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,	)	02-cv-5893 (Consolidated)
vs.	)	Judge Ronald A. Guzman
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	
Defendants.	)	

SPECIAL MASTER'S REPORT AND RECOMMENDATION ON DEFENDANTS' CATEGORY E AND F OBJECTIONS

INTRODUCTION

Plaintiffs filed a class action lawsuit against Defendants alleging that statements made and facts withheld caused an artificial inflation of the price of stock, which resulted in economic loss by the Plaintiffs. In Phase One of the bifurcated case, the jury found that Defendants violated the law and that their actions caused harm to the Plaintiff class. Phase Two involves determining whether Defendants have rebutted the presumption of reliance as to particular individuals as well as the calculation of damages as to each of the class members. The Court has referred issues related to claims determinations to the Special Master.

On October 17, 2013, a final judgment was issued on the then resolved List 1 claims in the case (Dkt. 1898). On November 12, 2013, Defendants appealed that judgment to the Seventh Circuit Court of Appeals and posted a *supersedeas* bond staying execution of the final judgment on the then List 1 claims (Dkts. 1902, 1903). On May 21, 2015, the Seventh Circuit issued its

opinion on appeal, *Glickenhaus & Co., et al v. Household International, Inc., et al.*, Case No. 13-3532, Dkt. 89 (7th Cir. 2013), reversing and remanding for a retrial on Phase I loss causation, and affirming the District Court's challenged rulings on Phase II procedures regarding rebuttal of the presumption of reliance and issues related to discovery. The Seventh Circuit explicitly acknowledged the separation of Phases I and II, providing that "there's no need to redo anything in Phase II, even though [they] are remanding for a new trial on certain issues from Phase I."

On May 29, 2015, Plaintiffs moved to amend the remand order to direct that Circuit Rule 36 (reassignment to new judge of case remanded for new trial) not apply on remand. Defendants opposed that motion. On June 18, 2015, the Seventh Circuit denied the motion and ordered that Circuit Rule 36 will apply on remand.

RELEVANT PROCEDURAL HISTORY

In the *Order Approving the Form and Manner of Notice* (January 11, 2011, Dkt. # 1721), the Court approved the Proof of Claim form and Summary Notice, as well as appointed the firm of Gilardi & Co. LLC ("**Gilardi**") as Claims Administrator to supervise and administer the claims processing procedure. ("**January 11, 2011 Order"**). The same Order provided a deadline for the return of the Proof of Claim form as follows:

> Unless the Court orders otherwise, all Proof of Claim forms must be postmarked no later than one hundred twenty (120) days from the Notice Date. Any Class Member who does not timely submit a Proof of Claim within the time provided for, shall be barred from sharing in the distribution of the proceeds of any award of damages, unless otherwise ordered by the Court. Notwithstanding the foregoing, Lead Counsel may, in their discretion, accept late-submitted claims for processing by the Claims Administrator so long as further proceedings in the Action are not materially delayed thereby.

The Proof of Claim form, mailed on January 24, 2011, included notice to the recipient that the completed Proof of Claim form must be returned and postmarked on or before May 24, 2011.

At the time the January 11, 2011 Order was entered, it was anticipated that all claim forms would be due by May 24, 2011; however, after the claim form was sent, the Court recognized that third-party claim filers reported difficulties in obtaining answers to the reliance question from their clients. *See* Order, April 11, 2011 (Dkt. #1753) ("**April 11, 2011 Order**"). Thus, the Court granted leave for Plaintiffs to propose a plan as to the most efficient way to proceed to obtain responses to this question. *Id*. Plaintiffs proposed a plan, and the Court authorized the Claims Administrator to prepare a one-page follow-up notice which would be disseminated directly to claimants with claims in excess of $250,000 to obtain an answer to the claim form question. Order, May 31, 2011 (Dkt. # 1763) ("**May 31, 2011 Order**"). In its May 31, 2011 Order approving the plan to provide the supplemental notice, the Court allowed 90 days from the date of receipt of the one-page notice to obtain executed forms. The May 31, 2011 Order did not contain the language of the January 11, 2013 Order indicating that late-submitted claims may be accepted by lead counsel or by the Court's discretion, but also did not contain language that claims not meeting this deadline would be barred. The one-page follow up notice was sent on June 10, 2011 and the due date for responses was September 12, 2011.

On December 22, 2011, Gilardi filed a report ("**Gilardi Report**") including lists of all claims it accepted and rejected. The Court thereafter issued an order requiring Defendants to enumerate the claims listed on the Gilardi Report to which they objected on or before February 27, 2012. *Order Setting Schedule for Claims Adjudication and Class Notice,* February 3, 2012 (Dkt. # 1798) ("**February 3, 2012 Order**"). In accordance with the February 3, 2012 Order, the Defendants provided objections to claims listed in the Gilardi Report. Those objections were placed in categories A through F and included several subcategories. *Defendants' Objections to*

Certain Claims Included in the Report of Claims Administrator Gilardi & Co. LLC, February 27, 2012 (Dkt. # 1800) ("**Defendants' Objections**").

