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' MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL RESPONSES TO DEFENDANTS' INTERROGATORIES

Lead plaintiffs respectfully oppose the Motion to Compel filed by defendants Household International, Inc. ("Household"), Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (collectively "defendants") as to their Seventh Set of Interrogatories, specifically Interrogatory Nos. 129-137.[1] As directed by the Court, the Class will not brief the objection that defendants have exceeded their 85 interrogatory limit, but will focus on the remaining objections to these interrogatories. Additionally, as acknowledged by defendants in a footnote, during the meet and confer, the Class agreed to provide responses to Interrogatory Nos. 135-137 should the pending Objection be overruled. As these interrogatories are not at issue here, the Court should defer any ruling on the Class' objections to these interrogatories. As discussed below, the Class' objections to the remaining interrogatories, Interrogatories Nos. 129-134, have merit and thus, defendants' Motion to Compel should be denied. Additionally, the Class requests the Court to count the interrogatories in this set, a counting which, together with Judge Guzman's ruling, is necessary to determine how many interrogatories defendants have remaining, if any.

Prior to discussing the substance, the Class wishes to note that contrary to defendants' hyperbole, the Class' refusal to respond to this entire set is eminently reasonable in light of the pending Objection before Judge Guzman. That Objection, if sustained, would render it unnecessary for the Class to respond to this set. Indeed, this Court has recognized that the Class need not respond to this set until that Objection has been ruled upon. December 15, 2006 Minute Order [Dkt. No. 831]. Accordingly, defendants have no basis to complain about the fact that the Class has not

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[1] Defendants have labeled this set their "Fourth Set." However, as the Court is aware, they have served an additional three sets, which they refuse to count. Accordingly, by principles of simple math, this is their Seventh Set. Additionally, due to the compound nature of many of their prior interrogatories, defendants' numbering of the individual interrogatories is also erroneous. Accordingly, the Class has renumbered the interrogatories at issue as Nos. 129-137 to reflect the number of interrogatories previously propounded. In this opposition, the Class will use this numbering.

provided any substantive responses to these interrogatories given the pending Objection. However, as the Court will learn below, the Class has additional valid reasons for not responding to the interrogatories still at issue.

A. The Class Should Not Have to Respond to Interrogatory Nos. 129-134

Each of these interrogatories is a hypothetical, generally requesting identification of what "would have been necessary and sufficient, if disclosed by defendants, to inform the market." Significantly, the responses to these improper hypothetical interrogatories are not relevant. Moreover, the hypothetical interrogatories are incomplete and ambiguous. They are also cumulative of other interrogatories such that no further response is warranted. In sum, the Class' objections have substantial merit.

To support their claim of relevance, defendants make sweeping arguments as to the nature of securities litigation and the elements that the Class must show. These arguments do not bear on this motion given the language of the interrogatories at issue. Defendants' reluctance to discuss relevancy in the context of the interrogatories at issue is not coincidental. For example, Interrogatory No. 134 calls for the Class to state whether a post-Class Period[2] statement is false. Defendants posit no argument as to why the Class' views on the accuracy of this post-Class Period statement have any pertinence to this litigation. Similarly, defendants make no argument as to why responses to any of the other hypothetical interrogatories would advance discovery in this case. There is no probative value to the Class' responses to these hypothetical interrogatories. Significantly, neither at summary judgment nor at trial will the Class be required to proffer hypothetical disclosures that defendants could have made during the Class Period, but did not.

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[2] The Class Period is July 30, 1999 to October 11, 2002.

Defendants' citation of *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (SWK), 2006 U.S. Dist. LEXIS 49525 (S.D.N.Y. July 19, 2006), and the other cases involving motions to dismiss actually supports the Class here. These cases set forth ***heightened pleading standard*** required in securities fraud cases under the Private Securities Litigation Reform Act ("PSLRA"). *See id.; see also Cent. Laborers' Pension Fund v. Sirva, Inc.*, No. 04 C 7644, 2006 U.S. Dist. LEXIS 73375 (N.D. Ill. Sept. 22, 2006). The Complaint in this case has survived a Motion to Dismiss and thus, this Court has already held over defendants' objection that the Complaint itself provides the requisite level of detail as to the Class' allegations on these issues. *See* March 19, 2004 Order at 8 [Dkt. No. 135]; *see also* Household Defendants' Motion to Dismiss the Corrected Amended Consolidated Class Action Complaint at 8-9 [Dkt. No. 88] (discussing PSLRA requirement that plaintiff identify each misleading statement and "the reason why each statement was untrue or misleading at the time it was made"). *Towers Fin. Corp. v. Solomon*, 126 F.R.D. 531 (N.D. Ill. 1989), and *Ivers v. Keene Corp.*, 780 F. Supp. 185 (S.D.N.Y. 1991), similarly do not support defendants as neither case found that the Class must provide the specific information defendants seek via these interrogatories.[3]

