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 THE HOUSEHOLD DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 18, 2005 ORDER

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Lead Plaintiffs respectfully submit the following Response to the Household Defendants' Motion for Reconsideration of the Court's April 18, 2005 Order ("Defs' Mot.") (Docket No. 742).

I. INTRODUCTION

In its April 18, 2005 Order, this Court held that "discovery of [lead plaintiff] PACE's investment history is ***irrelevant to any class-wide liability issues***."[1] April 18, 2005 Order ("April 2005 Order") at 7. This has not changed. Defendants' subpoenas and deposition notices remain irrelevant to any legal theory or defense impacting class-wide issues. Although defendants insist the discovery sought is necessary for summary judgment, they have not and cannot demonstrate how. Nor can they explain why the arguments they now make were not made in early 2005. Accordingly, there is no valid reason for the Court to reconsider its Order prohibiting defendants "from pursuing discovery related to individual claims and defenses until after class-wide liability had been determined." *Id.* at 11. Furthermore, this Court has put a moratorium on motions for reconsideration. *See* Ex. 1 at 41[2] (October 4, 2006 Hearing Transcript) ("No more motions to reconsider. There isn't enough time."). Defendants' proper remedy was an objection to Judge Guzman; however, they are a eighteen months too late for that.

The timing of defendants' request – three months before the fact-discovery deadline – is not accidental. Indeed, it makes clear that the discovery defendants seek is less about relevant information and more about erecting yet another barrier to the timely completion of fact discovery. Defendants did not seek reconsideration of the Court's Order when it was issued back in April of 2005. They did not bring a timely objection to Judge Guzman. Now, more than a year-and-a-half later, defendants seek reconsideration. Eighteen months, however, is far too long to wait.

More importantly, the argument that defendants now present, *i.e.*, that deposing lead plaintiffs and their investment advisors will reveal information necessary to support defendants' fraud on the market defense, is founded on a significant misconception of the law. Furthermore, this argument is no different that the one defendants made almost two years ago that individual depositions are needed to defeat class-wide reliance. As this Court already has held, however, discovery of the information individual plaintiffs considered when making their investment decisions

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[1] "PACE" refers to lead plaintiff PACE Industry Union Management Pension Fund. All emphasis added, unless otherwise noted.

[2] All exhibits are attached hereto, unless otherwise noted.

is relevant only to individualized reliance questions. April 2005 Order at 7. Such discovery is not proper at this time. *Id.* Defendants cannot establish a truth on the market defense through snapshots of what individual investors knew. In order to prevail on that defense, defendants will have to prove that based on the ***totality*** of information on the market, no reasonable investor could have relied on defendants' false statements. *Gianino v. Citizens Utility Co.*, 228 F.3d 154, 167 (2d Cir. 2000). Short of discovery from every single plaintiff, or a majority of them, defendants cannot prevail on their truth on the market defense through the use of individual plaintiff's investment histories.

Defendants have not offered ***any*** explanation as to why depositions of lead plaintiffs and their advisors are necessary to obtain the public information they seek. By definition, the information relevant to a truth on the market defense is "on the market." During the Class Period (July 30, 1999 through October 11, 2002), moreover, Household meticulously tracked the very information they now claim to seek. *See* Ex. 2. Thus, even if the Court considers defendants' new argument, the motion still should be denied. Lead plaintiffs' knowledge of what information was on the market and when, as well as the knowledge of their investment advisors, is irrelevant to class-wide issues.

Finally, despite this Court's requirement that defendants explain why the prior order should be overturned, they have not even attempted to meet the standard for reconsideration: defendants have presented no new evidence, facts or law supporting reversal of the April 2005 opinion. Defendants have not submitted a single case in response to the Court's explicit invitation to provide authority for the proposition that testimony of lead plaintiffs is binding on the Class for liability purposes. *See* Ex. 3 at 84 (October 19, 2006 Hearing Transcript). Indeed, defendants have (correctly) abandoned that argument altogether. There is no question that the arguments defendants present could have been made almost two years ago in response to lead plaintiffs' motion to quash. Having satisfied none of the elements required on a motion for reconsideration, defendants' motion should be denied.

