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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

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

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This reply 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 further support of their motion pursuant to 28 U.S.C. § 1292(b) for amendment of the Court's April 26, 2006 Memorandum Opinion and Order ("Mem. Op." or "Order") to include a certification for interlocutory appellate review.

INTRODUCTION

In an effort to stave off appellate review that might well resolve this action, plaintiffs' opposition to this motion disregards post-*Dura*[1] federal appellate authority granting precisely the relief sought by defendants here—dismissal of the complaint for contravention of *Dura's* loss causation principles *without leave to replead. E.g., D.E. & J. Limited Partnership* v. *Conaway*, 133 Fed. Appx. 994, 1000 (6th Cir. 2005). Each of plaintiffs' objections to certification is contradicted by the post-*Dura* dismissal of cases such as *Conaway*—a decision completely ignored in plaintiffs' papers. The legal issues raised by defendants and the pleadings to which they are addressed are virtually identical to those in *Conaway* and defendants seek the same result that the Sixth Circuit ordered in that case. The absence of post-*Dura* Seventh Circuit cases such as *Conaway* leaves no doubt that defendants present a "controlling question of law" as to which there is a "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). The Seventh Circuit has yet to speak on the impact of *Dura* on the requirements for pleading and proving loss causation and may well adopt the reasoning of the Sixth Circuit or a similar formulation inconsistent with prior rulings in this circuit. The time to find that out is now, before this Court and defendants are subjected to further burden that may prove to be unnecessary as a matter of law.

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1 *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005) ("*Dura*")

In *Conaway,* the Sixth Circuit concluded that *Dura* established new pleading principles to govern securities fraud claims in federal courts. Applying those principles, the Sixth Circuit ruled that the plaintiffs' generalized allegations (indistinguishable from those pleaded here) were insufficient after *Dura* because they "did not plead that the alleged fraud became known to the market on any particular day, did not estimate the damages that the alleged fraud caused, and did not connect the alleged fraud with the ultimate disclosure and loss." 133 Fed. Appx. at 999-1000. On this basis, the Sixth Circuit affirmed dismissal of the plaintiffs' claims without leave to replead. If the Court of Appeals adopts this as the Seventh Circuit's post-*Dura* pleading standard, this case will be over.

Plaintiffs' argument that the Seventh Circuit implicitly considered the implications of *Dura* is without merit. (Plaintiffs' Mem.[2] at 1 (citing *Makor Issues & Rights, Ltd.* v. *Tellabs, Inc.*, 437 F.3d 588 (7th Cir. 2006).) The issue in *Tellabs* was not the sufficiency of a plaintiff's pleading or proof of loss causation, but rather whether the plaintiff adequately alleged—with the particularity required by the PSLRA—material false statements and scienter. *Tellabs*, 437 F.3d 588. The requirement of pleading "proximate causation" was not even raised as an issue, but was mentioned only once—in passing—as one of six elements required to plead securities fraud. *Id.* at 595. In reaffirming the continued vitality of the "proximate cause" element of a securities fraud claim (*id.* at 595), the court in *Tellabs* did not even mention *Dura*, much less apply the loss causation pleading requirements it established. Even the Ninth Circuit, which also required "proximate cause" prior to having its loss causation standard reversed in *Dura,* continues to rely on pre-*Dura* "proximate cause" case law.[3] The question resolved in cases such as *Conaway* but unresolved in the Seventh

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2 "Plaintiffs' Mem." refers to The Class' Response to Household Defendants' Motion Pursuant to 28 U.S.C. § 1292(b).

3 *See In re Silicon Storage Technology, Inc., Securities Litigation*, No. C 05-0295 PJH, 2006 U.S. Dist. LEXIS 14790, at *8 (N.D. Cal. Mar. 10, 2006) ("To plead securities fraud under Section 10(b) of the 1934 Act, plaintiffs must allege (1) a misstatement or omission . . . which proximately caused the plaintiffs' injury. *DSAM Global Value Fund* v. *Altris Software, Inc.*, 288 F.3d 385, 388 (9th Cir. 2002).").