In its Memorandum Opinion and Order dated September 21, 2012 (Dkt. 1822), and in order to "facilitate resolution of the claims that need not be tried," the Court appointed Phillip S. Stenger as Special Master. In its written opinion on October 2, 2012, the Court clarified the duties of the Special Master, and specifically directed the Special Master to provide reports and recommendations to the Court regarding defendants' objections to certain claims included in the report of the claims administrator Gilardi & Co. Opinion, October 2, 2012 (Dkt. 1831). The October 2, 2012 Order further directed the Special Master to (1) identify the claimants that are entitled to judgment and the amount of damages each claimant should receive; (2) identify the claimants whose claims must be resolved at trial; and (3) identify the claimants who forfeited their claims.

The Special Master provided its first Report and Recommendation to the Court on May 17, 2013, regarding Category D.5, D.6, and D.7 Objections, recommending that Category D.5 and D.7 objections be deemed waived and that category D.6 objections should not be deemed waived. *Special Master's Report and Recommendation on Defendants' Category D.5, D.6 and D.7 Objections*, May 17, 2013 (Dkt. 1847). The Special Master's first Report and Recommendation was confirmed and adopted by the Court on June 6, 2013. Order, June 6, 2013 (Dkt. 1853). Thereafter, the Special Master filed a second Report and Recommendation providing the court with four lists: List 1 containing 10,902 claims for which the Special Master recommended judgment as to liability be entered; List 2 containing 133 claims whose claims should be resolved at trial; List 3 containing 2,476 claims which should be rejected for failing to answer the claim form and/or supplemental interrogatory; and List 4 containing 9,720 claims to

which defendants have objected and the parties agreed require a decision by the Special Master. *Special Master's Report and Recommendation*, July 11, 2013 (Dkt. 1860). The Court entered final judgment as to the claims on List 1 on October 17, 2013. *Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b)*, October 17, 2013 (Dkt. 1898).

The Special Master has now reviewed Defendants' Objections in categories E and F. The Category E Objections are objections to claims submitted after claim form deadlines. Category F Objections are as to claims filed by individuals or entities whom Defendants argue are not members of the certified class.

I. CATEGORY E OBJECTIONS TO CLAIMS SUBMITTED AFTER CLAIM FORM DEADLINES

Defendants' Category E.1 and E.2 Objections are to claims for which the initial claim form was received after the initial May 24, 2011 deadline, and to claims for which the one-page follow-up response was received after the September 12, 2011 deadline, respectively. Defendants contend that in order for untimely claims to be accepted, the claimant must show excusable neglect for failure to meet the court ordered deadline, citing *In re Cendent Corp. Prides Litig.*, 233 F.3d 188, 197 (3d. Cir. 2000). *See Defendants' Update Regarding Objections to Certain Claims Included in the Report of Claims Administrator Gilardi & Co., LLC*, May 9, 2012 (Dkt. # 1817) ("**Defendants' Update to Objections**").

Plaintiffs claim that the language of the January 11, 2011 Order allows for late claims to be accepted by lead counsel, if proceedings were not materially delayed. *See Plaintiffs' Opposition to Defendants' Objections to Certain Claims Included in the Report of Claims Administrator Gilardi & Co, LLC*, March 28, 2012 (Dkt. # 1802) ("**Plaintiffs' Opposition to Defendants' Objections**"). Additionally, Plaintiffs argue that even if claims are not accepted based on the failure of Defendants to show a 'material delay' in the proceedings, that they should

be reviewed on a claim-by-claim basis, as certain claimants have included explanations for the delay, and additional objections should be overruled as Plaintiffs contend the claims were not untimely, per the post-mark. *Id*.

A. E.1 Objections to Late-Filed Claims. The January 11, 2011 Order clearly articulates that notwithstanding the initial May 24, 2011 deadline for claim forms, lead counsel may accept late-submitted claims for processing, so long as the acceptance thereof does not "materially delay" further proceedings. As the deadline for follow-up responses was extended until September 12, 2011, and the Claims Administrator did not issue its report until December 22, 2011, it is hard to see a material delay caused by these tardy submissions. Therefore, by the terms of the Order, Proof of Claim forms that were received and submitted to the Claims Administrator prior to the filing of the Gilardi Report on December 22, 2011 should be accepted, and Defendants' E.1 Objections should be denied.

B. E.2 Objections to Late-Filed Follow-up Responses. The May 31, 2011 Order which extended the deadline for follow-up responses until September 12, 2011 does not contain language allowing counsel the discretion to accept late-filed follow-up responses; thus, the analysis must focus on the ability or responsibility of the Court to accept late-filings.

