

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

LAWRENCE E. JAFFE PENSION PLAN, On )	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly )	(Consolidated)
Situated, )	
	) <u>CLASS ACTION</u>
Plaintiff, )	
	) Judge Ronald A. Guzman
vs. )	Magistrate Judge Nan R. Nolan
	)
HOUSEHOLD INTERNATIONAL, INC., et )	
al., )	
	)
Defendants. )	
_____ )	

**THE CLASS' MOTION FOR RECONSIDERATION OF THE COURT'S JANUARY 24,  
2007 ORDER OR FOR ALTERNATIVE RELIEF REGARDING  
STOCK REPURCHASE DISCOVERY**

## I. INTRODUCTION

Following the January 24, 2007 hearing, the Court issued an Order that was entered and served on the parties on January 29, 2007, *see* Dkt. No. 934, two days before the close of discovery. The Class respectfully requests the Court reconsider that Order and compel defendants to produce the stock repurchase documents discussed herein. In the alternative, the Class requests the Court (i) set a briefing schedule on the stock repurchase issue because there has been no briefing on this issue at all as a result of defendants' last-minute reversal of their prior agreement to produce responsive documents, or (ii) order defendants to cooperate with the Class to resolve any "burden" issues. The documents at issue are simply too important to fall victim to defendants' delay tactics.

## II. RELEVANT BACKGROUND

On October 12, 2006, nearly four months prior to the close of fact discovery, the Class served its Fifth Request for Production of Documents ("Fifth Request"). *See* Ex. 1.<sup>1</sup> It requested "documents sufficient to identify *each share repurchase* and each share sale, including the *date*, volume, price, mode of purchase or sale and the entity(ies) through which *each trade* was executed." *Id.* (emphasis added). The request covers the time period January 1, 1999 through December 31, 2002, when Household repurchased \$2.3 *billion* dollars of its shares. Household responded on November 17, 2006, and agreed to produce responsive documents. *See* Ex. 2. Defendants represented to the Court in their November 27, 2006 status report that they would produce responsive documents by December 15, 2006. *See* Ex. 3 (Dkt. No. 782). Following the November 30, 2006 status hearing, the Court ordered defendants first to produce the stock repurchase list and then underlying documents if requested by the Class. *See* Ex. 4 (Dkt. No. 831). On December 18,

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<sup>1</sup> All exhibits are attached to the Declaration of Jason C. Davis in Support of the Class' Motion for Reconsideration, filed herewith.

2006, defendants produced a general ledger spreadsheet which reflects the sum totals of all trades made throughout the course of an entire month as a single entry. *See* Ex. 5.

The stock list provided by defendants on December 18, 2006 is not responsive to the Fifth Request because it does not provide the date on which “each share repurchase” was executed, nor the volume, nor the price at which the shares were acquired, nor the entity through which the purchase was made. *Id.* Following this deficient production, the Class requested the documents underlying the stock repurchases. *See* Ex. 6. In order to comply with the Court’s December 15, 2006 Order, defendants were required to produce those documents by December 29, 2006. Defendants produced no responsive documents. Defendants requested no extension to that deadline and requested no meet and confer with the Class over any purported problems.

The Class brought defendants’ non-compliance to the Court’s attention before the January 10, 2007 status conference. In defendants’ status report for the same hearing they claimed “Defendants produced documents regarding stock repurchases in response to Plaintiffs’ Fifth Request for the Production of Documents” on December 21, 2006. *See* Ex. 7 (Dkt. No. 883). That claim was not exactly accurate. While defendants produced a handful of equity forward purchase agreements, which are not the subject of this motion, they produced no documents responsive to the stock repurchase request. At the January 10, 2007 status hearing, the Class requested dates by which defendants would be required to complete their production. *See* Ex. 8. No dates were provided, and the Class again raised defendants’ failure to comply with the Court’s December 15, 2006 Order in its status report in advance of the January 24, 2007 status hearing. *See* Ex. 9 (Dkt. No. 927).

On January 29, 2007, the Court entered the January 24, 2004 Order, finding that to the extent any additional documentation is available regarding Household’s stock repurchase program, it would be “overly burdensome, costly, and time-consuming” to require production. *See* Ex. 10 at 1 (Dkt.

No. 934). The Class respectfully submits the Court had insufficient information at the time to weigh any purported burden on defendants against the importance of the documents at issue to the Class.

### **III. ARGUMENT**

In this district, motions to reconsider are reviewed under the standard established by the Seventh Circuit in *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). *See Ramada Franchise Sys., Inc. v. Royal Vale Hospitality of Cincinnati, Inc.*, Case No. 02 C 1941, 2004 U.S. Dist. LEXIS, 24036 at \*11 (N.D. Ill. Nov. 23, 2004). In *Bank of Waunakee*, the Seventh Circuit held that a motion for reconsideration is proper where, among other reasons, “the Court has patently misunderstood a party . . . or has made an error not of reasoning but of apprehension.” *Bank of Waunakee*, 906 F.2d at 1191 (citation omitted). The Court “patently misunderstood” the Class or made an “error” of apprehension for good reason: defendants never told the Class or the Court that the Fifth Request was unduly burdensome until a few days before the close of discovery. Defendants blindsided the Class at the last minute because they knew the information sought is highly relevant. As a consequence of defendants’ last-minute argument, the Court was provided insufficient information upon which to base any ruling.

