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, Plaintiff, v. HOUSEHOLD INTERNATIONAL, INC., et al. Defendants.	Lead Case No. 02-C-5893 (Consolidated) Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

NOTICE OF FILING

PLEASE TAKE NOTICE that, on January 26, 2005, we caused to be filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, 219 S. Dearborn Street, Chicago, Illinois, **THE HOUSEHOLD DEFEDANTS' OPPOSITION TO LEAD PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER**, a copy of which is served upon you.

Dated: January 26, 2005

Respectfully, submitted

By: _____

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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,

- against -

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants.

Lead Case No. 02-C-5893
(Consolidated)

CLASS ACTION

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

THE HOUSEHOLD DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

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PRELIMINARY STATEMENT

Lead Plaintiffs' ("Plaintiffs'") motion for a protective order is founded upon several misconceptions. First, Plaintiffs distort the class action stipulation in this matter. The class stipulation is clear: Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (collectively the "Household Defendants") have retained all arguments as to the merits of Plaintiffs' claims. Stipulation and Order Regarding Class Action Certification ("Class Stipulation") ¶ 6 ("[t]he parties agree that nothing herein precludes the parties from making any and all substantive arguments concerning the claims of the named plaintiffs and/or the Class"). The information that the Household Defendants seek from the third parties at issue herein is directly relevant to the merits of Plaintiffs' claims. Information pertaining to Class Representative PACE Industry Union-Management Pension Fund's ("PACE's") investment history, not only in Household but in other securities, is relevant to reliance — a critical element in a securities fraud case.

Second, PACE earlier *invited* the very discovery that Plaintiffs now challenge. It is unclear whether PACE has provided the Household Defendants with complete or accurate information regarding its transactions in Household securities. PACE produced a Rule 30(b)(6) witness who was unable to shed *any* light on PACE's transactions in Household securities, such as why PACE purchased or sold Household securities. Indeed, this witness testified that the Household Defendants would have to obtain that type of information from PACE's third party advisors — the very parties which Plaintiffs seek to shield from discovery by this motion.

The Household Defendants' subpoenas seek information that is relevant to PACE's claimed reliance on the alleged misstatements at issue in this case, which in turn is relevant to the Class that PACE represents. Plaintiffs cite no persuasive authority to the contrary. In fact, Plaintiffs admit that the information sought through the subpoenas is relevant by arguing that such discovery should be relegated to a later stage in the case. But Plaintiffs should not be permitted to pursue sweeping discovery of their own and frustrate the Household Defendants' rights to discover information relevant to its defense. Plaintiffs' argument that the Household Defendants have been dilatory in their discovery obligations is a red herring and in any event is untrue. The Court should thus reject Plaintiffs' motion to quash.

I. PROCEDURAL HISTORY

PACE served Amended Responses and Objections to Defendants Household International, Inc. and Household Finance Corporation's First Set of Interrogatories on September 17, 2004 ("PACE's Amended Interrogatory Responses"). Ex. 1.[1] In these amended responses, PACE identified twelve non-parties to this case that it represented "served as outside advisors to PACE with respect to Household securities." *Id.*, Response to Interrogatory No. 1.

During class discovery, PACE provided Maria Wieck for a deposition on September 24, 2004, as the witness designated pursuant to Fed. R. Civ. 30(b)(6) and identified in her testimony as the person "most knowledgeable" about, *inter alia*, the analytical process in which PACE engaged before purchasing Household securities. Ex. 2 (Rule 30(b)(6) Deposition Notice). Notwithstanding her designation by PACE, however, Ms. Wieck admitted that *she didn't know anything at all* about the Household securities owned by PACE or the reasons for selecting Household securities for purchase or sale. Instead, Ms. Wieck directed counsel for the Household Defendants to various investment managers who made the investment decisions on behalf of PACE subject to certain guidelines and restrictions. *See* Section II.B., *infra*.

Thus, in reliance on PACE's amended interrogatory responses and Ms. Wieck's testimony, on December 6, 2004, the Household Defendants served fourteen (14) third-party subpoenas seeking relevant documents from the current and former investment advisors, consultants, and document custodians of PACE (the "third-party subpoenas"). The third-party subpoenas generally seek production of documents related to PACE's investment history, including investments by PACE in the securities of Household International, Inc. ("Household"), Beneficial Corporation ("Beneficial"), and HSBC Holdings, plc ("HSBC").[2] In addition, three of the subpoenas also requested deposition testimony. Winkler Decl. Ex. A (attaching copies of the third-party subpoenas).

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1 All exhibits ("Ex.") are attached to the Affidavit of Landis C. Best in Support of the Household Defendants' Opposition to Lead Plaintiffs' Motion for Protective Order. Plaintiffs' Exhibits are attached to the Declaration of Monique C. Winkler in support of Lead Plaintiffs' motion ("Winkler Decl. Ex.").

2 For example, the subpoenas seek documents relating to "Your allocation of risk among investments, overall investment strategy, and/or investment philosophy for PACE . . . " See Winkler Decl. Ex. A, Schedule A, Request No. 1.

In response to the subpoenas, five of the third parties informed the Household Defendants that they had *never made any purchases or sales of Household securities whatsoever for PACE*. These investment managers are Security Asset Management, Valenzuela Capital Partners, Weaver C. Barksdale & Associates, Wright Investors' Service, and ICC Capital Management. Winkler Decl. Exs. D, E, F, G; Ex. 4. Therefore, these investment managers apparently did *not* serve "as outside advisors to PACE with respect to Household securities," as PACE claimed in its interrogatory responses. If they did, they must have advised *against* purchasing the relevant securities, which would make discovery from them particularly relevant.

On December 7, 2004, Eric Feiler of Hunton & Williams, counsel for third party Thompson Siegel & Walmsley, called counsel for the Household Defendants and requested a copy of the complaint and answer in this action. Best Aff. ¶ 7. Mr. Feiler informed counsel for the Household Defendants that his client was gathering responsive documents and that they should be able to meet the December 20, 2004, deadline. He stated that some of the requested documents might be proprietary, and counsel for the Household Defendants informed him that there was a protective order that may need to be modified to protect third parties. *Id.*

Counsel for the Household Defendants and counsel for PACE met and conferred at various times between December 9, 2004, and January 7, 2005, regarding the third-party subpoenas. Best Aff. ¶ 8. The Household Defendants agreed to give Plaintiffs additional time to determine whether they would seek a protective order from this Court. The Household Defendants informed the third parties of the extension of the deadline for responding to the subpoena. Winkler Decl. ¶¶ 4-5. Contrary to PACE's assertion (Pl. Br. at 4), on December 16, 2004, the Household Defendants stated that they would *consider* withdrawing all third-party subpoenas where the third party had communicated to the Household Defendants that it had not executed any trades of Household, Beneficial, or HSBC securities on behalf of PACE. Best Aff. ¶ 9.[3]

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[3] The documents requested are broader than those reflecting trades of Household securities on behalf of PACE. For example, the subpoenas request "Documents that You relied upon in making investment decisions for PACE" and documents that show "any policy, procedure, process or criteria pursuant to which You recommend or have recommended publicly traded securities for purchase or sale in Your capacity as an investment manager or advisor to PACE." (Winkler Decl. Ex. A, Schedule A, Requests No. 2 and 4).

The Household Defendants have withdrawn the subpoenas for Shields Associates, Thompson Financial, and Highland Capital Management, L.P., who informed Household that PACE was never a client. Winkler Exs. B, C; Best Aff. Ex. 5. Thus, eleven (11) third-party subpoenas are currently outstanding.

On January 7, 2005, in an attempt to resolve the issue amicably, counsel for the Household Defendants offered to hold in abeyance the subpoenas for advisors who did not have documents evidencing trades in Household, Beneficial or HSBC securities on behalf of PACE, so long as Plaintiffs agreed not to challenge the remaining subpoenas. Best Aff. ¶ 11. This proposed compromise would have permitted six (6) third-party subpoenas to go forward. Plaintiffs refused this compromise and informed the Household Defendants that they would move the Court for a protective order. *Id.*

On January 12, 2005, counsel for the Household Defendants wrote to counsel for PACE, requesting that PACE amend its Revised Interrogatory Responses to correct the inaccuracies regarding the "outside advisors to PACE with regard to Household securities" and any other existing inaccuracies. Ex. 6. By letter dated January 14, 2005, counsel for PACE informed the Household Defendants that it would not correct its interrogatory responses with respect to the investment advisors of PACE at this time. Ex. 7.

Since granting Plaintiffs additional time to consider whether to seek a protective order from this Court, the Household Defendants have received form objections and responses from some of the third parties that are largely identical in nature. Ex. 8.

II. HOUSEHOLD DEFENDANTS ARE ENTITLED TO THIRD PARTY DISCOVERY REGARDING LEAD PLAINTIFFS' INVESTMENT HISTORY

A. Plaintiffs Have Not Demonstrated "Good Cause" for a Protective Order

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). In this district, as elsewhere, discovery requests are examined under a broad and liberal standard. *See, e.g., Ziemack* v. *Centel Corp.*, No. 92 C 3551, 1995 WL 729295, at *1 (N.D. Ill. Dec. 7, 1995) ("The term 'rele-

vant' is much more liberally construed during the discovery stage . . ."); [4] *Schaap* v. *Executive Indus., Inc.*, 130 F.R.D. 384, 386 (N.D. Ill. 1990).

Where a party seeks protection from a subpoena, courts apply a balancing test weighing the needs of the discovering party against the adverse effects which disclosure of the material sought would have on the opposing party. *Deitchman* v. *E.R. Squibb & Sons*, 740 F.2d 556, 559 (7th Cir. 1984); *Lewis* v. *Chicago Hous. Auth.*, No. 91 C 1478, 1991 WL 173247 (N.D. Ill. Sept. 4, 1991). The party seeking a protective order must demonstrate "good cause" for such an order to issue by reference to particular and specific facts. *Loy* v. *Motorola, Inc.*, No. 03-C-50519, 2004 WL 2967069, at *3 (N.D. Ill. Nov. 23, 2004); *see also* Fed. R. Civ. P. 26(c); 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Fed. Prac. & Proc.* § 2035 (2d ed. 1994). If the opposing party fails to specifically allege that the subpoena will cause them sufficient hardship, their motion to quash must fail. *Loy,* 2004 WL 2967069, at * 3; Fed. R. Civ. P. 45(c); *LaSalle Nat'l Assoc.* v. *Nomura Asset Capital Corp.*, No. 03 C 3065, 2003 WL 21688225, at *1 (N.D. Ill. July 16, 2003). Where the discovery at issue is sought *not* from the discovering party's adversary *but instead from a third party*, the showing of hardship on a party sufficient to quash a subpoena should be that much more stringent. Indeed, the scope of discoverable materials from non-parties under Fed. R. Civ. P. 45 is as broad as that otherwise permitted under the federal rules. Fed. R. Civ. P. 45 *Adv. Comm. Notes* (1991); 8A Wright, Miller & Marcus, *Fed. Prac. & Proc. Civ.* § 2209 (2d ed. 1994).

PACE has failed to demonstrate that compliance with the subpoenas by the investment advisors and consultants will place any burden on PACE. It is the third parties, and not PACE, who will have the obligation to search for and to produce any responsive documents. Indeed, prior to Plaintiffs' decision to seek a protective order, at least one of the subpoenaed investment advisors was prepared to produce responsive documents. Best Aff. ¶ 7. The sole argument advanced by PACE as to burden is that the third-party subpoenas will "unnecessarily divert class resources." Pl. Br. at 7. In support of their position, Plaintiffs claim that the Household Defendants have been unable to meet their discovery obligations in a timely fashion. As set

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[4] All unreported cases cited herein are contained in the Appendix to this memorandum.

forth below, however, this allegation is simply not true. *See* Section II.E., *infra*. Plaintiffs, in a show of desperation, raise the specter of the Household Defendants seeking discovery of "hundreds of thousands of absent Class members." Pl. Br. at 8. Of course, this is not the case. The Household Defendants merely seek discovery from the investment advisors of one of the plaintiffs who has assumed the responsibility of serving as a Class Representative. Plaintiffs are the ones who have diverted unnecessary resources by filing their meritless motion to quash.

B. PACE Invited the Very Discovery That it Now Seeks to Quash

Plaintiffs claim that the Household Defendants have served the third-party subpoenas for purposes of harassment or some other improper purpose. Pl. Br. at 1, 6, 10. Plaintiffs' bald allegations could not be further from the truth. As Plaintiffs well know, the Household Defendants are seeking third-party discovery based upon PACE's own testimony in this matter.

Ms. Wieck was designated as PACE's Rule 30(b)(6) witness regarding, *inter alia,* PACE's investment decisions with respect to Household securities. Ex. 2. During her deposition, it became apparent that she would be unable to provide relevant testimony beyond instructing counsel that the information they sought was in the hands of PACE's individual investment advisors. Ms. Wieck identified 11 entities as investment advisors/managers who make or who have made investment decisions on behalf of PACE and identified one additional independent consultant. (Wieck 9:12-14:1)[5]

Ms. Wieck testified that PACE relied, through its investment managers, on allegedly false financial statements prepared by the defendants in this case.[6] (72:15-73:1) However,

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5 The excerpts of Ms. Wieck's deposition testimony cited herein are collected at Exhibit 3 to the Best Affidavit.

6 Independent Fiduciary Services ("IFS") is not an investment manager, but is PACE's independent investment consultant. PACE attempts to draw a distinction between IFS and the investment advisors, claiming that IFS is simply a consultant. Pl. Br. at 9, n.6. However, IFS has supervisory authority over all of the investment managers, and serves as a conduit for information that is provided from the investment managers to PACE. For example, PACE's investment guidelines are selected between and among the individual investment advisor, the consultant (IFS), and then approved by the trustees of PACE. (Wieck Dep. 19:15-21:19) IFS is responsible for recommending general statements of investment policy to PACE's trustees, and then is responsible for negotiating the terms of PACE's agreements with the individual investment managers. (204:14-205:19) PACE's investing strategies for its overall portfolio are "based on the recommendations of the investment consultant [IFS]." (207:1-5)

she had no idea what PACE's investment managers relied on in making investment decisions involving Household. (73:2-8; 75:1-19) The decision to invest or not invest in specific stocks was made by the individual investment managers. (17:7-11) Regardless, Ms. Wieck testified that she was the most knowledgeable person at PACE with respect to the following topics:

- "the analytical process PACE engaged in before purchasing any Household securities or [HSBC] securities" (112:15-113:12)
- "any evaluations, reports, reviews, or analyses of the performance of Household securities or HSBC's securities which PACE conducted, caused to be conducted, or reviewed" (114:19-115:12)
- "PACE's procedure or process pursuant to which it selects or has selected [publicly]-traded securities for purchase [or] sale, including, but not limited to, Household securities or HSBC securities" (117:21-118:19)
- "PACE's procedure or process pursuant to which it approves or has approved publicly-traded securities for purchase or sale, including, but not limited to, Household securities or HSBC securities" (119:13-120:4)
- "PACE's investments, purchases, sales, gifts, or devises of Household or HSBC securities" (120:18-121:4)

With respect to all of these topics, Ms. Wieck testified that she did not know anything about the topic, because each was delegated to the investment managers and consultants. Ms. Wieck further stated that she could not identify which manager or consultant would have knowledge of each topic because she did not know which ones considered an investment in Household. (113:13-114:17; 115:8-116:9; 118:20-119:12; 120:5-120:17; 121:5-17) For example, with respect to "any evaluations, reports, reviews, or analyses of the performance of Household securities," she testified as follows:

> Q. And since you don't know anything about it and . . . you're telling me [that] if I need to know the answer to that question, I [would] have to speak to the various managers and consultants you identified earlier today, correct?
>
> A. Yes.
>
> Q. And as among them, you don't know which [ones] I should talk to, correct?
>
> A. Correct. (115:22-116:9) (objection omitted)

Counsel for the Household Defendants attempted to ask Ms. Wieck about Schedule A to PACE's Certification of Named Plaintiff which sets forth PACE's purchases and sales of Household securities. Ms. Wieck did not know why PACE made the decision to purchase or sell any securities listed in that Schedule A. (99:10-100:8) She did not know which past or present investment manager made the decision to make purchases of Household securities. (100:10-

22) Ms. Wieck referred counsel for the Household Defendants to the individual investment managers, consultants, and custodian:

> Q. At the point of belaboring the obvious, Ms. Wieck, I need to ask a series of very detailed and specific questions about Schedule A line by line for each of these securities.
>
> I need to know the decision-making process that went into the acquisition decision. I need to know the decision-making process that went into the sale decision. I need to know what the person making that decision considered, what they didn't consider, what they were aware of, what they were not aware of, what they relied on, what they didn't rely on, what the totality of the mix of information they had available to them was.
>
> And I take it [that] if we spend the rest of the day here together, I can't get any of that information from you; is that correct?
>
> A. That's correct.
>
> Q. Nor is there any person at PACE more knowledgeable than you from whom I can get that information, correct?
>
> A. There's nobody more knowledgeable.
>
> Q. Including Ms. Bernard who signed the certification?
>
> A. Including Ms. Bernard.
>
> Q. So I would have to get the information either from Lerach Coughlin or from some combination of the Bank of New York and these various managers and consultants, correct?
>
> A. That's correct. (134:8-135:12)

Even more troubling, Ms. Wieck's testimony revealed that PACE filed an incomplete Certification of Named Plaintiff. PACE's counsel prepared this Certification, which PACE signed, attaching a Schedule A which lists acquisitions and sales of Household securities during the Class Period. (Wieck Dep. 102:6-21) Schedule A did not list any purchases of Household securities prior to March 22, 2001. However, documents produced by PACE indicate that PACE purchased Household securities prior to March 22, 2001, during the Class Period which were not reported on its Certification. Best Aff. ¶ 15.

During the deposition, Ms. Wieck admitted that she had seen documents indicating that PACE had, in fact, engaged in transactions in Household securities during the Class Period prior to March 22, 2001. (224:18-225:24) PACE's Certification of Named Plaintiff was therefore incorrect, or at the very least incomplete. However, Ms. Wieck again instructed counsel for the Household Defendants to ask the investment managers if they wanted to discover whether PACE purchased Household securities prior to March 22, 2001. (103:23-104:17;

105:10-22).

The record in this matter — PACE's empty testimony, PACE's incomplete Certification, and PACE's incorrect Amended Interrogatory Responses — demonstrates the need for the third-party subpoenas and completely undercuts Plaintiffs' argument that the Household Defendants served the third-party subpoenas for purposes of delay and harassment.

C. The Discovery Sought Is Not Related to Adequacy of the Class Representative but Rather Goes to the Merits of Plaintiffs' Claims

The Household Defendants are not, as Plaintiffs suggest, seeking discovery related to the adequacy of PACE for class certification purposes. Pl. Br. at 1. A class has been certified pursuant to the parties' Stipulation and by Order of the Court. By agreement of the parties, however, the Stipulation neither relieves Plaintiffs of their burden of proving the elements of their case, nor precludes Household Defendants from rebutting the fraud on the market theory advanced by Plaintiffs either as to individual plaintiffs or the class as a whole. Class Stipulation ¶ 4 ("nothing herein precludes the parties from making any and all substantive arguments concerning the claims of the named plaintiffs and/or the Class").

Plaintiffs bear the burden of showing reliance in this securities fraud action. *See, e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988). Plaintiffs have stated that they intend to show class wide reliance through the "fraud on the market" theory. Pl. Br. at 6. Courts have recognized that defendants may rebut the presumption of reliance that results from the "fraud on the market" theory by exploring the investment history and decision-making of plaintiffs. *See, e.g., In re SciMed Life Sec. Lit.*, Civ. No. 3-91-575, 1992 WL 413867, at *3 (D. Minn. Nov. 20, 1992) (quoting *Blackie* v. *Barrack*, 524 F.2d 891, 906 (9th Cir. 1975)); *In re Grand Casinos, Inc.*, 181 F.R.D. 615, 620 (D. Minn. 1998) ("[w]ith regard to the merits of the Plaintiffs' claims, we are persuaded . . . that the proposed discovery of the Lead Plaintiffs' investment histories and strategies could lead to the discovery of admissible evidence; namely, evidence which could serve to rebut any presumption that they relied on the integrity of the market"); *Roseman Profit Sharing Plan* v. *Sports and Recreation*, 165 F.R.D. 108, 112 (M.D. Fla. 1996) (granting defendants' motion to compel named plaintiffs to produce investment information because such information was "relevant to rebutting the presumption of reliance, i.e., motivation, and causation"); *In re Harcourt Brace Jovanovich, Inc. Sec. Lit.*, 838 F. Supp. 109, 112 (S.D.N.Y. 1993)

("since the fraud on the market theory creates a rebuttable presumption of reliance the defendants ought to be allowed discovery which would assist in rebutting such a presumption").

Courts from within this district are in agreement that information bearing upon a plaintiff's investment history is relevant to rebutting the fraud on the market theory. *See Grossman* v. *Waste Mgmt., Inc.*, 589 F. Supp. 395, 405-06 (N.D. Ill. 1984) (defendant must show that decision to purchase was based on factors "wholly extraneous to the market" in order to rebut fraud on the market theory); *Feldman* v. *Motorola, Inc.*, No. 90 C 5887, 1992 WL 137163, at *1 (N.D. Ill. June 10, 1992) (holding that when a complaint alleges fraud on the market, "this court agrees with defendants that the brokerage statements are *relevant to the merits* of plaintiff's federal securities law claim") (emphasis supplied).

Plaintiffs do not dispute that the information in the hands of PACE's investment advisors is relevant to the merits of this case. See Pl. Br. at 6-7. Plaintiffs instead argue that discovery into such matters relates to individualized claims and should be delayed until some point later in the discovery process. *Id.* at 7. Plaintiffs' argument is without force.

Plaintiffs selected PACE as a Lead Plaintiff and put them forward as a Class Representative. Thus, Plaintiffs have stipulated that PACE's claims are typical of other plaintiffs in the class. If PACE's claim has a defect for want of proving reliance, then not only does PACE's claim fail, but defendants will argue that the class that PACE represents cannot rely on the fraud on the market theory. Indeed, courts have recognized that defendants can defeat the fraud on the market theory of reliance on a *class wide basis* by showing that many of the class members did not rely on the integrity of the market in purchasing and selling the securities in question. *See Easton & Co.* v. *Mut. Ben. Life Ins. Co.*, Civ. Nos. 91-4012, 92-2095, 1994 WL 248172, at *4 (D.N.J. May 18, 1994) (agreeing with defendants' argument that "if the discovery shows that a significant number of class members who were purchasers in the market had information about Mutual's decline from sources other than Lehman, it would tend to prove that the market was not defrauded, and thus the benefit of the 'fraud on the market' presumption would be unavailable on a common basis to any of the class members").

Plaintiffs' reliance on *In re Lucent Technologies Inc. Securities Litigation*, Civ. No. 00-621, 2002 U.S. Dist. LEXIS 8799 (D.N.J. May 7, 2002), is misplaced. In *Lucent*, the lead plaintiffs objected to discovery sought from 41 other named plaintiffs. Here, by contrast, a

Lead Plaintiff (who has stipulated that its claims are typical of the class as a whole) objects to *any discovery* from its *own* investment advisors. Moreover, the scenario presented in *Lucent* is contrary to precedent within this district, where courts have declined to recognize a distinction between active class representatives and other class plaintiffs who institute actions and remain as parties. In this district, *all* named plaintiffs (including lead plaintiffs) are subject to discovery. *See In re Folding Carton Antitrust Lit.*, 83 F.R.D. 260, 264 (N.D. Ill. 1979) (holding that "[n]amed plaintiffs are always parties subject to discovery, while absent class members are not subject to discovery except under special circumstances"). Indeed, *Lucent* is at odds even with cases within its *own* district. *See, e.g., Easton*, 1994 WL 238172, at *4 (permitting discovery of absent class members; noting that discovery of individual reliance may be relevant to common questions).

D. The Scope of the Subpoenas Is Appropriate

Plaintiffs also claim that the third-party subpoenas are too broad in their scope. They challenge both the time frame of the subpoenas as well at their seeking of information pertaining to transactions in HSBC and Beneficial securities. Both are proper.

1. The Time Period Is Proper

The subpoenas seek documents from January 1, 1997, until December 31, 2003, which is a time period both before and after the Class Period of October 23, 1997, to October 11, 2002. Courts have recognized that documents relating to securities transactions both before and after the class period are relevant to the merits of a securities fraud claim in that such documents are likely to highlight factors beyond the market that led plaintiffs to purchase the securities at issue. *See In re Control Data Corp. Sec. Lit.*, No. 3-85 CIV 1341, 1987 U.S. Dist. LEXIS 16829, at *7-8 (D. Minn. Dec. 10, 1987) ("there is no rule fixing discovery in class action litigation to the class period."), *aff'd*, 1988 U.S. Dist. LEXIS 18603 (D. Minn. Feb. 22, 1988). Indeed, courts in this district have allowed discovery of plaintiffs' entire trading history for time periods longer on both sides of the class period than that sought here. In the *Feldman* litigation, for example, the court compelled production of plaintiffs' brokerage statements in a fraud on the market case for a period of more than two years before the class period and for one year and four months after it had ended, despite the fact that the class period was just over eight months long. *See Feldman*, 1992 WL 137163, at *1 ("defendants seek production of plaintiffs' brokerage account statements from January 1, 1988 to the present"); *Feldman* v. *Motorola, Inc.*, Civ. A. No.

90 C 5887, 1993 WL 497228, at *1 (N.D. Ill. Oct. 14, 1993) (specifying that the class period was from May 4, 1990, through January 16, 1991). *See also Ziemack*, 1995 WL 729295, at *3 (plaintiffs ordered to respond to discovery requests regarding their full trading and securities litigation histories, not limited to the five month class period).

Other federal courts have likewise required the production of brokerage statements and trading histories in all securities beyond the class period. *Cromer Fin. Ltd.* v. *Berger*, No. 00 Civ. 2284 (DLC), No. 00 Civ. 2498 (DLC), 2002 WL 1059158, at *1 (S.D.N.Y. May 28, 2002) (holding that defendants were entitled to discovery of "all of the trading undertaken by the named plaintiffs . . . during the period of time they were investing in the Fund and for some reasonable period of time before and after they invested"); *Harcourt Brace*, 838 F. Supp. at 114 (ordering plaintiffs to produce brokerage statements showing trades in all public securities for the 15 months prior to the eight month class period and for about one month afterward); *Easton*, 1994 WL 248172 (compelling plaintiffs to produce prior investment history of each class member for a period of four years prior to the class period).

Moreover, not only does the case law support the Household Defendants, but Plaintiffs' own conduct in this case demonstrates their willingness to engage in discovery beyond the Class Period. Plaintiffs Document Requests seek documents from January 1, 1997 through the date of production. Ex. 9. Pursuant to meet and confer conferences, the Household Defendants have agreed to produce certain categories of documents both before and after the Class Period. What is good for the goose is good for the gander: Plaintiffs cannot reasonably complain that the Household Defendants third-party subpoenas are temporally too broad.[7]

2. The Subpoenas Properly Seek Information Related to Plaintiffs' Holdings in Securities Other than Household

The third-party subpoenas seek information regarding PACE's transactions in Beneficial and HSBC securities, in addition to Household securities. Discovery into these holdings is proper.

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[7] Furthermore, counsel for Plaintiffs has already stated that it would produce responsive documents for the time period starting January 1, 1997, which is prior to the start of the class period. Ex. 10. It simply does not make sense to limit discovery from PACE's investment advisors when PACE itself has agreed to produce documents from beyond the Class Period.

First, courts have permitted discovery as to Plaintiffs' investments and holdings beyond those that are the subject of the securities fraud claim. Courts have recognized that such information about Plaintiffs' investment history generally may be relevant to defeat the presumption of reliance afforded by the fraud-on-the market theory. *SciMed*, 1992 WL 413867, at *2-3 (compelling plaintiffs to produce complete information concerning each named plaintiff's purchases and sales of SciMed securities as well as information concerning purchases and sales of other securities); *In re Grand Casinos, Inc.*, 181 F.R.D. at 620 (holding that with respect to "the *merits* of the [Lead] Plaintiffs' claims . . . proposed discovery of the Lead Plaintiffs' investment histories and strategies could lead to the discovery of admissible evidence; namely, evidence which could serve to rebut any presumption that they relied on the integrity of the market"); *In re Acceptance Ins. Cos. Sec. Lit.*, No. 8:99 CR 547, 2002 WL 32793423, at *4 (D. Neb. Aug. 2, 2002) (holding that sophisticated investors' "investment and trading history is directly relevant to the allegation in the complaint that defendants perpetrated a fraud on the market").

Second, as companies that became related to Household via corporate mergers, PACE's investments in Beneficial and/or HSBC securities are particularly relevant. Plaintiffs themselves note the connection between Household and Beneficial securities in stating "some Class members acquired Beneficial shares in an exchange pursuant to the merger of Beneficial and Household in 1998." Pl. Br. at 10. As Beneficial was acquired by Household in 1998 during the Class Period, whether PACE owned shares in Beneficial at that time — and what happened to them — may be relevant to issues such as reliance or damages. In other words, that PACE invested in Beneficial may be relevant to the total mix of information about Household of which PACE was aware.