Defendants urge the Court to engage in an analysis under FED.R.CIV.P. 6(b)(1)(B), which requires excusable neglect to extend a deadline once that deadline has passed.[1] To support its position that the Court must engage in an excusable neglect analysis in order to accept late-filed

[1] Fed. R. Civ. P. 6(b)(1)(B) on extending time provides:

> **(b) Extending Time.**
> **(1)** ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time:
> *** * ***
> **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect.

claim forms, Defendants cite to *In re Cendent Corp. Prides Litig.*, 233 F.3d 188 (3d. Cir. 2000); however, contrary to Defendants' assertion, the Third Circuit in the *Cendent* opinion acknowledged that the Court's power to change deadlines derives not just from FED.R.CIV.P. 6(b)(1)(B), but from the Court's vast equitable powers in class actions. As the Third Circuit explained, quoting with approval the District Court opinion, courts retain traditional equitable powers until distribution, and "[a] Court may assert this power to allow late-filed proofs of claim…." *Cendent*, 233 F.3d at 195. When utilizing equitable powers to extend deadlines for proofs of claim, the Court noted that a "good cause" analysis typically applies. *Id.* A general equitable standard to review deadlines in this context is well-supported. *See In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977) (affirming district court judge's determination that he would have discretion to permit late filed claims where there was a "good and sufficient cause" to do so); *Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994) (remanding for review under "excusable neglect" *or* "good cause" analysis the denial of a late opt-out); *See also In re Valdez*, 289 F. App'x 204, 206 (9th Cir. 2008) (accepting the district court's approval of some claims and not others based on a review for "plausible excuse"); *In re Agent Orange Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988) (applying general equitable factors to accept late claimants and opt-outs).

Although the Court maintains broad discretion over class action claims administration through its equitable powers, courts will still often apply the "excusable neglect" standard from FED.R.CIV.P. 6(b)(1)(B) to determine whether a late filing should be accepted. *See In re Cendent Corp. Prides Litig.*, 233 F.3d 188, 195 (3d. Cir. 2000) ("We do not find any fault, therefore, with the District Court's locating within FED.R.CIV.P. 6(b)2 [now designated as FED.R.CIV.P. 6.b(1)(B)] yet an additional source of its power to modify deadlines here.") The "excusable

neglect" standard involves a finding of "neglect," and then the determination that that neglect is "excusable," as laid out by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Neglect should not be read inflexibly to only include instances that were outside of the control of the party, but should be read plainly to include inadvertent or negligent omission. *Pioneer*, 507 U.S. at 394-95. Additionally, courts must balance the following factors to determine whether the neglect was excusable: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Id*. However, "application of this principle must not be so rigid as to preclude recovery by a deserving claimant." *In re Orthopedic Bone Screw Products Liab. Litig*., 246 F.3d 315, 329 (3d Cir. 2001).

The Court's equitable powers involve "balancing the goals of expedient… distribution and the consideration due to late-arriving class members." *Id.*, 246 F.3d at 321. However, within its equitable analysis, the Court must consider its "inherent power and duty to protect unnamed, but interested persons." *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972). A general balancing of equities or the "excusable neglect" factors in this context would produce the same result. As Defendants had adequate opportunity to review and object to these claims along with all others timely filed, there is no prejudice to Defendants by allowing these claims. Additionally, there would be no delay in the proceedings due to acceptance of claims submitted prior to the filing of the Gilardi Report, and no additional administrative costs, as these claims were included in the determinations of the Claims Administrator. As there have been further delays in the claims processing procedure, which resulted in additional deadlines for supplemental form submissions for a different set of class members, a short enlargement of the

initial timeframe, cut-off prior to the initial submission of Defendants' objections thereto, which resulted in no delay of the proceedings, is negligible. Furthermore, neither party has asserted bad faith on the part of any claimant submitting a late form. Therefore, the equitable considerations require the allowance of claims with supplemental forms submitted to the Claims Administrator prior to the submission of its Report on December 22, 2011. While "drawing a line is essential to achieve certainty and finality in such a large class action," equitable factors must be considered in determining which claims are excluded. *Hartman v. Powell*, 00-5356, 2001 WL 410461 (D.C. Cir. Mar. 15, 2001). As the equities fall on the side of the claimants for supplemental forms submitted prior to the filing of the Gilardi Report, Defendants' E.2 Objections should be denied.

However, the rejection of E.1 and E.2 Objections is not meant to affect any late filings provided after the Gilardi Report was finalized, as the equitable considerations in that situation would be materially different. As this Court noted, "[d]eadlines may lead to unwelcome results, but they prompt parties to act and produce finality." Order, August 22, 2013 (Dkt. # 1874) (quoting *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992)). Forms submitted after the Report was finalized may have a substantial effect on the claims procedure, cause a 'material delay,' and could result in significant prejudice. Therefore, it is recommended that December 22, 2011 be a firm deadline for the claims forms and follow-up notices originally due on May 24, 2011 and September 12, 2011, respectively.

