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

LEAD PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' [FIFTH] SET OF INTERROGATORIES

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I. INTRODUCTION

Defendants [Fifth] Set of Interrogatories (the "Interrogatories") are nothing more than a contrivance. Having served 101 interrogatories already, defendants are permitted no more. Furthermore, the Interrogatories and defendants' attempts to defend them rest on faulty factual and legal assumptions. Although defendants purport to seek simple "facts" regarding market disclosures, defendants have fashioned their questions in a manner designed to confuse rather than clarify the issues in this case. As written, Interrogatory Nos. 39-40 seek irrelevant information regarding inquiry notice, which is no longer at issue in this case. Defendants contend that, although Interrogatory Nos. 39-40 expressly refer to lead plaintiffs' argument regarding inquiry notice, they actually seek information regarding loss causation. Defendants' argument that in order for investors to suffer a loss they must be on inquiry notice of defendants' fraud reflects a misunderstanding (or manipulation) of the legal standards for loss causation and inquiry notice.

In any event, defendants' attempt to bind lead plaintiffs to arguments made in legal briefs is improper and unsupported by law. Judge Guzman rejected lead plaintiffs' argument in the *Foss* brief[1] and shortened the class period by two years. Thus, the facts and documents supporting lead plaintiffs' inquiry notice argument are no longer relevant.

Similarly, Interrogatory Nos. 41-43 incorrectly assume that in order for the Class members to suffer a loss, defendants' fraudulent scheme must first have been disclosed to the market. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342, 344 (2005). In *Dura*, the case on which defendants purport to rely, the Supreme Court recognized that loss occurs when "the relevant truth begins to

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[1] "*Foss* brief" refers to Lead Plaintiffs' Response to Household Defendants' Motion Pursuant to the Seventh Circuit's Decision in *Foss v. Bear, Stearns Co.*, attached as Exhibit 3 to the Affidavit of Janet A. Beer in Support of Household Defendants' Motion to Compel Responses to Defendants' Third Set of Interrogatories ("Beer Aff.").

leak out" about "the financial condition of a corporation." *Id.*[2] There is no requirement that defendants' fraudulent scheme be fully revealed to the market. Compounding the confusion inherent in the Interrogatories, defendants have steadfastly refused to modify or clarify them. Thus, the Interrogatories remain ambiguous.

Furthermore, the information defendants purport to seek (which is different than the information they actually request in the Interrogatories) is the subject of expert testimony. This is not the first time defendants have burdened lead plaintiffs and the Court with a motion to compel discovery that is properly addressed by experts. The Court rejected defendants' previous attempt at premature expert discovery regarding damages and should do the same here. September 20, 2004 Memorandum of Opinion and Order (Docket No. 180) ("September 20 Order"). Denial of this motion will not prejudice defendants in any way. If defendants truly seek information regarding loss causation, they will have ample opportunity to examine lead plaintiffs' expert on the subject during the expert discovery phase.

II. RELEVANT PROCEDURAL HISTORY

The parties scheduled a meet and confer to discuss the Interrogatories on August 1, 2006.[3] A cursory review of the meet and confer transcript reveals that defendants did not engage in a good faith attempt to resolve the parties' differences. Counsel for defendants refused to engage in

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[2] All citations, footnotes and internal quotation marks omitted throughout and all emphasis added, unless otherwise indicated.

[3] Contrary to defendants' statement, lead plaintiffs did not "drag[] their heels on Defendants' attempts to meet and confer." Memorandum of Law in Support of the Household Defendants' Motion to Compel Responses to Defendants' Third Set of Interrogatories ("Defs' Mem.") at 2. Rather, defendants sought to meet and confer on August 1, 2006 at 1:00 p.m. EDT. Exhibit 1 (all exhibits are attached hereto unless otherwise noted). Lead plaintiffs were unavailable at that time and the parties agreed to meet and confer at 4:30 p.m. EDT instead. *Id.* It is unlikely that defendants were prejudiced by this three and one-half hour "dragging of the heels." Defendants' brief, like many before it, is replete with similarly inaccurate accusations. Listing them all, however, would cause lead plaintiffs to exceed their page limitation.

