IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated,	)	Lead Case No. 02-C-5893 (Consolidated)
Plaintiff,	)	CLASS ACTION
v.	)	Judge Ronald A. Guzmán
HOUSEHOLD INTERNATIONAL, INC., *et al.*,	)	
Defendants.	)	

DEFENDANTS' SUBMISSION PURSUANT TO
THE COURT'S ORDER OF NOVEMBER 1, 2012

Defendant's respectfully provide this submission in accordance with the Court's Order of November 1, 2012. (Docket No. 1833). For the reasons set forth below, the Court's denial of claims for those claimants who failed to answer the "reliance interrogatory required in the Court approved claim form" should stand.[1]

I. INTRODUCTION

By its Order of November 1, 2012, the Court requested submissions from the parties on the issue of whether it would "constitute a lack of due process" for the Court to adhere to that aspect of its Order of September 21, 2012, "which, in part, denied the claims for those claimants who, to date, had failed to answer the reliance interrogatory required in the Court approved claim form." *Id.*

[1] Defendants have previously objected to the "reliance interrogatory" and the Phase II proceedings and do not restate those objections herein. Defendants continue to object on the previously stated grounds.

No due process violation arises from the denial of such claims. The notice procedures approved by this Court satisfied the requirements of due process and Federal Rule of Civil Procedure 23(c)(2)(B) with respect to all class members. It is undisputed, moreover, that the beneficial owners' agents—the nominees—received copies of the Notice of Verdict and Proof of Claim forms. The plain language of the Proof of Claim stated that a response to the reliance interrogatory was required, and the Notice of Verdict directed nominees to forward the Notice and Proof of Claim forms to the beneficial owners. If any beneficial owner failed to receive copies of the Notice of Verdict and Proof of Claim, it is only because that beneficial owner's own agent chose not to comply with the Court-approved notice procedures. Any such beneficial owner who otherwise would have timely submitted a complete Proof of Claim with an answer to the reliance interrogatory, *but for* his, her, or its agent's failure to comply with the Court-approved notice procedures, can seek redress from the nominee. *See* Section III, B. below.

II. PROCEDURAL HISTORY

A. The Court-Approved Procedures for Providing Notice to Class Members

On January 11, 2011, the Court approved as to form and content the Notice of Verdict, Proof of Claim, and Summary Notice submitted by Plaintiffs. (Docket No. 1721.) The Court: (1) appointed Gilardi & Co. LLC ("Gilardi") to act as the claims administrator; (2) ordered Lead Counsel to mail a copy of the Notice of Verdict and Proof of Claim to class members by January 24, 2011; and (3) ordered publication of the Summary Notice in *USA Today* by no later than February 1, 2011. (*Id.* ¶ 2.) Recognizing that many class members held their stock in "street name," the Court further ordered:

> Nominees who purchased the common stock of Household for the beneficial ownership of Class Members during the Class Period shall send the Notice of Verdict and the Proof of Claim to all beneficial owners of such Household common stock within ten (10) days after receipt thereof, or, if they have not

> already done so in connection with the Andersen Settlement, send a list of the names and addresses of such beneficial owners to the Claims Administrator within ten (10) days of receipt thereof, in which event the Claims Administrator shall promptly mail the Notice of Verdict and Proof of Claim to such beneficial owners.

(*Id.* ¶ 3.) The Notice of Verdict repeated this directive to "[b]anks, brokerage firms, institutions and other persons who are nominees who purchased the common stock of Household for the beneficial interest of other persons." (*Id.*, Ex. 1 at 6.)