II. CATEGORY F OBJECTIONS: CLAIMS FILED BY INDIVIDUALS OR ENTITIES THAT DEFENDANTS ARGUE ARE NOT MEMBERS OF THE CERTIFIED CLASS

By *Stipulation and Order Regarding Class Action Certification* entered on December 3, 2004 (Dkt. # 198) ("**Class Certification Order**"), the class was certified as follows:

> All Persons who purchased or otherwise acquired the securities of Household during the period between October 23, 1997 and October 11, 2002 [the "**Class Period**"]. Excluded from the Class are defendants herein, members of defendants' immediate families, any person, firm, trust, corporation, officer, director or other individual or entity in which any defendant has a controlling interest or which is related to or affiliated with any defendant, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party**.** [2]

Defendants generally argue, as detailed below, that Household's employees, the HSBC-North America Tax Reduction Investment Plan ("**HSBC-TRIP**"), an employee benefit plan,[3] and participants in the HSBC ADS Fund,[4] were "affiliates" of Household who are thereby excluded from the class under the foregoing definition.

"[A] class definition is interpreted according to the substantive law that provides the basis for the class action." *In re Motorola Sec. Litig.*, 644 F.3d 511, 517 (7th Cir. 2011), citing *In re Am. Cont'l Corp./Lincoln Sav.& Loan Sec. Litig.*, 49 F.3d 541, 543 (9th Cir. 1995). In securities-fraud actions, "federal securities law should inform the meaning of the term 'affiliate' as it appears in the class definition." *Motorola*, 644 F.3d at 517. Pursuant to the parties' stipulation, the class encompassed in this definition was only certified with respect to violations of the Securities Exchange Act of 1934 (the "**1934 Act**"). Class Certification Order (Dkt. # 198). And, in Phase One of this action, the jury found that all Trial Defendants violated §10(b) of the 1934 Act and Securities and Exchange Commission ("**SEC**") Rule 10b-5, which was promulgated by the SEC under the 1934 Act; and that all Trial Defendants except Gilmer violated the control person provisions (§20a) of the 1934 Act.

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[2] On February 28, 2006, the Court issued an order that all claims based on purchases of Household stock from October 23, 1997 through July 29, 1999 were time barred. The jury found that the Trial Defendants did not violate the federal securities laws for statements made during the time period of July 30, 1999 through March 22, 2001. For class members who purchased Household common stock during that time frame only, there is no recovery. The jury found that the Trial Defendants did violate federal securities laws for public statements made during the period of March 23, 2001 through October 11, 2002 (the "**Damages Period**").

[3] *See* discussion of F.2 Objections, set forth below.

[4] *See* discussion of F.4 Objections, set forth below.

A. Category F.1 Objections: Claims Filed by Household Employees

Defendants initially objected to 183 claims filed by Household employees, totaling $1,150,799, generally arguing that the Household employees are both "affiliates" and "agents" of Household and should therefore be excluded from the certified class as a matter of law. Defendants' Objections (Dkt. # 1800, pp. 17-18). Revised lists provided on May 20, 2014, show that 173 claims filed by Household employees remain in dispute, totaling $836,937.[5]

Plaintiffs oppose Defendants' F.1 Objections on grounds that the class definition only excludes defendants' immediate families, and any person or entity in which defendant has a controlling interest or which is related to or affiliated with a defendant, and the agents and affiliates of any such excluded parties. Plaintiffs' Opposition to Defendants' Objections (Dkt. # 1802, pp. 54-55). Plaintiffs argue (i) that Household has not provided any evidence that the individuals whose claims it seeks to exclude (other than the three individual defendants, Aldinger, Schoenholz and Gilmer) fit the categories of excluded entities; (ii) that Household has not provided any evidence establishing that these individuals were employed by Household during the Damages Period or when they purchased the shares at issue; and (iii) that individuals who no longer work for Household cannot be Household's agents, noting that the Court has already ruled that former employees are not under Household's control.[6] Plaintiffs further argue that the purpose of the exclusion is to provide that those persons or entities (either the Individual Defendants or entities controlled by Household) that benefitted from the fraudulent activity

[5] Per letter to the Special Master dated February 21, 2013, Defendants identify that per manual review, 31 claims to which Defendants previously maintained an F.1 Objection were made by persons not employed during the Damages Period. As such, Defendants state they have withdrawn such objections. The February 21, 2013 letter included only 151 employees with hire and termination dates which verify employment. The Special Master's analysis is based on the Defendant's contention that it has withdrawn all objections to claims where the claimant was not employed during the Damages Period.