constructive discussions regarding lead plaintiffs' responses and objections, and made it clear from the outset that they had no intention to reach a reasonable compromise. Here is how they opened the discussion about lead plaintiffs' responses:

> Mr. Owen [counsel for defendants]: We're prepared to move on this set in its entirety and we intend to do so unless you agree now to provide actual responses to all of the six interrogatories within the next two weeks.
>
> * * *
>
> Mr. Brooks [counsel for lead plaintiffs]: Do you have any inclination to discuss any of the specific interrogatories?
>
> Mr. Owen: ***No, I don't***.
>
> * * *
>
> ***I'm not going to go back and forth with you on this objection or that objection or the other objection.*** What I'm telling you is that what we want is a commitment from you today to provide actual substantive responses to all six interrogatories in the next two weeks. If you don't provide us that, we're going to make our motion and we're going to take the position that you have responded to our interrogatories in bad faith. . . that's what we're here to talk about today, and that's it.

Beer Aff., Ex. 5 at 5-7.

The printed word does not do full justice to the tone and volume of Mr. Owen's demands. Defendants' hard-line stance is neither indicative of good faith compliance with Local Rule 37-2, nor is it conducive to eliciting useful discovery responses.

Notwithstanding lead counsel's efforts to engage in a productive meet and confer, defendants refused to modify or clarify any of their ambiguous and confusing interrogatories, taking the position that: "An interrogatory is defined according to the terms of the party who interposes it. And we do not agree to any redefinition . . . ." *Id.* at 10-11 ("[I]t is not a matter of clarification." *Id.* at 14. "No, no, no, no. We're not going to modify the interrogatory so that it does not mention the complaint." *Id.* at 17.).

Defendants' statements and demeanor during the meet and confer wholly undercut their false assertion that they "regret adding to the Court's workload." Defs' Mem. at 1. To the contrary, defendants have taken every opportunity to waste the Court's and lead plaintiffs' time by, among other things, filing three frivolous motions for sanctions, refusing to engage in productive meet and confers, forcing lead plaintiffs to file numerous motions to compel and stalling in providing their own responses to written discovery. Undoubtedly this behavior will continue unless the Court sends a message that defendants are to take seriously their discovery obligations, including the obligation to meet and confer in good faith. *Ridge Chrysler Jeep L.L.C. v. Daimler Chrysler Servs. N. Am., L.L.C.*, Case No. 03 C 760, 2004 U.S. Dist. LEXIS 26861, at **13-15 (N.D. Ill. Dec. 29, 2004) (denying motion to compel for failure to properly meet and confer: "Rule 37(a)(2)(B) requires parties to meet and confer, in a ***good faith*** effort to resolve discovery disputes before filing a motion to compel with the court.").

III. ARGUMENT

A. Defendants Have Exceeded Their Interrogatory Limit

Prior to serving the Interrogatories, defendants had served, by lead plaintiffs' count, a total of 101 interrogatories in four previous sets. Lead plaintiffs objected to the Interrogatories on these grounds, and again informed defendants that they were well over the limit during the meet and confer. Beer Aff., Ex. 5 at 4. Incredibly, defendants insisted during the meet and confer that their first two sets of interrogatories did not count toward defendants' total because they were propounded during "the pre-class certification time" and were "a different kind" than the interrogatories served in the subsequent three sets. *Id.* at 3. There have been no orders from this Court permitting defendants a greater number of interrogatories than the Class for a "different kind" of interrogatories. Such liberties by defendants, however, have not been unusual.

The Court in its August 10, 2006 Order precluded lead plaintiffs from serving any further interrogatories. At that time, lead plaintiffs had served only 56 of their allotted 85 interrogatories, but defendants objected that lead plaintiffs were over the limit. The Court apparently accepted defendants' count that lead plaintiffs' 56 interrogatories actually equaled 86. Similarly, the Court should accept lead plaintiffs' count that defendants have served over 100 interrogatories. Moreover, at the August 22, 2006 hearing, the Court ordered that "neither party may propound further interrogatories." Ex. 2 at 12:1-2.

Fairness requires that since defendants already served more than 100 interrogatories before serving their [Fifth] Set, lead plaintiffs should not be forced to respond to this latest set of confusing and harassing interrogatories. Defendants will not be prejudiced in any way because, as discussed below, they will have ample opportunity to discover and explore all aspects of loss causation during the expert discovery phase.

