, 943 (N.D. Ill. 1999) ("Plaintiffs' allegations of an inflated purchase price suffice to meet their burden of pleading loss causation."); *Fujisawa Pharmaceutical Co.* v. *Kapoor*, 814 F. Supp. 720, 727 (N.D. Ill. 1993); *Miller* v. *Apropos Technology, Inc.*, No. 01 C 8406, 2003 U.S. Dist. LEXIS 5074, at *26-27 (N.D. Ill. Mar. 31, 2003). Given that *Dura* rejected "artificial inflation"

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3 *Compare* Plaintiffs' Complaint ¶ 350 ("As a direct and proximate result of these defendants' wrongful conduct, plaintiffs and the other members of the class suffered damages in connection with their purchases of Household securities during the Class Period"), *with Conaway*, 133 Fed. Appx. at 1000. ("As a direct and proximate result of defendants' wrongful conduct, plaintiffs and the other members of the Class suffered damages in connection with their purchases of Kmart publicly traded securities during the class period.")

4 These new principles have also been adopted in various district court opinions that reached similar conclusions. *See, e.g., Joffee* v. *Lehman Bros.*, 410 F. Supp. 2d 187, 194 (S.D.N.Y. 2006) (holding that alleging that "'as a direct and proximate result of Defendants' wrongful conduct,' Plaintiffs were 'damaged by the loss' of their investment' . . . falls well short of what is required to demonstrate loss causation under . . . *Dura*"); *In re Compuware Sec. Litig.*, 386 F. Supp. 2d 913, 918-919 (E.D. Mich. 2005) ("The Court's opinion in *Dura* does not merely require a plaintiff to include the magic words 'direct and proximate' in connection with its alleged loss. Plaintiffs must do more than use talismanic language to cure an otherwise inadequately pled complaint.").

pleadings as insufficient to plead loss causation, the Seventh Circuit could well determine—as a matter of first impression—that *Dura* has in fact changed the law of the Seventh Circuit.

As the first Supreme Court case interpreting the PSLRA—which itself substantially changed the legal landscape relevant to cases alleging securities fraud—*Dura* provides new guidance in this area of law. *See, e.g., D.E. & J Limited Partnership* v. *Conaway*, 133 Fed. Appx. 994, 1000 (6th Cir. 2005); *Securities Class Action Settlements Reach Record Level in 2005, Finds Cornerstone Research; Median Settlement Size Nearly 20% Above 2004 Levels*, Business Wire, Feb. 7, 2006 ("'The Supreme Court's decision in *Dura* is clearly the most significant decision in many years. . .'") (citation omitted).

The absence of Seventh Circuit authority on this subject, and the above-cited case law, demonstrates the existence of reasonable and substantial differences of opinion about the impact of the *Dura* decision on Seventh Circuit law. As a matter of first impression, and a matter generating conflicting decisions regarding a controlling issue of uncommon importance, the question is therefore highly suitable for certification pursuant section 1292(b). *See, e.g. Boim*, 291 F.3d at 1008; *Gamboa* v. *City of Chicago*, No. 03 C 219, 2004 U.S. Dist. LEXIS 25105, *11 (N.D. Ill. Dec. 9, 2004); *Resolution Trust Corp.* v. *Gallagher,* No. 92 C 1091 1992 U.S. Dist. LEXIS 16226, at *16-18 (N.D. Ill. Oct. 22, 1992).

4. Certification Will Advance the Ultimate Resolution of the Litigation

A decision by the Seventh Circuit on the impact of *Dura* stands to materially advance or establish a final result in this case. *See e.g. Boim*, 291 F.3d at 1008 (holding that determination of a motion to dismiss for failure to state a claim will materially advance the termination of the litigation); *Gamboa*, 2004 U.S. Dist. LEXIS 25105 at *12 (same). Certification would not only "speed up" the litigation, *Ahrenholz*, 219 F.3d at 675, but it also "could head off protracted, costly litigation." *Brewton* v. *City of Harvey*, 319 F. Supp. 2d 890, 893 (N.D. Ill. 2004). It could also

potentially facilitate a settlement. *EEOC* v. *Dial Corp.*, No. 99 C 3356, 2001 U.S. Dist. LEXIS 24523, at *15 n.4 (N.D. Ill. Dec. 27, 2001); *Resolution Trust Corp.* v. *Franz*, No. 93 C 2477, 1996 U.S. Dist. LEXIS 4351, at *3-4 (N.D. Ill. Apr. 4, 1996).