[6] *See* March 11, 2009 Order Regarding Plaintiffs' Motions in Limine [Dkt. # 1500, p. 3] ("**March 11, 2009 Order**") (denying Plaintiffs' request to compel former employees Hennigan and Walker to testify at trial). *See also Motorola*, 644 F.3d at 518-19 (holding that a claimant is an affiliate only if it is under the control of the defendant).

should not be able to participate in any settlement or judgment, and further argue that Defendants have not shown that the challenged claimants benefitted from the fraudulent activity. Plaintiffs' Opposition to Defendants' Objections (Dkt. # 1802, pp. 54-55).

In response to Plaintiffs' Opposition, Defendants filed their Defendants' Update Regarding Objections (Dkt. #1817, p. 10), which simply reasserted that the claims remain in dispute and should fail as a matter of law. By letter to the Special Master dated February 21, 2013, Defendants subsequently produced an updated list of F.1 Objections, listing 151 individuals with their Household hire and termination dates, showing that each employee was employed during at least part of the Damages Period. *See supra* n.5. Between February 21, 2013 and the most recent lists submitted on May 20, 2014, the parties have conferred and agreed that 174 F.1 Objections remain in dispute, totaling $836,937.

As referenced above, class definitions are interpreted according to the "substantive law that provides the basis for the class action," *Motorola*, 644 F.3d at 517, citing *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 49 F.3d 541, 543 (9th Cir. 1995). In securities-fraud actions, "federal securities law should inform the meaning of the term 'affiliate' as it appears in the class definition." *Motorola*, 644 F.3d at 517. Specifically, this class action was based on violations of the 1934 Act and SEC rules promulgated there from, and so the class definition must be analyzed using the applicable statutory definitions.

The 1934 Act provides that the term "affiliated person" has the same meaning as in the Investment Company Act of 1940. 15 U.S.C. § 78c(19). The Investment Company Act of 1940 provides that an "[a]ffiliated person" of another person includes "(D) any officer, director, partner, copartner, or *employee* of such other person." 15 U.S.C. § 80a-2(3) (emphasis added).

The Seventh Circuit also addressed the meaning of "affiliate" in a class definition in securities litigation brought regarding violations of the 1934 Act in the *Motorola* case. In analyzing the definition's applicability to an employee 401(k) plan, the Court utilized the specialized securities-law definition of "affiliate" provided in BLACK'S LAW DICTIONARY (9th ed. 2009) ("**BLACK'S LAW**"). *Motorola*, 644 F.3d at 514, 518-19. BLACK'S LAW defines "affiliate" by interpreting whether one entity has "control" over another; specifically, "[o]ne who controls, is controlled by, or is under common control with an issuer of a security."

As explained by the Seventh Circuit in *Motorola*, the control requirement is also reflected in definitions specifically articulated in the Securities Act of 1933 as well as certain rules promulgated under the 1934 Act, including SEC Rule 12b-2, which defines an "affiliate" "as a 'person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.' *Id.*, § 240.12b-2." *Motorola*, 644 F.3d at 519. The control requirement is likewise present in the definition of affiliate in SEC Rule 10b-18(a)(2), as "any person that directly or indirectly controls, is controlled by, or is under common control with, the issuer." 17 C.F.R. § 240.10b–18. In its analysis, the *Motorola* Court noted that "control," as defined by BLACK'S LAW, means "direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract or otherwise; the power to manage, direct, or oversee." *Motorola*, 644 F.3d at 519.

Similarly, BLACK'S LAW defines "employee" as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."[7] As an "affiliate" is defined

[7] Plaintiffs have argued that individuals who no longer work for Household cannot be Household's agents, citing the Court's March 11, 2009 Order (Dkt. 1500). However, the March 11, 2009 Order addressed the control the company would have at the time to produce witnesses who were no longer employees. The March 11, 2009 Order did not

as one who controls another, and an "employee" is one who contracts to have their work performance controlled, it is only logical that employees would be considered affiliates, under BLACK'S LAW definitions. In light of the explicit definition of "affiliate" as an employee under the 1934 Act, and the overlapping definitions in BLACK'S LAW, it is clear that the term "affiliate" is meant to encompass employees. Therefore, the class definition in the present case excludes employees generally, and Plaintiffs' opposition to the objection based on class definition fails. As such, it is not necessary to address Defendants' objections based on "agency."

Although employees are excluded from the class per the class definition, Plaintiffs have also raised an equitable argument, contending that as the purpose of exclusion from a class is to ensure that those who benefitted from the fraudulent activity should be excluded from the judgment, only those employees who are shown to have benefitted from fraudulent activity should be excluded. Plaintiffs are correct that one of the purposes of exclusion from a class definition is to ensure that those who benefitted from fraudulent activity do not additionally profit from a settlement or judgment. However, the definition of the class does not qualify its exclusion of "affiliates" as only those who benefitted from the fraud. To require individual analysis to reevaluate the exclusion of members who are clearly excluded from the class by definition ignores the importance of having a class definition in class action context.