II. ARGUMENT

A. Defendants Have Not Met Their Burden on Reconsideration

Motions for reconsideration serve a limited purpose. District court opinions "are not intended as mere first drafts, subject to revisions and reconsideration as a litigant's pleasure." *Mountain Funding, Inc. v. Frontier Ins. Co.*, No. 01 C 2785, 2003 U.S. Dist. LEXIS 11274, at **3-4 (N.D. Ill. June 30, 2003) (quoting *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988)).

A motion for reconsideration is appropriate only if "(1) the court has patently misunderstood a party; (2) the court has made a decision outside the adversarial issues presented to the court by the parties; (3) the court has made an error not of reasoning but of apprehension; (4) there has been a controlling or significant change in the law since the submission of the issue to the court; or (5) there has been a controlling or significant change in the facts since the submission of the issue to the court." *United States v. Ligas*, No. 04 C 930, 2005 U.S. Dist. LEXIS 12365, at *1 (N.D. Ill. May 17, 2005) (citing *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)). As discussed below, defendants have not even identified the basis for their motion, let alone satisfied this standard.

Instead, defendants seek to avoid the stringent standard on reconsideration by mischaracterizing the Court's April 2005 Order. However, defendants' contention that the Court's April 2005 Order was based on the "limited ground that questions of individual reliance were not ripe for discovery" is incorrect. Defs' Mot. at 1. This limitation appears nowhere in the Order. In fact, the Court squarely held that "discovery of [lead plaintiff] PACE's investment history is ***irrelevant to any class-wide liability issues*** . . . ." April 2005 Order at 7. By their motion, defendants seek to convince the Court that the discovery they seek ***is***, in fact, relevant to class-wide liability. As the Court acknowledged at the October 19, 2006 hearing, this is a classic motion for reconsideration. *See* Ex. 3 at 78 ("[T]his . . . is an oral motion to reconsider").

As discussed below, defendants' motion does not present the type of rare circumstance where "[a] grievous wrong [has been] committed by some misapprehension or inadvertence by the judge for which there would be no redress." *Bank of Waunakee*, 906 F.2d at 1192. Accordingly, defendants' motion for reconsideration of the April 2005 Order should be denied.

1. Defendants Have Not Specified Their Basis for Reconsideration

The Household defendants present no evidence or argument to show how or why any of the five available reasons for reconsideration have been met. Indeed, defendants do not even specify which prong they are moving on. Defendants' failure to even specify the grounds on which they seek reconsideration demonstrates that this is not one of those rare cases in which reconsideration should be entertained.[3] *See Sunstar, Inc. v. Alberto-Culver Co.*, No. 01 C 736, No. 01 C 5825, 2005

[3] Although defendants contend that the Harcourt case is a post-class certification case, they do no explain why this provides a basis for the Court to reconsider its order. Defs' Mot at 9. It does not. As the

U.S. Dist. LEXIS 23098 (N.D. Ill. Sept. 19, 2005) (affirming order of this Court denying a request for reconsideration where movant offered no basis for reconsidering the decision). Defendants cannot move to reconsider an opinion simply because they do not like it, or to harass Lead Plaintiffs. *Neal v. Honeywell, Inc.*, No. 93 C 1143, 1996 U.S. Dist. LEXIS 15954, at **14-15 (N.D. Ill. Oct. 24, 1996) (where defendants were simply unhappy with the Court's conclusion and failed to satisfy the standard for reconsideration, motion was denied). Because defendants themselves cannot identify that basis for their motion, it should be denied.

2. Reconsideration Is Improper Because the Argument Defendants Present Could Have Been Made in the Initial Briefing

In moving for reconsideration, defendants have presented no new evidence and made no new argument that could not have been presented during the pendency of the original motion almost two years ago. For this reason, the Court should not consider this argument now. The argument defendants do present, moreover, is nothing more than the flip-side of the one presented in the prior briefing. The truth on the market defense, if proven, serves to rebut the fraud on the market presumption. In other words, defendants once again have reverted back to the argument that individual depositions can be used to rebut the class-wide presumption of reliance. This is an argument that was presented before and squarely rejected. April 2005 Order at 5-7.

