

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | No. 02 C 5893 |
| |) | |
| HOUSEHOLD INTERNATIONAL, INC., et al., |) | Judge Nan R. Nolan |
| |) | |
| Defendants. |) | |

ORDER

Plaintiffs have filed this securities fraud class action alleging that Defendants Household International, Inc., Household Finance Corporation ("Household"), and certain individuals engaged in predatory lending practices between July 30, 1999 and October 11, 2002 (the "Class Period"). In the latest motion before this court, Defendants move to compel responses to their Third Set of Interrogatories, Nos. 29-34. For the reasons set forth here, the motion is denied.

DISCUSSION

The Federal Rules of Civil Procedure permit "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." FED. R. CIV. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 930 (7th Cir. 2004) (quoting FED. R. CIV. P. 26(b)(1)).

Plaintiffs have refused to provide responses to interrogatories seeking information regarding the documents and facts that purportedly revealed Defendants' allegedly fraudulent scheme to the market. As a preliminary matter, Plaintiffs object that Defendants have exceeded their allotted number of interrogatories, in large part due to the fact that Defendants served several interrogatories regarding the issue of class certification. (Pl. Resp., at 4.) Defendants respond that

they only served 10 interrogatories on the issue of class certification, and that Plaintiffs themselves have only increased Defendants' interrogatory numbering by 10: Defendants discuss Interrogatory Nos. 29-34; Plaintiffs refer to these Interrogatories as Nos. 39-44. (Def. Reply, at 4-5.) Plaintiffs' objection that Defendants have exceeded their interrogatory limit is overruled. For purposes of this motion, the court will adopt the movant's nomenclature and refer to the disputed interrogatories as 29-34.

A. Interrogatory Nos. 29-33

1. Relevance

Interrogatory No. 29 asks Plaintiffs to identify all documents and facts supporting the statement in their "*Foss* Brief" that their claims did not arise until at least August 14, 2002. The *Foss* Brief refers to Plaintiffs' response to Defendants' motion pursuant to the Seventh Circuit's decision in *Foss v. Bear, Stearns & Co.*, 394 F.3d 540 (7th Cir. 2005), in which Plaintiffs objected to Defendants' attempt to shorten the Class Period. Specifically, Plaintiffs argued that investors were not on notice of their claims against Household until August 14, 2002 and, thus, the five-year statute of repose under the Sarbanes-Oxley Act of 2002 was applicable to the Class' claims. (Pl. Resp., at 6.) Plaintiffs also cited the August 14, 2002 date in a brief opposing Defendants' motion to dismiss based on the Supreme Court's ruling in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). In that "*Dura* Brief," Plaintiffs successfully opposed Defendants' motion to dismiss for failure to allege loss causation under *Dura*, asserting that "[o]n August 14, 2002, investors began to learn of the true facts about Household's financial and operating condition" (Ex. 4 to Def.'s Mem, at 10.)

Defendants insist that having made these factual representations in two briefs submitted to the district court, Plaintiffs cannot now argue that the August 14, 2002 date is somehow irrelevant. To the contrary, Defendants argue, *Dura* and its progeny teach that in order to establish

loss causation for purposes of a securities fraud case, Plaintiffs must demonstrate that: (1) the "relevant truth" was revealed to the market; (2) the stock price subsequently decreased; and (3) the decrease in stock price was caused by the revelation of the "truth." (Def. Mem., at 7; Def. Reply, at 9 (citing *Dura*, 544 U.S. at 342-44, 347).) Absent an allegation that the allegedly fraudulent scheme was disclosed, there can be no showing of loss causation. See *In re Initial Public Offering Sec. Litig.*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005). As a result, Defendants argue, the date the alleged fraud was disclosed is highly relevant to any analysis of Plaintiffs' case.

Plaintiffs disagree, arguing that the inquiry notice standard at issue in the *Foss* Brief has nothing to do with loss causation. Plaintiffs claim that they have never taken the position that investors did not suffer any loss prior to August 14, 2002, and emphasize that under *Dura*, "plaintiffs can suffer losses long before all the facts sufficient to put investors on inquiry notice are revealed to the market." (Pl. Resp., at 7.) The court agrees that the standards for inquiry notice and loss causation are not the same, and that Plaintiffs' invocation of the August 14, 2002 date in the *Foss* Brief does not speak to the interrogatories at issue here. To be sure, Defendants' Interrogatory No. 29 is inartfully drafted to the extent it seeks information based solely on a statement made in that particular brief, and Plaintiffs' objection is sustained.

That said, Interrogatory Nos. 30-33 are not limited to statements made in the *Foss* Brief. Interrogatory No. 30 asks Plaintiffs to identify all documents and facts demonstrating that the market or any class member became aware of the alleged fraud prior to August 14, 2002. Interrogatory Nos. 31-33 ask Plaintiffs to identify the disclosures that reveal when and how the market learned of three discrete theories of alleged fraud: illegal predatory lending; improper reaging of delinquent loans; and improper credit card accounting. Significantly, Plaintiffs also raised the August 14, 2002 date in their *Dura* Brief, which had nothing to do with inquiry notice and instead addressed the pleading requirements for loss causation. In addition, Plaintiffs filed both

the *Foss* and *Dura* Briefs on the same day, August 18, 2005.¹ (Doc. 279, 280.) The court agrees that facts and documents setting forth the disclosures that purportedly put the market on notice of Household's alleged fraud, as requested in Interrogatory Nos. 30-33, are relevant and discoverable. See *In re Initial Public Offering Sec. Litig.*, 399 F. Supp. 2d at 266 (if "plaintiffs do not allege that the scheme was ever disclosed, they fail to allege loss causation.") That does not, however, end the inquiry.