The merger between Household and HSBC took place in March 2003, shortly after the end of the Class Period in this case — October 11, 2002. The Household Defendants should be allowed to learn whether PACE held HSBC stock during 2002 (which is in the Class Period) and continued to hold HSBC in March 2003, when the merger took place, and on through December 2003. Such holdings would tend to undermine PACE's claims that Household engaged in material misstatements and omissions regarding its business because the purchase or continued holding of HSBC securities by PACE arguably signifies confidence in Household, rather than concern regarding fraudulent activity. This is especially so given that HSBC conducted its own due diligence of Household prior to the merger.

Indeed, Plaintiffs through their actions have admitted that information related to HSBC may be relevant to this matter. Plaintiffs have sought information related to HSBC in their discovery demands. Ex. 9 (Request No. 27 seeking "Household's merger or sale agreement with HSBC and all documents concerning any disclosures made to HSBC in connection with the sale"). Yet Plaintiffs now assert that their own holdings in HSBC and Beneficial are irrelevant and seek to block Household Defendants' discovery of third parties on these topics. Again, Plaintiffs cannot have it both ways.

E. Plaintiffs' Complaints About the Household Defendants' Discovery Efforts Is a Red Herring and in Any Event Is Not True

As a last ditch effort to try to prejudice the Court into ruling in its favor, Plaintiffs cast aspersions on the Household Defendants' discovery performance to date. Pl. Br. at 7-8. Such ancillary discovery issues are not relevant to whether Plaintiffs have shown "good cause" to quash the third-party subpoenas. Nevertheless, Plaintiffs' allegations of tardiness and non-responsiveness are not true and the Household Defendants briefly respond.

The Household Defendants have complied in good faith with the discovery demands of Plaintiffs. The Household Defendants are diligently collecting, reviewing, and producing documents responsive to Plaintiffs' document requests. The Household Defendants have been making a rolling production, and to date have produced over 2.4 million pages of documents to Plaintiffs. Best Aff. ¶ 19. Indeed, it is clear that the Household Defendants are producing documents at a faster pace than Plaintiffs can review them. After alerting Plaintiffs' counsel to 20 boxes of responsive documents that were ready for review, Plaintiffs' counsel waited more than 3 weeks before requesting that such documents be copied and sent *in toto* to their offices. Exs. 11, 12.

Plaintiffs complain in particular about the Household Defendants' supposed failure to serve revised interrogatory responses. But those amended responses have now been served. Best Aff. ¶ 22. Plaintiffs' complaints about the alleged failure to produce organizational charts is likewise misplaced. The Household Defendants have produced organizational charts; Plaintiffs' counsel has merely questioned the completeness of the production. Counsel for both parties have addressed this issue, along with other discovery issues, in recent meet and confer teleconferences and the Household Defendants believe that this issue will soon be amicably re-

solved. *Id.* at ¶ 23.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to quash the Household Defendants' third-party subpoenas should be denied.

Dated: January 26, 2005

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APPENDIX

Westlaw.
Slip Copy
2002 WL 32793423 (D.Neb.)
(Cite as: 2002 WL 32793423 (D.Neb.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Nebraska.

In re ACCEPTANCE INSURANCE COMPANIES SECURITIES LITIGATION

No. 8:99 CR 547.

Aug. 2, 2002.

Frederick S. Cassman, Abrahams, Kaslow Law Firm, John K. Green, Pickens, Green Law Firm, Omaha, NE, Gregory M. Castaldo, Schiffrin, Barroway Law Firm, Bala Cynwyd, PA, Jonathan M. Stein, Paul J. Geller, Cauley, Geller Law Firm, Boca Raton, FL, Joseph V. McBride, Rabin, Peckel Law Firm, Marvin L. Frank, Rabin, Murray Law Firm, Justin C. Frankel, Michael A. Swick, Robert A. Wallner, Steven G. Schulman, Milberg, Weiss Law Firm, New York, NY, for Plaintiffs.

David H. Kistenbroker, Joni S. Jacobsen, Laura M. Vasey, Leah J. Domitrovic, Matthew J. Cannon, Michael S. Weisman, Pamela G. Smith, Theresa L. Davis, Katten, Muchin Law Firm, Alan N. Salpeter, Brian J. Massengill, Daniel J. Delaney, Mayer, Brown Law Firm, Chicago, IL, J. Michael Gottschalk, National Indemnity, Joseph K. Meusey, Mark C. Laughlin, Fraser, Stryker Law Firm, Omaha, NE, for Defendants.

Edward G. Warin, McGrath, North Law Firm, Omaha, NE, pro se.

Gregory A. Horowitz, Kramer, Levin Law Firm, New York, NY, pro se.

Marc A. Topaz, Schiffrin, Barroway Law Firm, Bala Cynwyd, PA, pro se.

Gregory M. Castaldo, Schiffrin, Barroway Law Firm, Bala Cynwyd, PA, pro se.

JAUDZEMIS, Magistrate J.

***1** Pending before me is Defendants' Motion to Compel Plaintiffs to Comply with Rule 26(a)(1) and Respond to Defendants' Document Requests (# 114). The court has reviewed defendants' evidence found at Filing # 115 and plaintiffs' evidence in opposition to the motion found at Filing # 122. The court has also had the benefit of the briefs from the parties. Because I find that plaintiffs have not complied with their discovery obligations, I will sustain the motion, award defendants their costs, and extend for defendants the period of fact discovery in order to accommodate the relief granted in the motion.

FACTUAL BACKGROUND

This class action is being instituted on behalf of persons who acquired common stock of Acceptance Insurance Companies or one of its affiliated entities between July 29, 1997 and November 16, 1999. Plaintiffs contend that defendants perpetrated a fraud on the market by making false and misleading statements during the class period which resulted in an artificially inflated market price for the common stock and preferred securities. The statements were allegedly false and misleading because the statements did not account for additional loss reserves occasioned as a result of a California Supreme Court decision and because the statements did not account for reinsurance costs necessitated by a subsidiary's sale of an insurance policy marketed to rice farmers.

INSTANT DISPUTE

The Initial Order Setting Schedule for Progression of Case (# 85) was not established in a vacuum. The parties submitted and the court reviewed and filed the parties' Rule 26(f) planning report (# 80). On September 24, 2001, by telephone conference call, the court consulted with the attorneys of record regarding the appropriate deadlines for the completion of fact discovery. All such discovery was to be completed by July 31, 2002.

The motion pending before me seeks relief in the areas of initial disclosures and document requests. Defendants seek four items of relief: (1) an order requiring plaintiffs to disclose the identity of persons that "plaintiffs actually know" have discoverable information; (2) an order requiring plaintiffs to state in writing whether plaintiffs have documents that have not yet been produced which are responsive to already served discovery requests; (3) an order requiring plaintiffs to produce all non-privileged

documents, including documents gathered by counsel and information regarding the complete investment and trading history of the class representatives; and (4) an order requiring plaintiffs to produce a Privilege Log.

1. Initial Disclosures

With respect to persons with knowledge, Rule 26 requires the identification of the name, and if known, the address and telephone number of "each individual likely to have discoverable information and that the disclosing party may use to support its claim or defenses...." In making such a disclosure, the disclosing party must identify the subjects of the information known by each individual. The disclosures obligations memorialized in Rule 26 are directly referenced in Rule 37. A failure to make a disclosure required by Rule 26(a) subjects a party to sanctions. For purposes of Rule 37, an evasive or incomplete disclosure is to be treated as a failure to disclose. (R. 37(a), Fed.R.Civ.P.).

*2 The reformulation of the Rule 26 initial disclosures obligations in the 2000 amendments is instructive to the issue before me. Originally, as framed in 1993, a party was obligated to disclose witnesses, whether favorable or unfavorable, even if it did not intend to use those witnesses. The 2000 amendment narrowed the initial disclosures obligation to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. "Use" includes any use at a pretrial conference, to support a motion, or at trial. The narrowing of the obligation was not only to resolve the ethical dilemma faced by a counsel with a "smoking gun" witness or document, but also to prevent the "dump truck" approach to listing witnesses and identifying documents.

To impress upon the parties their obligations to comply in good faith with the Rule 26 initial disclosures, Rule 26 includes in its specific language certification and sanction warnings. Every disclosure must be signed by an attorney. "The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." R. 26(g)(1). "If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." R. 26(g)(3).

It is in light of these express obligations that I review plaintiffs' conduct in this case. Lead plaintiffs' initial disclosures (# 115 at B-4) are dated June 29, 2001. Seven names are listed. The first four names are class representatives. The next three names are the individually named defendants. Item No. 8 attempts to list without identification current and former employees, officers and directors of Acceptance Insurance Companies, Inc., and its subsidiaries. Also listed in Item No. 8 are two individuals, former employees of defendant. Following the eight itemized listings is a paragraph providing in general the subject matter information allegedly known by these persons. On June 7, 2002, plaintiffs served Supplemental Initial Disclosures. Plaintiffs' Supplemental Initial Disclosures (# 115 at B-8) list nine and one-half pages of names. Eighty-six names are listed, fifty-nine of which were, prior to the supplemental disclsoures, unknown to the defendants.

Setting aside the issue of timeliness, the Supplemental Initial Disclosures on their face do not comply with the rule. The party is to identify the subjects of the information known by the person whose name the party discloses. Plaintiffs have made no attempt to comply with that obligation. For example, on the first page of the supplemental disclosures, Kevin Albrach, whose location is "unknown" has the following language listed under "Subject Information:" "current or former Information Systems employee of Acceptance Insurance Companies." (# 115 at Ex. B-8, p. 2). Other persons are identified by their current or former employment position with Acceptance Insurance Companies. Most surprising in light of the good faith obligations that attend these disclosures is the fact that plaintiffs in their supplemental disclosures identified Gary Gross. (*Id.* at p. 5). For "Subject Information," plaintiffs state that Gary Gross is the current or former founder of Acceptance Insurance Companies. For location, plaintiffs list "Unknown." As a matter of fact, public records indicate that Mr. Gross died in 1987. Not surprisingly, plaintiffs do not address this egregious example of their failure to comply with their good faith obligations in either of their briefs.

*3 Plaintiffs' brief does argue that defendants' motion is calculated to force plaintiffs to identify "witnesses," that is, persons whom plaintiffs' counsel

have actually spoken to as opposed to anyone generally with knowledge. Plaintiffs' concern is misplaced. It is not defendants' tactics that plaintiffs need to be concerned about but rather the obligations plaintiffs have under Rule 26. By failing to list any legitimate subject matter and by including a deceased person within the listing, plaintiffs have used the "dump truck" approach to discovery. Somewhere in the initial disclosures there may well be compliance with the rule. But any good faith compliance is buried by intentionally extraneous listings and intentionally incomplete listings.

Plaintiffs will be required to identify those individuals whom they have a legitimate, good-faith basis to believe have discoverable, relevant information that may be used to support plaintiffs' claims and to clearly identify the subject matter of that information. Plaintiffs also must provide up to date contact information for each person so identified.

2. Production of Non-Privileged Documents

The court has reviewed the production requests at issue. The production requests are not "over broad and unduly burdensome" nor do they seek documents and information which are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. All such objections are denied. Plaintiffs must respond to each production request, in writing, and must identify whether plaintiffs have documents responsive to said requests which have not yet been produced. If any such documents exist, they are to be made available to defendants immediately.

Two specific subject matters are at issue regarding non-privileged documents. First, plaintiffs refuse to produce publically available documents which plaintiffs have gathered either prior to the suit or during the pendency of the suit, arguing that all such documents are protected by the work product privilege. The objection is not well taken. The cases which plaintiffs rely on are easily distinguishable on their facts. The collection of publically available documents by an attorney is not routinely protected by the work product doctrine. As the Supreme Court explained in *Hickman v. Taylor*, 329 U.S. 495, 508, 67 S.Ct. 385, 91 L.Ed. 451 (1947):

> We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions, or legal theories.

***4** In *Hickman* the Court outlined the contours of the work product doctrine by distinguishing it from the attorney-client privilege. At is heart, the work product doctrine protects and attorney's mental thought process and strategies, not the underlying facts which may give rise to the attorney's mental impressions, conclusions, and opinions. *See, Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir.1987).

Plaintiffs must identify and itemize in their responses to production requests and produce documents plaintiffs obtained from public sources.

Also at issue is Request No. 4 which seeks all documents related to each class representative's financial condition as it relates to investing and securities. The request includes without limitation "financial statements, bank statements, tax returns, and brokerage statements for the years 1997 through 1999."

The named plaintiffs are the following persons and entities: Lawrence I. Batt, P.C. Profit Sharing Plan and Trust; the Barbara Winer Revocable Trust; Diane K. Kinder and Jerome Rickman, Co-Trustees of the Joe Sonken Trust. They are sophisticated investors. Their investment and trading history is directly relevant to the allegation in the complaint that defendants perpetrated a fraud on the market. "[D]iscovery of lead plaintiffs' investment histories and strategies could lead to the discovery of admissible evidence; namely, evidence which could serve to rebut any presumption that they relied on the integrity of the market." Further, the request is limited to the relevant time period, 1997- 1999. For these reasons, plaintiffs will be required to comply with the production request.

3. Privilege Log

Plaintiffs have not produced a Privilege Log of those documents withheld from production. Plaintiffs' decision to do so is in disregard of Rule 26(b)(5) and

the specific order of this court. (# 85 at ¶ 6). Plaintiffs will be ordered to produce a Privilege Log of all documents withheld.

A separate issue involves the interview notes of witnesses and other related documents. (# 115 at B-5, Request Nos. 12, 13 & 16). The parties have filed no stipulation of record which would govern this area. *See,* Rule 29. Their communications, both oral and written, have not clarified the issue.

Any documents or audio recordings which are the words of the witness, by whomever prepared, must be itemized on the Privilege Log. (Request No. 16). Depending upon the circumstances, upon an appropriate showing, such statements may be subject to production. In contrast, counsel may have prepared memoranda to the file which memorialize counsel's mental impression and strategy as it is influenced by the information given by a witness. The production of such documents, if ordered, might well include an order of redaction to protect against the disclosure of mental impressions, conclusions, opinions or legal theories of an attorney. Nevertheless, such documents are subject to itemization on the Privilege Log. (Req. No. 12). Documents obtained from a person interviewed are not routinely privileged. Any document so withheld must be specifically itemized and the applicable privilege must be identified. (Req. No. 13).

CONCLUSION

***5** Plaintiffs' failure to comply with their good faith obligations concerning initial disclosure and complete failure to produce a Privilege Log was not "substantially justified." Rule 37(a)(1)(A). Plaintiffs' conduct appears to have been calculated to frustrate discovery by defendants. I find that an award of reasonable expenses, including attorney's fees, against plaintiffs' counsel is required in light of the discovery misconduct before me. Further, in order to negate the effect of plaintiffs' non-compliance with their discovery obligations, I will expand the time for fact discovery for defendants only. Should the discovery produced by plaintiffs require defendants to redo any completed discovery, those additional costs and attorney's fees are subject to being assessed against plaintiffs also.

IT IS ORDERED that the Motion to Compel (# 114) is granted as hereinafter follows:

1. On or before August 16, 2002, plaintiffs shall file a certification of compliance and serve on defendants the following:
   a. revised Supplemental Initial Disclosures;
   b. completed answers to First Request for Production of Documents;
   c. an itemized Privilege Log.

2. Defendants are awarded their reasonable costs to include attorney's fees against plaintiffs' counsel; the parties will be heard on the issue of the award as follows:
   a. on or before August 16, 2002, defendants shall file and serve their affidavit(s)--itemizing the fees and costs requested;
   b. on or before August 30, 2002, plaintiffs shall file any evidence in opposition and submit any written argument to the undersigned.

2002 WL 32793423 (D.Neb.)

END OF DOCUMENT

LEXSEE 1987 US DIST LEXIS 16829

In Re Control Data Corporation Securities Litigation

Master Docket 3-85-1341

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

1987 U.S. Dist. LEXIS 16829; Fed. Sec. L. Rep. (CCH) P93,720

December 10, 1987, Decided

SUBSEQUENT HISTORY: [*1] Adopting Order of February 22, 1988, Reported at: 1988 U.S. Dist. LEXIS 18603.

DISPOSITION: Plaintiffs' motion to compel responses to written discovery from defendant Peat Marwick & Main GRANTED in part and DENIED in part.

LexisNexis(R) Headnotes

COUNSEL: Thomas C. Bartsh, Minneapolis, MN.

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Elliott Kaplan, Deborah J. Palmer/Linda S. Foreman, Minneapolis, MN.

Charles S. Zimmerman, Minneapolis, MN.

Michael J. Bleck, Minneapolis, MN.

Steven J. Olson/James D. Miller, Minneapolis, MN.

Samuel P. Sporn, New York, NY.

Leonard Barrack, Philadelphia, PA.

Karl L. Cambronne, Minneapolis, MN.

JUDGES: JANICE M. SYMCHYCH, United States Magistrate.

OPINIONBY: JANICE M. SYMCHYCH

OPINION:

ORDER

The above matter was before the undersigned on July 8, 1987 upon class plaintiffs' motion to compel responses to written discovery from defendant Peat Marwick & Main (PMM). The class was represented by Leonard Barrack, Esq., Karl Cambronne, Esq., and Robert Hoffman, Esq. PMM was represented by Elliot Kaplan, Esq. and Linda Foreman, Esq. The Control Data (CDC) defendants were represented by Steven Olson, Esq. and Michael Bleck, Esq. Since the time of hearing, the parties have made additional written submissions on the discovery items in issue, and the dispute [*2] is now ready for disposition.

FACTUAL AND PROCEDURAL BACKGROUND

In order to responsibly determine the discovery motion, the allegations present in this litigation must be specifically considered.

The certified class consists of CDC shareholders who made their purchases between January 7, 1985 and August 6, 1985. They allege that the price of CDC stock was unlawfully inflated during the class period, due to material misrepresentations about CDC's financial health in three financial documents -- the 1984 10K filing with the Securities and Exchange Commission (SEC), the 1984 annual shareholder report, and the 1985 unaudited second quarter financial statement. In the complaint, and throughout the proceedings, the class has pointed to three specific accounting transactions appearing in these documents, constituting the misrepresentation. First, is the use of a $ 16.8 million net operating loss (NOL) carryforward, which the class asserts could not properly be claimed unless CDC was sure beyond a reasonable doubt that it would have future profits against which to

offset the NOL. The class plaintiffs rely, inter alia, on published accounting standards and correspondence from the SEC, [*3] for the claim that the NOL was improperly taken. Second, the class urges that a $ 9.7 million loss was improperly charged against retained earnings of a CDC subsidiary rather than against CDC's net income, in contravention of separate published accounting standards. Third, it claims that about $ 8.6 million in losses from two subsidiaries were omitted from CDC's second quarterly financial statement in 1985. The effect of this conduct, assert the class plaintiffs, was to dishonestly create the impression that CDC had 1984 net earnings of $ 31.6 million, when in fact they were $ 5.1 million, and that 81 cents on the share had been earned, when in fact 12 cents had. For the second quarter of 1985, plaintiffs assert, CDC improperly reported a $ 3.8 million profit, when it in fact suffered a $ 4.8 million loss. On August 6, 1985, the SEC required CDC to restate its financials, reflecting the above. The plaintiffs assert that upon this announcement, the price of CDC shares plummeted, causing them substantial loss. The court has certified the class on its federal claims of violation of the antifraud provisions of the securities laws under SEC Rule 10(b)(5). The pendent state claims [*4] have not been so certified.

After a period of discovery pertaining to class certification issues, the parties have commenced discovery regarding the merits of these claims. In issue here is plaintiffs' first set of Rule 34 document requests, served on PMM in the summer of 1986. Documents were served in response during December, 1986. A dispute about the sufficiency of the response ensued, and reached the court in July, 1987. Despite plaintiffs' treatment of the motion to compel in terms of five general issues, a review of the briefs, document requests and responses thereto, and the supplementary submissions, makes it clear that such generalized treatment would not adequately resolve the discovery dispute. For instance, the validity of confidentiality objections will vary depending on the nature of the documents sought in any given document request. This same truism applies with respect to relevancy issues. No broad statement of relevancy will adequately resolve which documents must, and which need not, be produced.

DISCUSSION

Relevancy in General

The parties seriously disagree about the allowable scope of discovery. PMM, during argument and in its July 22, 1987 letter brief [*5] regarding this issue, seeks to confine discovery to the three accounting events alleged by plaintiffs as their basis for a claim of fraudulent omission, and to the time period of class certification. It has agreed to provide documents for an additional period, not past December 31, 1985. PMM contends that it has already produced all responsive documents, when the scope of allowable discovery is thus defined.

This is too cramped a view of what is discoverable in an action such as this. As has been often stated, the intent of FRCP 26 is to allow discovery into all matters which are reasonably calculated to lead to admissible evidence. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978); Hickman v. Taylor, 329 U.S. 495, 501, 91 L. Ed. 451, 67 S. Ct. 385 (1947); Dabney v. Montgomery Ward & Co., Inc., 761 F.2d 494, 499 (8th Cir. 1985). A party is allowed to fully explore the facts so as to permit a reasoned, informed presentation of its proof at trial. Latitude during discovery is essential to that end. However, when, as here, the affairs of several multinational corporations are in issue, the potential for wasteful and abusive overdiscovery [*6] is heightened. Simply because a multinational corporation is a named defendant, it is not to be subjected to exploration of its business activities unless they are relevant to the litigation. The parties have obligations to so confine their discovery, and the responsibility is on the court to prohibit overdiscovery. Herbert v. Lando, 441 U.S. 153, 177, 60 L. Ed. 2d 115, 99 S. Ct. 1635 (1979); Oppenheimer, at 351.

With these axiomatic principles in mind, the substantive law must be examined, before relevancy issues are decided. In this circuit, the essential elements of a private securities fraud claim pursuant to Rule 10b-5 are well defined. In order to succeed on their claim, plaintiffs must prove:

> (1) that defendants engaged in a scheme to defraud, or made misrepresentations or omissions of material fact or engaged in such practices that amounted to fraud or deceit;
>
> (2) that they did so with scienter, that is, an intent to deceive;
>
> (3) that they did so in connection with the purchase or sale of securities;
>
> (4) that damages were suffered by plaintiffs; and
>
> (5) that the damages were caused by defendants conduct (often determined by issues of [*7] plaintiffs' reliance on, or the materiality) of the representation or conduct.

Forkin v. Rooney Pace, Inc., 804 F.2d 1047, 1049 (8th Cir. 1986); Harris v. Union Electric Co., 787 F.2d 355, 362 (8th Cir. 1986).

Time Period

Although the class period here is short and definite, it does not determine the period of relevancy for discovery purposes. There are numerous instances in securities fraud litigation where post-offering statement, documents, or conduct have been treated as admissible evidence on the issue of scienter, intent, and knowledge. E.g. Michaels v. Michaels, 767 F.2d 1185, 1195 (7th Cir. 1985); S.E.C. v. Holschuh, 694 F.2d 130, 143 (7th Cir. 1982); Quintel Corp. v. Citibank, N.A., 596 F. Supp. 797, 804 (S.D. N.Y. 1984); State Teachers Retirement Board v. Fluor Corp., 589 F. Supp. 1268, 1272 (S.D. N.Y. 1984). Likewise, pre-offering statements, conduct, and documents have been found relevant to these issues. E.g. Austin v. Loftsgaarden, 675 F.2d 168, 180 (8th Cir. 1982); Holschuh, at 143; State Teachers Retirement Board, at 1275; Clairdale Enterprises v. C.I. Realty Investors, 423 F. Supp. 257, 260 (S.D. N.Y. 1976). Because [*8] the intent of both PMM and CDC, behind the handling of these accounting transactions, is in issue in this case, there cannot be a time-frame limit on discoverable facts. Although PMM relies on the certified class period as the relevant time frame, there is no rule fixing discovery in class-action litigation to the class period. National Organization For Women, Inc. v. Minnesota Mining and Manufacturing, 73 F.R.D. 467, 472 (D.C. Minn. 1977).

For these reasons, all of PMM's objections to plaintiffs' document requests on the grounds that they seek materials either before or January 7, 1985 and after December 31, 1985 are overruled. All responsive materials must be searched for and produced, notwithstanding the objections based on time frame.

Other Financial Matters

The major remaining dispute pertains to the degree of allowable exploration into CDC's overall financial health and other specific financial events at the time of the three accounting occurrences in issue. Plaintiffs, for example, seek documents relating to CDC's stature with its lenders at the time involved (D.R. # 11 and 12), its ability at the time to sustain its research and development operations (D.R. # 20), [*9] its dividend increase in April, 1985 (D.R. # 23), and restructuring of specific operations (D.R. # 27). This parcel of documents requests does fairly bear on the issues raised in this litigation, for discovery purposes. Plaintiffs maintain that CDC and PMM engaged in accounting maneuvers in order to conceal financial troubles from shareholders and potential shareholders. A detection of any financial deficits which prompted such conduct is surely relevant and essential to proof of plaintiffs' theory. Plaintiffs are entitled to explore whether CDC offset deficits in seemingly unrelated divisions or operations through the allegedly deceptive accounting transactions involved in this case. C.f. Moore v. Fenex, Inc., 809 F.2d 297, 302 (6th Cir. 1987); Sirota v. Solitron Services, Inc., 673 F.2d 566, 573 (2nd Cir. 1982); Alna Capital Associates v. Wagner, 532 F. Supp. 591, 598-99 (S.D. Fla. 1982); affrm'd in part and revs'd in part, 758 F.2d 562 (11th Cir. 1985); Herzfeld v. Laventhol, et al., 378 F. Supp. 112, 122-123 (S.D. N.Y. 1974), affrm'd in part and revs'd in part, 540 F.2d 27 (2nd Cir. 1976).

For these reasons then, those documents requests directed to CDC's overall [*10] financial condition must be answered. They include the following disputed items. DR # 9, 11, 12, 20, 23, 24, 27, 28, 29, 30 and 35. As framed, and given the prior ruling as to the relevant time period, however, these requests are overbroad. In order to resolve a discovery dispute, the court may properly narrow the scope of a discovery request. Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 559 (7th Cir. 1984); Jepsen v. Florida Board of Regents, 610 F.2d 1379, 1384 (5th Cir. 1980); Ross v. Bolton, 106 F.R.D. 22, 23 (S.D. N.Y. 1985); Edwards v. Gordon & Co., 94 F.R.D. 584, 585-86 (D. D.C. 1982). Here, these requests as to the corporation's financial condition are judicially narrowed to the period from the class period up until December 31, 1985, and any documents responsive to each of these requests which were generated thereafter and relate directly or indirectly to the truthfulness of the three financial documents in issue.

PMM Workpapers

Plaintiffs had sought production of all PMM workpapers pertaining to accounting or auditing done on behalf of CDC. It also sought by way of interrogatory, an itemized description of all engagements of PMM by CDC. PMM had [*11] refused to answer such a query, but was ordered to do so at the July 8, 1987 hearing. It honored the oral order by making a written response, and plaintiffs have now formally narrowed their request for production of PMM workpapers, by letter dated July 28, 1987. Therefore, the motion to compel an answer to Interrogatory 18(a) and (b) has been mooted. What now remains is the question of the documents requests seeking more limited portions of the workpapers.

At the outset, it must be noted that there is no recognized accountant-client privilege which would provide a confidentiality protection against disclosure of these workpapers. United States v. Arthur Young & Co., et al., 465 U.S. 805, at 817, 79 L. Ed. 2d 826, 104 S. Ct. 1495 (1984). It is generally the case that piecemeal or limited disclosure of workpapers fails to satisfy the

purpose of examining the integrity or accuracy of the accounting work. Fein v. Numex Corp., 92 F.R.D. 94, 96 (S.D. NY 1981); and Seidman v. Stauffer Chemical Co., Civ. B-84-543 (D. Conn. Sept. 30, 1985), appended to plaintiffs' brief. Especially with plaintiffs' elimination of wholly irrelevant engagements from this request, there is no meritorious [*12] overall objection to the production of the workpapers sought by D.R. 33.

There are more limited disputes, however, about one engagement sought by plaintiff and objected to by PMM, and about two categories of documents enumerated on D.R. # 33 for each engagement. First, the disputed engagement concerns 18A.7 in PMM's list of engagements. It deals with PMM's work for CDC on employee stock option plans. PMM claims that this engagement is irrelevant to the issues. Because accounting papers on stock option plans may include raw data as to valuation or projected valuations of stock, cost and benefit analyses of offering employees more or less by way of stock options, and possible alternative offerings with comparative financial consequences, it is quite clear that this engagement is relevant within the meaning of FRCP 26(b). The documents must be provided.