If the purpose of the discovery defendants seek really is to uncover facts supporting their truth on the market defense, defendants could have and should have raised the issue in their original briefing.[4] Indeed, defendants had at that time already asserted their truth on the market defense. **Answer.** Defendants offer no excuse as to why this argument was not brought in the first instance. Because defendants elected not to present this fraud on the market argument in the first instance, they are barred from seeking reconsideration on these grounds. *C.R. Bard, Inc. v. M3 Sys., Inc.*, No. 93 C 4788, 1994 U.S. Dist. Lexis 9407, at *2 (N.D. Ill. July 11, 1994) ("On reconsideration, a party may not introduce evidence or legal theories that could have been presented earlier.").

Court correctly found the first time, *Harcourt* involved claims of ***direct*** reliance. April 2005 Order at 8, n.6 (citing *In re Harcourt Brace Jovanovich, Inc. Sec. Litig.*, 838 F. Supp. 109, 112 (S.D.N.Y. 1993)). Because this is a fraud on the market case and the Class does not have to show direct reliance, *Harcourt* is inapplicable. *Id.*

[4] Further calling into question defendants motivation, the 30(b)(6) notices served on lead plaintiffs do not specify the truth on the market as a deposition category. The 30(b)(6) notices served on the institutional advisors do not identify any deposition topics.

3. Defendants' Motion For Reconsideration is Untimely

Additionally, defendants' 18 month delay in challenging the Court's April 2005 Order also militates against reconsideration. Normally, a motion for reconsideration is brought within 10 days of the challenged Order. *See, e.g.*, Rule 59(c). Defendants also had 10 days to bring an objection to Judge Guzman. Rule 72(a). Defendants neither sought reconsideration from this Court nor brought a timely objection, but rather sat on their hands for 18 months. Defendants offer no excuse for this delay, which they have not even attempted to justify. *Espinoza v. Northwestern Univ.*, No. 02 C7563, 2004 U.S. Dist. LEXIS 1203, at *7 (N.D. Ill. Jan. 28, 2004) (A party whose objections are not timely filed "must demonstrate sufficient cause for failing to timely object."). Furthermore, in early October the Court has instructed the parties that no more motions for reconsideration should be filed because "[t]here isn't enough time." *See* Ex. 1 at 41. Although defendants have offered no excuse at all for waiting until three months before the end of discovery to seek reconsideration of the Court's April 2005 Order, the reason is obvious. Defendants are pulling out all the stops to divert Class resources in the final months of discovery. This reason does not constitute sufficient cause for failing to timely object and defendants' motion should be denied as untimely.

4. The Truth on the Market Defense Does Not Justify the Discovery Defendants Seek

As the Court held in the April 2005 Order, discovery of lead plaintiffs' "investment history is ***irrelevant to any class-wide liability issues***." April 2005 Order at 7. This holding is in line with the weight of authority holding that individualized issues should be adjudicated at a later stage after class-wide issues have been determined. *See In re Lucent Techs. Inc. Sec. Litig.*, Civil Action No. 00-621 (JAP) 2002 U.S. Dist LEXIS 8799, at *6 (D.N.J. May 7, 2002) ("The discovery sought by Lucent instead may be appropriate at a later stage in the case, in which individualized rebuttal proceedings may be pursued to determine whether a claimant may recover, once the matter of liability has been adjudicated."); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985) (court recognized that individual questions as to reliance lurk in every 10b-5 action and, rather than eliminate securities class actions, it would be more efficient to order separate trials, if necessary, limited to the issue of reliance); *Biben v. Card*, 789 F. Supp. 1001 (W.D. Mo. 1992) (court ordered that the ***first phase of trial should address liability*** and the true value of the shares and the second proceeding should determine individual class member's damages and to hear any evidence rebutting the presumption of reliance individually as to each class member); *Seidman v. Stauffer Chem. Corp.*,

Civil No. B-84-543 (TFGD), 1986 U.S. Dist. LEXIS 30264, at *17 (D. Conn. Jan. 17, 1986) (the court is free to hold separate trials on the issues of reliance and damages).