B. Interrogatory Nos. 39 and 40 Seek Information About the Class' Legal Argument on Inquiry Notice Which Is No Longer at Issue

Interrogatory No. 39 is derived from an incomplete excerpt of lead plaintiffs' legal argument based on the inquiry notice standard set forth in *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997).[4] Beer Aff., Ex. 3 at 7-8. The full sentence from which defendants lifted Interrogatory No. 39 reads:

> ***Under Fujisawa's controlling standard***, plaintiffs' claims did not arise until at least August 14, 2002, the earliest date that plaintiffs could have discovered the essential facts underlying defendants' fraud.

[4] The interrogatory seeks identification of "all facts and documents" supporting lead plaintiffs' argument that, pursuant to the Seventh Circuit's standard for inquiry notice set forth in *Fujisawa*, lead plaintiffs were not on inquiry notice of their claims, *i.e.*, they did not have enough information to file their lawsuit, until August 14, 2002. Beer Aff., Ex. 1 at 1.

Id. (emphasis added to portion omitted by defendants). The question of inquiry notice is no longer at issue in this litigation, and thus, Interrogatory No. 39 does not seek information likely to lead to the discovery of admissible evidence. Interrogatory No. 40, according to defendants, was propounded to simply cover the converse of Interrogatory No. 39. The question of whether the Class was on inquiry notice prior to August 14, 2002 is equally irrelevant. Defendants' motion to compel responses to these irrelevant interrogatories should be denied.

1. The Standards for Inquiry Notice and Loss Causation Are Not Interchangeable

As this Court is aware, in response to defendants' motion for judgment on the pleadings seeking to shorten the class period on statute of limitations grounds, lead plaintiffs argued that investors were not on inquiry notice of their claims until after August 14, 2002 and for that reason the five-year statute of repose under the Sarbanes-Oxley Act of 2002 was applicable to the Class' claims. Beer Aff., Ex. 4. Judge Guzman rejected this argument and reduced the class period by two years. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 02 C 5893 (Consolidated), 2006 U.S. Dist. LEXIS 15517 (N.D. Ill. Feb. 28, 2006). Judge Guzman decided, as a matter of law, that the Class was precluded from recovering on the earlier class period, *i.e.*, October 23, 1997 to July 29, 1999. *Id.* at *10. Because the Court rejected lead plaintiffs' argument based on inquiry notice, the facts supporting this argument are irrelevant.

Defendants' interpretation of lead plaintiffs' argument in the *Foss* brief relies on a distortion of the principles of inquiry notice and loss causation. In fact, there are distinct standards for inquiry notice (to which the partially quoted excerpt in Interrogatory No. 39 relates) and loss causation (to which defendants seek to apply the quoted excerpt).

Lead plaintiffs' argument in the *Foss* brief was an argument about the applicable statute of limitations, nothing more, nothing less. The "essential facts" referred to in the *Foss* brief and quoted in Interrogatory No. 39 are those facts necessary to file suit under the inquiry notice standard as

delineated by the Seventh Circuit in *Fujisawa*. The standard for loss causation is different. Loss causation is connected to the market's general response to the overall condition of the company, whereas the statute of limitations is only triggered by more precise information about specific conduct so as not to "precipitate groundless or premature suits" before plaintiff can discover facts to support his claims. *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1202 (10th Cir. 1998).

Inquiry notice requires that a suspicious circumstance "place the potential plaintiff in possession of, or with ready access to, the essential facts that he needs in order to be able to sue." *Fujisawa*, 115 F.3d at 1337. When lead plaintiffs made the legal argument based on the standard delineated by *Fujisawa*, that the Class was not on inquiry notice until at least August 14, 2002, this meant only that Class members did not have access to "precise" information enabling them to file suit until then. In other words, any prior revelations were not "sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated" and did not rise to the level "to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit." *Id.* at 1335.

By contrast, loss causation may be alleged under *Dura* without a direct corrective disclosure of earlier fraud. *Dura* recognizes that loss occurs when "the relevant truth begins to leak out" about "the financial condition of a corporation." *Dura*, 544 U.S. at 342, 344. Thus, under *Dura*, plaintiffs can suffer losses long before all the facts sufficient to put investors on inquiry notice are revealed to the market.

