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

THE CLASS' RESPONSE TO HOUSEHOLD DEFENDANTS' MOTION PURSUANT TO 28 U.S.C. §1292(b)

I. INTRODUCTION

The Class submits this response to Defendants' Motion Pursuant to 28 U.S.C. §1292(b) ("§1292(b) Motion"). As explained below, defendants' §1292(b) Motion fails to identify a question that meets the statutory standard for interlocutory review, *i.e.*, a "controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. §1292(b).

In its April 24, 2006 order denying Household Defendants' motion for judgment on the pleadings, this Court held that *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627 (2005), "did not change the controlling law in this circuit." April 24, 2006 Memorandum Opinion and Order ("April 24 Order") at 5-6 (citing *Bastian v. Petren Resources Corp.*, 892 F.2d 680 (7th Cir. 1990) and *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648-49 (7th Cir. 1997)). Defendants assert, however, that there is substantial disagreement in the district courts as to whether *Dura* raised the bar for pleading loss causation in this Circuit. Memorandum of Law in Support of Defendants' Motion Pursuant to 28 U.S.C. §1292(b) ("Defs' Mem.") at 2. The question they proposed for certification is:

> [W]hether the Supreme Court decision in *Dura* has affected or expanded upon the pleading requirements for loss causation in securities fraud cases in the Seventh Circuit.

Proposed Order Granting Defendants' Motion Pursuant to U.S.C. §1292(b) at 1.

First, defendants fail to inform the Court that the Seventh Circuit, on January 25, 2006, cited *Caremark* with approval in stating that plaintiff must prove that a false statement alleged "proximately caused the plaintiff's damages." *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 595 (7th Cir. 2006). Thus, the Seventh Circuit reaffirmed *Caremark* subsequent to the Supreme Court's *Dura* decision. Defendants' §1292(b) Motion ignores the *Tellabs* decision. Second, although defendants claim that *Dura* effected a change in pleading loss causation, they fail to explain ***how*** *Dura* changed the standard for pleading loss causation enunciated in *Bastian* and again in

Caremark. Third, none of the cases defendants cite holds that *Dura* changed the Seventh Circuit standard. Significantly, defendants overlook that it was *Dura* itself that resolved a controlling legal question on which the circuits were in conflict. The lower courts are now simply applying the *Dura* standard to various factual contexts alleged. But fact-based applications of a settled legal rule are not appropriate for §1292(b) certification. *Ahrenholz v. Bd. of Trustees*, 219 F.3d 674, 677 (7th Cir. 2000) (certification should be used only for a "pure" or "abstract" question of law).

In addition, interlocutory review would slow rather than "materially advance the ultimate termination of the litigation" – an additional §1292(b) statutory consideration. 28 U.S.C. §1292(b). A critical flaw in defendants' motion to certify an interlocutory appeal is that even assuming they are correct that *Dura* changed the pleading standard for loss causation in the Seventh Circuit, such an intervening change in applicable pleading standards would serve as a compelling reason for granting leave to amend. *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 646 (3d Cir. 1989); *Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522, 529-30 (9th Cir. 1987); *Wyatt v. Terhune*, 315 F.3d 1108, 1116 (9th Cir. 2000). An amended complaint would foster an additional round of motions further delaying the termination of the litigation. Thus, interlocutory review is unwarranted because it would impede rather than advance resolution of this litigation.

Accordingly, there is no valid reason to grant defendants' §1292(b) Motion for certification. The Class requests that defendants' motion be denied and the Class be permitted to complete its discovery without further delay.[1]

II. STANDARD OF REVIEW

Section 1292(b) provides as follows:

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[1] Defendants interpose this motion in yet another attempt to distract the Class' lead trial counsel from the important fact discovery underway.

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such 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***, he shall so state in writing in such order. . . .

28 U.S.C. §1292(b) (emphasis added). Certification of interlocutory appeals under 28 U.S.C. §1292(b) is "exceptional." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996). Whether to certify an appeal is left initially to the discretion of the district court. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995). Questions of law that may be affected by factual context are inappropriate for §1292(b) review. *Ahrenholz*, 219 F.3d at 677. Thus, a question of law, as used in §1292(b), is a question requiring the resolution of purely legal issues; it is not the application of a legal question to the particular facts of a case. *Id.*

III. ARGUMENT

A. The Impact of *Dura* Is Not a Certifiable, Controlling and Disputed Question of Law Because *Dura* Itself Settled a Circuit Conflict and the Lower Courts Are Simply Applying *Dura* to Various Fact Allegations