Defendants, however, claim it is necessary to depose the Lead Plaintiffs and their investment advisors to "help identify what public information was ***known to the market***." Defs' Mot. at 5 (emphasis in original). This is the same argument defendants made last time. Lead Plaintiffs' knowledge regarding "the nature of and risks inherent in Household's business" is completely irrelevant to defendants' alleged truth on the market defense (or any other question of class-wide liability). *Id.* Defendants admit as much in their brief: ***"Whether or not Plaintiffs relied on any of that information is not the point."*** *Id.* at 6. This is because in order to prevail on their truth on the market defense, defendants will have to prove that "the corrective information [was] conveyed to the public 'with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by' the alleged misstatements." *Ganino*, 228 F.3d at 167. Deposing lead plaintiffs, their investment advisors or any other single investor will do nothing to further this defense.

Defendants fail to cite even a single case indicating that testimony of individual class members is probative of a truth on the market defense. To the contrary, the cases cited by defendants, *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993) and *In re Andrx Corp. Sec. Litig.*, 296 F. Supp. 2d 1356 (S.D. Fla. 2003), confirm that information known to individual investors is irrelevant to the truth on the market defense. In *Cooke*, for example, certain of plaintiffs' securities fraud claims were dismissed because a combination of ***newspaper articles***, company ***press releases*** and other indicia of financial distress "overwhelmed [the market] with information questioning the financial integrity of [defendant]." 998 F.2d at 1262. Similarly, in *Andrx*, the court relied on "numerous ***analyst reports*** and ***press releases***" in granting summary judgment based on the truth on the market defense. 296 F. Supp. 2d at 1367. Neither *Cooke* nor *Andrx* (nor any other case cited by defendants) relied on ***a single shred of evidence*** provided by the plaintiffs in concluding that the truth was on the market. This is because the knowledge of a single investor has no bearing on whether the truth was "transmitted to the public with a degree of intensity and credibility sufficient to effectively counter-balance any misleading impression created by [defendants'] one-sided representations." *Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996).

Furthermore, defendants already have the information they purport to seek. Household, like most large corporations, closely tracked public information concerning the Company. Household's investor relations department collected and reviewed analyst reports and media coverage of the

Company on a continuing basis throughout the Class Period. This information was summarized in investor relations reports and media summaries provided to senior management and the board of directors. *See* Exhibit 2 attached hereto. Household is thus aware of and has in its possession the information defendants claim they need from Lead Plaintiffs. At bottom, the truth on the market defense is nothing more than a feeble excuse conjured up by defendants in an effort to circumvent the Court's well-reasoned April 2005 opinion.

Further, defendants' proposed discovery is intended to interrupt proper discovery by the plaintiffs, thereby wasting valuable Class resources and burdening the Class as a whole. For example, although defendants already deposed Lead Plaintiff PACE regarding its investment decisions prior to stipulating to class certification, they seek yet another deposition of PACE on the exact same issues. Defendants have not explained why this second deposition is warranted. Indeed, defendants have not made ***any*** showing that the information they seek through further depositions will give rise to a cognizable legal theory. Indeed, they cannot. It is clear, then, that rather than seeking information relevant to the defense of their case, defendants are intent on sidetracking the prosecution of plaintiffs' case with duplicative and unnecessary discovery. Because there is no valid purpose for defendants' subpoenas and deposition notices, the discovery sought by defendants will result in undue delay and constitutes harassment. *Builders Ass'n of Greater Chicago v. City of Chicago*, 215 F.R.D. 550, 554 (N.D. Ill. 2003) ("A subpoena is obviously unduly burdensome if the information is wholly irrelevant under any reasonable legal theory; if the subpoena was issued for the purpose of harassment or if the party issuing the subpoena did not, in good faith, believe, after reasonable inquiry, that the subpoena was not unreasonable or unduly burdensome or expensive for the reasons indicated.")

Defendants' 30(b)(6) deposition notices to the lead plaintiffs also include many more categories than would be required to explore the truth on the market issue. Defendants argue in their motion, without support, that they should be permitted "to depose the named Plaintiffs and their investment advisors about this [truth on the market] or ***any other issue relevant to Plaintiffs' claims or Household's defenses.***" Defs' Mot. at 6. Defendants, however, have made no effort to demonstrate that such testimony relates in any way to class-wide liability issues. This, once again, reveals defendants' real intentions. Accordingly, in the event that the Court permits defendants to depose lead plaintiffs and their investment advisors, questioning should be limited to issues directly related to the truth on the market defense.