On January 24, 2011, Gilardi mailed copies of the Notice of Verdict and Proof of Claim to 440,164 record owners who purchased Household stock during the class period. (Declaration of Michael Joaquin (Docket No. 1766-2) ¶ 3.) Gilardi also sent copies of the Notice of Verdict and Proof of Claim, together with a cover letter, to another 225 brokerages, custodial banks, and other institutions known to hold stock in "street name," whose names and addresses are included in a "proprietary database created and maintained by Gilardi." (*Id.* ¶ 4.) The cover letter advised these recipients to "pay particular attention to the 'Notice to Banks, Brokers, and other Nominees' on page three of the Notice." (*Id.*, Ex. C at 1.) Additionally, Gilardi delivered copies of the Notice of Verdict and Proof of Claim to 559 registered electronic filers that are qualified to submit claims on behalf of beneficial owners for whom they act as trustees or fiduciaries. (*Id.* ¶ 5.) Ultimately, Gilardi mailed copies of the Notice of Verdict and Proof of Claim for delivery to 646,715 potential class members. (*Id.* ¶ 8.) On February 1, 2011, Gilardi also caused the Summary Notice to be published in *USA Today*. (*Id.* ¶ 11.)

The Proof of Claim explained to recipients that, to be eligible to recover, a class member needed to file a completed and signed Proof of Claim postmarked on or before May 24, 2011. (*Id.*, Ex. B. at 1.) The Proof of Claim also stated, in bold type, that a class member needed to answer the following question (the "reliance interrogatory" or "reliance question"):

> If you had known at the time of your purchase of Household stock that defendants' false and misleading statements had the effect of inflating the price of Household stock and thereby caused you to pay more for Household stock than you should have paid, would you have still purchased the stock at the inflated price that you paid?

(*Id.* at 5.)

Many nominee agents apparently chose to ignore the explicit directive to send copies of the Notice of Verdict and Proof of Claim to their clients (the beneficial owners), or provide the names and addresses of the beneficial owners to Plaintiffs' counsel so that Plaintiffs' counsel or Gilardi could send the forms directly to the beneficial owners. Instead, these nominee agents took it upon themselves to submit Proofs of Claim on behalf of their clients, oftentimes submitting incomplete Proofs of Claim that did not contain answers to the reliance interrogatory.

On April 4, 2011, Plaintiffs' counsel filed a motion asking the Court to hold a status conference. (Docket No. 1743.) Plaintiffs' counsel stated in the motion that on March 17, 2011—almost two months after Gilardi mailed copies of the Notice of Verdict and Proof of Claim forms to record owners—nominee agents were not in a position to answer the reliance question and that it "would be either extremely difficult or impossible for the custodian banks to obtain an answer from their investor clients on or before the deadline of May 24, 2011 due to the sheer volume of class members for whom they submit claims." (*Id.* at 2.)

In response to Plaintiffs' motion, the Court scheduled a status hearing for April 7, 2011. (Docket No. 1750.) Following the status hearing, the Court issued an order dated April 11, 2011. (Docket No. 1753.) The Court held that the facts before it at that juncture did not warrant extending the May 24, 2011 deadline for submission of claims, but gave Plaintiffs leave to propose a plan by May 6, 2011 "as to the most efficient way to proceed" to obtain responses to the reliance interrogatory. (*Id.* at 2.)

Plaintiffs submitted their proposed plan on May 6, 2011. (Docket No. 1756.) Based on data supplied by Gilardi, Plaintiffs estimated that 11,760 Proofs of Claim that did not contain an answer to the reliance question had been submitted by nominees on behalf of beneficial owners with allowed losses of $250,000 or less each, which, in the aggregate, represented a total of $233,245,777 in allowed losses. (*Id.* at 2.) Plaintiffs nevertheless proposed that custodian banks and third-party claims filers "limit their efforts [to obtain an answer to the reliance question] to entities and individuals that have claims with an allowed loss in excess of $250,000." (*Id.* at 5.). On May 31, 2011, the Court approved Plaintiffs' proposed plan over Defendants' objections. (Docket No. 1763.)

B. The Court's Ruling as to Claimants Who Failed to Answer the Proof of Claim Form's Reliance Question

On August 24, 2011, the Court ordered Defendants to file a list of claims as to which they contend the evidence rebuts the presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). (Docket No. 1777.) Defendants filed their submission on rebuttal of the presumption of reliance on October 14, 2011. (Docket No. 1780.) Among other arguments, Defendants contended that the Court should deny any claims as to which the Proofs of Claim did not contain an answer to the reliance question. (*Id.* at 28.)