For each engagement, plaintiffs seek production of a series of enumerated documents. Included are categories (dd) and (ee) of D.R. # 33, which PMM contends are not discoverable. The former requests internal PMM reports or evaluations of PMM employees regarding each engagement; the latter requests peer review-type data regarding PMM employees' [*13] performance on the obligation. Defendant argues that such records are irrelevant and that production would be an invasion of the employee's privacy. Both have a bearing on the competency with which CDC engagements were handled, and will help to elucidate whether individual judgments versus patterns of corporate conduct were at the root of the claimed accounting errors. Such documents can also shed light on whether the corporation saw fault with its own performance. Therefore, these categories of documents shall be produced for each of the engagements to be disclosed. In re Hawaii Corp., 88 F.R.D. 518, 522 (D. Hawaii, 1980). The invasion of privacy argument against such production is without merit. No cognizable privilege is claimed. While the courts have recognized a privacy interest in an individual's personnel files, the proper remedy for protection of that interest in civil discovery is the entry of a Rule 26(c) protective order. Compagnie Francaise d' Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 40 (S.D. N.Y. 1984); In re Dayco Corporation, 99 F.R.D. 616, 624 (S.D. Ohio 1983); In re Hawaii, at 522; In re Equity Funding Corporation, [*14] M.D.L. No. 142 (C.D. Ca., Order dated October 24, 1985).

For the same reasons, any documents responsive to D.R. 16 and 19 also must be produced. They seek any documents in PMM's hands regarding discipline of CDC employees, at all levels, and evaluations of and inquiries regarding the competency of CDC employees. If judicially narrowed to cover discipline and evaluations which relate directly or indirectly to the truthfulness of the three financial documents in issue, regardless of the time when the document sought was generated, these items are of clear relevancy for discovery purposes. Again, the competence of employees in handling the financial disclosures of a company whose securities offering is under attack, can tend to either negate or establish the liability of the company under the securities laws. In re Hawaii, at 522. Therefore, any employee interest in the privacy of such records is overridden by the need for discovery, and is protectible upon application for a protective order limiting the use of the information.

Internal PMM Documents

Plaintiffs seek production of a number of documents regarding PMM's internal controls and policies on accounting practices, and [*15] also its internal documents on the CDC matter. With one exception, all will be compelled. D.R. 34 seeks PMM policy materials on the handling of post-audit reviews. It seeks such things as its internal professional literature, guidelines, and manuals. PMM has not provided any itemization of documents withheld on the grounds that these things are confidential trade secrets. Instead, it has interposed a blanket-style objection. The objection is overruled. Lewis v. Capital Mortgage, 78 F.R.D. 295, 311 (D. Md. 1978), Rosen v. Dick, 1975 U.S. Dist. LEXIS 13739, 20 Fed. R. Serv. 2d (Callaghan) 471 (S.D. N.Y. 1975). In addition, a number of unpublished slip opinions which are in accord, and are attached to plaintiffs' Narkin affidavit, support this conclusion. Here, as in those cases, plaintiffs are entitled to learn whether PMM's own yardsticks are adequate, and second, whether PMM's employees performed according to them. Again, any objection is properly remedied only by a protective order.

Plaintiffs in D.R. # 18, 38, and 39 seek internal PMM matters regarding the disputed CDC accounting. Respectively, they seek: any opinion letters, management letters or special studies regarding the events in question, by PMM, CDC, or others; [*16] internal PMM communications as to CDC and performance of SEC-related work, riskiness of the client, and nature of the work accomplished; and items pertaining to PMM's, or CDC's "due diligence" regarding the SEC filings. PMM's

answers to these document requests are improperly evasive; they also provide partial responses and purport to narrow the requests according to PMM's perceptions of relevancy. They are coupled with objections of confidentiality, vagueness, and irrelevancy. The confidentiality objection again is a matter for protective order, and does not obviate the obligation to respond. These three document requests, as drafted, are understandable and amenable to response without unnecessary guesswork as to what is intended. On their faces, and in view of the foregoing discussion on this motion, they call for relevant documents. The objections are overruled.

Last, plaintiffs seek PMM's insurance policy (D.R. 41) and its internal policy as to document destruction (D.R. 42). Rule 26(b)(2), Fed.R.Civ.P., expressly provides that the existence and contents of any insurance agreement that may satisfy all or part of a judgment which may be entered in the action is discoverable. [*17] Oppenheimer, at 352; Simon v. G.D. Searle & Co., 816 F.2d 397, 404 (8th Cir. 1987). The motion to compel a response to D.R. 41 is therefore, granted.

The documents destruction policy, however, should not be discoverable. There is no reason to believe that the nonproduction of documents here relates either to the intentional or course-of-business destruction of documents. The above discussion encapsulates the history and scope of the documents production dispute. Absent some showing that evidence is being destroyed, this sort of discovery is uncalled for. As a result, the motion to compel a response to D.R. 42 is denied.

Miscellaneous

A good number of the document requests in issue were answered in part by PMM with an objection that the items were apparently sought from others. That is not the case. Each and every request in issue was directed specifically to PMM. It is obliged to respond even if another party is likely to have the items sought. It cannot pass its obligation to respond to another, and every requested document which is in its possession must be produced, notwithstanding actual or potential production from another source. Pennwalt Corp. v. Plough, Inc., [*18] 85 F.R.D. 257, 263 (D. Del. 1979); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976).

In its briefs to the court, PMM has indicated that it could find no responsive documents to certain requests. A party cannot reasonably be ordered to produce what does not exist. Searock v. Stripling, 736 F.2d 650, 654 (11th Cir. 1984); SEC v. Canadian Javelin, Ltd., 64 F.R.D. 648, 651 (S.D. N.Y. 1974); Wm. A. Meier Glass Co. v. Anchor Hocking Glass Corp., 11 F.R.D. 487, 491 (W.D. Pa. 1951). However, in a manner which it can be legally bound, it must formally answer that no such documents exist. Therefore, even if there are document requests where nothing is produced, PMM must serve proper formal responses, so stating. Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 42, 46 (D. D.C. 1984); Alexander v. Parsons, 75 F.R.D. 536, 538 (W.D. Mich. 1977).

Last, two documents requests call for narrowing because, on their faces, they intrude too broadly into the highest decision making levels of CDC on irrelevant matters. In D.R. 21 plaintiffs seek documents disseminated by PMM to the CDC board or its committees. Obviously, the request should be confined [*19] to documents relevant to the issues in this case, excluding other dealings that PMM may have had with the CDC board. Likewise, in D.R. 22 seeks all documents in PMM's possession regarding CDC board meetings. It should be similarly limited. Plaintiffs will be allowed leave to suitably narrow these two document requests, which shall then be honored.

Therefore, based upon the foregoing, the briefs and arguments of counsel, and all the files and proceedings herein,

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to compel responses to document requests 6, 7, 8, 9, 10, 11, 12, 16, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 34, 35, 38, and 39, as narrowed herein, is GRANTED;

2. Plaintiffs' motion to compel responses to document request 33, as narrowed by the plaintiff and the court, is GRANTED;

3. Plaintiffs' motion to compel a response to document requests 41 and 42 is DENIED;

4. The parties shall submit, by December 30, 1987, an agreed form of protective order, protecting defendants' claims of confidentiality, or in the event they cannot agree, their separate proposals on the disputed terms of such an order;

5. The responses compelled herein shall be served upon plaintiff within [*20] 45 days hereof.

DATED: December 10, 1987.

JANICE M. SYMCHYCH

United States Magistrate

LEXSEE 1988 US DIST LEXIS 18603

IN RE: CONTROL DATA CORPORATION SECURITIES LITIGATION

3-85 CIV 1341

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

1988 U.S. Dist. LEXIS 18603

February 22, 1988, Decided
February 22, 1988, Filed

PRIOR HISTORY: Adopting Magistrate's Document of December 10, 1987, Reported at: 1987 U.S. Dist. LEXIS 16829.

LexisNexis(R) Headnotes

COUNSEL:

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JUDGES: [*1] ALSOP

OPINIONBY: DONALD D. ALSOP

OPINION:

This matter comes before the court on appeal by defendant Peat, Marwick, Main & Co. ("PMM") from Magistrate Janice M. Symchych's Order Compelling Discovery dated December 10, 1987. PMM is joined by Control Data Corporation ("CDC") and the individually named defendants. Pursuant to 28 U.S.C. § 636(b)(1)(A), an order of the magistrate is not to be overturned unless it is found to be clearly erroneous or contrary to law. See also, Local Rule 16(b)(2). This court has reviewed the record before the magistrate, and has reviewed the memoranda of law that have been submitted to it by the parties.

The magistrate's order analyzed the factual and procedural background of this case. She reviewed the basic discovery principles in a concise and thoughtful manner. The magistrate then examined each of the issues as it related to the various discovery requests. Her review and analysis was not only thorough but clear as well. The issues were complex. The magistrate is to be commended for sifting through the myriad of discovery requests and objections and addressing each of the issues before her.

The defendant, PMM, contends that the magistrate [*2] committed clear error. First, PMM is concerned that the magistrate's order allows the shareholders an "undeserved license to explore matters not in the least

related to their claims." Defendant PMM's Reply Memorandum in Support of Appeal at 3 (Jan. 22, 1988). The defendants' concern is unwarranted. There are three specific accounting related issues asserted by the plaintiffs in their pleadings. This court recognizes that any granted discovery request must be reasonably calculated to lead to admissible evidence as to these three issues. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978); Hickman v. Taylor, 329 U.S. 495, 501, 91 L. Ed. 451, 67 S. Ct. 385 (1947); Dabney v. Montgomery Ward & Co., Inc., 761 F.2d 494, 499 (8th Cir. 1985).

Likewise, PMM is concerned that discovery will be opened up for any time period. Defendant PMM's Reply Memorandum in Support of Appeal at 4 (Jan. 22, 1987). The magistrate did find that there cannot be a time frame limit on discoverable facts because it is not unlikely that post offering statements, documents, or other conduct could lead to admissible evidence on the issues of scienter, [*3] intent and knowledge. In Re: CDC Securities Litigation, No. 3-85-1341, slip op. at 5 (Magistrate's Order Dec. 10, 1987). PMM complains that the plaintiffs' discovery requests will generate thousands of pages of irrelevant information. It is possible, however, that such discovery requests will lead to admissible evidence which is in conformity with the standards of Fed. R. Civ. P. 26(b)(1). The magistrate in her order specifically narrowed some discovery requests concerning "CDC's overall financial health and other specific financial events . . . to the period from the class period up until December 31, 1985." In Re: CDC Securities Litigation, No. 3-85-1341, slip op. at 6, 8 (Magistrate's Order Dec. 10, 1987). These conclusions of the magistrate are not clearly erroneous nor contrary to law.

Finally, it is necessary to point out that the defendant PMM's appeal from Doc. Request 33 is withdrawn under the understanding that "none of the documents requested in Doc. Request 33 seek a generalized production of PMM's literature, guidelines and manuals." Plaintiffs' Memorandum in Opposition at 14, n. 5 (Jan. 14, 1987) (emphasis in original). See Defendant PMM's Reply [*4] Memorandum at 8 (Jan. 22, 1988).

It is clear that Magistrate Symchych gave thorough and thoughtful consideration to the positions advanced by all parties. The analysis given by the magistrate is not clearly erroneous, nor is it contrary to law. All parties are reminded that this grant of discovery shall not expand the issues as presently framed. This litigation has been extended and complex. Counsel are doing little to ease the burden that such litigation imposes on both the court and their clients.

IT IS ORDERED That Magistrate Janice M. Symchych's Order Compelling Discovery dated December 10, 1987 be, and the same hereby is, affirmed.

DATED: February 22, 1988.

DONALD D. ALSOP

Chief U.S. District Judge

Westlaw.
Not Reported in F.Supp.2d
2002 WL 1059158 (S.D.N.Y.)
(Cite as: 2002 WL 1059158 (S.D.N.Y.))

H
Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

CROMER FINANCE LTD. and PRIVAL N.V., et al., Plaintiffs,
v.
Michael BERGER, Fund Administration Services (Bermuda) Ltd., Ernst & Young International, Ernst & Young Bermuda, Kempe & Whittle Associates Limited, Deloitte & Touche (Bermuda), Deloitte Touche Tohmatsu, Deloitte & Touche L.L.P., Bear Stearns & Co., Inc., Bear Stearns Securities Corp., Financial Asset Management, Inc., and John Does 1-100, Defendants.
ARGOS et al., Plaintiffs,
v.
Michael BERGER, Financial Asset Management, Inc., Fund Administration Services (Bermuda) Ltd., Ernst & Young International, Deloitte Touche, Deloitte Touche Tohmatsu, Deloitte & Touche L.L.P., Bear Stearns & Co., Inc., and Bear Stearns Securities Corp., Defendants.

No. 00 CIV. 2284(DLC), 00 CIV. 2498(DLC).

May 28, 2002.

MEMORANDUM OPINION

COTE, District J.

***1** Through its May 6, 2002 application, Deloitte & Touche (Bermuda) ("DTB") challenges the refusal of the *Cromer* plaintiffs to provide certain information in response to DTB's Combined First Set of Interrogatories (Nos. 63-64 and 78-82), its First Request for Production of Documents (Nos. 9, 12, 20, 25-27, and 37), its Second Request for Production of Documents (Nos.24-26), and its Fourth Request for Production of Documents (No. 21). Having reviewed the parties' submissions regarding these issues, DTB's request that the plaintiffs be required to provide the disputed material is, with one exception, denied.

The plaintiffs in the *Cromer* action need not produce any information regarding allegations in the *Argos* action. Discovery by DTB in the *Argos* action has been stayed by Order of February 14, 2002.

The plaintiffs in the *Cromer* action need not produce their tax returns. DTB has not made an adequate showing of need for this information. Similarly, DTB has not shown an adequate connection to the issues to be tried to require production of information regarding the payment of costs, attorneys' fees and other expenses incurred by the plaintiffs in litigating the *Cromer* action. DTB is not entitled to information regarding the beneficial ownership of Fund shares other than for those entities of which the *Cromer* plaintiffs have given notice that they intend to rely on that ownership to support their claim of jurisdiction. *See* June 18, 2001 conference transcript at 37-38.

Finally, DTB is entitled to discovery of all of the trading undertaken by the named plaintiffs in the *Cromer* action during the period of time that they were investing in the Fund, and for some reasonable period of time before and after they invested in the Fund. DTB is entitled to discovery of information to explore whether the named plaintiffs would have invested in the Fund despite knowing that the NAV was significantly inflated. *See Cromer Finance Ltd. v.. Berger*, 205 F.R.D. 113, 133 (S.D.N.Y.2001).

SO ORDERED:

2002 WL 1059158 (S.D.N.Y.)

Motions, Pleadings and Filings **(Back to top)**

- 2004 WL 856454 (Verdict and Settlement Summary) Judgment by Default Against Defendants Michael Berger and Financial Asset Management, Inc. (Mar. 23, 2004)

- 2003 WL 22469895 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Deloitte & Touche Bermuda in Further Support of its Motion for Decertification of the Class or in the Alternative, Dismissal of Pendent Common Law Claims, Separate Trials and other Relief (Sep. 05, 2003)

- 2003 WL 22762643 (Trial Pleading) Lead

Plaintiffs' Proposed Voir Dire Questions (Sep. 05, 2003)

• 2003 WL 22794501 (Trial Filing) Deloitte & Touche Bermuda's Proposed Voir Dire (Sep. 05, 2003)

• 2003 WL 22048131 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law of Deloitte Touche Tohmatsu in Further Support of its Motion for Reconsideration or Certification Pursuant to 28 U.S.C. %4F 1292(b) (Apr. 04, 2003)

• 2003 WL 22048129 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Deloitte Touche Tohmatsu in Support of Its Motion for Reconsideration or Certification Pursuant to 28 U.S.C. %4F 1292(b) (Mar. 06, 2003)

• 2003 WL 22048127 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to the Motion for Summary Judgment of Defendant Deloitte Touche Tohmatsu (Feb. 19, 2003)

• 2003 WL 22048128 (Trial Motion, Memorandum and Affidavit) Notice of Motion for Summary Judgment (Feb. 07, 2003)

• 2002 WL 32150473 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Deloitte Touche Tohmatsu in Support of its Motion for Summary Judgment (Nov. 01, 2002)

• 2002 WL 32150400 (Trial Pleading) Deloitte & Touche Bermuda's Answer to the Third Amended Complaint and Cross-Claim Jury Trial Demanded (Jun. 05, 2002)

• 2002 WL 32150399 (Trial Pleading) Third Amended Complaint for Violations of the Securities Laws and Pendent State Law Claims (May. 08, 2002)

• 2002 WL 32150480 (Trial Order) Order (Feb. 28, 2002)

• 2002 WL 32150432 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law of Defendant Deloitte & Touche Bermuda in Further Support of its Motion for Leave to Renew its Motion to Dismiss on the Ground of Forum Non Conveniens and for Other Relief (Feb. 19, 2002)

• 2002 WL 32150479 (Trial Order) Order (Feb. 14, 2002)

• 2002 WL 32150431 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Deloitte's Motion for Leave to Renew Forum Non Conveniens Motion and for Other Relief (Feb. 04, 2002)

• 2002 WL 32150424 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Defendant Deloitte & Touche Bermuda in Support of Its Motion for Leave to Renew Its Motion to Dismiss on the Ground of Forum Non Conveniens and for Other Relief (Jan. 08, 2002)

• 2001 WL 34131297 (Trial Motion, Memorandum and Affidavit) Supplemental Memorandum of Law of Defendants Fund Administration Services (Bermuda) Ltd., Ernst & Young Bermuda, and Kempe & Whittle Associates Limited in Opposition to Plaintiffs' Motion for Class Certification (Oct. 29, 2001)

• 2001 WL 34131299 (Trial Motion, Memorandum and Affidavit) Lead Plaintiffs' Post-Argument Supplemental Reply Memorandum of Law in Further Support of Motion for Class Certification (Oct. 25, 2001)

• 2001 WL 34131295 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Defendant Deloitte & Touche Bermuda in Further Opposition to the Cromer Plaintiffs' Motion for Class Certification (Oct. 17, 2001)

• 2001 WL 34129759 (Trial Pleading) Third Amended Complaint Jury Trial Demanded (Oct. 05, 2001)

• 2001 WL 34131298 (Trial Motion, Memorandum and Affidavit) Lead Plaintiffs' Post-Argument Supplemental Memorandum of Law in Further Support of Motion for Class Certification (Sep. 27, 2001)

• 2001 WL 34131291 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Support of Defendant Deloitte & Touche Bermuda's Motion to Dismiss the Second Amended Complaints (Jul. 13, 2001)

• 2001 WL 34131292 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Support of Defendants Fund Administration Services (Bermuda) Ltd., Ernst & Young Services Ltd. and Ernst & Young Bermuda's Motion to Dismiss the Second Amended Complaint (Jul. 13, 2001)

• 2001 WL 34131293 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Defendants Fund Administration Services (Bermuda) Ltd, Ernst & Young Bermuda, and Kempe & Whittle Associates Limited in Opposition to Plaintiffs' Motion for Class Certification (Jul. 10, 2001)

• 2001 WL 34131296 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Defendants Fund Administration Services (Bermuda) Ltd, Ernst & Young Bermuda, and Kempe & Whittle Associates Limited in Opposition to Plaintiffs' Motion for Class Certification (Jul. 10, 2001)

• 2001 WL 34131290 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Fund Administration Services (Bermuda) Ltd., Ernst & Young Services Ltd. and Ernst & Young Bermuda's Motion to Dismiss the Second Amended Complaint (Jun. 25, 2001)

• 2001 WL 34129578 (Trial Motion, Memorandum and Affidavit) Lead Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification (Jun. 18, 2001)

• 2001 WL 34129582 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants Fund Administration Services (Bermuda) Ltd., Ernst & Young Services Ltd. and Ernst & Young Bermuda's Motion to Dismiss the Second Amended Complaint (Jun. 01, 2001)

• 2001 WL 34129577 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendant Deloitte & Touche Bermuda's Motion for an Order Permitting an Interlocutory Appeal Pursuant to 28 U.S.C. %4F 1292(b) (May. 17, 2001)

• 2001 WL 34129599 (Trial Order) Order (May. 15, 2001)

• 2001 WL 34129576 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendant Fund Administration Services (Bermuda) Ltd., Ernst & Young Services Limited (F/K/A Kempe & Whittle Associates Limited) and Ernst & Young Bermuda's Motion for Reargument of the Court's Opinion and Order Entere d on April 18, 2001 (May. 02, 2001)

• 2000 WL 34015588 (Trial Pleading) Answer (Sep. 08, 2000)

• 2000 WL 34015589 (Trial Pleading) Amended Complaint Jury Trial Demanded (Sep. 08, 2000)

• 2000 WL 34015546 (Trial Motion, Memorandum and Affidavit) Fam's Memorandum in Support of Motion to Dismiss (Jul. 10, 2000)

• 2000 WL 34015547 (Trial Motion, Memorandum and Affidavit) Bear Stearns & Co., Inc.'s and Bear Stearns Securities Corporation's Memorandum of Law in Support of Their Motion to Dismiss the Complaint (Jul. 10, 2000)

• 2000 WL 34015548 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Deloitte Touche Tohmatsu's Motion to Dismiss the Complaint (Jul. 10, 2000)

• 2000 WL 34015549 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendant Fund Administration Services (Bermuda) Ltd.'s Motion to Dismiss the Complaint (Jul. 10, 2000)

• 2000 WL 34015576 (Trial Pleading) Complaint, As Revised Pursuant To The Parties' Agreement Solely To Add Plaintiffs Or Information About Plaintiffs, Jury Trial Demanded (Jun. 21, 2000)

• 2000 WL 34015550 (Trial Motion, Memorandum and Affidavit) Deloitte's Memorandum in Response to Motion of Cromer Finance, Ltd. for Appointment as Lead Plaintiff and Approval of its Choice of Lead Counsel (Jun. 05, 2000)

• 2000 WL 34015534 (Trial Motion, Memorandum and Affidavit) Memorandum of Law for Appointment of Lead Plaintiff and Approval of Selection of Lead Counsel (May. 18, 2000)

• 1:00CV02498 (Docket) (Apr. 03, 2000)

• 2000 WL 34013248 (Trial Filing) Rule 1.9 Statement (Mar. 31, 2000)

• 2000 WL 34013273 (Trial Pleading) Complaint (Mar. 31, 2000)

• 1:00CV02284 (Docket) (Mar. 24, 2000)

Westlaw.
1994 WL 248172
1994 WL 248172 (D.N.J.)
(Cite as: 1994 WL 248172 (D.N.J.))

H
Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, D. New Jersey.

EASTON & CO., Plaintiff,
v.
MUTUAL BENEFIT LIFE INSURANCE CO.; Henry E. Kates; Shearson Lehman Brothers, Inc.; and Ernst and Young,
Defendants.
EASTON & CO., Plaintiff,
v.
SHEARSON LEHMAN BROTHERS, INC.,
Defendant.

CIV. Nos. 91-4012 (HLS), 92-2095 (HLS).

May 18, 1994.

SECOND AMENDED OPINION

PISANO, United States Magistrate Judge:

INTRODUCTION

***1** This matter comes before the court upon the motion of plaintiff Easton & Co. ("Easton") for a protective order precluding defendants Ernst & Young and Shearson Lehman Brothers ("Shearson") from taking discovery of absent class members. Oral argument was heard on February 14, 1994.

BACKGROUND

Easton, a broker and securities dealer, purchased bonds issued on or about May 3, 1991 by the DeKalb Georgia Housing Authority (the "DeKalb Bonds"). Mutual Benefit Life Insurance Co. ("Mutual") guaranteed the interest payments on the DeKalb Bonds. Defendant Henry Kates was the President, CEO, and a director of Mutual until July 16, 1991. Defendant Ernst & Young, a partnership of certified accountants which acted as Mutual's auditor, issued opinion letters for Mutual. Lehman Brothers, a division of Shearson, was the lead underwriter and seller of the DeKalb Bonds. Shearson prepared and disseminated to the investment public an Official Statement regarding the DeKalb Bonds.

On September 7, 1991, plaintiff filed a complaint ("*Easton I*") against Mutual, Henry Kates, Shearson, and Ernst & Young, claiming that the defendants knowingly disseminated inaccurate and misleading written statements regarding Mutual's guarantee and the investment risks associated with the DeKalb bonds. Specifically, Easton asserts that the defendants knew of Mutual's precarious financial situation, but failed to disclose the information in the Official Statement offering the DeKalb Bonds for sale. The *Easton I* complaint alleges that defendants violated section 10(b) of the Securities and Exchange Act of 1934 and 15 U.S.C. § 78j(b). Easton also asserts a state law negligent misrepresentation claim.

Easton filed *Easton I* on behalf of a class comprised of:

> all persons and entities who purchased DeKalb, Georgia Housing Authority Multifamily Housing Revenue Refunding Bonds (North Hill Ltd. Project), Series 1991, due November 30, 1994 (the "DeKalb Georgia Bonds") from May 3, 1991 through July 1991. Excluded from the class are defendants, subsidiaries and affiliates of the corporate and partnership defendants, and their respective principals, officers and directors, and the individual defendant and members of his immediate family, and the affiliates, heirs, successors or assignees.

(Pl.'s Br. in Supp. of Class Certification at 22).

On May 18, 1992, Easton filed a second class action (*Easton II*) naming only Shearson as a defendant. The *Easton II* complaint alleges that: 1) Shearson orally misrepresented that Mutual-backed bonds were rated AA or AAA and were a safe, conservative investment; 2) Shearson knew, or recklessly disregarded, facts showing that Mutual was experiencing financial difficulties and was rapidly moving toward insolvency, thus making Mutual's guarantees of the bonds worthless and the bonds a risky investment; and 3) had Easton and the class known of Mutual's financial position, they never would have purchased the Mutual-backed bonds.

***2** Easton filed the complaint in *Easton II* on behalf of:

all persons and entities who purchased any bond guaranteed by Mutual ... from Shearson during the period April 19, 1991 through July 16, 1991, excluding Shearson, Mutual, or their subsidiaries, affiliates, principals, officers and directors and their heirs, successors or assignees.

(Pl.'s Br. in Supp. of Class Certification at 22).

On November 4, 1992, Judge Sarokin entered an order consolidating *Easton I* and *Easton II*. On February 9, 1993, Judge Sarokin issued an Opinion certifying *Easton I* to proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure. Prior to this time, Shearson had agreed to certification of an *Easton II* class consisting of all fixed-rate bondholders.

On June 1, 1993, the Court entered an Order approving the proposed notices of pendency of the class actions and directed that the notices be provided to potential class members. The notices approved by the court informed class members that they need not take any action to be included in the class action, but gave them an opportunity to "opt-out" of the class by August 31, 1993. None of the class members elected to be excluded. Easton represents that there are 160 *Easton I* and *Easton II* class members.

On August 13, 1993 and November 16, 1993, respectively, Ernst & Young and Shearson served fifteen interrogatories and a single document request on the class members. The defendants do not dispute that the questions generally relate to the individual circumstances of each class member's purchase of the bonds and resulting damages. The information defendants seek includes:

(1) the number of bonds purchased;

(2) the price at which the bonds were purchased;

(3) the name of the broker used for each purchase;

(4) the dates and amounts for which the bonds were sold;

(5) the person to whom they were sold;

(6) the broker(s) used in connection with the purchase/sale;

(7) all advice, information, and/or documents received, reviewed, or relied upon in connection with the bond purchases;

(8) whether class members regularly read *The Wall Street Journal;*

(9) when class members learned of Mutual's financial difficulties;

(10) prior investment history of each absent class member from January 1987 through July 1991, including a listing of up to fifteen purchases of securities items identified by name, price, and date.

(Pl.'s Br. in Supp. of Protective Order at 6).

The instructions to defendants' discovery requests inform class members that they will risk dismissal of their claims if they fail to respond or if their responses are insufficient.

On December 23, 1993 Easton filed the instant motion for a protective order precluding the class members from answering Shearson and Ernst & Young's interrogatories. On January 7, 1994, Shearson and Ernst & Young filed separate submissions in opposition to Easton's motion. Oral argument was heard on February 14, 1994.

DISCUSSION

***3** It is fairly well-settled that, where warranted, discovery may be taken of absent class members during the course of class action litigation under Rule 23. In *Brennan v. Midwestern United Life*, 450 F.2d 999, 1005 (7th Cir.1971), the court explained that:

> If discovery from the absent members is necessary or helpful to the proper presentation and correct adjudication of the principal suit, [there is] no reason why it should not be allowed, so long as adequate precautionary measures are taken to insure that the absent class members are not misled or confused.

The guidelines first discussed in *Brennan* were modified by later cases, notably *Clark v. Universal Builders*, 501 F.2d 324 (7th Cir.1974) and *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.1986), *cert. denied*, 479 U.S. 883 (1986). One court, which undertook a survey of the various federal decisions following *Brennan*, concluded that:

> [t]he majority of courts considering the scope of discovery against absent class members have granted discovery via interrogatories or document requests (1) where the information requested is relevant to the decision of common questions, (2) when the discovery requests are tendered in good

faith and are not unduly burdensome, and (3) when the information is not available from the class representative parties.