Circuit is: What pleading and showing of *loss causation* does *Dura* require in claims of securities fraud?

Certification is particularly appropriate given the size of this case and its imposition of onerous burdens upon defendants and the Court. This case is nearly four years old and fact discovery is not yet remotely close to completion. Defendants' discovery has been deferred. Expert discovery and post-discovery motion practice have not even commenced. Even with fact discovery continuing during its pendency, an immediate appeal could ameliorate or eliminate many of these burdens. Certification of the Court's Order pursuant to 28 U.S.C. § 1292(b) would therefore be both practical and efficient.

ARGUMENT

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

The question presented for certification is whether *Dura* effected a change in Seventh Circuit pleading requirements for loss causation. (Def. Mem. at 2)[4] This motion does not seek review of the application of the law to particular facts, but instead questions whether the governing legal standard itself has changed. It is therefore a pure "question of law". *Ahrenholz* v. *Board of Trustees of the University of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000). No issues of fact need be resolved before the Seventh Circuit can address this question.

Plaintiffs argue that there can be no "question of law" because *Dura* itself establishes the relevant legal standard, and courts need only apply it to the relevant facts or allegations. (*See* Plaintiffs' Mem. at 3-4.) Plaintiffs then explain what *they believe* the key elements of that standard might be. (*Id.* at 4 ("The Supreme Court made clear . . . that plaintiff must provide . . . 'some indication of the loss and causal connection that the plaintiff has in mind.'" (quoting *Dura*, 544 U.S. at 347).) Whatever the ultimate merits, *vel non,* of plaintiffs' position as to the meaning of *Dura*, the

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[4] "Def. Mem." refers to Memorandum of Law in Support of Defendants' Motion Pursuant to 28 U.S.C. § 1292(b).

Sixth Circuit, among others, has undeniably read *Dura* in a manner quite different from that proffered by plaintiffs. *See, e.g., Conaway, supra.* Under any reading, however, this is a "question of law" within the meaning of § 1292(b).

The Seventh Circuit has rejected plaintiffs' crabbed reading of § 1292(b), stating that determinations as to the adequacy of a complaint are appropriate "questions of law" for interlocutory appeal. In *In re Healthcare Compare Corp. Securities Litigation*, 75 F.3d 276, 279 (7th Cir. 1996), a merits panel of the Seventh Circuit upheld a motions panel's grant of permission to appeal from the denial of a motion to dismiss over a dissent that argued for "restraint in using the certification procedure to review fact-bound issues with respect to the adequacy of a complaint" (*id.* at 285). Instead, certification by the district court was granted because—as here—"the applicable legal standard in the Seventh Circuit was unclear." *Id.* at 279. *See also Boim* v. *Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002) (certifying order denying motion to dismiss for failure to state a claim).

This circuit is not unique in rejecting plaintiffs' argument that orders denying motions to dismiss are never suitable candidates for § 1292(b) certification. In *Bryant* v. *Avado Brands, Inc.*, 187 F.3d 1271 (11th Cir. 1999), the Eleventh Circuit certified an order denying a motion to dismiss for failure to plead scienter under the PSLRA, bringing up for review the question of "what standard Plaintiffs must meet in this Circuit in order to plead scienter adequately under 15 U.S.C. § 78u-4(b)(2)." *Id.* at 1275. The district court reasoned that "the Reform Act had 'not yet been addressed by an appellate court,' . . . remarking that 'there is a distinct difference of opinion among the district courts that have considered the statute's proper interpretation.'" *Id.* at 1275. This analysis is equally applicable here.