After completion of briefing on the rebuttal of reliance issue, the Court issued a Memorandum Opinion and Order dated September 21, 2012. (Docket No. 1822.) The Court ruled that, given the unique circumstances of this case, "the only appropriate sanction for a claimant's failure to answer the question is dismissal of his claim." (*Id.* at 12). Accordingly, the Court held that "defendants are entitled to judgment on any claims for which the claimant did not answer the claim form question." (*Id.*)

C. The October 4 Status Hearing and the Court's Request for Submissions

At a status hearing on October 4, 2012, Plaintiffs' counsel asked the Court to clarify that its September 21 ruling did not apply to claimants with losses of $250,000 or less who filed through a custodial bank or other third-party and whose Proofs of Claim did not contain an answer to the reliance question. (Oct. 4, 2012 Tr. at 3:7–15.) The Court responded that its ruling *was* meant to apply to claimants with claims of $250,000 or less who did not answer the reliance question. (*Id.* at 5:18–19.)

Plaintiffs' counsel then argued that "there's been a complete lack of due process" with respect to claimants with allowed losses of $250,000 or less whose nominees filed Proofs of Claim on their behalf that did not contain an answer to the reliance question, because "those people have never ever gotten an opportunity to answer that claim form question." (*Id.* at 7:24–25.) The Court disagreed, noting that the agents of these class members had received notice, "[a]nd those agents were tasked to give them [their clients] notice." (*Id.* at 17:9–11.) The Court asked whether the agents had passed on the Notice and Proof of Claim to their clients, and Plaintiffs' counsel replied that they had not. (*Id.* at 10:4–6, 17–19.)

Plaintiffs' counsel attempted to justify any failure of the nominees to forward copies of the Notice of Verdict and Proof of Claim forms to their clients after receiving the forms in January, by arguing that the Court's later order of May 31 relieved the nominees of any obligation to do so. (*Id.* at 11:3–12.) Again, the Court disagreed with Plaintiffs' counsel, and challenged Plaintiffs' counsel to point to where in the May 31 order the Court had said that the claims of the beneficial owners at issue would be allowed even if they did not answer the reliance interrogatory. (*Id.* at 14:18–19.) After Plaintiffs' counsel was unable to do so, the Court stated:

> All over your responses to this were references to the large amount of time it would take to reach out to each one of these 22,000 claimants rather than going through their agents who are complaining that it's too much work for them. And I don't see how I can require as part of a claim for claimants to answer a question, get back from their agents a response that [it's] really a lot of trouble—we don't think we can do it—and then get a brief from you folks talking about how it makes little sense to ask third-party filers to undertake the task to obtain an answer to the claim form from these smaller claims, and then enter an order saying, well, even though they didn't do that, we're going to give them a right to move forward with their claims.

(*Id.* at 16:14—17:1.)

At the conclusion of the hearing, the Court stated that it would consider whether Plaintiffs should be given an additional opportunity to obtain answers to the reliance question from claimants with losses of $250,000 or less whose Proofs of Claim were filed by banks or other third-party filers. (*Id*. at 25:14–17.) On November 1, 2012, the Court asked the parties to provide submissions addressing this issue. (Docket No. 1833.)

III. LEGAL BASIS FOR THE COURT'S SEPTEMBER 21 RULING

A. The Court-Ordered Notice Procedures Afforded Due Process to All Class Members.

With respect to class actions certified under Federal Rule of Civil Procedure 23(b)(3), the "touchstone" of due process is notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–77 (1974); *see also* 2 Newberg on Class Actions, § 11.61 at 494 (2d ed. 1985) ("It is generally acknowledged that the touchstones of due process in the class context are notice and adequacy of representation."). Federal Rule of Civil Procedure 23(c)(2)(B) requires the court in a Rule 23(b)(3) class action to direct to class members "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "The legal standards for satisfying Rule 23(c)(2)(B) and the constitutional guarantee of procedural due process are coextensive and

substantially similar." *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005). "The due process inquiry in a Rule 23(b)(3) class, therefore, is whether the requirements of Rule 23(c)(2) have been met." *Shurland v. Bacci Café & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 144 (N.D. Ill. 2010). Here, those requirements indisputably have been met.