In *Dura*, the Supreme Court addressed the controlling and disputed legal question whether pleading that plaintiffs purchased stock at fraud-inflated prices suffices to plead loss causation under the federal securities laws. 15 U.S.C. §78u-4(b)(4); *Dura*, 125 S. Ct. at 1630. The Supreme Court resolved the conflict, holding that to plead loss causation, plaintiffs not only had to plead purchase at an artificially inflated price, but also that the fraud proximately caused their loss by alleging that the share price declined upon revelation of all or part of the truth about the company's business that the fraud had concealed or misrepresented. *Dura*, 125 S. Ct. at 1633-34.[2]

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[2] Here, as this Court recognized, the Corrected Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("Complaint" or "¶") pleads both in more than one paragraph. *E.g.*, ¶¶5-6, 22, 29, 56-57, 100-101, 140, 169, 343-344, 346-350. For example, the Complaint alleges: "In early 10/02, ***rumors began to circulate in the market*** of a pending settlement that would terminate Household's ability to continue the illegal practices detailed herein

The Supreme Court made clear, moreover, that Fed. R. Civ. P. 9(b) particularity that Household demands is not required to plead loss causation. Rather, plaintiff must provide "a short and plain statement" under Fed. R. Civ. P. 8(a)(2) giving notice to defendant of "some indication of the loss and the causal connection that the plaintiff has in mind." *Dura*, 125 S. Ct. at 1634. By its holding in *Dura*, the Supreme Court disapproved a rule followed in the Ninth Circuit. The Supreme Court recognized that most other circuits, including the Seventh Circuit, followed the correct rule. *Id*.

The district courts in this Circuit have simply been applying *Dura* to various factual allegations consistent with *Dura* and with pre-*Dura* Seventh Circuit decisions referenced in this Court's April 24 Order. Such lower court judicial review of the application of the *Dura* standard to varying fact patterns alleged does not present a "controlling" question of law. *Ahrenholz*, 219 F.3d at 677. *Dura* has already resolved that controlling question.

Defendants' own §1292(b) Motion acknowledges that to be certified, there must be a "pure" question of law "that stands substantially free from factual context." Defs' Mem. at 3 (citing *Ahrenholz*, 219 F.3d at 676-77). Here, while the question presented stands free of "evidentiary" facts, the issue rests in a factual context of allegational facts – which at the pleading stage must be accepted as true. *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000). Thus, while the pleading issue in *Dura* might be viewed as resolving a pure question of law, in this case and others, the lower courts are simply applying *Dura* to various facts alleged.

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and require a $500+ million payment. ***In response, the price of Household stock dropped*** from as high as $29 on 9/30/02 to less than $21 during early 10/02." ¶344 (emphasis added). These paragraphs are incorporated in the §10(b) claim (¶346) including ¶350 which summarizes – consistent with Rule 8 – that plaintiffs' damages in connection with their stock purchases were a "proximate result" of defendants' wrongful conduct as revealed to the market, resulting in a price decline. ¶¶344, 350.

Moreover, defendants have not shown how *Dura* is different from the Seventh Circuit standard. Although defendants claim that district courts in this Circuit have concluded that *Dura* changed the standard (Defs' Mem. at 5), the cases they cite do not support this proposition. In *Porter v. Conseco, Inc.*, No. 1:02-cv-01332-DFH-TAB, 2005 U.S. Dist. LEXIS 15466 (S.D. Ind. July 14, 2005) (opinion contains the following notation: Not Intended for Publication in Print), the court recognized the briefs were written before *Dura*, and found no causal link alleged, but granted leave to amend. *Id.* at **14-15. Similarly, there is no statement in *Davis v. SPSS, Inc.*, 385 F. Supp. 2d 697 (N.D. Ill. 2005), that *Dura* changed Seventh Circuit law. Rather, in granting leave to amend, the court simply suggested that plaintiffs consult *Dura*. *Id.* at 705 n.1. Contrary to defendants' assertions and as recognized by this Court, district courts have applied the loss causation standard set forth in *Bastian* and again in *Caremark* in post-*Dura* securities fraud decisions. April 24 Order at 6 (citing *Asher v. Baxter Int'l, Inc.*, No. 02 C 5608, 2006 U.S. Dist. LEXIS 4821 (N.D. Ill. Feb. 7, 2006)); *Greater Pa. Carpenters Pension Fund v. Whitehall Jewelers, Inc.*, No. 04 C 1107, 2005 U.S. Dist. LEXIS 12971 (N.D. Ill. June 30, 2005).