#### **A. The Specific Days on Which Household Acquired Its Own Stock Are Highly Relevant**

At no point have defendants seriously contested the relevance of the daily stock repurchase records. As the Class has stated, it is necessary to obtain these specific dates (as opposed to an aggregate of all trades on a monthly basis) because Household’s repurchases impacted the market price at specific points and are therefore necessary to the “analysis of stock price movement . . . a major part of what this case is all about.” *See* Ex. 11 at 21. One application of this information relates to defendants’ loss causation theory expressed in their motion concerning *Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627 (2005), where defendants argued “Household’s stock price did not decline (and in fact increased) in response to the revelation of *each* of the so-called ‘frauds.’” *See*

Defs' Reply at 1 (Dkt. No. 295) (emphasis in original). Defendants further argued "a plaintiff must be able to connect a particular decline in price to the 'truth' entering the market place, and the market's reaction to that new 'truth.'" *Id.* at 10 (citations omitted). It is axiomatic that the market's reaction to any "truth" being revealed by rumor or otherwise would be distorted by Household's use of its \$2.3 billion stock repurchase program on or around the time that each "truth" is disclosed to the market. For example, shortly after *Barron's* issued its December 3, 2001, article "Does It Add Up? A look at Household's accounting," an article questioning Household's accounting practices, Household recorded stock repurchases of nearly \$40.2 million. *See* Ex. 5 at 4.<sup>2</sup> That figure represented approximately 10% of the aggregate dollar value of all shares traded on December 3, 2001, which was the most active trading day between the beginning of December and the date on which the \$40.2 million was recorded on December 17, 2001. *See* Ex. 12. These strategic repurchases affected the market price at a point when "truth" entered the market. The Class needs this information to rebut defendants loss causation arguments and will provide such specific trade dates to its experts for use in damages calculations.

**B. Household's Burden Argument Is Not Credible**

On January 24, 2007, nearly four months after the Class served the Fifth Request, defendants argued *for the first time* that the stock repurchase information is "extremely difficult to find . . . [and] [i]f it exists, it's in warehouses . . . [i]t would consist of trade slips and receipts." *See* Ex. 11 at 17. Even defendants' January 22, 2007 status report – filed two days before the hearing – provided neither the Class nor the Court with any indication at all as to any burden they were experiencing in responding to the Fifth Request. Defendants showed no cause as to why they were

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<sup>2</sup> Showing stock repurchases/and forwards of \$186,000; \$465,294; \$9,865,530; and \$29,678,265.49 recorded on December 17, 2001.

unable to discern any burden during the four months between service of the Fifth Request and submission of defendants' status report on January 22, 2007. Defendants provided no affidavits or other credible evidence from Household that the requested information is too difficult to obtain.

The explanations defendants did offer are not plausible. It strains credulity to think that an incomplete and possibly inaccurate general ledger is the only shred of evidence left showing how Household executed its \$2.3 billion – the equivalent of approximately 18% of Household's entire market capitalization at the end of the Class Period – common stock repurchase program. Defendants' unsupported assertion that "trading slips" are the only other source of information that exists to discern the company's stock trading history is absurd. *See id.* at 18. The fact of the matter is that companies such as Household conduct large trades through sophisticated firms and banks. If Household has lost its own stock transaction records, it is well settled that Household is obligated to obtain those records under Fed. R. Civ. P. 34 from its agent banks. *See, e.g., Buckley v. Vidal*, 50 F.R.D. 271, 274 (S.D.N.Y. 1970) ("[p]roduction may be ordered when a party has the legal right to obtain papers, even though he has no copy, and regardless of whether a paper is beyond the jurisdiction of the court" (citation omitted)). Computer trading systems were in place well before the Class Period commenced in July of 1999. Computer recording systems existed as well. While representing to the Court that "[defendants] have looked at all the places that one can reasonably hope to find this information [and only found the general ledger]," defendants made no indication that they complied with their discovery obligations under Fed. R. Civ. P. 34. And even if "trading slips" are all that is left of the repurchase records, defendants should have told the Class about this problem before the close of fact discovery. The Class has in the past shared costs that are legitimately incurred in connection with some discovery requests and would have considered doing so in this context as well.

Further, the iota of evidence Household has provided appears to be inaccurate, or at least wildly inconsistent, with the company's publicly reported stock repurchase information. According to Household's Form 10-Q, filed with the Securities and Exchange Commission on May 10, 2000 the company reported "[d]uring the first quarter, we repurchased 700 thousand shares of our common stock as part of our 1999 share repurchase program . . . [t]he shares were repurchased on the open market for a total of \$24.3 million." *See* Ex. 13. This \$24.3 million figure is not even close the amounts listed in the general ledger produced by defendants. There, the sum of all "Stock Repurchases" occurring between January and March 2000 is over \$95 million. *See* Ex. 5 at 1-2. The fact that these figures are inconsistent by over a factor of two further undermines the credibility of defendants' factual assertions.

Finally, to the extent the Court is unwilling to grant the Class' motion to compel production of documents or to set a briefing schedule, the Class requests that the Court order defendants to meet and confer with the Class about potential solutions to Household's "burden" problems. The Class is amenable to considering a reduction in the time period covered by the request; sharing costs in locating the information at issue; and working with defendants to determine the cost of obtaining the information from Household's outside banks. Defendants deprived the Class the opportunity to resolve any burden problem by raising that argument a few days before the close of discovery. The Class should not be prejudiced as a result of defendants' delay.

#### IV. CONCLUSION

For the reasons set forth above, the Class respectfully requests the Court reconsider its January 24, 2007 ruling and compel defendants to produce the stock repurchase documents discussed herein. In the alternative, the Class requests the Court (i) set a briefing schedule on the stock repurchase issue, or (ii) order defendants to cooperate with the Class to resolve any “burden” issues.

DATED: February 7, 2007

Respectfully submitted,

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