Transamerican Refining Corp. v. Dravo, 139 F.R.D. 619, 621 (S.C.Tex.1991) (citing *Dellums v. Powell,* 566 F.2d 167 (D.C.Cir.1977); *United States v. Trucking Employers, Inc.,* 72 F.R.D. 101 (D.D.C.1976); and *Brennan*). A fourth requirement was referred to in *Clark:* that the discovery not seek information on matters already known to defendants. *Clark,* 501 F.2d 324, 341 n. 24

Easton essentially argues that the discovery currently at issue is irrelevant to the decision of common questions. The interrogatories focus on the reliance of the class members as individuals upon the alleged misrepresentations. Easton maintains that questions of individual reliance are irrelevant to the determination of class-wide issues relating to the liability of the defendants. According to Easton, this determination focuses on the "fraud on the market" theory.

The Supreme Court has explained that:

> The fraud on the market theory is based on the hypothesis that ... the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.... The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Basic v. Levinson, 485 U.S. 224, 241-42 (1988). In *Basic,* the Supreme Court held that when a plaintiff asserts a "fraud on the market" theory of liability, a presumption of causation arises. *Id.*

***4** However, the presumption of causation is rebuttable. *Id.* at 250. *Blackie v. Barrack,* 524 F.2d 891, 906 (9th Cir.1975), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57 (1976), set forth the manner in which a defendant may rebut the presumption of causation in a "fraud on the market" case:

> (1) by disproving materiality, or by proving that despite materiality, an insufficient number of traders relied on the deception so as to inflate the price; or (2) by proving that an individual plaintiff purchased despite knowledge of the falsity of a representation, or that he would have, had he known of it.

Therefore, as summarized in *Jaroslawicz v. Engelhard Corp.,* 724 F.Supp. 294, 301 (D.N.J.1989), "defendants may rebut fraud-on-the-market reliance as to the class, or as to each class member."

Defendants assert that, because they may rebut reliance as to the class and as to each class member, the discovery at issue is relevant to the common question of whether the market was actually defrauded. Defendants explain that if the discovery shows that a significant number of class members who were purchasers in the market had information about Mutual's decline from sources other than Lehman, it would tend to prove that the market was not defrauded, and thus the benefit of the "fraud on the market" presumption would be unavailable on a common basis to any of the class members, including individuals who might not themselves have learned of Mutual's problems. (Shearson's Br. in Opp'n to Protective Order at 10-11).

In a case very similar to the one at hand, *In re SciMed Life Securities Litigation,* Civ. No. 3-91-575, 1992 WL 413867, at *3 (D.Minn. Nov. 20, 1992), the court permitted discovery of plaintiffs' investment history and background. As in the present case, the *SciMed* class of stock purchasers sought to assert a "fraud on the market" theory of liability. The plaintiffs objected to discovery relating to their investment background and history. *Id.* at *2. The defendants argued that the information was highly relevant to the plaintiffs' reliance-based claims. *Id.*

Citing *Blackie,* the court noted that the presumption of reliance raised by the "fraud on the market" theory may be rebutted as to individual plaintiffs. *Id.* at *3. The court also noted that, as in the present case, the plaintiffs had asserted common law actions of fraud and negligent misrepresentation, which require showings of actual reliance. *Id.* (citing *Rosenberg v. Digilog, Inc.,* 648 F.Supp. 40 (E.D.Pa.1985)). The *SciMed* court concluded that the need for the defendants to conduct discovery concerning the plaintiffs' entire investment history and background was important, and ordered compliance with the majority of the requested discovery. [FN1] *Id.*

The requests for discovery in the instant case are similar to those permitted in *SciMed.* As defendants admit, the discovery is relevant to issues of individual reliance. However, these issues of individual reliance are relevant to the ultimate determination of liability under the "fraud on the market" theory, the

theory of liability which plaintiffs raise as a class. Therefore, the requested discovery is relevant to the determination of common questions.

***5** Easton also claims that the requested discovery is unduly burdensome and amounts to an impermissible "opt-in" requirement of class members. Easton bases this argument on case law emphasizing that class members should not be made to take affirmative steps to remain in a class. *See Clark v. Universal Builders, Inc.* 501 F.2d 324 (7th Cir.1974); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.1986), *cert. denied,* 479 U.S. 883 (1986); *B & B Investment Club v. Kleinert's,* 62 F.R.D. 140 (E.C.Pa.1974); *Wainwright v. Krafico,* 54 F.R.D. 532 (N.D.Ga.1972). However, in the cases plaintiff cites, rejection of the disputed discovery was routinely based on the failure of the discovery to comport with guidelines first discussed in *Brennan.*

In *Clark,* the Seventh Circuit found that the requested discovery was abusive in that it required the civil rights plaintiffs to acquire technical and legal advice in order to understand the questions and formulate responses, *Clark,* 501 F.2d at 340-41 n. 24. Moreover, the court found that the *Clark* defendants made no showing that the requested information was necessary to trial preparation, in contravention of the guidelines set forth in *Brennan. Id.* at 340.

Similarly, *Cox* did not hold that propounding interrogatories on absent class members is impermissible *per se.* In *Cox,* the Eleventh Circuit reversed a district court ruling dismissing the claims of absent class members who had failed to answer interrogatories. The interrogatories had been prefaced with a warning that failure to answer the interrogatories could result in dismissal from the class action suit. *Cox,* 784 F.2d at 1556. The Court of Appeals observed that dismissal is the most severe of sanctions and is to be used only where noncompliance results from willful or bad faith disregard. *Id.* The Court of Appeals found that, because "the lower court made no finding of any bad faith resistance to discovery orders and, further, left no indication on the record that it considered and rejected sanctions less severe than dismissal," the district court erred in dismissing the claims. *Id.*

The Eleventh Circuit declined "to approve the use of the discovery sanction of dismissal against passive class members in a class action suit even to the extent that it may be permitted by *Brennan* and *Clark.*" *Id.* at 1556- 57. However, the court discussed the guidelines set forth in *Brennan* and *Clark* and specifically found that the disputed interrogatories failed to satisfy those guidelines because they were an improper attempt to reduce class size and were of questionable necessity. *Id.* at 1556.

As drafted, the discovery in the instant case is not abusive. Class members need not obtain counsel to answer the interrogatories and document requests. However, the discovery may be made less burdensome. The discovery is prefaced by warnings that failure to respond completely and accurately could result in dismissal of individual claims. As noted in *Cox,* dismissal is the most severe of sanctions. The threat of dismissal need not be raised at this juncture, where there is no indication that class members will fail to comply with the discovery requests. Therefore, as a precaution against unnecessary intimidation of class members, the court directs that defendants re-draft the discovery requests to exclude the warnings regarding dismissal.

***6** Moreover, based upon the representations of defense counsel at oral argument, the court finds that the discovery requests could be streamlined by incorporating information already available to defendants. At oral argument, the court proposed that the discovery be re-drafted in the form of a questionnaire informing an individual class member of the securities purchased by him or her, as well as the dates, prices, and brokers correlating to those purchases. (Tr. of 2/14/94 at 26:13 to 27:4). Mr. Charles M. Lizza, counsel for Shearson, admitted that producing such a questionnaire would be possible. (Tr. at 27:6-8). In keeping with *Clark's* directive that discovery not seek information on matters already known to defendants, the court orders defendants to redraft the discovery requests as questionnaires providing, to the extent possible, the following information: (1) the securities purchased by the individual class member; (2) the dates of such purchases; (3) the prices paid for such securities; (4) the brokers involved in such transactions.

CONCLUSION

Easton's motion for a protective order precluding discovery of absent class members is denied. The discovery requests propounded by defendants Shearson and Ernst & Young shall be re-drafted in the manner prescribed by the court.

FN1. The *SciMed* court found that the defendants did not need the plaintiffs' financial statements or tax returns to

adequately assess plaintiffs' investment history and background. *Id.* at *3. The court ordered the plaintiffs to comply with requests for customer agreements, account statements, margin agreements, prospectus and official statements, correspondence concerning securities purchases, and documents concerning purchases and sales of securities. *Id.*

1994 WL 248172 (D.N.J.)

Motions, Pleadings and Filings (Back to top)

- 2:92CV02095 (Docket) (May. 18, 1992)

- 2:91CV04012 (Docket) (Sep. 17, 1991)

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Westlaw.
1992 WL 137163
1992 WL 137163 (N.D.Ill.)
(Cite as: 1992 WL 137163 (N.D.Ill.))

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Meyer FELDMAN, et al., Plaintiffs,
v.
MOTOROLA, INC., et al., Defendants.

No. 90 C 5887.

June 10, 1992.

MEMORANDUM OPINION AND ORDER

GOTTSCHALL, United States Magistrate Judge.

***1** This matter is before the court on defendants' motion to compel. For the reasons set forth below, the motion is granted.

In this action for securities fraud, plaintiffs seek recovery on a fraud-on-the-market theory. The Supreme Court has described the theory as follows:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers did not directly rely on the misstatements.... The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Basic, Inc. v. Levinson, 485 U.S. 224, 241-242 (1988) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-1161 (3d Cir.1986)). The *Basic* decision went on to comment that this presumption of reliance is supported by common sense and probability, as empirical studies confirm that the market price of shares traded on well-developed markets reflected all publicly available information. *Id.* at 246. *Basic* also noted the comment in a district court opinion that " 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?' " *Id.* at 246-247 (quoting *Schlanger v. Four-Phase Systems, Inc.*, 555 F.Supp. 535, 538 (S.D.N.Y.1982)).

Despite the perception that most purchasers rely on the integrity of the market, *Basic* found that the presumption of reliance could be rebutted. In the words of the Court, "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Id.* at 248. As an example, the Court suggested that an investor might not have been misled if he or she had access to the true state of affairs within a corporate issuer of securities. *Id.* In such a scenario, the investor might believe the securities are undervalued, even despite artificial price inflation stemming from the fraud.

Hoping to rebut the presumption of reliance in this case, defendants seek production of plaintiffs' brokerage account statements from January 1, 1988 to the present. Although defendants allege no facts leading them to suspect plaintiffs did not rely on the market, they maintain that such discovery is reasonably calculated to lead to evidence that plaintiffs are "sophisticated investors" who purchased their shares in reliance on factors other than market price. Although this court agrees with defendants that the brokerage statements are relevant to the merits of plaintiffs' federal securities law claim, the inquiry does not end here. Plaintiff objects to this discovery because the question of class certification has not yet been resolved. As this court sees it, the pertinent question therefore becomes one of whether to order production now or defer it until after resolution of the motion for class certification.

***2** Defendants argue that this discovery is relevant to the requirements under Rule 23(a) that named plaintiffs adequately represent the class and that named plaintiffs have claims typical of those of the class. Fed.R.Civ.P. 23(a)(3) and (4). As support for their argument, they cite case law to the effect that a sophisticated investor is not an appropriate class representative. *See, e.g., J.H. Cohn & Co. Employment Retirement Trust v. American Appraisal Assoc., Inc.*, 628 F.2d 994, 998 (7th Cir.1980); *McNichols v. Loeb Rhoades & Co., Inc.*, 97 F.R.D. 331, 335 (N.D.Ill.1982) (plaintiffs subject to unique

defense that they did not rely on integrity of market); *Lewis v. Johnson,* 92 F.R.D. 758, 760 (E.D.N.Y.1981); *Kline v. Wolf,* 88 F.R.D. 696, 699 (S.D.N.Y.1981), *aff'd,* 702 F.2d 400 (2d Cir.1983) (speculator in stocks subject to unique defenses on issue of reliance). Plaintiffs respond to this argument by pointing to decisions that have rejected the proposition that a sophisticated investor is subject to a unique defense. *See, e.g., Blackie v. Barrack,* 524 F.2d 891, 905 (9th Cir.1975), *cert. denied,* 429 U.S. 816 (1976); *Spicer v. Chicago Board Options Exchange, Inc.,* [1989-1990 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 94,943 at 95,252 (N.D.Ill.1990); *Grossman v. Waste Management, Inc.,* 100 F.R.D. 781, 789 (N.D.Ill.1984) (omitted information is no more available to a "sophisticated" investor than to a "normal" one). Other decisions concur that non-reliance is not a unique defense in an action for securities fraud. *See, e.g., In re VMS Securities Litigation,* 136 F.R.D. 466, 478 (N.D.Ill.1991); *Katz v. Comdisco, Inc.,* 117 F.R.D. 403, 409 (N.D.Ill.1987) (speculator not subject to unique defense because it is not atypical for investors to look for bargains); *Healy v. Loeb Rhoades and Co.,* 99 F.R.D. 540, 541 (N.D.Ill.1983); *Ridings v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.,* 94 F.R.D. 147, 151 (N.D.Ill.1982). Which of these positions should prevail is not an easy question, however, as the question of class certification is a discretionary determination that turns on the facts of a particular case. *See J.H. Cohn & Co.,* 628 F.2d at 998; *Alexander v. Centrafarm Group, N.V.,* 124 F.R.D. 178, 185 (N.D.Ill.1988).

Plaintiffs have submitted copies of unreported orders of other courts which have limited discovery of a class representative's investment transactions to those involving a particular corporate defendant's securities. A number of these orders do not discuss surrounding circumstances or enunciate the reasoning behind the court's decision to so limit discovery. Other decisions rule on the typicality of the non-reliance or sophisticated investor defense before the record on class certification is complete. *See, e.g., Cohen v. Long Island Lighting Co.,* [1986-1987 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 92,850 at 94,136 (E.D.N.Y.1986); *Malanka v. Data General Corp.,* [1986-1987 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 92,837 at 94,073 (D.Mass.1986). While this kind of preliminary decision not to consider a plaintiff's investment history may prove to be appropriate in many or even a majority of cases under a fraud-on-the-market theory, a plaintiff's investment history could reveal unusual typicality defenses. *Shields v. Smith,* [Current Binder] Fed.Sec.L.Rep. ¶ 96,449 at 91,967 (N.D.Cal.1991) (plaintiff exhibited consistent pattern of purchasing shares in troubled companies, possibly to pursue litigation).

***3** The question of class certification is to be decided "as soon as practicable" after the commencement of an action. *E.g., Rutan v. Republican Party of Illinois,* 848 F.2d 1396, 1400 (7th Cir.1988). Some discovery may be appropriate to make the necessary class determinations. *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130,* 657 F.2d 890, 895 (7th Cir.1981), *cert. denied sub nom. Joint Apprenticeship Comm. Local No. 130 v. Eggleston,* 455 U.S. 1017 (1982). At the same time, there exists a potential for abuse in that a defendant may use discovery of representative plaintiffs to delay. *See* C. Aron *et al., Class Actions: Law and Practice* § 25.02 (1987). In deciding this motion, the court also bears in mind that the class determination generally involves considerations that are " 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Coopers and Lybrand v. Livesay,* 437 U.S. 463, 469 (1978) (citation omitted); *Eggleston,* 657 F.2d at 895 (boundary between class determination and merits not always easily discernible ... some overlap may be unavoidable); *Gray v. First Winthrop Corp.,* 133 F.R.D. 39, 41 (N.D.Cal.1990) (discovery relating to class certification closely enmeshed with merits discovery). There is no hard and fast rule on the timing of discovery [FN1] and some flexibility is appropriate. *See* discussion in 2 H. Newberg, *Newberg on Class Actions* § § 9.43, 9.44 and 9.49 (2d ed. 1985).

Here, plaintiffs' sole objection to the requested discovery is based on relevance. There is no claim of undue burden or inability to protect confidential matter through a protective order. Although plaintiffs accuse defendants of seeking this discovery for purposes of harassment, they do not support this allegation with any description of underlying facts. Nor does the record suggest that defendants are utilizing discovery for delay or for any other abusive purpose. This court also prefers to defer ruling on the contours of the issues of typicality and adequacy of representation until the decision on class certification. Because this court considers the material relevant to the inquiry into class certification, it will allow this discovery. At the same time, in order that this discovery not become a source of delay, the court will hold the parties to their agreed briefing schedule. Defendants' motion to compel is therefore granted.

CONCLUSION

For the reasons set forth above, defendants' motion to compel is granted. Defendants' response to plaintiffs' motion for class certification is due July 8, 1992; plaintiffs' reply is due August 7, 1992.

> FN1. The parties here have agreed that defendants' response to plaintiffs' motion for class certification will not be due until 30 days after the ruling on this motion to compel, with plaintiffs' reply due 30 days after the response is filed.

1992 WL 137163 (N.D.Ill.)

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Not Reported in F.Supp.
1993 WL 497228 (N.D.Ill.), Fed. Sec. L. Rep. P 97,806
(Cite as: 1993 WL 497228 (N.D.Ill.))

United States District Court, N.D. Illinois.

FELDMAN, et al.
v.
Motorola, Inc., et al.

Civ. A. No. 90 C 5887.

Oct. 14, 1993.

To The Honorable Charles R. Norgle, Sr., one of the Judges of the United States District Court for the Northern District of Illinois.

GOTTSCHALL, United States Magistrate Judge.

REPORT AND RECOMMENDATION

***1** Two matters are presently pending in the referral of this case to this court. This report addresses each motion in turn.

MOTION FOR CLASS CERTIFICATION

Plaintiffs move under Fed.R.Civ.P. ("Rule") 23(b)(3) for certification of the two claims of securities fraud asserted in their second consolidated amended complaint ("complaint").

In Count I, plaintiffs bring claims under Section 10(b) of the Securities Exchange Act ("the Act"), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5. The class is defined as including all persons who purchased the common stock of Motorola, Inc. ("Motorola" or "the Company") during the period extending from May 4, 1990 through January 16, 1991 ("the Class Period"). [FN1]

To prove liability for securities fraud, plaintiffs rely on the fraud on the market theory articulated in *Basic, Inc. v. Levinson,* 485 U.S. 224 (1988), pursuant to which theory the market price of a security is determined by publicly available information concerning the company and its business. *See, e.g., Roots Partnership v. Lands' End, Inc.,* 965 F.2d 1411, 1416 n. 4 (7th Cir.1992) (quoting *Basic,* 485 U.S. at 241-242). Because most publicly available information is reflected in market price, an investor is presumed to have relied on material misrepresentations concerning the Company and its financial status. *In re Bally Mfg. Corp. Sec. Litig.,* 141 F.R.D. 262, 269 (N.D.Ill.1992). The liability of the individual defendants under Count I is premised on their status as "controlling persons" of Motorola under Act § 20, 15 U.S.C. § 78t(a). Alternatively, plaintiffs contend that the individual defendants directly participated in or aided and abetted Motorola's acts of securities fraud.

In Count II, a subclass of plaintiffs asserts claims of insider trading under 15 U.S.C. § 78t-1(a) against individual defendants Robert W. Galvin, John F. Mitchell, and Morton L. Topfer (collectively "the insider-trading defendants"). The subclass is defined as including all persons who purchased Motorola common stock contemporaneously with sales of Motorola common stock by the insider-trading defendants during the period July 24, 1990 to August 16, 1990. With the exception of the issue of standing, the parties have not separately addressed the requirements of Rule 23 as applied to this insider trading claim. Since the challenge to standing overlaps with defendants' arguments that most of the insider trading claims should be dismissed, this report will return to the question of certification of Count II after it addresses the motion to dismiss.

In determining whether to certify a class under Rule 23(b)(3), a two-step procedure must be followed. First, plaintiffs must establish that the following four requirements of Rule 23(a) are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the other class members; and (4) the class representatives are able to protect the interests of the class fairly and adequately. *Harriston v. Chicago Tribune Co.,* 992 F.2d 697, 703 (7th Cir.1993); *Spencer v. Central States, Southeast and Southwest Areas Pension Fund,* 778 F.Supp. 985, 989 (N.D.Ill.1991). Besides satisfying all the requirements of Rule 23(a), a plaintiff must establish one of the requirements of Rule 23(b). *Rosario v. Livaditis,* 963 F.2d 1013, 1017 (7th Cir.1992), *cert. denied,* 113 S.Ct. 972 (1993). As part of the analysis on class certification, the court makes no determination as to the merits of the case. *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 178 (1979). Plaintiffs bear the burden of proving that each of the

requirements for class certification has been met. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 162 (1982); *Trotter v. Klincar*, 748 F.2d 1177, 1183 (7th Cir.1984). In ruling on the motion, the court accepts as true the allegations made in support of certification. *Bally Mfg. Corp. Sec. Litig.*, 141 F.R.D. 262, 267 (N.D.Ill.1992).

***2** Several elements of the test for class certification are not challenged here, and this court agrees that they are met. First, under Rule 23(a)(1), the court must determine that the plaintiff class is so numerous that joinder is impracticable. This finding may be supported by common sense assumptions. *In re VMS Sec. Litig.*, 136 F.R.D. 466, 473 (N.D.Ill.1991). Since more than 44 million shares of Motorola stock were traded on major stock exchanges during the Class Period, and hundreds of thousands of shares were traded during the periods when the insider-trading defendants sold large blocks of their stock, the class and subclass are so numerous that joinder would be impracticable.

The inquiry into adequacy of representation is two-pronged. *Fry v. UAL Corp.*, 136 F.R.D. 626, 634 (N.D.Ill.1991); *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D.Ill.1986). "First, the named representatives must have a sufficient interest in the outcome to insure vigorous advocacy while having no interest antagonistic to the interest of the class." *Id.* Second, "counsel for plaintiffs must be competent, experienced, and capable of conducting the class action." *Harris v. General Dev. Corp.*, 127 F.R.D. 655, 662 (N.D.Ill.1989). This court readily concludes that the named plaintiffs' claims are coincidental with those of other potential class members, and that they have a sufficient interest in the outcome of this suit. Also, counsel is experienced, competent and capable of representing the class.

Certification under Rule 23(b)(3) entails two sets of findings: (1) that the questions of law or fact common to class members predominate over any question affecting only individual members, and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Riordan*, 113 F.R.D. at 65. Looking to the second requirement under that subsection, this court agrees with those decisions concluding that the class action device is a superior means of litigating claims like those that are raised in this lawsuit. *See, e.g., Bally Mfg. Corp. Sec. Litig.*, 141 F.R.D. 262, 267 (N.D.Ill.1992). Thus, only the requirement of predominance of common issues is potentially problematical. Defendants' challenge to predominance, as well as to commonality and typicality under Rules 23(a)(3) and (a)(4), interrelates with their argument that the Class Period should be limited to the time period between July 25, 1990 and October 9, 1990. Accordingly, these three elements will be discussed after defendants' arguments concerning the class period.

Question of the Appropriate Class Period

The named plaintiffs in this case purchased their stock in Motorola on or after July 26, 1990. However, they seek to represent a class of investors that purchased stock as early as May 4, 1990 and as late as January 16, 1991. The latter date is approximately three months after plaintiffs sued Motorola for securities fraud. Thus, some potential class members would have purchased their shares of Motorola stock after this lawsuit had already commenced.

***3** The Class Period corresponds to the period over which defendants allegedly made a series of misleading statements in order to artificially inflate the price of Motorola common stock. The statements in question all related to Motorola's 1990 earnings and were allegedly made without a reasonable basis for defendants' representations that its earnings would increase over 1989 levels. A number of the public pronouncements also are alleged to have had an immediate impact on the market price of Motorola stock.

First, on July 25, 1990, defendants' statements in a meeting with securities analysts allegedly assured the public that market concerns with lagging profits were unwarranted. Cmplt., ¶ ¶ 43-44. The representations impacted favorably on analysts' views of the Company, and the price of Motorola stock increased $3 1/8 per share the day after the meeting. Cmplt. ¶ ¶ 45-47. All along, though, defendants allegedly knew that increased research and development expenditures would result in declining profit margins. Cmplt., ¶ ¶ 48-49.

The market allegedly first came to suspect that earnings predictions were inflated on September 5, 1990, after Motorola informed analysts of reductions in certain growth estimates and profit predictions. At that point, the market price of Motorola common stock fell sharply. Cmplt. ¶ 51. A month later, on October 9, 1990, "without warning and to the shock of the marketplace," Motorola announced a decline in third quarter earnings. Cmplt., ¶ 54. The

announcement of third quarter earnings caused the market price of the Company's stock to decline nearly 12 percent, down $7.00 per share from the closing price on the previous day. Cmplt. ¶ 57. Finally, "Motorola shocked investors once again" when it announced poor fourth quarter 1990 results on January 16, 1991. Cmplt., ¶ 62. This announcement caused the market price of Motorola stock to decline from a closing price of $49.625 on January 16, 1991 to a closing price of $45.875 on January 17, 1991. Cmplt., ¶ 65. Throughout this period between the announcement of third and fourth quarter results, defendants are alleged to have assured the public that profits would improve. For instance, it is alleged that contemporaneously with the Company's announcement of third quarter earnings, management emphatically predicted a sharp snap back due to reduced research and development spending. Cmplt., ¶ 57.

Initially, this action was brought on behalf of persons purchasing Motorola stock between July 23, 1990 [FN2] and October 8, 1990. Consolidated Amended Complaint, ¶ 16. As defendants see it, a class period commencing July 25, 1990 is a more appropriate one, since it was then that Company officials met with analysts to address their concerns. As already noted, the price of Motorola stock rose after that meeting. Defendants further contend that the announcement of third quarter results, rather than fourth quarter results, should mark the end of the class period, since it is then that the market learned the truth about Motorola's predictions. Indeed, plaintiffs were apparently disabused of any misconception concerning the stock's value at the time of the third quarter announcement, since they sold their shares and sued for fraud.

***4** A number of cases provide some support for defendants' argument that the Class Period should be limited to the time period between Motorola's two announcements. First, numerous decisions have found that a class period ends when curative facts are publicly announced or otherwise effectively disseminated. *See, e.g., Farber v. Public Serv. Co. of New Mexico,* [1990-1991 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 95,663 at 98,112 (D.N.M.1990); *McFarland v. Memorex Corp.*, 96 F.R.D. 357, 364 (N.D.Cal.1982); *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 688 (E.D.Pa.1977). *See also Piel v. Nat'l Semiconductor Corp.*, 86 F.R.D. 357, 369 (E.D.Pa.1980). One of this court's own opinions acknowledges that principle. In a case when a named plaintiff purchased shares of stock *after* a critical announcement of reverses in the business of a corporate issuer, this court commented that the plaintiff was arguably an inappropriate representative of parties who purchased stock before the adverse reports. *Blumenthal v. Pomerantz,* No. 90 C 4080, 1992 U.S.Dist. LEXIS 8461 at *26 (N.D.Ill. June 16, 1992).

In making that comment, this court relied on a decision in which the Seventh Circuit held that loss causation was not established if a plaintiff purchased corporate shares after the company's announcement of actual operating results dispelled any misconceptions created in the minds of investors by its previous predictions of earnings. *Roots Partnership v. Lands' End, Inc.*, 965 F.2d 1411, 1419 (7th Cir.1992). *Roots Partnership* further found the plaintiff had no claim based on post-purchase statements of the issuer because later statements could not have affected the price at which stock was purchased. *Id.* at 1420. although *Roots Partnership* dismissed the case before the plaintiff moved for class certification, the Seventh Circuit commented that the plaintiff would not be a proper representative of persons buying stock in reliance on later statements of the issuer. *See id.* at 1420 n. 6. This court having made note of the Seventh Circuit's comment in *Blumenthal,* 1992 U.S.Dist. LEXIS 8461 at *27, defendants ask it to find that plaintiffs here cannot represent purchasers buying Motorola stock after they sold theirs on or shortly after October 9, 1990.

For a number of reasons, this court would not limit the Class Period as defendants ask. First, *Roots Partnership* did not address the question of class certification. The essence of the holding there was that the plaintiff lacked standing to assert a claim based on any of the corporate issuer's statements. Having no claim whatsoever, the plaintiff could not represent a class that relied on those statements. Second, while the decision concerning the named plaintiff in *Blumenthal* impacted on class certification, the circumstances of that case were unique and no decision was made on class certification. More importantly, both the *Roots Partnership* and *Blumenthal* decisions effectively decided the merits of the claims of named plaintiffs before class certification.

***5** Persuasive authority holds that this kind of preliminary assessment of the merits should be deferred until after the class has been certified. *See, e.g., Bally Mfg. Corp. Sec. Litig.*, 141 F.R.D. 262, 270 (N.D.Ill.1992) [FN3] (citing *In re IGI Sec. Litig.*, 122 F.R.D. 451, 462 (D.N.J.1988)); *Shields v.*

Smith, [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,001 at 94,377 (N.D.Cal.1992), *Margolis v. Caterpillar,* 815 F.Supp. 1150, 1153-1154 (C.D.Ill.1990); *In re Lilco Sec. Litig.,* 111 F.R.D. 663, 668 (E.D.N.Y.1986); *In re LTV Sec. Litig.,* 88 F.R.D. 134, 147 (N.D.Tex.1980). When there are questions of fact as to whether a particular release cured prior misrepresentations, a broader time period may be certified. *In re Kirschner Medical Corp. Sec. Litig.,* 139 F.R.D. 74, 82 (D.Md.1991); *Sherin v. Gould,* 115 F.R.D. 171, 174-175 (E.D.Pa.1987). *See also Nicholas v. Poughkeepsie Sav. Bank/FSB,* [1990-1991 Transfer Binder] Fed.Sec.L.Rep. (CCH), ¶ 95,736 at 98,495 (S.D.N.Y.1990).