In sum, whether *Dura* changed the Seventh Circuit standard is not an "abstract legal issue" that might be appropriate for §1292(b) certification. *Ahrenholz*, 219 F.3d at 677. *Dura* construed the statutory provision. Lower courts are simply applying it to the facts alleged.

Defendants' §1292(b) Motion fails as well because the question presented is not controlling in the sense urged by defendants, that if their *Dura* motion was granted on appeal, "it would dispose of all claims." Defs' Mem. at 4. To the contrary, even if defendants achieve a ruling that *Dura* changed the Seventh Circuit pleading standard, it would not dispose of the case. Rather, plaintiffs could and would seek leave to amend. Leave to amend is virtually automatic when there has been an intervening change in the pleading standard. *See, e.g.*, *Craftmatic*, 890 F.2d at 646.

B. Interlocutory Review Will Retard Rather than Advance This Litigation

Each of the conditions set forth in §1292(b) must be met by a court to certify an interlocutory appeal. *Ahrenholz*, 219 F.3d at 676 ("The criteria [for a §1292(b) review] are conjunctive, not disjunctive."). One condition is that the appeal "will materially advance, not retard, ultimate termination of the litigation." *Clark-Dietz & Assocs.-Eng'rs, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir. 1983).[3]

First, the requested interlocutory appeal itself will, without question, build a significant delay into the litigation and distract the parties as they attempt to complete discovery in this case. The briefing on defendants' motion will not be complete until May 26, 2006, with the Court's decision coming sometime after that. If the Court certifies the interlocutory appeal, defendants must still apply to the Seventh Circuit within ten days, the Class may respond, and the Circuit can take as long as it needs to accept or reject the appeal. From the time the Seventh Circuit takes the appeal, if it does, the case will likely be delayed for another year. Docket congestion is a proper factor to consider in deciding whether to certify a §1292(b) appeal. *Coopers & Lybrand v. Livesay*, 437 U.S.

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[3] Defendants' protestations about the burden of fact discovery are not a consideration in certifying an interlocutory appeal. Defs' Mem. at 1-2, 8-10. Moreover, defendants' burden is in large part self-inflicted. For example, defendants have aggressively pursued motion practice, filing a number of motions that on their face had no substantive merit – the eleven-page Memorandum of the Non-Setting Household Defendants Pursuant to the PSLRA with Respect to Plaintiffs' Proposed Settlement with Defendant Arthur Andersen LLP and nine-page reply. Docket Nos. 445-1, 468-1. Other discovery motions were permanently tabled or summarily denied without any briefing by the Class. Docket Nos. 314, 436, 477, 486. Similarly, defendants' "inadvertent" production of federal regulatory agency documents has forced the parties and the court to expend substantial time and effort undoing the resulting snafus, forcing an extension of the fact discovery deadline. In these circumstances, it is highly ironic that defendants complain of the burden of litigation while at the same time filing this motion which as discussed below would only add to the burdens of litigating this case during the most critical phase of discovery without any benefit to the parties.

463, 475 (1978). Even a four- to six-month delay makes it unlikely that ultimate determination would be advanced rather than slowed by a §1292(b) appeal. *See Clark-Dietz*, 702 F.2d at 69.

Additionally, interlocutory review is granted to determine discrete questions that have the potential to terminate litigation "once and for all." *See, e.g.*, *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961) (determining whether there is jurisdiction could end the case); *Ex Parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963) (same); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307 (5th Cir. 2005) (class certification decision); *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005) (same); *Castano v. American Tobacco Co.*, 162 F.R.D. 112, 116 (E.D. La. 1995) (same). Here, an appeal would not terminate the litigation. *See Hadjipateras*, 290 F.2d 697. Rather, even assuming the Seventh Circuit held that *Dura* changed the pleading standard in this Circuit and found that loss causation has not been adequately alleged by the Class in the existing complaint, it would likely grant the Class here leave to amend. Leave is liberally granted generally, and particularly when there has been an intervening change in law as defendants repeatedly assert. *Craftmatic*, 890 F.2d at 646. Accordingly, none of the grounds for certification is met here. This Court should reject certification.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the Household Defendants' §1292(b) Motion to certify an appeal.

DATED: May 19, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL AND BY U.S. 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 Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on May 19, 2006, declarant served by electronic mail and by U.S. Mail the **THE CLASS' RESPONSE TO HOUSEHOLD DEFENDANTS' MOTION PURSUANT TO 28 U.S.C. §1292(b)** to the parties listed on the attached Service List. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of May, 2006, at San Francisco, California.

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