FED.R.CIV.P. 23 specifically provides that a class certification must define the class. This requirement is fundamental to ensure the practical awareness of those included in the class action and to reap the benefits from a class action structure. In this vein, courts have ruled that the class definition must be adequately tailored and definite, or the class cannot be certified. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 515 (7th Cir. 2006) ("…the proposed class is not sufficiently

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determine that Household had never had control over the employees, nor did it determine that Household did not have control over the employees during the relevant Damages Period.

identifiable or definite…to qualify for class certification.") In addition, most courts also find that FED.R.CIV.P. 23 requires the definition to be "sufficiently definite to permit ascertainment of the class members." *Alliance to End Repression v. Rochford,* 565 F.2d 975, 977 (7th Cir. 1977). Ascertainability requires objective criteria to identify the members. *Driver v. Apple Illinois, LLC*, 06 C 6149, 2013 WL 5818899 (N.D. Ill. Oct. 29, 2013), citing MANUAL FOR COMPLEX LITIGATION § 21.222 at 270 (4th ed. 2004). Requiring ascertainability serves several purposes, including to "avoid heavy administrative burdens inconsistent with the efficiency expected of class actions." *Driver v. Apple Illinois, LLC*, 06 C 6149, 2013 WL 5818899 (N.D. Ill. Oct. 29, 2013), citing *Marcus v. BMW of N. America,* 687 F.3d 583, 593 (3rd Cir. 2012). Pursuant to the requirements of FED.R.CIV.P. 23, class definitions are required to be narrow, definite, and ascertainable, to allow for administrative benefits of class actions as well as protect defendants by ensuring that those who will be bound by a judgment are clearly identifiable. *BMW of N. America,* 687 F.3d at 593.

In the present matter, both parties stipulated to the class definition, which excluded employees as previously discussed, and the class was certified with this definition by order of the Court. Class Certification Order (Dkt. # 198). The definition was tailored to exclude parties that may have benefitted from the fraudulent activity, but also drafted narrowly (or broadly) enough so that the class members, and excluded parties, could be objectively identified in groups, in accordance with FED.R.CIV.P. 23. Employees have been excluded from the class by the objective, stipulated definition, and there is not an additional requirement for Defendants to individually prove benefit of fraudulent activity for each excluded claimant. Although the Court maintains the power to amend a class certification order before final judgment, pursuant to FED.R.CIV.P. 23 (c)(1)(C), to change the class definition to require an individual review of each

claimant's benefit, or lack thereof, from the fraudulent activity would be contrary to the fundamental nature of a class action. As such, the definition in the Class Certification Order should remain intact. By the clear terms of the class definition, employees' claims should be denied, and Defendants' F.1 Objections upheld, as to employees of Household.

B. Category F.2 Objections: The Claim Filed by HSBC-North America Tax Reduction Investment Plan ("HSBC-TRIP")

Defendants object to the claim, in the amount of $37,693,268, filed by HSBC-North America Tax Reduction Investment Plan ("**HSBC-TRIP**"), an employee benefit plan, on grounds that HSBC-TRIP is an affiliate of Household and is therefore excluded under the class definition, citing *Motorola*, 644 F.3d 511 at 513 (holding that the Motorola 401(k) Profit Sharing Plan was an affiliate of Motorola and, therefore was ineligible to participate in a securities class action settlement, where the class definition excluded Motorola affiliates). Defendants' Objections, p. 18 (Dkt. # 1800).

Plaintiffs argue that to invoke *Motorola*, Defendants must establish that HSBC-TRIP is an "affiliate" of Household by demonstrating with competent evidence that HSBC-TRIP "controlled, or is controlled by, or is under common control with" Household, *Motorola*, 644 F.3d at 518-519 (quoting SEC Rule 144, 17 C.F.R. §230.144(a)(1), and Regulation 12 B, SEC Rule 12b-2, 17 C.F.R. §240.12b-2), and by demonstrating that Household has direct or indirect power to govern the management and policies of HSBC-TRIP. *Id.* at 519. The Special Master agrees.

As discussed in Section II.A above, in analyzing the applicability of the definition of affiliate to an employee 401(k) plan in *Motorola*, the Seventh Circuit looked to the specialized securities-law referent for the term "affiliate" provided in BLACK'S LAW, which defines "affiliate" by interpreting whether one entity has "control" over another; specifically, "[o]ne who

controls, is controlled by, or is under common control with an issuer of a security." *Motorola*, 644 F.3d at 518-519. "'[C]ontrol' by or in common with the issuer of a security is the key inquiry in assessing whether an entity is an affiliate," *Id.* BLACK'S LAW in turn, defines "control" as the "direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee." *Id.* at 519, citing BLACK'S LAW at 378 (9th ed. 2009).