It is beyond dispute that this litigation has required both parties to expend tremendous resources and has substantially burdened this Court. Ongoing fact discovery is continuing to be a long and arduous process.[5] In response to plaintiffs' First and Second Document Demands — consisting of more than 70 requests — defendants have spent tens of thousands of hours, interviewed hundreds of individuals, collected thousands of boxes of documents, and produced almost three and a half million pages of hard-copy documents and almost 600,000 pages of electronic records. Plaintiffs have recently served a Third Document Demand, consisting of an additional 35 requests, which seeks, *inter alia*, to require defendants to conduct a second documentary search of the entire organization. Although defendants have ample cause to oppose such excesses, even the related motion practice will take a toll on them and the resources of the Court. Plaintiffs have also served three sets of interrogatories, three sets of requests for admission consisting of 143 requests, and taken more than 17 depositions while announcing a wish to take over 80 more. (Here too, they ought not to get their unreasonable wish, but the related meet and confer sessions, motion practice and constant hearings before the Magistrate Judge are themselves quite burdensome.) Plaintiffs have also propounded extensive discovery on numerous non-parties to the action seeking additional documents and deposition testimony.

The burden on the Court has also been substantial, with no relief in sight. Since 2005, the parties have made no fewer than 25 discovery motions to the Magistrate Judge requiring extensive briefing and a review of many different legal and factual contentions, all in addition to regular status conferences. There have also been seven motions submitted to this Court. The ongoing discovery burden has become so substantial that the Magistrate Judge has ordered bi-weekly status conferences requiring personal appearances by counsel for all parties.

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[5] The original close of fact discovery — January 12, 2006 — was extended by the Court to May 12, 2006. The Magistrate Judge has also signaled her intention to extend fact discovery again, but has not formally done so.

The burden on defendants and the Court can only increase as the case goes forward. Apart from the discovery already underway, and compliance with and resolution of disputes regarding plaintiffs' incessant new demands, defendants will resume their depositions of plaintiffs when the Magistrate Judge allows, followed by rounds of expert discovery. Prior to any trial there will also be motions, including a comprehensive summary judgment motion by defendants, and any necessary *in limine* motions and other pre-trial efforts. Given the prolix nature of plaintiffs' complaint and the vast discovery plaintiffs have taken and still demand, these motions are likely to entail thousands of hours of counsel time to prepare and brief, and impose a commensurate burden on the Court.

Certification pursuant to 28 U.S.C. 1292(b) may well focus, accelerate or even eliminate this process to the benefit of all involved. Any clarification of the impact of *Dura* on the law of the Seventh Circuit would refine the issues of the case, speeding up not only this litigation but also all current and future litigations that will ultimately confront this widely debated issue. *See Gamboa*, 2004 U.S. Dist. LEXIS 25105, at *12 (granting certification because "[e]ven if the appellate court agrees with our decision, it may in its opinion provide guidance for the trial of the case"); *Drnek*, 205 F. Supp. 2d at 900 (holding that resolution of an issue would speed up the litigation where it would refine the scope of discovery and a contrary decision would be dispositive and obviate the need for discovery); *In re AOL Time Warner, Inc.*, 2006 U.S. Dist. LEXIS 17588, at *33 (stating that given the recent developments post-*Dura*, loss causation will "continue to be the subject of profound dispute throughout the litigation"). The Court of Appeals' early focus on the impact of *Dura* may thereby terminate or narrow this litigation and avoid a needless expenditure of resources by the parties and the Court.

CONCLUSION

For the foregoing reasons, and consistent with the proposed order submitted herewith, the Court should amend and certify for interlocutory review the order entered on April 26, 2006 with respect to the *Dura* Motion.

Dated: May 9, 2006
Chicago, Illinois

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