In today's securities markets, it is a "widespread practice" for the beneficial owners of stock to hold their shares in "street name." *Silber v. Mabon*, 957 F.2d 697, 700 (9th Cir. 1992.)[2] "Courts in securities class actions have long recognized that due process requires notice procedures that take into account these industry facts." *Id.* "Thus, the 'best notice practicable under the circumstances,' the standard required since *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950), and by the express terms of Rule 23, took shape within the shadow of this industry practice." *Id.*

The standard practice that courts have adopted to provide individual notice to stockholders whose shares are registered in "street name" is to provide actual notice to the nominees and request that the nominees forward copies of the notice to the beneficial owners, or provide a list of the names and addresses of the beneficial owners to plaintiffs' counsel so that plaintiffs' counsel can send the notice to the beneficial owners. *See, e.g., In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS), 2007 U.S. Dist. LEXIS 29062, at *42 (E.D.N.Y. Apr. 19, 2007) (stating that "this manner of notice is standard and effective in securities class actions"). Plaintiffs' counsel proposed using this procedure, and the Court approved it, with respect to both

[2] As explained in *Silber*, this practice "grew out of a perceived 'paperwork crisis' in the securities industry in the 1960s. Using street names 'facilitated the prompt handling of a huge volume of transactions on the various exchanges in the buying and selling of securities by investors and speculators.'" *Id.* (citing and quoting *In re Franklin Nat'l Bank Sec. Litig.*, 574 F.2d 662, 673 (2d Cir. 1978), *modified on other grounds*, 599 F.2d 1109 (2d Cir. 1979).)

notice to the class of the 2006 settlement with Arthur Andersen and notice to the class of the 2009 jury verdict. (Docket Nos. 405, 1721.)

Every court that has considered the issue has held that this practice comports with the requirements of due process and Rule 23(c)(2)(B)—*even if* the nominee agents fail to forward the notice to the beneficial owners or provide class counsel or the claims administrator with the names and addresses of the beneficial owners. *See Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008) (noting that "in each case in which a court has confronted this issue, notice provided to the class members' nominees—*i.e.*, the brokerage houses—has been deemed sufficient even if brokerage houses failed to timely forward the notice to the beneficial owners," and citing cases); *see also In re Johnson & Johnson Deriv. Litig.*, No. 10-2033 (FLW), 2012 U.S. Dist. LEXIS 153978 at *56 (D.N.J. Oct. 26, 2012) ("Cases addressing the adequacy of notice under these circumstances have held that notice to a nominee is sufficient and, if the nominee 'fails to forward the notice to the beneficial owner within the time allotted, . . . the beneficial owner is still bound.'" (quoting Joseph M. McLaughlin, 1 *McLauglin on Class Actions* § 5:80 (8th ed.) (2011)).)

These decisions are in accord with the well-settled principle that "'[a]n absent class member will be bound by any judgment that is entered if appropriate notice is given, even though that individual never actually received notice.'" *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987) (quoting 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1789, at 253 (2d ed. 1986)); *see also, e.g., In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 968 (N.D. Ill. 2011) ("Due process does not require that every class member receive notice." (rejecting contrary contention by objectors and citing cases)); *Medina v. Mfr's & Traders Trust Co.*, No. 04 C 2175, 2004 U.S. Dist. LEXIS 25305, at *10 (N.D. Ill. Dec.

9, 2004) (stating that the requirements of Rule 23(c)(2)(B) "can be satisfied even though a particular class member never receives actual notice—a difficult reality for many plaintiffs to accept.").

To hold otherwise would render filing deadlines meaningless and undermine the finality of judgments. *Cf. In re VMS Sec. Litig.*, No. 89 C 9448, 1992 U.S. Dist. LEXIS 12141, at *8–9 (N.D. Ill. Aug. 11, 1992) ("[I]t must be recognized that in any settlement there will be some class members who are difficult to locate and who may not receive timely notice of the settlement: the function of the filing deadline is to put a time limit on the claims procedure to achieve finality and certainty in class action settlements." (internal quotations and citation omitted)); *accord Fox v. Dart*, No. 11 C 409, 2012 U.S. Dist. LEXIS 22717, at *4–5 (N.D. Ill. Feb. 23, 2012).