Here it is alleged that defendants' comments of July 25, 1990 served to confirm assurances of improving profits made in earlier statements to the public. Thus, the announcement continued a course of conduct already begun. While the October 9, 1990 announcement caused a severe decline in stock prices, defendants allegedly continued to reassure investors that there would be a turnaround. The alleged scheme, then, continued. Overall, this court concludes that there are fact questions as to the appropriate limits of the class period, and it would therefore not limit the period as defendants propose. Having reached this conclusion, the inquiry returns to the requirements of Rule 23. As discussed below, concerns relating to changes in the mix of information during the Class Period permeate defendants' challenges to plaintiffs' ability to meet the requirements of Rules 23(a)(2) and (a)(3), as well as the predominance requirement under Rule 23(b)(3).

Typicality

The analysis of typicality under Rule 23(a)(3) focuses on whether there is a similarity of legal theory between the claims of the named plaintiffs and those of other class members. A plaintiff's claim is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members and the claims are based on the same legal theory. *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir.1992), *cert. denied,* 113 S.Ct. 972 (1993) (quoting *De La Fuente v. Stokley-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir.1983)). Rule 23(a)(3) does not require that all class members suffer the same injury as the named class representative. *Rosario, id.* Rather, the court looks to the defendant's conduct and the plaintiff's legal theory to satisfy the rule. *Id.*

On the other hand, the presence of even an arguable defense peculiar to a named plaintiff or a small subset of a plaintiff class may destroy typicality and bring into question the adequacy of a named plaintiff's representation. *J.H. Cohn and Co. Self-Employment Retirement Trust v. American Appraisal Assoc., Inc.,* 628 F.2d 994, 999 (7th Cir.1980). "The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." *Id.* A frequently recurring defense is not "unique," however. *See Goldwater v. Alston and Bird,* 116 F.R.D. 342, 352-353 (S.D.Ill.1987).

*6 Defendants' challenge to typicality is two-pronged. First, they argue that plaintiffs' claims are not typical of those buying Motorola stock beyond the period of their purchases because the mix of information relied on will differ. This argument has been repeatedly rejected in fraud-on-the-market cases since the decision in *Basic. See, e.g., Scholes v. Stone, McGuire and Benjamin,* 143 F.R.D. 181, 185 (N.D.Ill.1982); *In re Scott Paper Co. Sec. Litig.,* 142 F.R.D. 611, 615 (E.D.Pa.1992); *Alfus v. Pyramid Technology Corp.,* 764 F.Supp. 598, 606 (N.D.Ill.1991); *see also Walsh v. Chittenden Corp.,* 798 F.Supp. 1043, 1055 (D.Vt.1992). As one decision has commented, were the rule otherwise, there could never be a class action in securities fraud cases because a representative plaintiff would potentially be needed for each day of the class period, since on each day the mix of information available to the public would vary. *Farber v. Public Serv. Co. of New Mexico,* [1990-1991 Transfer Binder] Fed.Sec.L.Rep. (CCH), § 95,663 at 98,112 (D.N.M.1990).

Defendants also argue that plaintiff Saul Pearl ("Pearl") is subject to a unique defense in that he did not rely on the market in deciding to purchase shares of Motorola common stock after October 9, 1990. (This purchase is not alleged in the complaint. *See* Cmplt., ¶ 5(c).) Pearl has testified at deposition that he bought shares after the October 9, 1990 announcement because he felt Motorola stock was undervalued. His strategy was to "average down" his purchases, and he even made a slight profit when he later sold the shares in question.

The fact that a named plaintiff has made a profit on a sale of securities does not preclude his or her participation in a class action for securities fraud. *In re VMS Sec. Litig.,* 136 F.R.D. 466, 481-482 (N.D.Ill.1991). Nor are class representatives required to rely exclusively on the integrity of the market. *In re Bally Mfg. Corp. Sec. Litg.,* 141 F.R.D. 262, 269 (N.D.Ill.1992). *Bally* further opines that to delve into

a named plaintiff's investment strategy at this point in a lawsuit would entail an impermissible consideration of the merits. *Id.* Also, different traders may use market information differently, all the while relying on it. *See* Moskowitz v. Lopp, 128 F.R.D. 624, 631 (E.D.Pa.1989). The fact that investors have divergent motivations in purchasing securities should not defeat the fraud-on-the market presumption absent convincing proof that price played *no* part whatsoever in their decisionmaking. *Id. See also Nicholas v. Poughkeepsie Sav. Bank/FSB,* [1990-1991 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 95,736 at 98,493-98,494 (S.D.N.Y.1990). Because the evidence of record does not establish that Pearl or any other of the named plaintiffs here employed a strategy that did not take into account market factors, none are subject to the kind of unique defense that would preclude a finding of typicality. This court finds that the typicality requirement is satisfied.

Commonality and Predominance of Common Issues Over Individual Questions

***7** Under Rule 23(a)(2), a class may not be certified unless "there are questions of law or fact common to the class." A common nucleus of operative fact is normally sufficient to satisfy this requirement, despite some factual variation among class grievances. Rosario v. Livaditis, 963 F.2d 1013, 1017-1018 (7th Cir.1992), *cert. denied,* 113 S.Ct. 972 (1993). In the context of a fraud-on-the-market action, commonality is met when defendants allegedly engaged in a common cause of conduct by making substantially similar misrepresentations and omissions concerning a security. *See* VMS, 136 F.R.D. at 474.

The questions of commonality under Rule 23(a)(2) and predominance of common issues under Rule 23(b)(3) are closely related. Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 674 (N.D.Ill.1989); United Energy Corp. Solar Power Modules Tax Shelter Invest. Sec. Litig., 122 F.R.D. 251, 254 (C.D.Cal.1988) (finding of predominance implies that common questions exist). In determining whether common issues predominate over questions affecting only individual members, the court ascertains "the existence of a group which is more bound together by a mutual interest in the settlement of common questions than it is divided by the individual members' interest in matters peculiar to them. *Spicer v. Chicago Bd. Options Exchange,* [1989-1990 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 94,943 at 95,254 (N.D.Ill.1990). The court is not required to mechanically sum up the common and individual issues and predict which will consume more time, a result that would unduly block class actions because only the most complex of common questions would require more litigation time than a series of mini-trials. Simer v. Rios, 661 F.2d 655, 672 (7th Cir.1981), *cert. denied,* 456 U.S. 917 (1982). Instead, resolution of the predominance question tends to focus on the form trial would take, with consideration of whether the action would be manageable. *See id.* at 672- 673.

In actions involving a widely held security, the court is not unaware that a potentially very large class size could make the litigation unmanageable. *See* Bally, 141 F.R.D. at 268. However, that risk is better addressed down the road, if necessary, by altering or amending the class. *Id.* To prohibit certification on the basis of such speculation would undermine the utility of the class action device and the policy that Rule 23 is intended to promote. Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,023 at 94,506 (S.D.N.Y.1992).

Defendants' arguments concerning commonality and predominance tend to reiterate their concern that not all class members were influenced by the same factors in their decisions to purchase stock. Besides noting that changes would have occurred within the Company during the Class Period, defendants argue that significant changes in the American economy during the summer of 1990 would have impacted on investment decisions. Overall, they suggest that the trial would be an amalgam of mini-trials on the essential elements of liability, as people purchasing at different times would have wholly different sets of proof. As plaintiffs correctly note, however, defendants make no allegations of misrepresentations directed at any individual plaintiff. As has been the case throughout this litigation, the only statements on which liability would be premised were directed at the public generally.

***8** This court agrees with the many decisions cited in this opinion which conclude that both the commonality and predominance requirements are met in an action such as this one. It further considers it rather unlikely that this case will degenerate into an uncontrollable series of mini-trials, as this action is based on a rather limited group of statements made by defendants. On the present record, those statements are alleged to have been substantially similar, and made as part of a single scheme. While not unmindful that differences in investment strategy or other defenses might ultimately necessitate subclassing or changes in the class definition, the

court believes that a class action will be manageable. Accordingly, it concludes that the elements under Rule 23(a)(2) and (b)(3) have been met. Having found that plaintiffs have satisfied all the requirements for certification under Rule 23(b)(3), the court recommends that their motion for class certification be granted.

MOTION TO DISMISS IN PART THE SECOND CONSOLIDATED AMENDED COMPLAINT

In this motion, defendants seek to eliminate a number of issues from this litigation. Two of the three arguments made on the motion relate to allegations in Count I. If successful, defendants' third argument would result in the dismissal of a number of the insider trading claims in Count II. Since the court considers these arguments on a motion to dismiss, it accepts as true all well-pleaded factual allegations, and construes those allegations in plaintiffs' favor. Roots Partnership v. Lands' End, Inc., 965 F.2d 1411, 1416 (7th Cir.1992). Dismissal of the complaint is proper only if it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Id.* For instance, a claim may be dismissed if the complaint fails to allege an essential element of that claim. *Id.*

Regulation S-K

Plaintiffs allege that Motorola's second quarter reports to the SEC on Form 10-Q failed to disclose that Motorola expected that its expenses would increase more than its revenues, and that certain research and development ("R & D") expenditures would rise dramatically, causing the Company's profit margins and income to decline materially. According to plaintiffs, the failure to disclose these facts "violated Item 303(b) of SEC Regulation S-K, 17 C.F.R. § 229.303(b), which requires, *inter alia,* that a company disclose anticipated changes 'in the relationship between costs and revenues.' " Cmplt. ¶ 42. Similarly, they allege that Motorola's third quarter 1990 Form 10-Q failed to disclose that R & D spending was continuing to increase sharply, with material increases in R & D spending budgeted for the fourth quarter. Again, the Form 10-Q allegedly failed to disclose that profit margins were declining. Plaintiffs allege that the third quarter Form 10-Q "violated Item 303(b) of SEC Regulation S-K by failing to disclose the foregoing trends and changes in the relationship between the Company's costs and revenues." Cmplt. ¶ 60.

*9 Defendants take issue with plaintiffs' characterization of the Company's obligation to make disclosure of forward-looking information in Form 10-Q, and they argue that under existing law the Company had no obligation to disclose internal projections. Plaintiffs for their part counter that the omitted information was the kind of forward-looking information required to be disclosed under SEC rules. Much of the argument concerns whether the information concerned an "existing trend" or an internal prediction of the future.

Although plaintiffs have not sought to imply a cause of action under SEC regulations, defendants ask for a declaration that Motorola had no duty under Regulation S-X to disclose internal projections or budgets. Two of defendants' cases in fact state that there is no duty to disclose internal projections, but they made that finding under the securities statutes and cases interpreting them. *In re Lyondell Petrochemical Sec. Litig.*, 984 F.2d 1050, [1992-1993 Transfer Binder] FED.SEC.L.REP. (CCH) ¶ 97,335 at 95,704 (9th Cir.1993); In re Verifone Sec. Litig., 784 F.Supp. 1471, [1992-1993 Transfer Binder] FED.SEC.L.REP. (CCH) ¶ 97,368 at 95,933 (N.D.Cal.1992). Both decisions consider in passing the question of whether Item 303 of Regulation S-K creates an alternative source of a duty to disclose, but their conclusions are not, in this court's view, particularly helpful to defendants' argument here. *Lyondell* states that SEC regulations do not require disclosure of internal projections, while acknowledging that "known trends of uncertainties" must be disclosed. *Lyondell, supra,* ¶ 97,335 at 95,704-95,705. For its part, *Verifone* states that Regulation S-K "governs the disclosure of known historic trends, but does not provide a basis of liability when a corporation fails to 'disclose' the future." *Verifone, supra,* ¶ 97,368 at 95,933. Given their dispute over the characterization of the information omitted from Motorola's Form 10-Q, each of the parties could argue that *Lyondell* and *Verifone* support its theory of the case. Since this court has not seen the omitted information, it cannot say which side's characterization is the better one.

It has been held that demonstration of a violation of the disclosure requirements of Item 303 does not inevitably lead to the conclusion that such disclosure would be required under Rule 10b-5. Alfus v. Pyramid Technology Corp., 764 F.Supp. 598, 608 (N.D.Cal.1991). Because plaintiffs have only asserted a claim under § 10(b) and Rule 10(b)(5) in this lawsuit, it is unnecessary on this motion to dismiss to determine whether Motorola violated the requirements of Item 303. While failure to comply

with disclosure requirements under Regulation S-K may be probative of the presence or absence of intent to defraud in making a public pronouncement, on the present record the court is unable to determine compliance with obligations under SEC regulations. Accordingly, it is recommended that this portion of the motion to dismiss be denied.

Theories of Secondary Liability

***10** All of the individual defendants in this case are officers or directors of Motorola. Among those defendants, George M.C. Fisher is alleged to have made a number of misleading statements concerning the Company's business. In addition, defendants Gary L. Tooker, Donald R. Jones, and Morgan L. Topfer allegedly made misleading statements on that topic at Motorola's July 25, 1990 meeting with securities analysts. Cmplt., ¶ 43. Only Robert W. Galvin and John F. Mitchell, two of the three insider trading defendants, are not alleged to have made statements to the public concerning Motorola. Galvin is a former Chairman of Motorola's Board of Directors, who assumed the position of Chairman of the Board's Executive Committee in January 1990. Cmplt., ¶ 10. Mitchell is Vice-President of the Board of Directors. Cmplt., ¶ 11. Plaintiffs allege that all the individual defendants are "control persons" of the Company. Cmplt., ¶ 13. They further contend "each of the control person defendants is liable as a direct participant in and/or as an aider and abettor of the wrongs complained of herein." Cmplt., ¶ 14.

Defendants move to dismiss all Count I claims against all individual defendants except Fisher. In addition, they argue that the claims of secondary liability against Fisher should be dismissed. Since defendants have not addressed the question of primary liability in their briefs, this court addresses only the questions of secondary liability. Also, because all defendants except Galvin and Mitchell allegedly made statements to analysts at the July 25 meeting, it will be assumed that plaintiffs have sufficiently alleged that Fisher, Tooker, Jones, and Topfer were participants in an act of securities fraud. Having made that threshold determination, the court turns to the questions of secondary liability presented.

Control person liability

To establish control person liability under § 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a), the Seventh Circuit requires that a plaintiff "show that the defendant has 'the practical ability to direct the actions of the people who issue or sell the securities.' " *Donohoe v. Consolidated Operating and Production Corp.*, 982 F.2d 1130, 1138 (7th Cir.1992) (quoting *Barker v. Henderson, Franklin, Starnes and Holt*, 797 F.2d 490, 494 (7th Cir.1986)). The ability to control depends not on the qualifications of the control people, but on their authority. *Id.* Control person liability will attach if a control person possessed the power or ability to control the specific transaction or activity on which the primary violation was based, even if that power was not exercised. *Id.* This circuit has explicitly rejected a requirement that the control person actually participate in the transaction. *Donohoe, id.*, at 1138-1139 n. 7 (citing *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 880-881 (7th Cir.1992) *cert. denied*, 113 S.Ct. 2994 (1993).

Plaintiffs' allegations of control person liability are found at ¶ ¶ 14-15 of their complaint. There they allege that the individual defendants, by reason of their positions of control and authority as principal executive officers, controlled the dissemination of information to securities analysts and the investing public. Other than to make these sweeping conclusions, however, plaintiffs allege no facts detailing the individual defendants' place in the flow of corporate information. Without these details, control person liability is premised solely on status within the Company. Although the Seventh Circuit has not enunciated a requirement that facts underlying control person liability be alleged with particularity, district courts employing the since-rejected "culpable participation" test have in the past dismissed claims where allegations of control person status did not explain a control person's role in the alleged fraud. *Koplin v. Labe Federal Sav. and Loan Ass'n.*, 748 F.Supp. 1336, 1341-1342 (N.D.Ill.1990); *Brickman v. Tyco Toys, Inc.*, 731 F.Supp. 101, 106 (S.D.N.Y.1990); *Beck v. Cantor, Fitzgerald and Co., Inc.*, 621 F.Supp. 1547, 1564 (N.D.Ill.1985). Plaintiffs would not have the court require that level of detail here. Instead, they advance conclusory allegations of ability to control disclosures to analysts and the public.

***11** In the case of the four individual defendants alleged to have made statements to analysts, this court concludes that plaintiffs' allegations of control person liability are sufficient. These defendants not only possessed the power or authority to control the dissemination of news to the public--they themselves made statements. However, as to Galvin and Mitchell, there are not allegations, other than their

job titles, to support an inference of control over Motorola's statements to the public. Bearing in mind that fraud must be pleaded with particularity and that the liability to be imposed here is vicarious, this court would recommend that the allegations that Galvin and Mitchell were control persons be stricken.

Aiding and abetting liability

Decisions addressing the standard for aiding and abetting liability have most frequently considered claims against third parties, such as a corporation's attorneys and accountants. Aider and abettor liability requires, at a minimum, (1) that the defendants commit a manipulative or deceptive act within the meaning of § 10(b) and Rule 10b-5, and (2) that the act be committed with the same degree of scienter that primary liability requires. *E.g.*, *Robin v. Arthur Young and Co.*, 915 F.2d 1120, 1123 (7th Cir.1990), *cert. denied*, 111 S.Ct. 1317 (1991); *Renovitch v. Kaufman*, 905 F.2d 1040, 1045 (7th Cir.1990). Where the wrong complained of is a failure to disclose the truth, there is an additional requirement. The test in these instances is three-pronged, comprising the following elements: (1) someone committed a primary violation; (2) positive law obliges the abettor to disclose the truth; and (3) the abettor fails to do this, with the same degree of scienter necessary for the primary violation. *E.g.*, *DiLeo v. Ernst and Young*, 901 F.2d 624, 628 (7th Cir.) *cert. denied*, 498 U.S. 941 (1990). The difference, then, is a legal duty to speak. *Robin*, 915 F.2d at 1125. Such a duty does not find its source in securities law, but comes from a fiduciary relation outside securities law. *Id.*

As already noted, defendants Galvin and Mitchell are not alleged to have made any statements to analysts or to the public concerning Motorola. As a consequence, the wrong complained of is a "duty to blow the whistle." Plaintiffs contend that this duty had its source in the individual defendants' status as officers and directors with access to internal financial information, but they have provided no authority establishing that corporate officers have such a duty to speak. Plaintiffs having failed to establish this essential element of their aiding and abetting claim against Galvin and Mitchell, this court would strike these claims. There being no allegations of direct participation in a violation of the securities law, and because the court has already recommended dismissal of the control person claims against these two individuals, it would recommend that the claims against them in Count I of the complaint be dismissed.

***12** Looking to the remaining individual defendants, plaintiffs' claims of aiding and abetting liability would similarly have to be dismissed if the offense is construed as a failure to disclose. Nonetheless, albeit somewhat redundantly, one can infer that they aided one another in the affirmative action of making statements to analysts and the public. Assuming, then, that the problem of duty is overcome, there remains the question of scienter. Scienter must be pleaded with particularity, although it can be inferred when the fraud or cover-up was in the interest of the defendants. *Robin*, 915 F.2d at 1127-1128. For instance, scienter can be inferred from the selling of large quantities of stock during a class period. *In re Abbott Lab. Sec. Litig.*, 813 F.Supp. 1315, 1320 (N.D.Ill.1992).

In their allegations concerning Motorola's disclosures, plaintiffs consistently allege that statements were made without a reasonable basis or in reckless disregard for the truth. Plaintiffs also allege that individual defendants received large sums of money as compensation from the Company and that they traded in Motorola stock at a profit. Overall, this court considers scienter to have been sufficiently alleged. While the claims of aiding and abetting are arguably redundant of plaintiffs' claims of primary liability, this court would not dismiss the aiding and abetting claims against Fisher, Tooker, Jones and Topfer.

Insider Trading

Count II is brought under § 20A of the Securities Exchange Act, 15 U.S.C. § 78t-1, which contains the following provision for a right of action based on contemporaneous trading:

> Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material nonpublic information shall be liable in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

15 U.S.C. ¶ 78t-1(a). The total amount of liability for any such violation "shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation." 15 U.S.C. ¶ 78t-1(b).

The duty imposed on a person possessing material nonpublic information is to either disclose the information or abstain from trading in the securities concerned while the inside information remains undisclosed. *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88, 94 (2d Cir.1981). The duty is owed only to those trading contemporaneously with the insider, however. *Id.* Non-contemporaneous traders do not require the protection of the "disclose or abstain" rule, since they do not suffer disadvantage of trading with someone who has superior access to information. *Id.* at 94-95. Contemporaneous trading is a required element of an insider trading claim in order to substitute for the privity requirement of common law. Since there is no practical method of matching purchases and sales in the open market, to require privity in the common law sense as an element of the cause of action would create an insurmountable obstacle to a plaintiff. *Fridrich v. Bradford*, 542 F.2d 307, 325 (6th Cir.1976) (Celebrezze, J., concurring), *cert. denied*, 429 U.S. 1053 (1977).

***13** Decisions on the question of contemporaneity recognize that liability does not extend beyond the period of contemporaneous trading; otherwise, it could go on indefinitely if the material nonpublic information was never disclosed. *See Wilson*, 648 F.2d at 94. The duration of the "contemporaneous trading" period is not fixed under the case law, although it is not met if a plaintiff's trading occurred *before* the wrongful insider transaction. *See Alfus v. Pyramid Technology Corp.*, 745 F.Supp. 1511, 1522 (N.D.Cal.1990); *Backman v. Polaroid Corp.*, 540 F.Supp. 667, 670 (D.Mass.1982). Generally, the contemporaneity requirement is not met if a plaintiff's trades occurred more than a few days apart from a defendant's transactions. *Alfus, id.* In the context of stock heavily traded on a daily basis, it has been held that trades are not contemporaneous unless they take place on the same day. *Aldus Sec. Litig.*, [1992-1993 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,376 at 95,987 (W.D.Wash.1993). The question of whether a plaintiff has traded contemporaneously with insiders is a significant one in a lawsuit like this, as a plaintiff not meeting the requirement lacks standing to represent putative class members that did trade contemporaneously with insiders. *In re Verifone Sec. Litig.*, 784 F.Supp. 1471, [1992-1993 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,368 at 95,938-95,939 (N.D.Cal.1992); *Aldus, supra*, ¶ 97,376 at 95,987; *Alfus*, 745 F.Supp. at 1523.

The insider trading defendants are Robert Galvin, John F. Mitchell, and Morton L. Topfer. Galvin sold Motorola stock on August 7, 1990, Cmplt., ¶ 10; Mitchell sold stock on August 3, 1990, Cmplt. ¶ 11, and Topfer sold stock on the following days in 1990: July 24, July 26, July 27, July 31, August 1, August 3, August 7, and August 16, Cmplt., ¶ 12. Significantly, only plaintiff Harold Sucher traded on one of these days, July 26, 1990. Cmplt., ¶ 5(a). Plaintiffs Saul Pearl and Meyer Feldman traded on days before and after insider trades, having respectively purchased stock on August 2 and August 6, 1990. Cmplt., ¶ 5(c)-(d). However, plaintiff Albert Feldman purchased shares in Motorola over a month after the last insider trade alleged, having bought his shares on September 24, 1990. Cmplt., ¶ 5(f).

Under the above authorities, defendants ask that all the insider trading claims except Sucher's claim against Topfer be dismissed. As support for the use of a same-day contemporaneous trading limitation, they cite authority that trades on the New York Stock Exchange are consummated within a single trading day. Facts concerning the operation of the stock exchange are not alleged in the complaint, however, and plaintiffs have not included in their complaint any allegations concerning volume of trading on the days of the insider trades here. On this motion to dismiss, the court may not consider facts outside the complaint and the exhibits thereto.

***14** Several cases have declined to determine the parameters of a contemporaneous trading period on motions for class certification, concluding that such question is better decided on a more developed record. *In re Genentech Sec. Litig.*, [1990 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 95,347 at 96,682 (N.D.Cal.1990); *In re Worlds of Wonder Sec. Litig.*, [1989-1990 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 95,004 at 95,631 (N.D.Cal.1990). While this court is not so certain that to do so is inappropriate on a motion for class certification, this question has been raised on a motion to dismiss. Given the lapse of over a month between the last of the insider defendants' trades and September 24, 1990, this court concludes that Albert Feldman cannot establish an insider trading claim. However, this court would not dismiss the claims of Sucher, Pearl, and Meyer Feldman, as all purchased stock in Motorola within one day of an insider trade. Rather, this court would defer any such determination, allowing plaintiffs to present proof of trading volume and market conditions in connection with the certification of Count II.

Certification of Insider Trading Claims

It has been held that a common course of conduct in selling stock at inflated prices based on inside information creates the common question required for certification of an insider trading claim. *Genetech, supra,* ¶ 95,347 at 96,680. Also, common questions of duty to disclose or abstain from trading predominate over individual issues of contemporaneity and damages. *Worlds of Wonder, supra.* ¶ 95,004 at 95,631. While these facts militate in favor of certification, this court cannot at the present make the requisite finding as to numerosity, since relevant information concerning trading on the days at issue has not been presented. *See Genetech, supra,* ¶ 95,347 at 96,680. For that reason, at this point in time, this court recommends only the certification of Count I.

CONCLUSION

For the reasons set forth above, this court recommends that plaintiffs' motion for class certification be granted as to Count I, and that decision be deferred as to Count II. The court further recommends that defendants' motion to dismiss be granted in part and denied in part. The court would grant the motion to dismiss with respect to the claims against Galvin and Mitchell in Count I, and it would dismiss Albert Feldman as a plaintiff in Count II.

Counsel are given ten days from the date hereof to file objections to this Report and Recommendation with the Honorable Charles R. Norgle, Sr. Failure to object waives the right to appeal.

FN1. Defendants and certain others are excluded from both the class bringing Count I, and the subclass bringing Count II. Second Consolidated Amended Complaint ("Cmplt."), ¶ 16.

FN2. July 23, 1990 is the date Motorola filed its second quarter Form 10-Q with the Securities and Exchange Commission ("SEC"). That statement is alleged to have violated Item 303(b) of SEC Regulation S-K, 17 C.F.R. § 229.303(b), in that it did not disclose anticipated changes in the relationship between costs and revenues. Cmplt. ¶ 42.

FN3. The plaintiffs in *Bally* moved unsuccessfully for reconsideration of a different aspect of Judge Aspen's decision. 144 F.R.D. 78 (N.D.Ill.1992). Although that decision was recently upheld on appeal, *see Arazie v. Mullane,* No. 92-3667 (7th Cir. Aug. 17, 1993), the question of an appropriate class period was not addressed on the appeal. Consequently, an opportunity for clarification of the Seventh Circuit's dicta in *Roots Partnership* did not present itself.

1993 WL 497228 (N.D.Ill.), Fed. Sec. L. Rep. P 97,806

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2003 WL 21688225 (N.D.Ill.)
(Cite as: 2003 WL 21688225 (N.D.Ill.))

C
Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois.

LASALLE NAT. ASSOC.
v.
NOMURA ASSET CAPITAL CORP

No. 03 C 4065.

July 16, 2003.

ORDER

KEYS, Magistrate Judge.

***1** The Motion relates to litigation filed by LaSalle, in its capacity as Trustee of a REMIC, against Nomura Asset Capital Corp. ("Nomura") and Nomura's affiliate, Asset Securitization Corporation ("ASC"), which is pending in the Southern District of New York (the "Litigation"). The Litigation concerns a $50 million loan made by Nomura to HPCH, and subsequently transferred to LaSalle as Trustee of the REMIC trust.

Nomura loaned HPCH $50 million, secured by a guarantee from Doctors Hospital. Nomura subsequently transferred the $50 million loan, along with other loans, to LaSalle, as Trustee of the REMIC Trust. When Doctors Hospital filed for bankruptcy protection and ceased making lease payments to HPCH in 2000, HPCH defaulted on the $50 million loan. LaSalle sued Nomura and ASC, alleging that Nomura and ASC either failed to properly investigate the borrower and the guarantor, or that the Defendants knew that the $50 million loan was not properly secured.

During discovery, LaSalle learned that Dr. James Desnick was the majority shareholder and/or managing partner of several entities that were involved with HPCH, and the $50 million Nomura Loan. Specifically, Dr. Desnick owned 100% of HP Membership, Inc, which owned 1% of HPCH and was the managing member of HPCH. In addition, Dr. Desnick owned 100% of Stoney Island Ventures, Inc., which was the managing partner of HPCH Partners LP, which in turn owned 99% of HPCH. Dr. Desnick also owned 100% of the stock of Doctors Hospital.