2. There is Substantial Ground for Difference of Opinion Regarding *Dura's* Effects

Dura did not purport to resolve every legal issue relevant to loss causation. Instead, by announcing that specific types of loss causation allegations are now required in securities fraud

cases, *Dura* has raised a number of new issues that are now being sorted out by the circuit courts. Their post-*Dura* decisions reflect the uncertainty of this process. For example, although most post-*Dura* circuit court decisions have disagreed with their position, plaintiffs nevertheless argue that a complaint need not plead a "corrective disclosure" followed by a drop in stock price to satisfy *Dura*. (Plaintiffs' *Dura* Brief at 12 ("Nowhere does the Supreme Court require a 'corrective disclosure' tied to a stock drop")).[5] But in *United States* v. *Olis*, 429 F.3d 540 (5th Cir. 2005), the Fifth Circuit found that "there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines" (*id.* at 546). *Accord, e.g., In re Merck & Co., Securities Litigation*, 432 F.3d 261, 275 (3d Cir. 2005); *D.E. & J. Limited Partnership* v. *Conaway*, 133 Fed. Appx. 994, 1000 (6th Cir. 2005); *In re IPO Securities Litigation*, 399 F. Supp. 2d 298, 308 (S.D.N.Y. 2005) (holding that "plaintiffs' failure to allege a corrective disclosure of the falsity of defendants' opinions precludes any claim that such falsity caused their losses"). Circuit decisions which directly contradict plaintiffs' position make this issue well suited for certification. *See Resolution Trust Corp.* v. *Gallagher*, No. 92 C 1091, 1992 U.S. Dist. LEXIS 16226, at *16-18 (N.D. Ill. Oct. 23, 1992) (holding that contradictory opinions provide substantial grounds for a difference of opinion).

Prior to *Dura*, district courts in this circuit had held 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 without pleading any explanation of how the loss was caused. *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."); *Miller* v. *Apropos Technology, Inc.*, No. 01 C 8406, 2003 U.S. Dist. LEXIS 5074, at *26-27 (N.D. Ill. Mar. 31, 2003).

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[5] "Plaintiffs' *Dura* Brief" refers to Lead Plaintiffs' Response to Household Defendants' Motion Based on the Supreme Court's Decision in *Dura Pharmaceuticals, Inc.*, v. *Broudo*.

Since *Dura*, other district courts in this circuit have held that *Dura* raises new and potentially controlling issues of loss causation. *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"); *see also Davis* v. *SPSS, Inc.*, 385 F. Supp. 2d 697, 705 n.1 (N.D. Ill. 2005) (noting that counsel contemplating superseding pleadings "should consult the Supreme Court's recent analysis in Dura"). Plaintiffs' contention that these cases do not reflect any unresolved post-*Dura* issues in Seventh Circuit law (Plaintiffs' Mem. at 5) is thus insupportable.

The Sixth Circuit's *Conaway* decision illustrates a resolution of such substantial differences relating to the meaning and application of *Dura's* principles. *Conaway* rejected a boilerplate allegation of loss causation indistinguishable from that alleged here.[6] 133 Fed. Appx. at 1000. 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 the plaintiffs "did not plead that the alleged fraud became known to the market on any particular day, did not estimate the damages that the alleged fraud caused, and did not connect the alleged fraud with the ultimate disclosure and loss." *Id.* at 999-1000. Were the Seventh Circuit to agree with the Sixth, this case would be over.

Considering these substantial differences of opinion and the absence of Seventh Circuit authority on the subject, certification under § 1292(b) is appropriate.

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[6] *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.").

3. Certification Can Materially Advance the Ultimate Termination of the Litigation and the Theoretical Possibility of Amendment is Immaterial to Certification

Plaintiffs argue that certification should be denied because they would inevitably seek leave to amend if the Complaint were dismissed by the Seventh Circuit. (Plaintiffs' Mem. at 7.) According to plaintiffs, their option at some later time to seek leave to amend their pleading to satisfy *Dura* renders certification inappropriate. (*Id.* ("[E]ven assuming the Seventh Circuit held that *Dura* changed the pleading standard . . . it would likely grant the Class here leave to amend.") This argument is incorrect for at least two reasons.