The Seventh Circuit further observed that the BLACK'S LAW "definition is almost identically replicated in Rule 12b-2, which defines 'control' as 'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'" 17 CFR § 240.12b-2. *Motorola,* 644 F.3d at 519. The control requirement is likewise present in the definition of affiliate in SEC Rule 10b-18(a)(2), as "any person that directly or indirectly controls, is controlled by, or is under common control with, the issuer." 17 C.F.R. § 240.10b-18. *Motorola,* 644 F.3d at 519.

With the foregoing securities-law understanding of "affiliate" and the concept of "control," the Seventh Circuit in *Motorola* turned to the record evidence before it, which included the Plan governing documents, finding (i) that Motorola, acting through its Board of Directors, controlled the Profit-Sharing Committee, the designated Plan Administrator; (ii) that because Motorola appointed and removed Committee members at will, it had structural organizational control over the management and policies of the Committee; and (iii) that based on the Plan's structure and the requirements of ERISA, the Profit-Sharing Committee, as Plan Administrator, had managerial control over the policies and operations of the Plan. *Motorola,* 644 F.3d at 519-520. The Seventh Circuit concluded:

> In the end, the Profit-Sharing Committee had managerial and operational control over the Plan—albeit for the benefit of the participants—and because Motorola controlled the Committee through appointment and removal of its members, Motorola had structural organizational control over the Plan. This degree of control is sufficient to make the Plan an affiliate of Motorola, and as an affiliate of Motorola, the Plan is specifically excluded from the class.

Id. at 521

In the present case, Household exhibits similar structural organizational control over HSBC-TRIP as did Motorola over the Plan. HSBC-TRIP is governed by the Administrative and Investment Committee (the "**Committee**"), which is controlled by the Board of Directors of Household. Household International Tax Reduction Investment Plan, §18.1. The Committee consists of at least three employees of Household, which are appointed by Household's Chief Executive Officer, and serve at the pleasure of Household. *Id*. The CEO of Household has the sole authority to appoint and remove the Committee members. *Id*. As Household may appoint and remove Committee members at will, it has structural organizational control over the Committee. The Committee, in turn, is the plan administrator and named fiduciary of the Plan under ERISA. *Id*. The assets of HSBC-TRIP are held in a Trust (the "**Trust**") managed by the Trustee, which is subject to Committee directions regarding funding, investment policies, and methods and objectives of the Trust, among other directives. *Id*. at §18.2. Similar to the Profit-Sharing Committee in *Motorola*, the Committee has the power to direct the management of HSBC-TRIP, and the Committee is in turn controlled by Household. Therefore, Household had sufficient managerial and operational control over HSBC-TRIP to make it an affiliate of Household. As an affiliate of Household, HSBC-TRIP is excluded from the Class, and Defendants' F.2 Objection should be sustained.

C. Category F.3 Objections: Claims Filed by HSBC as the Beneficial Owner

Defendants have withdrawn their Category F.3 Objections.

D. Category F.4 Objections: Claims Submitted by Participants in the HSBC ADS Fund

Defendants, once again citing to *Motorola*, object to 14 claims, totaling $129,268, submitted by participants in the HBSC ADS Fund. Defendants state that the HSBC ADS Fund is the successor to the Household International Common Stock Fund (the "**Household Stock Fund**"), one of the investment options that was available to participants in Household's 401(k) fund. Defendants contend that participants in the Household Stock Fund did not purchase Household common stock, but rather purchased units of the Household Stock Fund. Defendants also conclude that the Household Stock Fund, which was the actual purchaser of Household stock, is excluded as a claimant under the class definition because the Household Stock Fund is an affiliate of Household. Defendants' Objections (Dkt. # 1800, pp.18-19).

Plaintiffs respond that in order to prevail under *Motorola,* Defendants must prove that Household controls the HSBC ADS Fund. Plaintiffs further respond that the Seventh Circuit explicitly rejected the same argument in *Motorola*, holding "[t]hat the individual participants did not purchase publicly traded Motorola stock does not take the Plan outside the class definition if the Plan itself purchased the stock." *Motorola,* 644. F.3d at 516.

In Defendants' Update Regarding Objections (Dkt. #1817, p. 10), Defendants simply reassert that these claims remain in dispute and should be rejected as a matter of law for the reasons stated above.