Here, the beneficial owners themselves made the decision to hold their Household stock in "street name." "[U]ntimely notice is an attendant risk of owning stock in 'street name.'" *In re Intel Corp. Deriv. Litig.*, No. 09-867-JJF-Consolidated, 2010 U.S. Dist. LEXIS 74661, at *5 (D. Del. July 22, 2010); *accord Johnson & Johnson*, 2012 U.S. Dist. LEXIS 153978, at *56. The fact that the beneficial owners' nominee agents disregarded the directive to send the Notice of Verdict and Proof of Claim forms to the beneficial owners within ten days of receipt thereof, or provide Plaintiffs' counsel with the names and addresses of the beneficial owners, is not the result of any defect in the Court-approved notice procedures.

The Court, therefore, should deny Plaintiffs' request that the beneficial owners at issue be afforded a further opportunity to submit Proofs of Claim containing answers to the reliance interrogatory, and should reaffirm its decision to deny the claims of these class members. *Cf. In re Waste Mgmt., Inc. Sec. Litig.*, No. 97 C 7709, 1999 U.S. Dist. LEXIS 16566, at *8 (N.D. Ill. Oct. 15, 1999) ("Clearly, it was the movant who selected the method of holding his shares and

the movant who chose Prudential to serve as his nominee. . . . Settled expectations should not be disturbed when a delay relating to notice is attributable to the moving party or his agents.") (denying late motion to intervene by class member who claimed his broker had failed to forward class action notice). As noted by the Court at the October 4 hearing, at no time did the Court rule that claimants who failed to submit a valid Proof of Claim containing an answer to the reliance interrogatory would, nonetheless, be entitled to move forward with their claims. (Oct. 4 Tr. at 16:14–17:1).

B. Beneficial Owners Whose Opportunity to File Valid Claims Was Foreclosed by the Actions of Their Nominee Agents Can Seek Redress From Those Agents.

Based on its conversations with the unidentified BDUG representatives, Plaintiffs' counsel has asserted that additional notice to the beneficial owners at issue would be expected to result in only a low level of responses. (Docket No. 1756 at 3.) Thus, the number of beneficial owners who actually suffered prejudice as a result of their agents' failure to forward the Notice of Verdict and Proof of Claim forms likely is low. But if any beneficial owner in fact would have filed a valid and complete Proof of Claim with an answer to the reliance question *but for* his, her, or its agent's failure to follow the Court-approved notice procedures, that beneficial owner can seek remedies against its nominee agent for breach of the nominee's contractual and/or fiduciary duties. *See, e.g., Balkema v. Wachovia Sec., LLC*, No. 11-412 SC, 2011 U.S. Dist. LEXIS 71626, at *10–13 (N.D. Cal. July 5, 2011) (denying motion to dismiss breach of contract and breach of fiduciary duty claims against broker that failed to forward notice of class action settlement); *see also* James D. Cox and Randall S. Thomas, *Leaving Money on the Table: Do Institutional Investors Fail to File claims in Securities Class Actions?*, 80 Wash. U. L. Q. 855, 870 (Fall, 2002) (noting that while there is no SEC requirement that nominees forward copies of class action

notices, "the fiduciary relationship between customers, whether widowers or large financial institutions, and their broker-advisors embodies an affirmative command that the notices be forwarded to the beneficial owners").

IV. CONCLUSION

Because all class members, including the beneficial owners at issue, were afforded due process by the Court-approved notice procedures, and because there is no other compelling reason to grant the relief Plaintiffs request, the Court should deny Plaintiffs' request to provide additional notice to the beneficial owners at issue and should proceed to enter judgment in favor of Defendants with respect to the claims of these class members.

Dated: November 15, 2012

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on November 15, 2012 he caused true and correct copies of the foregoing Defendants' Submission Pursuant to the Court's Order of November 1, 2012 to be served via the Court's ECF filing system on the following counsel of record in this action:

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