Pretermitting plaintiffs' prior refusal to seek leave to replead following *Dura*,[7] plaintiffs' reliance on Fifth Circuit law[8] is misplaced because it contradicts prior rulings of the Seventh Circuit expressly rejecting the notion that the possibility of a new pleading undermines the utility of an interlocutory appeal from the denial of a motion to dismiss. Plaintiffs' argument likewise does not acknowledge that *Dura's* principles will prevent plaintiffs from successfully repleading these claims because the history of Household's stock price does not bear out any of their three theories of securities fraud in a *Dura*-compliant manner. As the *Dura* Motion documents (pp. 10-20), plaintiffs cannot satisfy the loss causation requirements spelled out in *Dura* because they cannot connect any of their three theories of alleged fraud to any "corrective disclosures" that were promptly followed by a significant decline in the price of Household's securities.

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[7] See *Dura* Motion at 9 n.11. "*Dura* Motion" refers to Memorandum of Law in Support of Household Defendants' Motion Based on the Supreme Court's Decision in *Dura Pharmaceuticals, Inc.*, v. *Broudo*. Leave to amend is sparingly granted in cases subject to the PSLRA. *See PR Diamonds, Inc. v. Chandler*, 364 F.3d. 671, 700 (6th Cir. 2004) (affirming district court's decision denying plaintiffs leave to amend a complaint that had already been amended once because "allowing repeated filing of amended complaints would frustrate the purpose of the PSLRA" which is to "prevent harassing strike suits, and to encourage attorneys to use greater care in drafting their complaints" (citations and internal quotation marks omitted). *Begala v. PNC Bank, Ohio, Nat'l Ass'n,* 214 F.3d 776, 784 (6th Cir. 2000) (affirming denial of leave to amend, noting that plaintiffs cannot expect "an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies") (emphasis omitted).

[8] In their Argument, plaintiffs cite to seven cases which address certification under § 1292(b). Five of the seven are from courts of the Fifth Circuit. (Plaintiffs' Mem. at 4, 6-7).

If the *Dura* Motion were granted on this basis it would dispose of all claims, making the matter highly appropriate for interlocutory review under Seventh Circuit law. *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). The *Dura* Motion argues not only that plaintiffs have improperly pled loss causation but that given the requirements of *Dura, they cannot properly do so even in an amendment.* Defendants' motion seeking dismissal without leave to amend is therefore squarely within existing Seventh Circuit law. *See, e.g., GE Capital Corp.* v. *Lease Resolution Corp.*, 128 F.3d 1074, 1078 (7th Cir. 1997) (holding that a court may deny a plaintiff leave to amend if amendment would be futile). This is precisely what happened in *Conaway* where the Sixth Circuit relied on *Dura* in affirming the denial of leave to replead a complaint that failed properly to plead loss causation post-*Dura*, noting, *inter alia*, that plaintiffs had already been given other opportunities to amend their complaint. 133 Fed. Appx. at 1001-2. Thus, plaintiffs' hypothesis that they might later seek to amend their pleading is directly addressed by the *Dura* Motion itself and by cases such as *Conaway*, which deny the "option" to replead claimed by plaintiffs. Plaintiffs' speculation, therefore, does nothing to limit the potential benefit and cost savings that § 1292(b) certification could bring to this case.

Even if it were assumed that leave to amend were certain to be granted, Seventh Circuit law would defeat plaintiffs' position. In the Seventh Circuit the fact that a complaint might be successfully amended is not a barrier to certification of orders denying motions to dismiss. *See, e.g. In re Healthcare*, 75 F.3d at 284; *In re Brand Name Prescription, Drugs Antitrust Litigation*, 94 C 897, 1998 U.S. Dist. LEXIS 18133, *22-23 (N.D. Ill. Nov. 17, 1998) ("For purposes of § 1292(b), a question is not uncontrolling merely because it does not dispose of a case.") (citations and internal quotation marks omitted). In *In re Healthcare*, the Seventh Circuit certified an order denying a motion to dismiss for failure to state a claim and remanded for dismissal of the complaint, leaving open the issue of whether the plaintiff would be permitted to amend. 75 F.3d at 284. In doing so the Court of Appeals implicitly rejected the dissent's argument that issues concerning the adequacy of

the complaint are inappropriate for interlocutory appeal. *Id.* at 279. Likewise, in *Bryant*, 187 F.3d 1271, the Eleventh Circuit certified an order denying a motion to dismiss containing the question of "what standard Plaintiffs must meet in this Circuit in order to plead scienter adequately under 15 U.S.C. §78u-4(b)(2)." *Id.* at 1275. The court chose only to articulate the governing pleading standard and remand to the district court, without resolving issues of dismissal or amendment. *Id.* at 1275 n.4.