In addition to objecting on the grounds of relevancy, the Class objected to these interrogatories on the grounds that they were improper hypotheticals and ambiguous.[4] "Interrogatories calling for an opinion based on hypothetical facts are improper." *Mobil Oil Corp. v. Dep't. of Energy*, No. 81-CV-340 (HGM), 1982 U.S. Dist. LEXIS 9553, *6 (N.D.N.Y. Mar. 8,

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[3] Additionally, *Ivers* is a pre-PSLRA case and thus distinguishable on that basis as well.

[4] These objections are set forth in Lead Plaintiffs' Responses and Objection to Household Defendants' [Seventh] Set of Interrogatories to Lead Plaintiffs. *See, e.g.*, Affidavit of David R. Owen in Support of Motion to Compel Responses, Ex. 7 at 3 (General Objection No. 9), 5 (General Objection Nos. 19-20), & 7-17 (specific objections including objections re: calling for expert opinion, undue burden and as improper hypotheticals).

1982); *see also Union Carbide Corp. v. Travelers Indem. Co.*, 61 F.R.D. 411, 413 (W.D. Pa. 1973). Indeed, defendants' counsel have repeatedly instructed witnesses at depositions not to answer hypothetical questions; their insistence that the Class respond to hypothetical interrogatories now is hypocritical. *See* Anderson Depo. at 162-63; Walker Depo. at 137-38.[5] (Relevant excerpts of which are attached hereto as Exhibits A and B.)

Interrogatory Nos. 130-133 each employ the phrase "would have been necessary and sufficient, if disclosed by Defendants." Use of this phrase renders the interrogatories hypothetical. Defendants could and should have requested that the Class identify why the statement was false or misleading.

Interrogatory No. 134, which ironically does not include the "would have been necessary and sufficient, if disclosed by Defendants" language, is likewise an improper hypothetical. This interrogatory provides: "State whether Plaintiffs contend that the following disclosure contained in Household's March 19, 2003 8-K accurately informed the market of Household's restructure policies and practices." Thus, Interrogatory No. 134 requests the Class' position on whether a March 19, 2003 disclosure would have been false if used by the defendants during the Class Period. This is plainly a counterfactual hypothetical because defendants did not make this disclosure in their Class Period filings with the Securities and Exchange Commission ("SEC").

Defendants attempt to convert these hypothetical interrogatories into interrogatories seeking information "of the facts that Plaintiffs claim were omitted from the market." Opp. at 6. This is yet another example of defendants' rewriting their interrogatories after they bring a motion. The Class discusses this pattern and practice by defendants in the Class' Response to Defendants' Motion for Sanctions and to Compel Responses to "Additional" Interrogatories Allowed by the Court's August

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[5] The Class could cite other examples, but these are sufficient.

10, 2006 Order, filed concurrently herewith. *See* Response at 7. The Court should not permit this rewriting. Defendants did not draft these interrogatories using the plain language employed in their motion, but employed hypothetical language having a very different meaning.

Further, even as "rewritten," the interrogatories are still hopelessly ambiguous. Interrogatory Nos. 130-132 are not limited to specific identified statements but to broad subject areas and thus, do not address the question of "when" to measure disclosure. Is the Class to identify the hypothetical disclosure as of the first day of the Class Period, the last date or some unspecified interim date? Responding to such open-ended and ambiguous hypotheticals imposes an undue burden on the Class. Providing the "particular facts" allegedly omitted from an actual statement made on a certain date is one thing. It is quite another thing to identify what should have been said on a broad topic over the entire three years plus Class Period.