Despite the parties' referral to *Motorola*'s affiliate analysis with respect to this objection, the claims subject to F.4 objections were brought by individual beneficial owners and not the Household Stock Fund itself. The *Motorola* opinion rests, in primary measure, upon the fact that it was the Motorola 401(k) Profit-Sharing Plan (the "**Plan**"), not the individual Plan participants, who filed the claim to share in the settlement proceeds: "It is true that the Plan's participants

purchased units of the Motorola Stock Fund, not Motorola common stock […] [b]ut the claim was filed by the Plan, and it is undisputed that the Plan regularly purchased publicly traded Motorola common stock on the open market." *Motorola*, 644 F.3d at 513.

Plan participants in *Motorola* may have been excluded under the class definition in that case, which only included persons who purchased "publicly traded Motorola, Inc. common stock…." *Motorola*, 644 F.3d at 515. However, the class definition in this case does not limit claimants to those who purchased stock on the open market. Rather, the class includes "[a]ll Persons who purchased or otherwise acquired the securities of Household." Class Certification Order, Dkt. 198. Thus, the relevant discussion is whether a participant in the HSBC ADS Fund "purchased or otherwise acquired" Household securities.

The Household Stock Fund was an option available to investors under Household's 401k Plan. The fund was primarily composed of investments in Household common stock and was held in the trust established by the Household International Tax Reduction Investment Plan, predecessor to HSBC-TRIP. Household International Tax Reduction Investment Trust Agreement (the **"Trust Agreement**") § 4.1. Each participant in the 401k plan would have the right to direct the Trustee to invest their account funds in the Household Stock Plan, or any other investment option available. *Id.* at§ 4.2. The Trustee had "no discretionary authority to determine the investment of the assets of the Fund." *Id.* at § 4.1. Pursuant to the Trust Agreement, the Trustee was authorized to purchase Household common stock from the company or any other source at fair market value. *Id.* Once an allocation of the participant's funds had been made to the Household Stock Plan, Household delivered all information and materials related to the common stock directly to the participant. *Id.* at § 6.5(i). The participant then had "the right to direct the Trustee as to the exercise of all rights with respect to full and fractional shares of the

Company Common Stock held for the Participant." *Id*. The Trust Agreement also provides that "[t]he number of shares of Company Common Stock held by a participant in the Plan shall be the total number of shares held for the Participant (whether or not the shares are vested) as of the close of business on the date immediately preceding the date on which the tender offer or exchange commences." *Id*. at § 6.5(ii)

While it is clear that Participants in the Household Stock Fund did not themselves purchase common stock directly on the open market, such a restriction is not included in the class definition in this matter. By electing to participate in the Household Stock Fund, each participant directed the Trustee to purchase Household common stock on his or her behalf. Although the common stock was held by the Trustee and the Trustee may have maintained legal ownership, the participant was the beneficial owner and maintained all rights with respect to the stock. By the terms of the Trust, the participant was designated a specific amount of stock, received documentation relating thereto, and also maintained the right to direct the voting of the same. As the participants were beneficial owners of the common stock, they are covered by the class definition, and Defendant's F.4 objections should be denied on their face.

However, all but five of the putative class members subject to the F.4 objection appear to have been Household employees during the Damages Period, making them subject to the logic of the Special Master's recommended upholding of the Defendants' objections classified as F.1. That is to say that if the F.4 objection is being denied because the participants in the Fund, not the Trustees of the Fund, made the relevant stock purchase decision, then the ineligibility of the participants to be members of the class becomes relevant to the ultimate decision-making under the Defendant's F.4 objection. The claims of the nine participants in the Fund who also appear to be ineligible employees of Household during the Damages Period total $38,661 and the

Defendants' objections to those claims should be upheld.[8] The Defendants' objections to the other five participants in the Fund whose claims total $90,607 should be denied. [9]

SPECIAL MASTER'S RECOMMENDATION

For the reasons stated above, the Special Master reports and recommends that:

A. Proof of Claim forms that were received and submitted to the Claims Administrator prior to the filing of the Gilardi Report on December 22, 2011 should be accepted and Defendants' E.1 Objections should be denied.

B. Supplemental forms that were received prior to the filing of the Gilardi Report on December 22, 2011 should be accepted and Defendants' E.2 Objections should be denied;

C. Claims from employees of Household should be denied and Defendants' F.1 Objections should be upheld;

D. The claim submitted by HSBC-North America Tax Reduction Investment Plan should be denied and Defendants' F.2 Objections should be upheld;

E. Defendants' F.3 Objections have been withdrawn; and

F. Claims from participants in the HSBC ADS Fund should be accepted and Defendants' F.4 Objections for such participants should be denied.

[8] Gilardi Claim numbers: 126740, 126722, 124839, 123497. 122355, 120500, 117470,, 117060, and 111353 all appear to be associated with Household employees during the Damages Period.

[9] Gilardi Claim numbers: 123917, 125532, 125395, 124450, and 122256 all appear to be associated with participants who were not Household employees at least during the Damages Period.

Respectfully submitted:

DATED: July 2, 2015

/s/ Phillip S. Stenger
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