2. Timeliness

The next question is whether information regarding public disclosures is discoverable now, or whether production must await expert testimony. Plaintiffs argue that even assuming Interrogatory Nos. 30-33 seek information relevant to loss causation, they are premature. Plaintiffs note that "questions of 'loss causation and damages [are] likely [to] involve conceptually difficult economic theories and complex calculations based on experts with diametrically opposed opinions.'" (Pl. Resp., at 10 (quoting *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 166 (3d Cir. 2006).) In Plaintiffs' view, "[b]ecause 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." (*Id.* at 11.)

Defendants insist that Plaintiffs are confusing the issues of "disclosure" and "loss causation." Defendants claim that they only seek information regarding the dates of public disclosures revealing the "relevant truth." Whether those disclosures in fact affected the stock price, Defendants argue, is a separate matter within the province of the experts. (Def. Reply, at 8-9.) Defendants deny that these two issues are inextricably linked, arguing that Plaintiffs must "answer interrogatories with the facts they have at hand, even if experts will later analyze this information to offer an opinion." (*Id.* at 10 (citing *Ziemack v. Centel Corp.*, No. 92 C 3551, 1995

¹ The court does not agree with Plaintiffs' suggestion that Defendants have raised a judicial estoppel argument, and this objection is overruled. (Pl. Resp., at 8-9.)

WL 729295, at *3 (N.D. Ill. Dec. 7, 1995) (requiring plaintiffs to answer interrogatories seeking information regarding the fact of their damages, even though expert testimony was also expected regarding loss causation).)

The court agrees with Defendants that Plaintiffs do not need experts to identify the public disclosures they believe contributed to the "relevant truth" leaking out and becoming known in the marketplace. To be sure, the primary relevance of such disclosures depends upon the impact they had, if any, on investors' losses, which requires expert analysis and testimony. As courts have recognized, there are a "tangle of factors affecting price," and "the market may learn of possible fraud through a number of sources [besides a formal corrective disclosure]: e.g., from whistleblowers, analysts' questioning financial results, resignations of CFOs or auditors, announcements by the company of changes in accounting treatment going forward, newspapers and journals, etc." *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, Civil Action No. H-01-3624, 2006 U.S. Dist. LEXIS 43146, at *212 (S.D. Tex. June 5, 2006); *Dura*, 544 U.S. at 343.

Nevertheless, the court does not believe that the disclosures are inextricable from the expert's loss causation analysis. Rather, the court views Interrogatory Nos. 30-33 as contention interrogatories. *Ziemack*, 1995 WL 729295, at *2 ("Basically, contention interrogatories require the answering party to commit to a position and give factual specifics supporting its claims.") As such, they must be answered no later than two months prior to the close of fact discovery. (See Order of August 10, 2006, Doc. 631.)

B. Interrogatory No. 34

Interrogatory No. 34 requests the identity of the alleged "efforts by defendants to bolster the price of Household stock referenced in ¶ 140 of the Complaint." Paragraph 140 discusses Household's release of a restatement setting forth the amounts by which it had misstated its earnings per share from 1994 to the second quarter of 2002. Plaintiffs allege that Household

released the restatement before the markets opened for trading on August 14, 2002, and that the stock shares "immediately plunged to as low as \$32.09 per share." (Cmplt. ¶ 140.) As trading progressed that day, however, Household allegedly made efforts to "bolster the price of Household stock, which caused the stock to stabilize before closing slightly higher on that day." (*Id.*)


Defendants claim that Plaintiffs responded to this interrogatory by "delug[ing] Defendants with non-responsive information and general references to the Complaint and the document production, including statements made months prior to the day at issue [August 14, 2002]." (Def. Mem., at 3 n.4.) In their opening brief, however, Defendants' only argument regarding Interrogatory No. 34 is that Plaintiffs should be required to supplement their response despite having "alleged facts sufficient to meet the minimum requirements to state a claim." (*Id.* at 11.) In their reply brief, Defendants purport to expand their discussion regarding public disclosures to include Interrogatory No. 34, but they never actually mention the substance of that question. (Def. Reply, at 6.) In the court's view, public disclosures that purportedly put the market on notice of fraud are not the same as public disclosures designed to conceal that fraud (i.e., improperly bolster Household's stock price). In any event, in the absence of any meaningful argument on this matter, the court will defer any response until no later than two months prior to the close of fact discovery. (See Order of August 10, 2006, Doc. 631.) Defendants' motion to compel an immediate response is denied.

CONCLUSION

For the reasons stated above, Defendants' motion to compel responses to their third set of interrogatories [Doc. 642] is denied.

ENTER:

Dated: September 19, 2006



NAN R. NOLAN
United States Magistrate Judge