Interrogatory No. 133 avoids this ambiguity and burden by referencing a particular statement. However, it has a different fatal ambiguity again due to poor drafting. The interrogatory provides in relevant part: "If Plaintiffs contend that the following disclosure contained in Household's March 23, 2002 10-K was insufficient to inform the market of Household's restructure policies and practices, identify any facts Plaintiffs contend would have been necessary and sufficient, if included in the disclosure to inform the market of Household's restructure polices and practices." However, what does it mean to be "insufficient to inform the market of Household's restructure policies and practices" as requested in the interrogatory? The ambiguity is two-fold: 1) what is "insufficient" and what conversely is "necessary and sufficient"? and 2) inform the market as to what about the restructure policies and practices? The interrogatory, thus, is fundamentally incomprehensible aside from its other failings. (As an aside, the Class notes that this disclosure was found to be false and violative of the federal securities laws in the SEC's March 13, 2003 Order, a finding that Household stipulated to.)

Interrogatory No. 134 improves upon the prior interrogatory by substituting "accurately" for the "insufficient," but still suffers from the latter defect, "accurately informed the market of" what? Again, the interrogatory by its language leaves this question unanswered.

This Court has previously rejected defendants' "inartfully drafted" interrogatories and it should do so here. *See* September 19, 2006 Order at 3 [Dkt. No. 677].

Finally, defendants have propounded other interrogatories that are directed to the same subject matter and thus, responding to these interrogatories is cumulative and unduly burdensome. For example, Interrogatory Nos. 135-137 call for the Class to identify alleged affirmative misrepresentations and the reasons for the allegation. The Class has already agreed to respond to these interrogatories should Judge Guzman overrule the Class' pending Objection on the counting issue. Defendants make no argument as to why the Class' responses to these interrogatories do not suffice to respond to Interrogatory Nos. 130-134.

Similarly, Interrogatory No. 129 is cumulative of prior interrogatories. This interrogatory requests the identification of facts and documents that "the Plaintiffs contend support their statement in Plaintiffs' *Dura* Brief that 'August 14, 2002' was the date that 'investors began to learn the true facts about Household's financial and operating condition concealed by the multi-component fraud scheme.'" This interrogatory is identical in substance to previously propounded interrogatories in the prior Fourth Set. Indeed, this Court's prior September 19 Order respecting these interrogatories, which defendants cite, shows this complete overlap. *See* September 19, 2006 Order at 3-4 [Dkt. No. 677]. Defendants make no arguments as to why the Class must respond to Interrogatory No. 129 in addition to responding to these other interrogatories covering the same subject matter. *See id.* (interrogatory 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); *see also id.* (discussing

Interrogatory Nos. 31-33). The motion as to this interrogatory should be denied as this interrogatory is cumulative of the prior interrogatories.

For each of the foregoing reasons, the Court should deny the Motion to Compel.

B. The Court Should Count the Interrogatories in This Set

The Class requests that the Court count the interrogatories in this set. Defendants continue to propound interrogatories and the parties need this Court's counting on this set (as well as Judge Guzman's ruling on the Objection) in order to determine if defendants remain within their limit of 85. The Class counts this set in the following manner:

Interrogatory Nos. 129-132 and 134 each consist of a single interrogatory.

Interrogatory No. 133 consists of two interrogatories. The first interrogatory is the introductory clause requesting the Class to state what it contends and the second interrogatory is the one requesting the identification of the "particular facts" that should have been disclosed.

Interrogatory Nos. 135-137 each consists of multiple interrogatories: the introductory contention interrogatory plus one for each of the affirmative misrepresentations identified. Put differently, each time the Class identifies an affirmative misrepresentation and the reasons for its allegation, that counts as a separate interrogatory, just as it was a separate interrogatory for each affirmative defense raised by defendants and subject to the Class' First Set of Interrogatories. *See* November 10, 2005 Order at 2 n.1 [Dkt. No. 339]. Thus, if the Class identifies seven affirmative misrepresentations in response to Interrogatory No. 135, that interrogatory counts as eight.

DATED: December 29, 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 December 29, 2006, declarant served by electronic mail and by U.S. Mail to the parties the: **LEAD PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL RESPONSES TO DEFENDANTS' INTERROGATORIES**. 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 29th day of December, 2006, at San Francisco, California.

s/ Monina O. Gamboa
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