Lead plaintiffs have never taken the position that investors did not suffer any loss prior to August 14, 2002. The Complaint specifically alleges that Household's stock price declined from over $53.00 per share in June 2002 to approximately $30.00 per share in late August 2002, as the magnitude and pervasiveness of defendants' fraud leaked to investors. Complaint, ¶¶21-22. These

allegations are specifically referenced in the *Dura* brief[5] regarding loss causation. Beer Aff., Ex. 4 at 11.

This is not the first time defendants have served interrogatories seeking one thing only to turn around on a motion to compel and ask for something different. In its August 10, 2006 Order, this Court denied defendants' motion to compel because the information sought in defendants' motion was not clearly requested in the "interrogatories as written." August 10, 2006 Order (Docket No. 631) at 17. If defendants really were interested in discovering whether lead plaintiffs contend the Class suffered losses due to leakage into the market prior to August 14, 2002 – as opposed to putting words in lead plaintiffs' mouths – they would have propounded the question directly, *i.e.*, state whether you contend that members of the Class suffered no damages prior to August 14, 2002.[6] Defendants, however, chose to distort lead plaintiffs' argument about inquiry notice – an argument Judge Guzman has rejected – in an effort to bind lead plaintiffs to a position they have never taken. Such tactics serve only to confuse the proceedings, not clarify them.

As it stands, defendants' interrogatories relating to lead plaintiffs' statements on inquiry notice do not seek relevant information. Their motion should be denied.

2. Defendants' Attempt to Invoke Judicial Estoppel Is Not Supported by Law

In determining the relevance of discovery, the Court's analysis should focus on the allegations of the operative complaint. Defendants seek to evade this basic tenet of discovery by

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[5] "*Dura* brief" refers to Lead Plaintiffs' Response to Household Defendants' Motion Based on the Supreme Court's Decision in *Dura Pharmaceuticals, Inc. v. Broudo*, attached as Exhibit 4 to the Beer Affidavit.

[6] For the reasons discussed below, this question is one for experts. Defendants will have ample opportunity to further explore loss causation issues at that point. Given the Court's August 10 and August 22 Orders precluding further interrogatories in this case, the Court should not allow defendants to propound additional interrogatories correcting these objectionable interrogatories.

asserting that lead plaintiffs are somehow bound by prior legal arguments without regard to the context of the prior briefing. *See* Defs' Mem. at 5. This attempt to invoke judicial estoppel *sub silentio* fails as a matter of law.

Judicial estoppel only applies in this Circuit where the party at issue adopted a clearly inconsistent prior position in order to obtain a judgment in a prior proceeding. *Patz v. St. Paul Fire & Marine Ins. Co.*, 15 F.3d 699, 702 (7th Cir. 1994); *see United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999). As Justice Posner explained, "[i]t is thus about abandoning winning, not losing, grounds." *Patz*, 15 F.3d at 702. The legal briefs that Household cites are from this case. Thus, there is no prior judgment upon which to found a claim of judicial estoppel. Moreover, lead plaintiffs lost the *Foss* motion. Third, unlike in *Feldman v. American Memorial Life Ins. Co.*, 196 F.3d 783 (7th Cir. 1999) (the case relied on by defendants), this case does not involve a prior sworn statement. *Id.* at 791. In sum, context is important and here it demonstrates that lead plaintiffs cannot be bound by prior statements made in legal briefs, particularly where the statement was not adopted expressly by the Court. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 02 C 5893 (Consolidated), 2006 U.S. Dist. LEXIS 36603 (N.D. Ill. Apr. 24, 2006). Thus, defendants' discovery, which is based on statements made in lead plaintiffs' legal briefs, is irrelevant, not designed to lead to admissible evidence and designed to harass and distract lead plaintiffs' efforts to complete discovery in a timely fashion.