Finally, while defendants assure the Court that they seek a mere three depositions, their real intention is buried in a footnote. Defs' Mot. at 3 n.2 ("If given the right to take the depositions of PACE's investment advisors, Household would consider taking more than the three originally set forth in its prior subpoenas. Household would also consider seeking deposition testimony of any investment advisors to the other two named Plaintiffs, if relevant.") If defendants are granted leave to conduct these depositions, they intend to depose each of PACE's investment advisors and anyone else they can find to harass.

B. Defendants' Citation to the PSLRA is a Red Herring

The Private Securities Litigation Reform Act ("PSLRA") contains no provision requiring lead plaintiffs to offer testimony regarding individualized issues after class certification and before a determination of class-wide liability.

Defendants are correct that "***potential class representatives***" are required to certify that they are willing to serve as a representative party and provide testimony "***if necessary***." Defs.' Mot. at 6 (citing 15 U.S.C. § 87u-4(a)(2)(A)(iii)). Lead Plaintiffs provided the required certification at the inception of this action and made themselves available for deposition in 2004. Defendants opted not to take those depositions (other than PACE) and, instead, stipulated to class certification.[5] Lead plaintiffs have satisfied their obligations under the PSLRA to date, and will continue to do so. Sitting for repeated, fruitless and frivolous depositions is not among those obligations.

Defendants do not cite a single case supporting their theory that the PSLRA requires lead plaintiffs to submit to depositions under these circumstances. The case defendants cite in support of this dubious proposition, *AOL Time Warner*, is completely off point. First, the *AOL* case cited by the defendants ***is not a class action***. *In re AOL Time Warner, Inc. Sec. Litig.*, No. 06 Civ. 0695, 2006 U.S. Dist. Lexis 49162 (S.D.N.Y. July 13, 2006). Accordingly, unlike this case, individual reliance issues are squarely at issue in *AOL*. Furthermore, the question presented in *AOL* was whether the purposes of the PSLRA discovery stay would be served by preventing defendants from pursuing discovery prior to resolution of the motion to dismiss. *Id.* The court is not faced with this question here; defendants have been pursuing discovery from plaintiffs for more than two years. Finally, although the court in *AOL* allowed defendants to commence discovery while a motion to

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[5] Defendants' argument that they are being punished for stipulating to class certification is absurd. Defs' Mot. at 10. As this Court already has found, defendants suffer no prejudice because the depositions they seek are not probative of issues related to class-wide liability. April 2005 Order at 10.

dismiss was pending, there was no discussion of depositions. Indeed, the court specifically cautioned: "Clearly, ***the extent to which discovery is allowed must be limited.***" *Id*. at *10.

Defendants would like the Court to believe they have been prohibited from taking discovery in this action. This is far from the truth. In reality, defendants have served more than 100 interrogatories, in six different sets, including numerous contention interrogatories which the Class will respond to later this month. Additionally, each of the lead plaintiffs has produced to defendants all documentation of their trades in Household securities from January 1, 1997 to December 31, 2003 as well as documents relating to Household's predatory lending activities obtained from third-party sources. Household also has deposed the 30(b)(6) designee for PACE. After deposing PACE and reviewing documents produced by the lead plaintiffs, defendants stipulated to class certification. *See* Stipulation Regarding Class Action Certification (Docket No. 183) at 1. Further depositions are not necessary, and certainly not required by any provision of the PSLRA.

III. CONCLUSION

For the foregoing reasons, defendants' motion for reconsideration should be denied.

DATED: November 3, 2006

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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 November 3, 2006, declarant served by electronic mail and by U.S. Mail to the parties the: **LEAD PLAINTIFFS' RESPONSE TO THE HOUSEHOLD DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 18, 2005 ORDER**. 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 3rd day of November, 2006, at San Francisco, California.

s/ Marcy Medeiros
MARCY MEDEIROS

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