On January 29, 2003, LaSalle deposed Dr. Desnick in his individual capacity, regarding his participation in obtaining the $50 million loan. Subsequently, LaSalle subpoenaed HPCH, seeking to depose its designated Rule 30(b)(6) representative. Only then did HPCH identify Dr. Desnick as its designated representative.-almost six months after Dr. Desnick's individual deposition was taken.

HPCH seeks to quash the subpoena pursuant to Federal Rule of Civil Procedure 45(c)(3)(A)(iv), which provides that "On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it ... subjects a person to undue burden." HPCH claims that the deposition would be duplicative of the day-long deposition of Dr. James Desnick, which LaSalle took on January 29, 2003, and would be unduly burdensome. A party seeking to quash a subpoena bears the burden of proving that the subpoena is unduly burdensome. *Plant Genetic Sys., N.V. v. Northrup King Co. Inc.*, 6 F.Supp.2d 859, 862 (E.D.Mo.1998). HPCH correctly notes that the court in *Novartis Pharmaceuticals Corp v. Abbott Labs* prohibited a Rule 30(b)(6) deposition of a corporation through its designated representative, because the representative had already been deposed in his individual capacity. 203 F.R.D. 159 (D.Del.2001). The case is readily distinguishable, however, because the corporation in *Novartis* agreed to be bound by the individual's deposition testimony, whereas HPCH has refused to be bound by Dr. Desnick's testimony. *Id.* at 162. HPCH also claims that LaSalle cannot satisfy the test set forth in *Block v. Abbott Labs., Inc.*, 2001 WL 1539159, at *2 (N.D.Ill.2001), which identifies the circumstances warranting deposing a witness for a second time. *Block* is also distinguishable, however, because LaSalle is seeking to depose HPCH, a distinct corporate entity, *see Pacific Mutual Life Ins. Co. v. American Nat'l Bank and Trust Co. of Chicago*, 649 F.Supp. 281, 287-88 (N.D.Ill.1986), via their designated representative Dr. Desnick; LaSalle is not seeking to redepose Dr. Desnick in his individual capacity. Even if the Court were to ignore this distinction, the Court finds that LaSalle would

satisfy the *Block* test: 1) neither Dr. Desnick nor HPCH, both central actors in the events giving rise to this lawsuit, have answered LaSalle's deposition questions on the record about HPCH's participation in and knowledge of the events leading up to the $500 million loan; 2) as the borrower, HPCH has relevant knowledge that it uniquely possesses; and 3) HPCH has not identified, nor is the Court aware of, less burdensome avenues for obtaining the desired information. *Id.* In conclusion, the Court finds that HPCH has not demonstrated that making Dr. Desnick, as HPCH's designated representative, available for a deposition is unduly burdensome. Therefore, the Court denies HPCH's Motion to Quash.

2003 WL 21688225 (N.D.Ill.)

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• 2003 WL 23524605 (Trial Motion, Memorandum and Affidavit) Motion of Lasalle Bank (A) to Compel Stephen Weinstein to Appear for Deposition (B) for Contempt of Deposition Subpoenas and (C) for Reasonable Attorney's Fees and Expenses (Nov. 03, 2003)

• 2003 WL 23524591 (Trial Motion, Memorandum and Affidavit) Plaintiff's Rule 37 Motion to Compel Production of Documents by Doctors Hospital of Hyde Park, Inc., or, Alternatively, to Compel Production of Privilege Log (Sep. 05, 2003)

• 2003 WL 23524599 (Trial Motion, Memorandum and Affidavit) Plaintiff's Rule 37 Motion to Compel Production of Documents by HPCH, LLC, or, Alternatively, to Compel Production of Privilege Log (Sep. 05, 2003)

• 2003 WL 23524583 (Trial Motion, Memorandum and Affidavit) Motion of Lasalle Bank (A) to Compel Compliance with Prior Order Directing HPCH, LLC, to Appear at Deposition by James H. Desnick, M.D., as Its Designated Representative, and (B) for Reasonable Attorneys' Fees and Expenses (Aug. 11, 2003)

• 1:03CV04065 (Docket) (Jun. 13, 2003)

• 2003 WL 23524564 (Trial Motion, Memorandum and Affidavit) Motion of HPCH, LLC to Quash Subpoena (2003)

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1991 WL 173247
1991 WL 173247 (N.D.Ill.)
(Cite as: 1991 WL 173247 (N.D.Ill.))

H
Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Alfred LEWIS, Plaintiff,
v.
CHICAGO HOUSING AUTHORITY, Defendant.

No. 91 C 1478.

Sept. 4, 1991.

MEMORANDUM OPINION

KOCORAS, District Judge:

*1 This matter is before the court on the defendant's motion to reconsider Judge Nordberg's ruling of July 12, 1991. In addition, the defendant presents its own motion to quash a subpoena. For the following reasons, both motions are denied.

BACKGROUND

The plaintiff, Alfred Lewis, brought this cause of action to secure redress of rights protected by the Fourteenth Amendment due process clause pursuant to 42 U.S.C. § § 1983 and 1988. Sergeant Lewis was a police officer employed by the Chicago Housing Authority ("CHA"). He alleges that after completion of a six month probationary term, CHA police officers acquire a property interest in their continued employment and cannot be discharged absent just cause and a hearing. Sergeant Lewis states that his probationary term expired on or about May 13, 1990.

On or about July 25, 1990, Sergeant Lewis contends that CHA informed him that he was being suspended for misrepresenting his medical condition and employment history on his CHA employment application. After receiving this notice Sergeant Lewis requested a hearing concerning the charges. However, he contends that on or about July 30, 1990, CHA advised him that his termination was effective immediately.

The plaintiff claims that his medical and employment histories were disclosed to and known by CHA prior to its hiring him, and his discharge without a hearing was in violation of the due process clause of the Fourteen Amendment. On March 12, 1991 Sergeant Lewis filed suit against CHA.

DISCUSSION

1. Motion for Reconsideration

The defendant moves for reconsideration of Judge Nordberg's July 12, 1991 emergency ruling which granted the plaintiff's motion to limit the defendant's subpoena of Illinois Bell Telephone Company records. The subpoena sought:

Any and all information relating to the telephone service of Mr. Albert Lewis ... including but not limited to: complete subscriber information, including long distance carrier, all billing records for local and long distance calls, application for phone service, credit information, notes and records, charges, journal entries, computer printouts and graphs.

Finding the subpoena overly broad and an invasion of privacy, the judge asked that the subpoena be revised to (a) request only phone numbers called from Lewis' residence, and (b) allow the subpoenaed documents to go to the plaintiff first, to allow him to delete personal calls from the record.

In support of its motion for reconsideration, the defendant contends that (1) the ruling is no longer necessary in light of the parties' agreement to a protective order on July 25, 1991 which addresses the confidentiality concerns originally raised by the plaintiff's motion to quash, and (2) it needs the material as originally subpoenaed, and unexpurgated, in order to carry its burden of proving that the plaintiff failed to mitigate his damages. Specifically, the defendant asserts that the plaintiff claims that he did most of his job hunting by phone, and the phone records are the only means available to determine how much job hunting the plaintiff actually did. In addition, the defendant contends that if the plaintiff is allowed to expunge personal calls, he might also edit calls from current employers to avoid a decrease in any backpay award.

*2 In response, the plaintiff contends that (1) the defendant has already been given all of the employment applications in the plaintiff's possession, and more records are available at the unemployment office; (2) the original subpoena would invade the privacy of the plaintiff, his family, and his friends; (3) whether the plaintiff paid his bills on time is irrelevant to this case; and (4) the defendant wants to engage in a broad fishing expedition.

The issue before this court is whether Judge Nordberg's ruling limiting the defendant's subpoena was proper.

We have reviewed the briefs and documents which were presented to Judge Nordberg for consideration of the plaintiff's motion to quash. After reviewing all of the materials, we find that the original subpoena of the Illinois Bell Telephone Company records was overly broad and an invasion of privacy. The defendant has no need of the phone numbers of the plaintiff's family and friends. Moreover, we fail to see the relevance of the information concerning the plaintiff's credit, billing, and special services. Only calls made. to prospective or present employers appear to have any relevance to the issues presented in this case. We find that the plaintiff's privacy interests, and those of his family and friends, outweigh the defendant's concern that the plaintiff might delete phone calls to present employers from his phone bill.

In addition, as neither party has presented the agreed upon protective order nor elaborated on its contents, we have no evidence that it would adequately protect the plaintiff's privacy interests. Accordingly, the defendant's motion for reconsideration of Judge Nordberg's July 12, 1991 ruling is denied.

2. Motion to Quash Subpoena

In support of its motion to quash the Notices of Deposition for Vincent Lane and Robert Whitfield, Defendant CHA asserts that neither of these men had any first hand knowledge of the plaintiff's pre-termination meeting. Rather, Lane's position as the Chairman of CHA's Board of Commissioners and Whitfield's position as the First Deputy Executive Director required them to simply approve lower management decisions. CHA further argues that the notices of depositions for Lane and Whitfield are an abuse of the discovery process and harassment of the defendant.

In response, the plaintiff asserts that during the deposition of Chief Ira Harris, one of CHA's supervisory employees, Harris revealed that Lane and Whitfield both played a role in the decision making process by which the plaintiff was discharged. Sergeant Lewis contends that Harris stated in his deposition that he made a recommendation to Whitfield that Sergeant Lewis be discharged. In addition, Sergeant Lewis claims that other witnesses said that Whitfield participated in the original training and instruction of police officers on such items as probationary terms and investigation procedures.

Under the Federal Rules of Civil Procedure, protection from discovery may be granted only upon a showing of "good cause." Fed.R.Civ.P. 26(c). When protection from a discovery subpoena is sought, the Seventh Circuit has imposed a balancing test measuring the hardship to the movant if discovery is allowed against the harm to the discovering party if the discovery is quashed. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 559 (7th Cir.1984); *Wilson v. Wilson*, No. 90 C 9620, slip op. p. 5 (August 2, 1991) (Kocoras, J.). Regardless of the standard, the district court has the authority to regulate discovery in such a way as to minimize the unnecessary burdens and disruption potentially caused by expansive discovery. *Wilson*, No. 90 C 9620, slip op. at 5.

*3 After reviewing the arguments presented by the parties, it appears that the depositions of Lane and Whitfield are relevant to material issues in the case. Moreover, we see little hardship to the defendant in requiring Lane and Whitfield to appear for deposing by the plaintiff. Therefore, we find that the hardship to the plaintiff of quashing the subpoenas outweighs the hardship to the defendant of allowing the subpoenas. Accordingly, the defendant's motion to quash the subpoenas is denied.

1991 WL 173247 (N.D.Ill.)

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- 1:91CV01478 (Docket) (Mar. 12, 1991)

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2004 WL 2967069 (N.D.Ill.)
(Cite as: 2004 WL 2967069 (N.D.Ill.))

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

Jessica LOY, f/ka/ Jessica Vincer, individually and on behalf of all other
Motorola employees similarly situated, Plaintiff,
v.
MOTOROLA, INC., a corporation, Defendant.

No. 03-C-50519.

Nov. 23, 2004.

George S. Bellas, Clifford Law Offices, P.C., Chicago, IL, Paul R. Cicero, Cicero & France, Rockford, IL, Brian J. Wanca, Anderson & Wanca, Rolling Meadows, IL, Peter Thomas Shovlain, Peter T. Shovlain & Associates, Gurnee, IL, for Plaintiffs.

Michael A. Warner, Joan E. Gale, Scott A. Carlson, Christopher Lawrence Casazza, Seyfarth Shaw, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

MAHONEY, Magistrate J.

***1** Jessica Loy ("Plaintiff") filed a two count Amended Complaint against Motorola, Inc. ("Defendant") individually and on behalf of all other Motorola employees similarly situated, on April 15, 2004. Plaintiff filed her Amended Complaint pursuant to the Family and Medical Leave Act of 1993 ("FMLA"), Section 107(a)(2)(B), 29 U.S.C. § 2601, et. seq., and in the alternative, pursuant to Fed.R.Civ.P. 23(b)(3). [FN1] Currently, no motions to certify a class or collective action have been filed in this case. This matter is now before the court on Defendant's Renewed Motion for a Protective Order relating to Plaintiff's First Request for Production and certain depositions sought by Plaintiff. For the reasons stated below, Defendant's Motion for a Protective Order is denied.

FN1. The case was originally filed on December 2, 2003, on behalf of twenty-three Motorola employees, but the original complaint was voluntarily dismissed by the Plaintiffs.

I. Background

For the limited purposes of this motion, the court accepts as true the background facts relayed in Plaintiff's Response to Defendant's Motion for a Protective Order. By doing so, the court makes no judgment about the actual truth or accuracy of the facts alleged. Plaintiff worked in the Login Department at Motorola's Rockford facility from April, 2001, to April, 2002. While working for Defendant, Plaintiff was granted medical leave under the FMLA from December 4, 2001, through December 9, 2001, and intermittent leave thereafter. Allegedly, Plaintiff's FMLA leave time was used to calculate her employee production average, thereby lowering her average and denying her the opportunity to participate in various benefits/incentive programs. On April 22, 2002, Plaintiff was told that she was being terminated for tardiness and attendance issues.

Plaintiff asserts that the alleged inclusion of FMLA leave time into her productivity average was a violation of the FMLA. In addition, Plaintiff alleges that Defendant calculated other Motorola employees' productivity without regard to the FMLA's requirement of excluding leave time under the Act. Thus, Plaintiff brings this action as an individual and on behalf of other employees similarly situated pursuant to Section 107(a)(2)(B) of the FMLA, and in the alternative, Fed.R.Civ.P. 23.

On or about June 8, 2004, Plaintiff served her First Request for Production of Documents on Defendant. Defendant did produce materials responsive to Plaintiff's request, in particular in regard to the original twenty-three Plaintiffs. Plaintiff, however, contends that outstanding materials have not been turned over, including various employee files and information on how Motorola calculated productivity rates at times relevant to her lawsuit. As part of her precertification discovery, Plaintiff also seeks to depose Motorola employees who are knowledgeable about Defendant's FMLA policies and practices and productivity tracking customs.

Defendant first moved for a protective order relating

to Plaintiff's discovery on August 12, 2004. Defendant's motion was denied on August 18, 2004. Since then, Defendant has taken the deposition of the Plaintiff, and has renewed its Motion for a Protective Order based on information discovered at the deposition that convinced Defendant that Plaintiff is not an appropriate representative for additional individuals who may have claims against Motorola under the FMLA regarding productivity practices. Because of this, Defendant seeks to limit Plaintiff's broad discovery generally allowed under Fed.R.Civ.P. 23(b)(3).

***2** Underlying Defendant's Motion for a Protective Order is the issue of whether Plaintiff can proceed under Fed.R.Civ.P. 23(b)(3) as Plaintiff asserts, or whether FMLA class violations must be treated as collective actions under the Fair Labor Standards Act ("FSLA"), 29 U.S.C. § 216(b), as Defendant asserts. Claims filed under § 216(b) are different than Rule 23 class actions because § 216(b) collective actions require parties to "opt in" to be bound, while under Rule 23, parties must "opt out" not to be bound. *See Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir.1982); *Mielke v. Laidlaw Transit, Inc.*, 313 F.Supp.2d 759 (N.D.Ill.2004). Class based discovery under Rule 23 is generally broader than in § 216(b) collective actions as well.

II. Discussion

Whether or not Plaintiff's case can proceed as a class or collective action is not the issue currently before the court, nor is it normally a decision for the Magistrate Judge to make. However, whether Plaintiff proceeds under the FLSA or Rule 23 impacts Defendant's Motion for a Protective Order so the Magistrate must reach that issue.

Defendant argues that alleged class violations of the FMLA must be treated as collective actions under the FLSA, 29 U.S.C. § 216(b). Defendant bases its argument on the statutory language of the FMLA, stating that the language of the enforcement provision of the FMLA, 29 U.S.C. § 2617(a)(2) mirrors that of the FLSA, 29 U.S.C. § 216(b). Further, Defendant quotes FMLA legislative history that suggests the enforcement scheme of the FMLA was intended to be identical to that of the FSLA:

> [The FMLA's] enforcement scheme is modeled on the enforcement scheme of the FLSA, which has been in effect since 1938. Thus the FMLA creates no new agency or enforcement procedures, but instead relies on the time-tested FLSA procedures already established by the Department of Labor.... The Relief provided in the FMLA also parallels the provisions of the FLSA.

S.Rep. No. 103-3, at 35 (1993). Defendant also compares the FMLA with the Age Discrimination in Employment Act ("ADEA") because actions brought under ADEA have been treated as opt-in collective actions under the FLSA, not Rule 23. Defendant finally notes that courts interpreting the FMLA frequently track FLSA interpretations on collateral issues such as damages [FN2] and jury trials. [FN3]

> FN2. *See Thorson v. Gemini, Inc.*, 96 F.Supp.2d 882, 890 (N.D.Iowa 1999).
>
> FN3. *See McNeela v. United Air Lines, Inc.*, 1999 WL 987096, *5 (N.D.Ill. Oct.28, 1999).

Plaintiff, on the other hand, argues that class violations of the FMLA must be treated as opt-out actions under the FMLA, 29 U.S.C. § 2617(a)(2) and pursuant to Fed.R.Civ.P. 23(b)(3). In support of her argument, Plaintiff states that the statutory language of the FMLA § 2617(a)(2) clearly does not incorporate the express "consent" and "opt-in" language of the FLSA, which provides in § 216(b) that no person may be bound by, or benefit from, a judgment unless the person has filed a written consent to become a party. This is, of course, in direct contrast to Rule 23, which binds absent parties who fall within a certified class unless they opt out.

***3** Plaintiff also points out that when other statutes, like the ADEA, incorporate the "opt-in" enforcement procedures of § 216(b), they do so expressly. For example, Section 7(b) of the ADEA specifically directs that "provisions of this Chapter shall be enforced in accordance with the powers, remedies, and procedures provided in Sections ... 216 of this title." 29 U.S.C. § 626(b). [FN4] Plaintiff asserts that the FMLA contains no such provision, and absent a contrary intent of Congress, Fed.R.Civ.P. 23 is the appropriate enforcement mechanism. Plaintiff also analogizes the FMLA with class claims brought under Title VII and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, because these class claims, likewise, do not incorporate the FLSA, and are subject to certification by the court pursuant to Rule 23. [FN5]

> FN4. *See also King v. Gen. Elec. Co.*, 960 F.2d 617, 621 (7th Cir.1992)(citing *LaChapelle v. Owens-Illinois, Inc.*, 413 F.2d 286, 289 (5th Cir.1982)(finding that because ADEA § 7(b) "incorporates the

enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. § 216, by reference" the class action procedure under Fed.R.Civ.P. 23 is pre-empted).

FN5. *See, e.g., Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir.1965).

In *Califano v. Yamasaki,* the Supreme Court held that "[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate." 442 U.S. 682, 700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)(quoting Fed.R.Civ.P. 1). Because the plain language of the FMLA is silent as to the appropriate vehicle for an action to proceed on the behalf of others, this court is inclined to apply Fed.R.Civ.P. 23 as it moves with this case through its discovery stages. While Defendant argues that FMLA claims are highly factual, and thus inappropriate for a class context, Defendant has not pointed to any inconsistency between the FMLA and the procedures of Rule 23. Thus, this court finds that Rule 23 class action rules are appropriate to apply in this case. [FN6]

FN6. Defendant cites the court to one reported decision where an FMLA class claim was brought under Rule 23. *See Bond v. Abbott Labs.*, 7 F.Supp.2d 967 (N.D.Ohio 1998).

Accordingly, this court turns to Defendant's Motion for a Protective Order. Under Rule 26(c), it is clear that "for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... (1) that the disclosure or discovery not be had." Fed.R.Civ.P. 26(c)(1). The district court has discretion to decide when a protective order is appropriate and what degree of protection is required. *Seattle Times Co., v. Rhinehart,* 467 U.S. 20, 36, 104, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Only good cause is required in determining whether or not to issue a protective order. *Id.* at 37. In deciding whether good cause exists, the district court must balance the interests of the parties, taking into account the harm to the party seeking the protective order and the importance of the disclosure to the non-moving party. *Wiggins v. Burge,* 173 F.R.D. 226, 229 (N.D.Ill.1997). The party seeking the protective order has the burden of showing that good cause exists by alleging particular and specific facts. *See Gulf Oil Co. v. Bernard,* 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981).

Further, courts have considerable discretion in deciding whether, and to what degree discovery in regards to class certification issues should go forward. Typically, discovery is permitted to allow Plaintiff to show the existence of a class. Specifically, discovery is allowed where there is a need to determine whether Rule 23 requirements are met and whether the action fits in one of the Rule 23(b) categories. Discovery must be sufficiently broad to give the plaintiff a realistic opportunity to meet the requirements of class certification, but at the same time, a defendant should be protected from overly burdensome or irrelevant discovery. *See McCray v. Standard Oil Co.*, 76 F.R.D. 490 (N.D.Ill.1977). Rule 26(c) provides courts the authority to limit the scope of discovery generally, and Rule 26(c)(4) allows the court to circumscribe discovery of irrelevant matters.

*4 While Defendant does argue that further production and depositions under Plaintiff's requests would be burdensome, Defendant does not lay out what its burden would be to produce under Plaintiff's request other than concluding that Plaintiff's discovery is "inappropriate, vexatious, and completely unnecessary." Instead, Defendant's central argument is that it should not be required to submit further discovery because Plaintiff cannot possibly be a proper class representative under Rule 23. Defendant maintains that it has turned over all materials relating to Plaintiff's individual claim, and that any other discovery is irrelevant and excessive in scope because Plaintiff seeks information beyond what Defendant characterizes as a "simple" claim regarding Plaintiff's termination for instances of tardiness that possibly should have been excused time under the FMLA. (Def.'s Mot., p. 7).

Defendant vehemently argues that Plaintiff's deposition testimony illustrates that she cannot connect her FMLA claims to productivity, and thus, there is no basis for her class claim challenging Defendant's productivity practices under the FMLA because she cannot be a proper class representative. Defendant quotes excerpts from Plaintiff's deposition transcript in support of its argument. Most of the excerpts go to showing that Plaintiff's claim is unrelated to productivity. For example, Defendant cites Plaintiff's statement that she was not terminated for poor productivity, and that Plaintiff does not know if any of her FMLA leave time days were included in Motorola's productivity calculations; she

just thought they were "kind of off." Defendant also notes that different employee teams used different productivity tracking systems, and that Plaintiff only knows about her own team. Finally, Defendant downplays Plaintiff's assertion that employees who took FMLA leave time were penalized by being refused time-off incentives because Plaintiff could not state which weeks she thinks she did not get a bonus of getting off early on Fridays because she took FMLA leave time.

Plaintiff argues, with equal confidence, that she has connected her claim for a violation of the FMLA to production average issues, maintaining that adverse employment actions were taken against her due to the inclusion of FMLA leave time in her productivity averages, *despite the fact that* other alleged FMLA violations ultimately resulted in her employment termination. Plaintiff asserts that her deposition testimony bears out her productivity claim, and she also presents the declarations of twenty other present and former Motorola employees who also claim FMLA leave time was used to lower their productivity averages.

Plaintiff cites excerpts from her deposition in support of her argument. She notes that she testified that "if she took the total of her productivity for the week and divided that number by the actual number of hours/days that she worked, her weekly production average was higher than the production average reported by Motorola. Further, if she divided her weekly production by 5 days (even if she worked less than 5 days), she would get the same exact weekly production average as determined by Motorola." (Pl.'s Resp., p. 3). Plaintiff also cites to her testimony that "employees who met their daily production quotas for each work day during that work week were permitted to leave work early on the last work day of that week. However, if an employee missed a day of work for any reason, including FMLA leave, that employee was not permitted to leave work early ... even if that employee had met his or her production quota." (*Id.*).

***5** The court has reviewed Plaintiff's deposition for evidence of a productivity related claim, and has considered both parties' arguments on this issue. At this time, the court finds that Defendant has failed to meet its burden to show that discovery sought by Plaintiff is either unreasonably burdensome or irrelevant. Plaintiff has connected her FMLA claims to productivity by alleging adverse employment actions taken against her due to the incorporation of FMLA leave time into her productivity average. While Plaintiff may also have other FMLA related claims against Defendant, it does not change the fact that Plaintiff has alleged wrongful productivity practices taken by Defendant, much the same as the other twenty employees that filed their declarations with the court.

Plaintiff's First Production Request also does not strike the court as overly broad. Plaintiff requests personnel and occupational health resources files for approximately 25 individuals, and productivity related documents for approximately 200 named individuals, with the team position of each individual already listed. Defendant does not specify its burden to produce these documents, and the court finds that Plaintiff's request falls in the amount and type of discovery necessary for Plaintiff to show that a class exists and that she is an appropriate representative. Plaintiff's requests for FMLA leave logs and documents related to FMLA compliance generated by six named individuals also are relevant to whether a class should be certified and the proper scope of the class action.

Plaintiff's proposed depositions of Michael Davies, Drew Williams, and Robert White, and further deposition of Krista Meyer, also do not appear beyond the scope of Plaintiff's complaint. Krista Meyer ran Motorola's FMLA program in Rockford. According to Plaintiff, Michael Davies submitted a Declaration that he has personal knowledge of the methods used to track production at Motorola's Rockford facility. Drew Williams was an IT expert at Motorola's Rockford facility and possesses information with regard to the computer programs used to track productivity. Robert White developed the software program that was used to track productivity at the Rockford plant. Because the court does not accept Defendant's assertion that Plaintiff cannot assert a claim of productivity at this time, the court finds no reason why Plaintiff should not be able to proceed with her deposition of persons knowledgeable of Defendant's productivity programs.

III. Conclusion

For the foregoing reasons, the court finds that Plaintiff is entitled to proceed with discovery to determine if a class should be certified under Rule 23. Defendant's Motion for a Protective Order is denied.

2004 WL 2967069 (N.D.Ill.)

Motions, Pleadings and Filings **(Back to top)**

- 3:03CV50519 (Docket)
(Dec. 02, 2003)

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LEXSEE 2002 US DIST LEXIS 8799

Re: In re Lucent Technologies Inc. Securities Litigation

Civil Action No. 00-621 (JAP)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2002 U.S. Dist. LEXIS 8799

May 7, 2002, Decided
May 9, 2002, Entered on the Docket

SUBSEQUENT HISTORY: [*1] Affirming Order of July 15, 2002, Reported at: 2002 U.S. Dist. LEXIS 24973.

DISPOSITION: Defendants' request to compel production of documents denied.

LexisNexis(R) Headnotes

COUNSEL: For ROBERT ELAN, plaintiff: JOSEPH E. SAUL, GELLERSTEIN & SAUL, ESQS., TEANECK, NJ.

For JOHN M. RAZZANO, WAYNE E. MEYER, consolidated plaintiffs: WILLIAM J. PINILIS, KAPLAN, KILSHEIMER & FOX, LLP, MORRISTOWN, NJ.

For ZIPORA BARON WEBER, DONALD PRESS, consolidated plaintiffs: JAMES V. BASHIAN, LAW OFFICE OF JAMES V. BASHIAN, PC, FAIRFIELD, NJ.

For OREN GISKAN, BERNICE BERNICE SEIDEN, consolidated plaintiffs: ANDREW ROBERT JACOBS, EPSTEIN, FITZSIMMONS, BROWN, RINGLE, GIOIA & JACOBS, PC, CHATHAM TOWNSHIP, NJ.

For JOHN P. CLIFFORD, JR., JAMES COURTRIGHT, MIRIAM SARNOFF, DAVID PLOTKIN, DENNIS PASPARAGE, DANIEL MURPHY, consolidated plaintiffs: GARY S. GRAIFMAN, KANTROWITZ, GOLDHAMER & GRAIFMAN, ESQS., MONTVALE, NJ.

For STEPHEN SCHOEMAN, RACHEL STERN, consolidated plaintiffs: ROBERT J. BERG, BERNSTEIN LIEBHARD & LIFSHITZ, LLP, FORT LEE, NJ.

For SUSAN KAUFMAN, FMWL ENTERPRISES, INC., ELLIOTT MAYERHOFF, DAVID PLOTKIN, THOMAS PEARLMAN, consolidated plaintiffs: ROBERT A. HOFFMAN, BARRACK, RODOS & BACINE, ESQS., HADDONFIELD, NJ. [*2]

For JAMES V. BIGLAN, JACQUELINE BRAGIN, JOHN J. WIZBICKI, NAOMI RAPHAEL, DAVID M. FEDER, consolidated plaintiffs: JOSEPH J. DEPALMA, LITE, DEPALMA, GREENBERG AND RIVAS, LCC, NEWARK, NJ.

For PETER S. POWERS, DOMINIE MORELLI, consolidated plaintiffs: LISA J. RODRIGUEZ, TRUJILLO, RODRIGUEZ & RICHARDS, LLC, HADDONFIELD, NJ.

For TOM CHAPLINSKI, consolidated plaintiff: LEO W. DESMOND, SPARTA, NJ.