C. Interrogatory Nos. 41-43 Prematurely Seek Expert Information

Interrogatory Nos. 41-43 are contention interrogatories which defendants contend seek information regarding loss causation. These interrogatories are premature.[7] This Court denied

[7] As re-defined by defendants' in their brief, Interrogatory Nos. 39 and 40 also seek information subject to expert analysis. To the extent the Court concludes that Interrogatory Nos. 39 and 40 seek information relevant to loss causation, they too are premature.

defendants' prior motion to compel premature discovery regarding damages, because "damages in securities fraud cases are generally an issue addressed by experts." September 20 Order at 2. The instant motion is simply an attempt to circumvent the Court's prior order by framing the issue in terms of loss causation as opposed to damages. This strategy should be rejected because loss causation, like damages, is properly the subject of expert testimony. Defendants will have ample opportunity to obtain the information they seek during the expert phase of discovery, following the parties' court-ordered mediation.

As the Third Circuit recently acknowledged, questions of "loss causation and damages [are] likely [to] involve conceptually difficult economic theories and complex calculations ***based on experts*** with diametrically opposed opinions." *In re AT&T Corp. Sec. Litig*., 455 F.3d 160, 166 (3d Cir. 2006); *see also Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 832 (8th Cir. 2003) (declining "to attach dispositive significance to the stock's price movements absent sufficient facts and expert testimony").

In a recent opinion regarding class certification in the *Enron* litigation, Judge Harmon discussed one technique experts use to evaluate loss causation:

"One method increasingly recognized by courts . . . is an event study, a statistical method of measuring the effect of a particular event such as a press release, a Form 10-K, or a prospectus, on the price of a company's stock:

> An event study is a statistical regression analysis that examines the effect of an event on a dependent variable, such as a corporation's stock price. This approach assumes that the price and value of the security move together except during days when disclosures of company-specific information influence the price of the stock. ***The analyst then looks at the days when the stock moves differently than anticipated solely based upon market and industry factors-so-called days of 'abnormal returns.' The analyst then determines whether those abnormal returns are due to fraud or non-fraud related factors***. . . . [E]vent study methodology has been used by financial economists as a tool to measure the effect on market prices from all types of new information relevant to a company's equity valuation."

In re Enron Corp. Sec. Derivative & "ERISA" Litig., 236 F.R.D. 313, 2006 U.S. Dist. LEXIS 43146, at *216 (S.D. Tex. June 5, 2006) (quoting Jay W. Eisenhoffer, Geoffrey C. Jarvis, and James R. Banko, *Securities Fraud, Stock Price Valuation, and Loss Causation: Toward A Corporate Finance-Based Theory of Loss Causation*, 59 Bus. Law. 1419, 1425-26 (August 2004)) (second alteration in original).

Because the question of which disclosures led to investors' losses is inextricable from the expert's loss causation analysis, the information defendants seek must be left until expert discovery. *Dura*, 544 U.S. at 343 (question of loss causation requires analysis of a "tangle of factors affecting price"). If lead plaintiffs are required to respond to these interrogatories now, the result will be "an artificial narrowing of the issues, instead of an informed paring down." *Ziemack v. Centel Corp.*, No 92 C 3551, 1995 U.S. Dist. LEXIS 18192, at *5 n.3 (N.D. Ill. Dec. 6, 1995). As discussed *ad nauseum* in the parties' prior briefing regarding contention interrogatories, courts generally seek to avoid such results. *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 348 (N.D. Cal. 1985) (Absent a showing "that there is a real likelihood that ***early*** answers . . . will result in a significant re-shaping of the litigation," responses to contention interrogatories should be left until the end of discovery.) (emphasis in original).

Defendants, moreover, refused to respond to lead plaintiffs' discovery regarding loss causation on the grounds that it called for an expert opinion. Ex. 3. Lead plaintiffs propounded Requests for Admissions seeking admissions that certain price changes in Household's stock were statistically significant. *Id.* Defendants refused to fully respond on the grounds that: "the determination of statistical significance of stock price increases, if it is to be of assistance to the fact finder, requires expert analysis and testimony." *Id.*

Furthermore, "[d]efendants will suffer no prejudice and will have ample opportunity to obtain this factual information when they take their discovery of [p]laintiffs' experts." *Roberts v.*

Heim, 130 F.R.D. 424, 428 (N.D. Cal. 1989). Defendants have identified no compelling reason for why identification of the factors contributing to lead plaintiffs' losses should be required prior to expert discovery.[8]