Plaintiffs insists that the discovery and pre-trial burdens upon the parties and the court should not be considered in certifying an interlocutory appeal. (Plaintiffs' Mem. at 6 n.3 ("Defendants' protestations about the burden of fact discovery are not a consideration in certifying an interlocutory appeal.").) To the contrary, it is *precisely* these burdens which prompted the enactment of § 1292(b). *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 180 (1972) ("The legislative history of § 1292 (b) indicates that its primary benefit was expected to occur in the protracted or 'big' cases....").[9] Discussing the adoption of § 1292(b), the Seventh Circuit has noted that the Senate Committee Report explained that a case which could last eight months is an ideal example of where interlocutory appeal would be appropriate. *Fisons Ltd.* v. *United States*, 458 F.2d 1241, 1246 n. 7 (7th Cir. 1972) ("[I]ts primary efficacy was expected to occur in cases of exceptional magnitude.").

Given the history of this securities fraud case—which has been underway for almost four years with all of the substantial burdens attendant to such cases and more—certification of the *Dura* issue to the Court of Appeals is particularly appropriate. To date, more than four million pages of documents have been produced. Plaintiffs have noticed almost 100 depositions (of which 55 have been allowed) and served almost 150 requests for admission and three sets of interrogatories. The majority of those depositions have yet to be taken, document and fact discovery contin-

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[9] Plaintiffs' argument that certification should be denied because appellate review will take too long (Plaintiffs' Mem. at 6n) is simply illogical. Such delays exist for any certification. Plaintiffs' argument would foreclose certification of *any* order *ever*. Moreover, any delay is outweighed by the time and expense that this case will continue to require from the parties and the Court.

ues, and defendants' affirmative depositions and expert discovery have been stayed pending the conclusion of plaintiffs' massive fact discovery. Even if plaintiffs should fail in their current campaign to expand most of their discovery demands well beyond the end of the class period, it seems likely that at least another year of substantial burden and expense will pass before defendants are able to present their motion for summary judgment to the Court.

It is well settled that certification is appropriate when it "could head off protracted, costly litigation," *Brewton* v. *City of Harvey*, 319 F. Supp. 2d 890, 893 (N.D. Ill. 2004), or potentially facilitate a settlement. *Resolution Trust Corp.* v. *Franz*, No. 93 C 2477, 1996 U.S. Dist. LEXIS 4351, at *3-4 (N.D. Ill. Apr. 8, 1996). Thus, even if the Seventh Circuit does not reverse the denial of defendants' *Dura* Motion, any guidance that could terminate, focus, expedite, limit or lead to the settlement of this case would be beneficial to both parties and the Court. *See In re Healthcare*, 75 F.3d at 279 (affirming district court certification, which was granted because a "'massive amount of discovery [is] lurking in this case'"); *Gamboa* v. *City of Chicago*, No. 03 C 219, 2004 U.S. Dist. LEXIS 25105, at *12 (N.D. Ill. Dec. 9, 2004) (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").

CONCLUSION

For the foregoing reasons, the Court should amend and certify for interlocutory review the order entered on April 26, 2006 denying the *Dura* Motion.

Dated: May 26, 2006
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CERTIFICATE OF SERVICE

Adam B. Deutsch, an attorney, certifies that on May 26, 2006, he caused to be served copies of Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion Pursuant to 28 U.S.C. § 1292(b), to the parties listed below via the manner stated.

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