For JEFFREY MARKS, RALPH M. STONE, THE PARNASSUS FUND, consolidated plaintiffs: ELLEN M. MCDOWELL, WHITTLESEY MCDOWELL & RIGA, MAPLE SHADE, NJ.

For HOWARD DAVIS, consolidated plaintiff: MICHAEL J. KANE, MAGER WHITE & GOLDSTEIN, LLP, WESTMONT, NJ.

For HOWARD DAVIS, consolidated plaintiff: BRUCE G. MURPHY, VERO BEACH, FL.

For MILTON ABOWITZ, consolidated plaintiff: PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, SADDLE BROOK, NJ.

For FLORIDA STATE BOARD OF ADMINISTRATION, consolidated plaintiff: ANDREW J. ENTWISTLE, ENTWISTLE & CAPPUCCI LLP, PRINCETON, NJ.

For LUCENT TECHNOLOGIES INC., RICHARD A. MCGINN, DONALD K. PETERSON, defendants: JOHN H. SCHMIDT, JR., LINDABURY, MC CORMICK & ESTABROOK, WESTFIELD, NJ.

JUDGES: Stanley R. Chesler, U.S.M.J. [*3]

OPINIONBY: Stanley R. Chesler

OPINION:

LETTER OPINION AND ORDER

Dear Counsel:

The Court writes to address a matter brought before the Court on the correspondence of the parties concerning a discovery dispute in the above-captioned case. Specifically, defendants (hereinafter collectively referred to as "Lucent") seek to compel all named plaintiffs to produce documents in response to Lucent's Third Request for Production of Documents and Things ("Third Request"). Lead plaintiffs have submitted a letter in opposition to this request. For the reasons discussed below, the Court denies Lucent's request to compel discovery of all named plaintiffs.

Lucent's Third Request seeks documents concerning plaintiffs' investment history. Lucent takes the position that the decision of plaintiffs' counsel to limit the response to the Third Request to documents from the files of Lead plaintiffs only shirks the discovery obligations owed by the 41 other named plaintiffs. See In re Folding Carton Antitrust Litigation, 83 F.R.D. 260, 264 (N.D. Ill. 1979). It argues that discovery as to the investment history and background of all named plaintiffs is necessary to rebut the presumption that arises [*4] in a fraud on the market case of an investor's reliance on misrepresentations as reflected in the market. See Basic v. Levinson, 485 U.S. 224, 246-47, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988). Lucent also contends that this discovery is relevant to any opposition that Lucent may file to a motion by plaintiffs for class certification.

In opposition, Lead plaintiffs contend that the named plaintiffs from whom discovery is sought are not proposed as class representatives and as such, remain on equal footing with absent class members, who are not generally not subject to discovery. See In re Carbon Dioxide Industry Antitrust Litigation, 155 F.R.D. 209, 211-12 (M.D. Fla. 1993). Discovery with respect to the behavior of this handful of plaintiffs, they contend, cannot shed any light on the overall issue of liability, in particular on whether the entire class acted in reliance on the market price of Lucent stock.

The Court agrees with Lead plaintiffs' position. Though one way to rebut the presumption of reliance involves "proving that an individual plaintiff purchased the stock despite knowledge of the falsity of a representation," Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 301 (D.N.J. 1989) [*5] (quoting Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975)), individualized questions of reliance will not in this case illuminate a determination of class-wide liability or bear on the inquiry into whether the class representative's claims are typical of the entire class. See Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985). In other words, discovery as to the investment behavior of the 41 named, non-lead plaintiffs is not be probative of the question of class-wide reliance on the market. Conclusions drawn from the experience of this handful of named parties cannot be extrapolated to represent the experience of a class of hundreds of thousands of individuals of which the putative class is comprised.

The situation presented in this case is distinct from that in Easton & Co. v. Mutual Benefit Life Ins. Co., 1994 U.S. Dist. LEXIS 12308, No. 91-4012, 92-2095, 1994 WL 248172 (D.N.J. May 18, 1994). In Easton, the court allowed defendants to take discovery of absent class members' investment history and background in order to rebut the presumption of fraud-on-the-market reliance. In stark contrast to this case, Easton involved a total of 160 class members. [*6] The small class size established a strong possibility that discovery of individual class members would be probative of the overall class experience. This factor undoubtedly influenced the Easton court's finding that such discovery would be relevant to the issue of class-wide reliance.

In the Lucent matter, there is no basis for concluding that the 41 non-representative named plaintiffs could fulfill the same purpose as to a class of thousands. 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. See Eisenberg, 766 F.2d at 786; Jaroslawicz, 724 F. Supp. at 302-303.

Therefore, for the aforementioned reasons, the Court will treat the non-lead named plaintiffs as absent class

members and will not compel them to respond to Lucent's Third Request.

Accordingly, IT IS on this 7th day of May, 2002:

ORDERED that Lucent's request to compel the production of documents in response to the Third Request for Production of Documents and Things is DENIED.

Stanley R. Chesler, [*7] U.S.M.J.

Westlaw.
1992 WL 413867
1992 WL 413867 (D.Minn.), Fed. Sec. L. Rep. P 97,220
(Cite as: 1992 WL 413867 (D.Minn.))

United States District Court, D. Minnesota.

In re SCIMED LIFE SECURITIES LITIGATION.

Civ. No. 3-91-575.

Nov. 20, 1992.

Opinion

LEBEDOFF, United States Magistrate Judge.

***1** The above-entitled matter came on hearing before the undersigned Magistrate Judge of District Court on November 6, 1992, on Defendant SciMed's Motion to Compel Responses to Discovery, Plaintiffs' Motion for a Protective Order with Respect to Class Discovery and Plaintiffs' Motion for a Protective Order with Respect to Defendant SciMed's Subpoenas of Plaintiffs' Trading Records.

This case involves a consolidated class action brought on behalf of all persons and entities who purchased the common stock of SciMed Life Systems, Inc. ("SciMed") (which is publicly traded on the national over-the-counter market) during the period of June 26, 1991 through September 25, 1991, inclusive.

SciMed develops, manufactures, and markets disposable medical devices for interventional treatment of coronary heart disease, including wire-catheters and small balloons, used together to clear blocked coronary arteries. Such devices are commonly called balloon angioplasty catheters. *See* Complaint sec. 36-44.

Defendant asks the Court to order Plaintiffs to respond fully and fairly to SciMed's document requests and interrogatories, contending that Plaintiffs have only selectively disclosed information.

In turn, Plaintiffs seek two protective orders. First, Plaintiffs want a protective order with respect to class discovery. Second, Plaintiffs want a protective order with respect to Plaintiffs' trading records.

A. *Defendant's Motion to Compel*

Defendant SciMed moved this Court for an order to compel all named Plaintiffs to respond fully and fairly to written discovery. Only six Plaintiffs have partially responded to the Defendant's requests for production of documents and interrogatories. Defendant wants to depose all of the eleven named Plaintiffs.

Plaintiffs argue that Defendant is not entitled to take depositions of all named Plaintiffs. In turn, they seek a protective order, because deposing all of the named plaintiffs would "constitute an egregious waste of time, effort, and money." *See* Plaintiffs' Memorandum of Law in Support of their Motion For a Protective Order with Respect to Class Discovery, October 6, 1992." (P.Mem.Prot.Ord. # 1) at 7.

Further, Plaintiffs argue that Defendant is not entitled to discovery on class certification. However, many courts have allowed discovery on class issues. *See In re One Bancorp Securities Lit.*, 134 F.R.D. 4 (D.Me.1991); *Orrison v. Balcor Co.*, 132 F.R.D. 202 (N.D.Ill.1990); *Cray v. First Winthrop Corp.*, 133 F.R.D. 39 (N.D.Cal.1990); and *Connett v. Justus Enter. of Kansas Inc.*, 125 F.R.D. 166 (D.Kan.1988).

Plaintiffs also assert the "fraud on the market" theory, and therefore they do not need to prove reliance. They argue that this precludes the need for discovery of all the named Plaintiffs.

Further, Plaintiffs assert that if depositions are allowed then they should be taken at a location convenient for the Plaintiffs. In support of their argument, Plaintiffs cite *Hyam v. American Export Lines*, 213 F.2d 221 (2nd Cir.1954), in which the court did not require the Bombay resident to come to New York to be deposed even though he chose it as a forum. The court found that:

***2** The Federal Courts are open to foreign suitors as to others, and procedural rules are not to be construed in such a fashion as to impose conditions on litigation which in their practical effect amount to a denial of jurisdiction.

Id. at 223. However, in the present case requiring the Plaintiffs to travel to Minneapolis to be deposed would not impose the same hardship as was present in *Hyam*. [FN1]

Further, Plaintiffs voluntarily chose Minneapolis/St. Paul to be their forum, thus they are in no position to complain of costs of discovery. The court in *Orrison v. Balcor*, 132 F.R.D. 202 (N.D.Ill.1990), found that:

> Having voluntarily selected N.D. of Illinois as a forum ... In the absence of compelling circumstances or extreme hardship, a Plaintiff should appear for a deposition in the forum of his choice even if he is a non resident.

Id. at 203. Plaintiffs have presented no evidence of extreme hardship or compelling circumstances for Plaintiffs to be deposed in Minneapolis. This Court ORDERS that all named Plaintiffs be deposed in Minneapolis.

Defendant listed the categories of information it wished to obtain from Plaintiffs through Defendant's interrogatories and document requests.

1. *Information Regarding Purchases and Sales of SciMed Securities*

Defendant requests complete information concerning each named Plaintiffs' purchases and sales of SciMed Securities. It seeks information and documents which are relevant to class certification and the merits of the case.

Plaintiffs argue that they have fully and adequately responded to Defendant's discovery responses. The Court notes that Plaintiffs have a continuing obligation to produce any information that they may yet discover responsive to SciMed's Requests.

To the extent that Plaintiffs have complied with SciMed's requests, the motion is moot. To the extent that Plaintiffs have not complied with SciMed's requests, this Court compels all named Plaintiffs to disclose complete information concerning each named Plaintiffs' purchases and sales of SciMed securities; therefore, Plaintiffs must answer Interrogatories Nos. 5 and 9 (although the Court agrees that these are somewhat repetitive, Plaintiffs can incorporate some of their answers from No. 5 into No. 9), Nos. 7 and 8. Additionally, Plaintiffs must comply with Document Request Nos. 2, 4, 8, 9, 15, 16, 17, 18, 19, and 20, which pertain directly to each Plaintiffs' transactions in SciMed securities. The above mentioned requests relate both to certification issues and the merits of the case.

2. *Discovery of Investment History and Background*

Defendant seeks discovery concerning Plaintiffs' investment history and background. It argues that these documents are highly relevant to Plaintiffs' reliance-based claims and should be produced.

Plaintiffs argue that Defendant is trying to obtain the documents to show that Plaintiffs are sophisticated investors. Plaintiffs correctly assert that sophistication is not a unique defense precluding the typicality requirement of class representation. *In re Control Data Corp. Sec. Litigation*, 116 F.R.D. 216 (D.Minn.1986).

*3 Further, Plaintiffs assert fraud on the market, thus dispensing with the need to prove causation. In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the court held that when a Plaintiff asserts the theory of "fraud on the market" then a presumption of causation arises. However, the presumption is rebuttable. *Id.* at 250. Defendant SciMed should have an opportunity to rebut the presumption, using information obtained through discovery of investment history and background. In the seminal case in this area, *Blackie v. Barrack*, 524 F.2d 891, the court said that the fraud on the market case is rebuttable and that:

> Defendant may do so in at least two ways: (1) by disproving materiality, or by proving that despite materiality, an insufficient number of traders relied on the deception so as to inflate the price; or (2) by proving that an individual Plaintiff purchased despite knowledge of the falsity of a representation, or that he would have, had he known of it.

Id. at 906. Many courts have adopted the *Blackie* court's list of ways to rebut the presumption. *See Ross v. Bank South, N.A.*, 837 F.2d 980 (11th Cir.1988); *Peil v. Speiser*, 806 F.2d 1154 (3d Cir.1986) (Defendant successfully rebutted the fraud on the market presumption); *Rosenberg v. Digilog, Inc.*, 648 F.Supp. 40 (E.D.Pa.1985); *Grossman v. Waste Management, Inc.*, 589 F.Supp. 395 (N.D.Ill.1984); and *In re LTV Securities Litigation*, 88 F.R.D. 134 (N.D.Tex.1980).

Additionally, Plaintiffs have also asserted the common law actions of fraud and negligent misrepresentation which requires a showing of actual reliance. *See In re Employee Benefit Plans Securities Litigation*, Civ. No. 4-92-41, slip op. 17-20 (D.Minn. July 27, 1992); and *Rosenberg, supra.*

This Court recognizes the importance of the

Defendant's need to conduct discovery concerning Plaintiffs entire investment history and background. This case is similar to *Elster v. Alexander*, 74 F.R.D. 503 (N.D.Ga.1976), in which the court said:

> ... in view of Defendant's allegation regarding "strike" suit, inadequate class representation and absence of claims in which were typical information concerning named Plaintiff's ownership of other securities was relevant and discoverable.

Id. at 505.

However, the Court finds that Defendant does not need to obtain Plaintiffs' financial statements (Document Request No. 5) or tax returns (Document Request No. 7), in order to discover Plaintiffs' investment history and background. The other documents requested will adequately provide the information sought by the Defendant.

This Court ORDERS the Plaintiffs to comply with Document Request Nos.: 1 (customer agreements), 2 (account statements), 3 (margin agreements), 4 (prospectus and official statements), 8 and 9 (correspondence concerning securities purchases) and 21 (documents concerning purchases and sales of securities); in addition, the Court DENIES request to compel Plaintiffs to respond to Defendant's Document Request Nos.: 5 (financial statements) and 7 (tax returns).

3. *Information Pertaining to Prior Litigation*

*4 Defendant requests discovery concerning Plaintiffs prior litigation background. Defendant argues that its discovery requests are relevant and it needs to obtain the information to assess the credibility of Plaintiffs, and discover information that can be used for cross-examination purposes.

Plaintiffs argue that their prior litigation background is irrelevant and has no bearing on their ability to represent the class adequately. They also allege that their background has no bearing on the merits of the case.

This Court agrees with the *Elster* Court, which allowed discovery of information about the number of class actions filed by Plaintiffs, and the status of such cases. *Elster v. Alexander*, 74 F.R.D. 503 (N.D.Ga.1976).

This Court ORDERS Plaintiffs to comply with Interrogatories No. 12 (seeking identification of prior litigation involving Plaintiffs as parties); and Document Request Nos. 10 (pleadings from previous actions involving Plaintiffs as parties), 11 (pleadings from actions in which plaintiffs have given sworn testimony), 12 (statements of Plaintiffs), and 13 (testimony of Plaintiffs).

4. *Information Regarding Plaintiffs' Ability to Finance the Litigation*

Defendant seeks information regarding the ability of the named Plaintiffs' ability to finance the litigation. Pursuant to this request, the Defendant wants to obtain responses to Interrogatory No. 14 and Document Nos. 5 (financial statements), 6 (bank statements) and 7 (tax returns).

Plaintiff argues that the information is not relevant because counsel, pursuant to Minnesota Rule of Professional Conduct 1.8(c)(1), "have agreed to advance costs and expenses of this litigation, the payment of which is contingent upon the outcome of the case." *See* Plaintiffs' Answer to Defendant SciMed, Inc.'s Interrogatory No. 14.

In the recent case, *In re Workers' Compensation*, 130 F.R.D. 99 (D.Minn.1990), District Judge Rosenbaum said that:

> Defendant's final argument questioning Plaintiff's financial resources is baseless ... Plaintiff's counsel's assurances satisfy the Court that the financial requirements which may be imposed upon the class representatives will be satisfied adequately. The Court finds this sufficient to meet the requisites of 23(a)4.

Id. at 108. Other courts have also refused to allow discovery of Plaintiffs' financial condition.

This Court orders that the Plaintiffs are not required to provide Defendant with information regarding their ability to finance the litigation. Therefore, Plaintiffs do not have to answer Interrogatory No. 14, nor produce documents in response to Requests for Production of Document Nos. 5 (financial statements), 6 (bank statements) and 7 (tax returns). [FN2]

D. *Plaintiffs Motion for a Protective Order with Respect to Class Discovery*

Plaintiffs seek a protective order regarding class discovery, on the grounds of expense and inconvenience. They allege that the Defendant is merely using the depositions as a harassment tool.

***5** Defendant argues that depositions of named Plaintiffs in a class action are proper and common. Defendant asserts that the depositions are needed to respond to certification issues.

For the reasons addressed above pertaining to Defendant's Motion to Compel, the Court will order depositions of all named Plaintiffs to take place in Minneapolis. Thus the Plaintiffs' Motion for a Protective Order with respect to class discovery is DENIED.

C. *Plaintiffs' Motion for a Protective order with Respect to Plaintiffs' Trading Records*

Plaintiffs seek a protective order regarding their trading records. They argue that by asking for their brokerage accounts, the Defendant is either trying to harass them or prove that Plaintiffs are "sophisticated" investors.

Defendant argues that these documents pertain directly to class certification and the merits of the Plaintiffs case. [FN3] Defendant cites Rule 26 in support of its argument that "[p]arties may obtain information regarding *any* matter, not privileged which is relevant to the subject matter involved in the pending action ..." Fed.R.Civ.P. 26(a)(1) (emphasis added). *See* Defendant's Memorandum in Opposition to Plaintiffs' Second Motion For Protective Order, at 5.

Discovery rules are to be afforded broad and liberal treatment. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). Courts should allow discovery under the concept of relevancy unless it is clear that the information sought can have no possible bearing on the subject matter of the action. *Marshall v. Electric Hose and Rubber Co.*, 68 F.R.D. 287 (D.Del.1975).

This Court DENIES the Plaintiffs' request for a Protective Order for Plaintiffs' trading records.

Based on the foregoing, and all the files records and proceeding herein.

IT IS HEREBY ORDERED that:

1) Defendant SciMed's Motion for Discovery and Inspection is GRANTED IN PART and DENIED IN PART, as set forth above.

2) Plaintiffs' Motion for a Protective Order with Respect to Class Discovery is DENIED.

3) Plaintiffs' Motion for a Protective Order with Respect to Defendants' Subpoenas of Plaintiffs' Trading Records is DENIED.

FN1. This Court also acknowledges the current trend requiring even Plaintiffs who live in a foreign country to travel to their chosen forum. *See Clem v. Allied Van Lines Int'l Corp.*, 102 F.R.D. 938 (S.D.N.Y.1984) (Despite living in Iran, Plaintiff was required to be deposed in New York, because he had chosen New York as his forum).

FN2. The Court notes that Plaintiffs object to Request for Production of Document No. 14 pertaining to telephone statements during the relevant time period, on page 10 of their "Memorandum of Law in Opposition to Defendant's Motion to Compel Responses to Discovery dated October, 30 1992." Plaintiffs discuss the document request in their objection to discovery of information regarding Plaintiffs' ability to finance the litigation. The Court would characterize this information differently, but will address it here. Since Defendant does not specifically address Request for Production of Document No. 14, and particularly in light of Plaintiffs agreement to produce documents pertinent to SciMed, the Court finds no reason to compel production of Document Request No. 14.

FN3. The Court notes Defendant's argument that the motion is untimely. Federal Rule of Civil Procedure Rule 45(b) does state, "... the court, upon motion promptly and in any event *at or before the time specified in the subpoena for compliance* therewith, may (1) quash." However, in the interests of justice the court will entertain the motion.

1992 WL 413867 (D.Minn.), Fed. Sec. L. Rep. P 97,220

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Westlaw.
Slip Copy
2004 WL 2997957 (S.D.N.Y.)
(Cite as: 2004 WL 2997957 (S.D.N.Y.))

H
Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

TEACHERS' RETIREMENT SYSTEM OF LOUISIANA, et al. Plaintiffs,
v.
ACLN LTD., et al. Defendants.

No. 01 Civ. 11814(LAP).

Dec. 27, 2004.

OPINION AND ORDER

PRESKA, J.

***1** Lead Plaintiff, Teachers' Retirement System of Louisiana ("Lead Plaintiff"), has moved for certification of this action ("the Action") as a class action against BDO Seidman, LLP ("Seidman") pursuant to Rule 23 of the Federal Rules of Civil Procedure. Lead Plaintiff alleges that Seidman was an accountant of A.C.L.N., Ltd. ("ACLN" or the "Company") responsible for issuing allegedly false audit reports for the years ended December 31, 1999 and December 31, 2000. Lead Plaintiff's claims arise under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated by thereunder by the Securities Exchange Commission, 17 C.F.R. § 240.10b-5. For the reasons set forth herein, I certify the Action as a class action against Seidman.

PROCEDURAL HISTORY OF THE MOTION

I was assigned this case from the Honorable Milton Pollack on August 26, 2004, following Judge Pollack's passing after nearly forty years of distinguished service on this Court.

By Order entered November 13, 2002, Judge Pollack certified the Action to proceed as a class action and certified Lead Plaintiff as the class representative ("November 2002 Certification Order"). The Action was certified against, among others, the accounting firm BDO International. On December 19, 2002, Lead Plaintiff filed the Second Consolidated Amended Class Action Complaint. In addition to again naming BDO International, the global entity in whose name the audit reports at issue in the Action were signed, the Second Consolidated Amended Complaint separately named the specific BDO International entities that allegedly issued the audit reports, that is, BDO Global Coordination B.V. (formerly BDO International B.V.), BDO International Accountants and Consultants (CYPRUS) ("BDO Cyprus"), and Seidman. The Complaint was further amended on June 13, 2003, August 8, 2003, and February 25, 2004.

Seidman believed that it was not "bound" by the November 2002 Certification Order and thus argued that while the Action had been certified as a class action against BDO International, it had not been certified as a class action against Seidman. Seidman also argued that if the Court believed the November 2002 Certification Order bound Seidman, then Judge Pollack should decertify the class. Accordingly, on April 9, 2004, Seidman made a Motion for Clarification or, in the Alternative, Class Decertification ("Clarification Motion"). On May 18, 2004, Judge Pollack denied both of Seidman's motions ("May 18 Order"). Seidman applied, pursuant to Federal Rule of Civil Procedure 23(f), to the Court of Appeals for interlocutory review of the May 18 Order. Seidman also made a motion to the District Court for a stay pending appeal pursuant to Rule 23(f). Judge Pollack's Order, entered June 3, 2004, denying Seidman's motion for a stay, made clear that there was no decision with respect to class certification as applied to Seidman. Accordingly, by mandate issued September 24, 2004, the Court of Appeals denied Seidman's interlocutory appeal as premature.

***2** On June 15, 2004, Lead Plaintiff, pursuant to Rule 23, moved for certification of the Action as a class action against Seidman.

DISCUSSION

In reviewing a motion for class certification, "the question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*

v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (citation omitted). The party seeking to certify a class bears the burden of demonstrating that the requirements of Rule 23 are satisfied. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 378 (S.D.N.Y.1996). However, "under the prevailing view in this Circuit, the Court may not consider on a class certification motion ... the contrary evidence offered by defendants...." *DeMarco v. Lehman Bros, Inc.*, 222 F.R.D. 243, 247 (S.D.N.Y.2004) (citing *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir.1999)):

The Court must nevertheless conduct "a rigorous analysis" before concluding "that the prerequisites of Rule 23(a) have been satisfied." *Caridad*, 191 F.3d at 291 (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982)). Additionally, the Court may require a plaintiff seeking class certification to "adduce admissible evidence that, taken most favorably to the plaintiff, establishes a *prima facie* entitlement to such certification." *Demarco*, 222 F.R.D. at 247. To this end, "a court may consider material outside the pleadings in determining the appropriateness of class certification." *Robertson v. Sikorsky Aircraft Corp.*, No. 397 CV 1216(GLG), 2000 WL 33381019, at *16 (D.Conn. July 5, 2001); *see also Falcon*, 457 U.S. at 160 ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action'.... [S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.") (citations omitted).

Rule 23(a) lists four threshold requirements applicable to all class actions:

> (1) the class is so numerous that joinder is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 26(a). In other words: numerosity, commonality, typicality, and adequate representation are required. "In light of the importance of the class action device in securities fraud suits, these factors are to be construed liberally." *Gary Plastic Packing Corp. v. Merrill, Lynch, Pierce, Fenner, & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir.1990). If an action satisfies the four prerequisites of Rule 23(a), it may be certified as a class action provided that is maintainable under Rule 23(b)(1), (2), or (3).

*3 Here, Lead Plaintiff requests certification of the class under Rule 23(b)(3), which requires the court to "find" that (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Courts must "take a 'close look' at each of the criteria for a Rule 23(b)(3) action." *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 120 (S.D.N.Y.2001) (citing *Amchem Products*, 521 U.S. at 615).

Lead Plaintiff contends that Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequate representation are satisfied here and that the predominance and superiority requirements of 23(b)(3) are also satisfied.

With respect to Rule 23(a), Seidman does not dispute that Lead Plaintiff has satisfied the numerosity requirement or that questions of law or fact common the class exist. However, Seidman argues that without discovery it is unable to determine whether Lead Plaintiff's claims are typical of the class and whether Lead Plaintiff will adequately represent the interests of the class.

Regarding Rule 23(b)(3), Seidman argues that the Class is not entitled to the fraud-on-the-market presumption and thus that the class members will have to prove the Section 10(b) element of reliance on an individual-by-individual basis. If reliance must be proved in this manner, Seidman contends common questions of law or fact do not predominate and the Action cannot be maintained as a class action against Seidman. Seidman also argues that if the Court is persuaded there might be a basis for a presumption of market-wide reliance, then the Court should allow Seidman to depose a subset of absent class members in order to test that presumption.

I. The Requirements of Rule 23(a) Are Satisfied

A. The Class Is So Numerous That Joinder Is Impracticable

"Plaintiffs are not obligated to prove the exact class size to satisfy numerosity." *Cross v. 21st Century Holding Co.*, No. 00 Civ. 4333(MBM), 2004 WL 307306, at *1 (S.D.N.Y. Feb. 18, 2004) (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir.1993)). In securities fraud class actions relating to

publicly owned and nationally listed corporations, "the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *Garfinkel v. Memory Metals, Inc.*, 695 F.Supp. 1397, 1401 (D.Conn.1988).

During the Class Period, there were approximately fourteen million shares of ACLN common stock issued and outstanding, of which approximately seven million traded actively first on the NASDAQ and then the New York Stock Exchange until the stock was delisted on March 18, 2002. Approximately 15,000 potential class members were identified for purposes of providing notice of the pendency of the action and the settlement achieved with the ACLN defendants. The proposed Class consists of a sufficient number of persons to make joinder impracticable, thus satisfying the numerosity requirement of Rule 23(a)(1).

B. There Are Questions of Law and Fact Common To The Class

***4** The commonality requirement "has been applied permissively by courts in the context of securities fraud litigation." *In re Blech Sec. Litig.*, 187 F.R.D. 97, 104 (S.D.N.Y.1999). Factual variations among class members' claims will not defeat the commonality requirement so long as the claims arise from a common nucleus of operative facts. *See Green v. Wolf Corp.*, 406 F.2d 291, 299-300 (2d Cir.1968); *In re Avon Sec. Litig.*, No. 91 Civ. 2287(LMM), 1998 WL 834366, at * *5-6 (S.D.N.Y. Nov. 19, 1998).

The allegedly false and misleading statements that are the basis of the claims were made in two audit reports disseminated in documents filed with the SEC. Where, as here, Lead Plaintiff has alleged a common course of fraudulent conduct, which has allegedly caused all members of the Class to suffer damages, commonality is satisfied.

C. The Claims of The Representative Parties Are Typical of The Claims of The Class

Typicality "does not require that the factual background of each named plaintiff's claim be identical to that of all class members." *Caridad*, 191 F.3d at 293. Rather, typicality "requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Id.* (internal citation and quotation marks omitted).

Where, as here, the lead plaintiff alleges a common pattern of wrongdoing and will present the same evidence, based on the same legal theories, to support its claim as other members of the proposed class, courts have held the typicality requirement to be satisfied, notwithstanding factual variances in the position of each member. *See Green*, 406 F.2d at 299. "When inquiring into the typicality requirement under Rule 23(a)(3), the focus must be on the defendants' behavior and not that of the plaintiffs." *Forman v. Data Transfer*, 164 F.R.D. 400, 404 (E.D.Pa.1995).

Lead Plaintiff purchased ACLN Common stock during the Class Period. If Lead Plaintiff and other members of the Class were harmed by Seidman's conduct--that is, Seidman's alleged involvement with the allegedly false audit reports--then Lead Plaintiff and other members of the class were harmed by the same acts.

D. The Representative Party Will Fairly and Adequately Protect The Interests of The Class

The adequate representation requirement of Rule 23(a) has two elements: "(1) the representative party's attorney must be qualified, experienced and generally able to conduct the litigation; and (2) the plaintiff's interests must not be antagonistic to those of the remainder of the class." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y.1995) (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir.1992)).