Defendants do not cite a single case in which the court compelled a plaintiff to provide information regarding loss causation prior to the expert discovery stage. Indeed, the cases they rely on support lead plaintiffs' position. For example, in *Ziemack* plaintiffs were ordered to disclose "the raw data on stock prices." *Ziemack*, 1995 U.S. Dist. LEXIS 18192, at *8. Defendants here already have this information. Importantly, the court in *Ziemack* specifically stated that it did "not expect Plaintiffs to address the issues that will be more appropriately dealt with by experts, at a later date." *Id.* Similarly, in *Roberts*, the court required plaintiffs to provide only "factual information independent of that to be provided by their experts." *Roberts*, 130 F.R.D. at 429. Here, the facts regarding how and when the market was informed of the relevant truth regarding Household's financial and operational condition are not independent of those the expert will provide. Thus, defendants' motion should be denied.

D. Interrogatory Nos. 41-43 Lack Foundation and Are Designed to Confuse Rather than Clarify the Issues

Interrogatory Nos. 41-43 are based on a misstatement of the law, *i.e.*, that loss causation occurs only when it is revealed to the "market or any member of the class that Household was allegedly engaged in a 'Fraudulent Scheme.'" Beer Aff., Ex. 1. As discussed, *Dura* does not require a full revelation of defendants' fraudulent scheme as a predicate to loss causation. *Dura*, 544 U.S. at 342, 344. Nor is "a single formal corrective measure" necessary. *Enron*, 2006 U.S. Dist. LEXIS

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[8] Even if the Court accepts defendants' argument that these interrogatories are not subject to expert testimony, defendants' motion should be denied for failure to meet their burden of demonstrating that early answers to well-tailored contention interrogatories will result in a significant re-shaping of the litigation or a significant savings for one or more parties. *Convergent*, 108 F.R.D. at 338.

43146, at **211-12 (citing *Dura*, 544 U.S. at 341-42, 346). Investors' economic loss may occur as the "relevant truth begins to leak out" or "after the truth makes its way into the market place." *Dura*, 544 U.S. at 342; *see, e.g.*, *Greater Pa. Carpenters Pension Fund v. Whitehall Jewellers, Inc.*, No. 04 C 1107, 2005 U.S. Dist. LEXIS 12971, at **15-17 (N.D. Ill. June 30, 2005) (no requirement that the complaint allege a specific direct disclosure or admission that prior financial statements were in fact false); *In re Daou Sys.*, 411 F.3d 1006, 1026 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1335 (2006) (Rejecting the district court's insistence upon express "negative public statements, announcements or disclosures," the court held that it was sufficient to allege that "disclosures of [the company's] true financial health" led to a decline in stock price.).

Judge Guzman already has denied defendants' attempts to dismiss this case based on *Dura*. *Household Int'l*, 2006 U.S. Dist. LEXIS 36603. In his Order, Judge Guzman held that *Dura* did not change the loss causation standard previously applied in the Seventh Circuit as set forth in *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990) and *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645 (7th Cir. 1997). Neither *Bastian* nor *Caremark* (nor *Dura*) requires plaintiffs to allege that the fraudulent scheme was disclosed in order to allege loss causation, the position urged by defendants. Defs' Mem. at 8 (citing *In re Initial Pub. Offering Sec. Litig.*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005)). Defendants' attempt to re-litigate this issue on a motion to compel and undermine Judge Guzman's prior order is improper and should be rejected.

Since the assumptions regarding loss causation inherent in Interrogatory Nos. 41-43 are incorrect, requiring lead plaintiffs to respond would create confusion, not clarity. *Ziemack*, 1995 U.S. Dist. LEXIS 18192, at *5 n.3. Defendants already have demonstrated their willingness to manipulate lead plaintiffs' statements in an attempt to create confusion. They should not be given further opportunity to do so.

IV. CONCLUSION

For the foregoing reasons, defendants' motion to compel should be denied.

DATED: September 1, 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 September 1, 2006, declarant served by electronic mail and by U.S. Mail the **LEAD PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' [FIFTH] SET OF INTERROGATORIES** to the parties. 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 1st day of September, 2006, at San Francisco, California.

s/ Marcy Medeiros
MARCY MEDEIROS