Lead Counsel has extensive experience in the specialized field of shareholder securities litigation, and in this action there are no disabling conflicts of interest between Lead Plaintiff and the other members of the Class. As Lead Plaintiff offers evidence to prove its claims against Seidman, it simultaneously will advance the interests of the Class. Accordingly, this requirement is satisfied.

E. Additional Discovery to Determine Typicality and Adequate Representation Is Not Warranted

***5** The Action has been styled as a class action from its inception, and Seidman has been aware of the claims against it from at least December of 2002. Pursuant to this Court's order, fact discovery concluded on April 30, 2004. Prior to that date, Seidman had the opportunity to inquire into the typicality of Lead Plaintiff's claim, and into Lead

Plaintiff's adequacy to serve as a class representative. That Seidman was unable to unearth any basis to challenge Lead Plaintiff on those grounds in the discovery it undertook does not provide a basis for reopening fact discovery.

II. The Action May be Maintained As a Class Action Pursuant to Rule 23(b)(3)

Rule 23(b)(3) allows for class certification only where common questions of law or fact predominate over questions solely affecting individual members of the class. "A common course of conduct by the defendant is not enough to show predominance." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir.2002). A plaintiff must demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir.2001) (citation omitted).

To state a claim for securities fraud under Section 10(b) and Rule 10b-5, a plaintiff "must plead that in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material representation or omitted to disclose material information and that the plaintiff's reliance on defendant's action caused plaintiff injury." *Rothman v. Gregor*, 220 F.3d 81, 89 (2d Cir.2000) (citation omitted). In this action the proof of the elements of misrepresentation or omission, materiality, and Seidman's alleged scienter are all based on a common nucleus of facts and a common course of conduct. For example, the alleged misrepresentations are uniform and are contained in the two auditor's reports publicly disseminated in required filings with the SEC.

Seidman, however, argues that individualized issues of reliance predominate. Specifically, Seidman argues that the fraud-on-the-market theory, under which class members' reliance on alleged misrepresentations is presumed, does not apply. Thus, Seidman contends class members will have to prove the Section 10(b) element of reliance on an individual-by-individual basis.

Under the fraud-on-the-market theory, an individual plaintiff need not show that he actually read or heard a misrepresentation. Instead, he is presumed to have relied on the misrepresentation by virtue of his reliance on a market that fully digests all publicly available information about a security and incorporates that information into the security's price. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). In a fraud-on-the-market case a plaintiff is presumed to have relied on an "efficient" market. The fraud-on-the-market presumption of reliance is not, however, automatically applied in all federal securities fraud actions. For example, if the plaintiff has not adduced admissible evidence that, taken most favorably to the plaintiff, establishes a *prima facie* entitlement to the presumption that the market for the securities at issue was efficient, then the presumption of reliance will not apply. Or, as the Supreme Court noted in *Basic*, "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." 485 U.S. at 248.

***6** Here, Lead Plaintiff has adduced evidence that the market for ACLN securities was efficient. Throughout the class period ACLN traded on either the NASDAQ or the NYSE and reported significant trading volume. There were numerous news stories about ACLN in leading financial publications, and institutional investors were interested in and owned ACLN stock.

Seidman makes a different sort of objection. The Class is not entitled to the fraud-on-the-market presumption, Seidman argues, because Seidman's two alleged misrepresentations--the two audit reports--were signed in the name "BDO International" and not "BDO Seidman" and thus "can be attributed (if at all) to Seidman only by piecing together disparate bits of highly circumstantial evidence." (Reply Mem. in Supp. of Clarification Mot., 4.) For this reason Seidman suggests there is "simply no basis for *presuming* that the entire market attributed the allegedly false statements to Seidman." *Id.* at 7 (emphasis in the original).

This argument conflates reliance with attribution. The fraud-on-the-market theory merely relieves plaintiffs of proving the reliance element individually; it does not speak to attribution of the alleged misrepresentations to a specific defendant.

The starting point for the attribution analysis in this case is *Wright v. Ernst & Young*, 152 F.3d 169 (2d Cir.1998). In *Wright*, the plaintiffs sued accountants Ernst & Young, LLP for approving false and misleading information contained in the press release of a client. The press release included "a notation that the information [was] unaudited" and did not mention the identity of the client's outside auditor. *Wright*,

152 F.3d at 171. The Court of Appeals held that a secondary actor (such as an accounting firm) cannot incur primary liability under the Securities Exchange Act of 1934 for a statement not attributed to that actor "in advance of the investment decision." *Id.* at 175. Accordingly, the Court of Appeals affirmed the district court's dismissal of the complaint.

Attribution can be "indirect" in some cases. A plaintiff may state a claim for primary liability under Section 10(b) for a false statement (or omission), even where the statement is not directly attributed to the defendant, where the defendant's participation is substantial enough that it may be deemed to have made the statement and where investors are sufficiently aware of the defendant's participation that they can be found to have relied on it as if the statement had been directly attributed to the defendant. *See In re Global Crossing, Ltd. Sec. Litig.*, 322 F.Supp.2d 319, 332-35 (S.D.N.Y.2004); *In re Lernout & Hauspie Sec. Litig.*, 230 F.Supp.2d 152, 161, 166-67 (D.Mass.2002).

In *Lernout,* as in the present case, the alleged misstatements at issue were contained in an audit report, not, as in *Wright,* in a press release expressly declaring that the information it contains is unaudited. The principal auditor in *Lernout* was KPMG Belgium, but it was assisted by other KPMG affiliates that did not sign the audit reports at issue. The *Lernout* court held that KPMG's Singapore affiliate could not be held liable under Section 10(b) where it "did not prepare, draft, edit or provide numbers for the audit" and instead was alleged to have played a role "more akin to the 'review and approval' allegations which no court has found sufficient to trigger liability after *Central Bank."* *Lernout,* 230 F.Supp.2d at 171 (referring to *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), in which the Supreme Court held that aiding-and-abetting claims do not exist under Section 10(b)). However, because KPMG's U.S. affiliate was alleged to have "played a significant role in drafting the financial statements and in conducting the audit" and because the role of KPMG's United States affiliate had been widely made known in the company's annual reports, the *Lernout* court found that "it was appropriate to infer that ... investors reasonably attributed the statements contained in the quarterly and annual reports to [the United States affiliate]." *Id.* at 166- 67. Accordingly, the district court denied the motion of KPMG U.S. to dismiss.

*7 Following the persuasive reasoning in *Lernout,* the Court in *Global Crossing* noted that "[a] strict requirement of public attribution would allow those primarily responsible for making false statements to avoid liability by remaining anonymous, and thus 'would place a premium on concealment and subterfuge rather than on compliance with the federal securities laws." ' 322 F.Supp.2d at 333 (quoting *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 235 F.Supp.2d 549, 587 (S.D.Tex.2002)). Judge Lynch went on to hold that plaintiff had sufficiently alleged that Arthur Andersen's role as Global Crossing's auditor was widely known even without particular statements expressly attributed to it. *Id.* at 335. When combined with allegations that Arthur Andersen's participation in the audit process was substantial enough that it may be deemed to have made the statements at issue, plaintiff's allegations were sufficient to state a claim for primary liability under Section 10(b). *Id.* at 333-35. Judge Lynch concluded that "Andersen may thus be liable for any statement it is shown to have made and that investors attributed to it" and that "[e]stablishing the actual extent of Andersen's participation in making the statements will, of course, await summary judgment or trial." *Id.* at 335.

I note that under my reading of cases addressing the issue, such as *Global Crossing,* the question of attribution is a related but distinct concept from the Section 10(b) element of reliance. Here, Lead Plaintiff has made out a *prima facie* entitlement to the fraud-on-the-market presumption of reliance, which Seidman has not rebutted. That presumption is distinct from the relevant questions with respect to attribution that ask whether the market, and not individual investors, attributed the audit reports to Seidman. Thus, the questions presented here are whether Lead Plaintiff has adduced admissible evidence that, taken most favorably to Lead Plaintiff, supports findings that (1) as a result of Seidman's participation in the audit process Seidman can be deemed to have made the statements at issue in this action, and (2) the market was, in advance of the class members' investment decisions, sufficiently aware of Seidman's participation in the audit process that the market can be presumed to have attributed to Seidman the audit reports for the years ended December 31, 1999 and December 31, 2000.

A. Lead Plaintiff Has Proffered Evidence that Seidman May Be Deemed to Have Made the Statements in the Audit Reports

In its brief, Lead Plaintiff cites to evidence that Seidman could be deemed to have made the

statements contained in the audit reports at issue. For example, Lead Plaintiff submits that Lee Dewey, the Seidman partner in New York, worked extensively on the ACLN audits for the calendar years ending December 31, 1999 and December 31, 2000. [FN1] In support of this position, Lead Plaintiff cites to invoices suggesting that Seidman was actively involved in reviewing and preparing the allegedly false and misleading financial statements issued by ACLN.

> FN1. The audit report for calendar year 1999 was included in ACLN's Form 20-F filed with the SEC on June 29, 2000. The audit report for calendar year 2000 was included in ACLN's Form 20-F filed with the SEC on June 28, 2001.

***8** With respect to ACLN's financial statements for the year ended December 31, 1999, Lead Plaintiff also proffers evidence that suggests Dewey changed and inserted numbers used in calculating basic and diluted earnings per share. With respect to ACLN's consolidated financial statements for the year ended December 31, 2000, Lead Plaintiff has proffered evidence which tends to show that Dewey made significant changes, and with respect to ACLN's 20-Fs for the years ended December 31, 1999 and December 31, 2000, Lead Plaintiff has submitted evidence to support the contention that Dewey made significant alterations. Lead Plaintiff also has proffered evidence to support the assertion that Dewey considered himself to be ACLN's auditor.

Evidence also suggests that ACLN considered its auditor to be "BDO", which it understood to be both BDO Cyprus and Seidman, and an ACLN internal memo states "[o]ur auditors are BDO Seidman, an international accounting firm with offices in Cyprus, New York, and around the world." Members of ACLN's Board of Directors and Officers apparently stated that ACLN's primary contact at BDO was Dewey and that Dewey determined what type of audit opinion would be rendered on ACLN's financial statements, that is, whether an opinion would be in the form of "a clean opinion" or a "going concern opinion".

B. Lead Plaintiff Has Proffered Evidence that the Market Was, in Advance of Class Members' Investment Decisions, Sufficiently Aware of Seidman's Participation in the Audit Process

Lead Plaintiff also proffers evidence suggesting that the market was aware that Seidman was acting as ACLN's auditor. The evidence, if believed, proffered shows that Dewey held himself out as a representative of "BDO International" at an annual shareholders meeting and thus that the market may have connected Seidman to BDO International. For example, there is evidence to the effect that Dewey identified himself at the annual meeting by declaring "I am Lee Dewey from BDO Seidman," and in the proxy statement sent to shareholders with the notice of the annual meeting to be held July 23, 2001, ACLN told its shareholders that its auditor was "BDO International" and that representatives of BDO International were expected to attend the annual meeting. The proxy statement also said that representatives of BDO International are "expected to respond to appropriate questions," and there is evidence that Dewey answered questions at the annual meeting. Dewey also acknowledges that he was the only person from BDO at the July 2001 annual shareholders meeting, that no one from BDO Cyprus or any other BDO entity spoke at the meeting via telephone, and that "whoever opened the meeting said that there was someone from BDO" present at the meeting. The July 2001 meeting was attended not only by shareholders but also by brokers representing shareholders.

The class period stretches from June 29, 2000 to March 18, 2002. Thus the shareholder meeting in 1999 preceded the entire class period, and the 2001 shareholder meeting precedes a large portion of the class period, and therefore, presumably, the decision of many class members to invest in ACLN.

***9** Lead Plaintiff also submits evidence that Seidman was presented as ACLN's auditor in contexts other than the annual shareholders meetings. The evidence tends to show that bankers and individual investors who wanted to speak with ACLN's auditor were told that Seidman was the auditor, and investors were directed to contact Dewey and a representative from BDO Cyprus.

Based upon this evidence Lead Plaintiff contends that the market had reason to believe that BDO Seidman might sign its name to an audit report as "BDO International". Additionally, Seidman maintains "International" letterhead with the same address, telephone number, and fax number as Seidman's New York office, and Seidman has issued audit reports in the name of Seidman on its "International" letterhead. *See, e.g.,* Berger Declaration Exhibit 49, Audit Report for Michael Anthony Jewelers, Inc., dated April 6, 2001, issued by Seidman on its "International" letterhead. (This

audit report was included in the company's Form 10-K/A for the year ended January 2001, which also was included in its annual report to shareholders.) Based on the above, Lead Plaintiff has proffered sufficient evidence to, if believed by a jury, support a verdict against Seidman as a primary violator. As in *Global Crossing,* evaluation of the factual question of attribution will await summary judgment or trial.

C. A Class Action Is Superior To Other Available Methods for The Fair and Efficient Adjudication of the Controversy

Under Rule 23(b)(3), plaintiffs are also required to demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Among the factors that a court should consider are "the difficulties likely to be encountered in the management of a class action."

The cost and expense of bringing individual suits in this matter would, in many instances, far exceed most individual recoveries. Moreover, even if an individual plaintiff chose to pursue the action, multiple lawsuits would be inefficient. The prosecution of this action as a class action will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Dolgow v. Anderson,* 43 F.R.D. 472, 488 (E.D.N.Y.1968) (quoting *Advisory Committee Notes to Rule 23,* 39 F.R.D. 69, 102-03 (1966)). *See also In re Blech,* 187 F.R.D. at 107:

> In general, securities suits such as this easily satisfy the superiority requirement of Rule 23. Most violations of the federal securities laws, such as those alleged in the Complaint, inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible. Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would neither be "fair" nor an adjudication of their claims. Moreover, although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf.

***10** A class action is the superior way to litigate the claims alleged in this action.

D. Seidman's Request to Depose a Subset of Absent Class Members is Without Merit

Seidman asserts that it should be allowed to test Lead Plaintiff's assertion that the "market" attributed the audit reports to Seidman by deposing a subset of absent class members. However, the fraud-on-the-market theory is predicated on the understanding that individual investors in an impersonal market may be unaware of particular information. *See Basic,* 485 U.S. at 241-42 (" 'The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements ....' ') (quoting *Peil v. Speiser,* 806 F.2d 1154, 1160-1161 (3d Cir.1986)). Additionally, while the Federal Rules of Civil Procedure do not specifically address discovery of absent class members, courts are extremely reluctant to permit discovery of absent class members. *See Kline v. First Western Govt. Sec., Inc.,* No. Civ. 83-1076, 1996 WL 122717, at *2 (E.D.Pa. March 11, 1996) ("[U]pon survey of the cases, it is safe to state that discovery of absent class members is disfavored."); 8 Charles A. Wright, et al., *Federal Practice and Procedure* § 2171 (2d ed. 1994) ("If discovery from absent class members is permitted at all, it should be sharply limited and allowed only on strong showing of justification."); *In re Worlds of Wonder Sec. Litig,* No. C-87-5491 SC (FSL), 1992 WL 330411, at *2 (N.D.Cal. July 9, 1992) (" 'Absent a strong showing of necessity, discovery [of absent class members] generally will be denied.' ') (quoting 3 *Newberg on Class Actions,* § 16.03, at 278 & n. 57 (2d ed.1985)).

Here, as to rebutting the presumption of reliance based upon the fraud-on-the-market theory, Seidman has not explained how the discovery sought of the absent class members will "sever[ ] the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic,* 485 U.S. at 248. As to the question of whether the audit reports ought to be attributed to Seidman, I see nothing in the current record to suggest that the general prohibition against discovery of absent class members ought to be relaxed. Discovery of the Lead Plaintiff appears to be sufficient, and to the extent that Seidman has not had adequate discovery of Lead Plaintiff on these issues, it may request that discovery. *See In re Worlds of Wonder,* 1992 WL 330411, at *6 ("Evidence to rebut the presumption primarily would come from underwriters, market makers and corporate insiders rather than individual investors, even large institutional investors."). If, after

discovery of the Lead Plaintiff is complete, Seidman contends that discovery of Lead Plaintiff has been insufficient, Seidman may reapply for discovery of absent class members on these issues.

CONCLUSIONS

***11** Having satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequate representation and having qualified under Rule 23(b)(3), the Action is hereby certified as a class action against Seidman, and the following class definition is adopted:

> All persons who purchased ACLN common stock on the NYSE or other U.S. Exchanges during the period from June 29, 2000 through March 18, 2002 (the "Class Period") and who were damaged thereby (the "Class") excluding (i) the Company, its officers and directors, employees, affiliates, legal representatives, heirs, predecessors, successors and assigns, and any entity in which the Company has a controlling interest or of which the Company is a parent or subsidiary; (ii) BDO International, its officers and directors, employees, affiliates, legal representatives, heirs, predecessors, successors and assigns, and any entity in which BDO International has a controlling interest or of which BDO International is a parent or subsidiary; (iii) the Individual Defendants, their employees, affiliates, legal representatives, heirs, predecessors, successors and assigns, and any entity in which they have a controlling interest.

Lead Plaintiff is hereby certified to act as the representative of the Class with respect to Seidman.

To the extent that Seidman contends that additional discovery is required of Lead Plaintiff in order to rebut the presumption of reliance that follows from the fraud-on-the-market theory, it may apply to take such discovery of Lead Plaintiff.

Seidman's request for discovery from a subset of the absent class members in order to determine whether the market attributed the alleged misstatements to Seidman is hereby denied without prejudice to renewal if discovery of Lead Plaintiff, as set out above, proves insufficient.

So Ordered.

2004 WL 2997957 (S.D.N.Y.)

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- 1:01CV11814 (Docket) (Dec. 21, 2001)

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Janet ZIEMACK, Kenneth Z. Slater, and Ellen Z. Slater, Herbert Eisenstadt, Joseph Meyer, Harvey Meyer, and Brenda Drucker, Plaintiffs,
v.
CENTEL CORPORATION, John P. Frazee, Jr., and J. Stephen Vanderwoude, Defendants.

No. 92 C 3551.

Dec. 7, 1995.

Michael David Craig, Schiffrin & Craig, Ltd., Buffalo Grove, IL, for Plaintiffs.

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MEMORANDUM OPINION AND ORDER

KEYS, District Judge.

***1** This matter comes before the Court on Defendants' Motion to Compel Plaintiffs to Answer Interrogatories and Document Requests. For the following reasons, Defendants' motion is granted in part, and denied in part.

BACKGROUND

On January 23, 1992, Centel Corporation ("Centel") announced that it was considering a number of alternatives in order to enhance its shareholders' value. These considerations comprised a formal program known as the Strategic Alternatives Process. The Strategic Alternatives Process culminated in Centel's merger with Sprint Corporation. The merger was publicly announced on May 27, 1992 and finalized by shareholder vote on March 8, 1993.

Plaintiffs are individuals who purchased Centel's common stock between January 23, 1992 and May 27, 1992. On May 29, 1992, Plaintiffs filed this securities fraud class action against Centel and the individuals who were Centel's principal senior officers when Plaintiffs bought the stock.

The matter currently before this Court involves a discovery dispute. On November 21, 1994, Defendants served their first set of interrogatories and first requests for production of documents on Plaintiffs. Plaintiffs [FN1] objected to many of the interrogatories and document requests. The parties attempted to resolve Plaintiffs' objections, pursuant to Local Rule 12(k), but were unsuccessful. Defendants then filed the instant motion seeking to compel answers to Interrogatories No. 1, 2, 3, 4, 5, 6, 8, 9, 10, and 16, and responses to Document Requests No. 2, 7, 8, and 18.

DISCUSSION

The scope of discovery should be broad in order to aid the search for the truth. *See Hickman v. Taylor*, 329 U.S. 495, 500-501 (1964); *Cf. United States v. White*, 950 F.2d 426, 430 (7th Cir.1991); *Allendale Mut. Ins. Co. v. Bull Data Sys. Inc.*, 152 F.R.D. 132, 135 (N.D.Ill.1993). The Federal Rules of Civil Procedure allow discovery regarding any non-privileged matter that is relevant to the subject matter of the action. 8 Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2007 at 95 (1994). The term "relevant" is much more liberally construed during the discovery stage, under the Federal Rules of Civil Procedure, than at trial, where the Federal Rules of Evidence govern. *Id.* § 2008 at 99-100. Therefore, a party objecting to discovery bears the burden of sustaining its objections. 8A Wright, Miller & Kane, *supra* § 2174 at 293; *In re Folding Carton Antitrust Litig.*, 83 F.R.D. 251, 254 (N.D.Ill.1978).

Here, Plaintiffs object to Defendants' discovery on the basis that: (1) contention interrogatories are premature; (2) damage theory interrogatories and document requests are premature and implicate work

product doctrine; [FN2] and (3) securities trading and litigation history of named plaintiffs is irrelevant.

I. *Objections to Contention Interrogatories*

Plaintiffs argue that Interrogatories No. 1-6 and 8 are "contention" interrogatories, and are, therefore, premature. Plaintiffs do not dispute whether these interrogatories should be answered, only *when* they should be answered.

***2** "[T]he phrase 'contention interrogatory' is used imprecisely to refer to many different kinds of questions." *In re Convergent Technologies Sec. Litig.*, 108 F.R.D. 328, 332 (N.D.Cal.1985). Some people classify as contention interrogatories questions asking the opposing party to indicate what it contends or whether it makes some specified contention. *Id.* Other people classify as contention interrogatories questions asking an opposing party to: state all facts or evidence upon which it bases some specific contention; take a position and apply law and facts in defense of that position; or explain the theory behind some specified contention. *Id; see also Fischer and Porter Co. v. Tolson*, 143 F.R.D. 93, 95-96 (E.D.Pa.1992).

Basically, contention interrogatories require the answering party to commit to a position and give factual specifics supporting its claims. The general policy is to defer contention interrogatories until discovery is near an end, in order to promote efficiency and fairness. [FN3] However, courts have the discretion to allow use of contention interrogatories before discovery is complete. *Rusty Jones, Inc. v. Beatrice Co.*, No. 89 C 7381, 1990 WL 139145 *2, 1990 U.S.Dist. LEXIS 12116, at *4 (N.D.Ill. Sept. 11, 1990); *In re Arlington Heights Funds Consol. Pretrial*, No. 89 C 701, 1989 WL 81965 *1, 1989 U.S.Dist. LEXIS 8177, at *1 (N.D.Ill. July 7, 1989) (generalizations about proper timing of contention interrogatories cannot substitute for specific analysis of their propriety on a case by case basis).

In light of the twin purposes of efficiency and fairness, the Court must consider, as part of its criteria in deciding whether to compel answers to early contention interrogatories, whether those early answers are likely to require multiple supplemental answers or prematurely commit Plaintiffs to positions and artificially narrow the issues.

Although discovery has not yet ended, a significant amount of discovery has already taken place in this three and one half year old case. This Court finds that Interrogatories No. 4, 5, 8, and the first portion of Interrogatory No. 2 [FN4] are timely in this particular case, and will not impede the aims of fairness and efficiency. Thus, Plaintiffs are ordered to answer Interrogatories No. 4, 5, 8, and the first part of Interrogatory No. 2.

Because no ending date for discovery has been set at this time, the Court denies without prejudice Defendant's motion as to Interrogatories No. 1, 3, 6, and the second part of Interrogatory No. 2. Defendants, if necessary, may file a motion to compel answers to these interrogatories near the close of discovery.

II. *Objections to Damage Theory Interrogatories and Document Request*

Plaintiffs contend that Interrogatories No. 3, 9, and 10 and Document Request No. 2 seek information which requires the testimony of experts. [FN5] Defendants' motion to compel Interrogatory No. 3 has already been denied as premature, thus, no further discussion is necessary. Since experts have not been either retained or deposed, much of the remaining discovery is also premature.

***3** In a securities action, where the securities may be easily liquidated, damages can be generally ascertained by looking at the market price. *See Goldberg v. Household Bank, F.S.B.*, 890 F.2d 965, 966-67 (7th Cir.1989) ("When markets are liquid and respond quickly to news, the [price] drop when the truth appears is ... the appropriate measure of damages). The more difficult part of the analysis involves ascertaining the *extent* to which the drop in stock price was caused by any actionable information disseminated by Defendants into the marketplace. Such detailed analysis is found chiefly through third-party information, such as research and surveys; hence, the discovery thereof is more appropriately within the experts' domain.

Nonetheless, Plaintiffs are ordered to answer Interrogatories No. 9 and 10 with the information that they do have, limited though it might be, bearing in mind that this Court does not expect Plaintiffs to address the issues that will be more appropriately dealt with by experts, at a later date. Rather, Plaintiffs' provision of information regarding the *fact* of their damages will suffice, even if the only such underlying facts are the raw data on stock prices. *See King v. E.F. Hutton & Co., Inc.*, 117 F.R.D. 2, 5-6 (D.D.C.1987) (although expert may be necessary to

refine evidence of losses, plaintiffs must have had some factual basis for concluding that they sustained losses at the time they filed complaint).

Document Requests No. 2 and 18 are premature, and the Defendants' motion to compel these documents is dismissed without prejudice. *See supra* at 3, n. 2. Additionally, Plaintiffs' concerns about work-product doctrine are superfluous, given the discussion above, since providing the factual basis of damages does not implicate attorney work-product.

III. *Objections to Securities Trading and Litigation History Interrogatories and Document Requests*

Plaintiffs maintain that Interrogatory No. 16 and Document Requests No. 7 and 8 are irrelevant. However, Count II of Plaintiffs' Consolidated Second Amended Complaint concerns common law fraud and alleges Plaintiffs' reliance on misstatements, material misrepresentations and/or omissions of Defendants. *See In re AES Corp. Sec. Litig.*, 849 F.Supp. 907, 910 (S.D.N.Y.1994). Plaintiffs' sophistication in the marketplace is certainly relevant towards rebutting their allegations of reliance. *See Feldman v. Motorola, Inc.*, No. 90 C 5887, 1992 WL 137163 *1, 1992 U.S.Dist. LEXIS 8157, at *3 (N.D.Ill. June 9, 1992). Clearly with respect to named plaintiffs, trading histories are relevant to show their sophistication, therefore Plaintiffs are ordered to respond to Document Requests No. 7 and 8.

This Court also finds that the previous securities litigation history of the named plaintiffs, excluding the Slaters, [FN6] is relevant to their adequate representation of the class, as well as to their sophistication. Plaintiffs' argument, that Defendants never challenged the adequacy of class representation for prior involvement in securities litigation, begs the question--Defendants currently seek the information that would form the basis of such a motion. Nevertheless, Defendants' request for the named plaintiffs' litigation is somewhat overbroad. *See In re Harcourt Brace Jovanovich, Inc. Sec. Litig.*, 838 F.Supp. 109 (S.D.N.Y.1993); *Epstein v. Reserve Corp.*, Nos. 79 C 477, 80 C 6251, 81 C 1475, 1985 WL 2598, at *3-4 (N.D.Ill. Sept. 18, 1985). Thus, named plaintiffs are ordered to answer Interrogatory No. 16, with the modification that they identify all securities related litigation, [FN7] filed in the last *five* years, in which they were *named* plaintiffs seeking monetary damages.

CONCLUSION

*4 Defendants' Motion to Compel Plaintiffs to Answer Interrogatories and Document Requests is GRANTED IN PART, AND DENIED IN PART, consistent with this Opinion.

FN1. One response to Defendants' document requests, Class Plaintiffs' Responses to Defendants' first Requests for Production of Documents, was submitted on behalf of all plaintiffs.
Although each plaintiff submitted individual responses to Defendants' interrogatories, the responses were identical, except for objections submitted on behalf of plaintiffs Kenneth A. Slater and Ellen Z. Slater. Thus, except as otherwise specifically noted, the named plaintiffs are collectively referred to herein as Plaintiffs.

FN2. The Court includes in this section Document Request No. 18, even though Plaintiffs did not discuss it in their memorandum in opposition to this motion to compel.

FN3. Efficiency prescribes that the parties should not be obliged to answer contention interrogatories repeatedly. Further, because one of the chief purposes of contention interrogatories is to narrow the issues for trial, fairness dictates that parties not be forced to prematurely take a position, which would produce an artificial narrowing of the issues, instead of an informed paring down.

FN4. Interrogatory No. 2 requests Plaintiffs to: (1) "[i]dentify in full ... each and every of the individual statements contained in the alleged 'series of false and misleading statements,' referenced in Paragraphs 30 and 54 of the Complaint" and (2) "for each such statement, provide the complete factual basis for your allegation that the statement is false and misleading."
The second part, which asks Plaintiffs to "provide the complete factual basis," is premature.

FN5. Plaintiffs also objected on the ground that responding to this discovery would require disclosure of attorney work-product.

FN6. Defendants did not seek to compel an answer on Interrogatory 16 from plaintiffs

Kenneth A. Slater and Ellen Z. Slater, since they have already answered by stating that neither has been involved in such a lawsuit.

FN7. This means claims filed under the Securities Exchange Act of 1934, claims filed under the Williams Act, state law Blue Sky actions, and any common law fraud claim brought *in connection with* one of the foregoing actions.

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