

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

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

**MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' REQUEST FOR
NOTICE OF RECENT AUTHORITY AND REQUEST FOR JUDICIAL NOTICE IN
FURTHER SUPPORT OF LEAD PLAINTIFFS' RESPONSE TO HOUSEHOLD
DEFENDANTS' MOTION BASED ON THE SUPREME COURT'S DECISION IN *DURA
PHARMACEUTICALS, INC. v. BROUDO***

REDACTED VERSION

A. REQUEST FOR NOTICE OF RECENT AUTHORITY

1. Lead plaintiffs respectfully request that this Court take notice of the following decisions in further support of Lead Plaintiffs' Response to Household Defendants' Motion based on the Supreme Court's Decision in *Dura Pharmaceuticals, Inc. v. Broudo* ("Plaintiffs' Response") filed on August 18, 2005: (1) *Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Sys., Inc.*, No. C 01-20418 JW, 2005 U.S. Dist. LEXIS 25398 (N.D. Cal. Oct. 26, 2005) attached hereto as Exhibit A; (2) *In Re Retek Inc. Sec.*, Civil No. 02-4209 (JRT/SRN), 2005 U.S. Dist. LEXIS 25986 (D. Minn. Oct. 21, 2005) attached hereto as Exhibit B; and (3) *Stumpf v. Garvey (In re TyCom Ltd. Sec. Litig.)*, Case No. 03-CV-1352-PB, 2005 U.S. Dist. LEXIS 19154 (D.N.H. Sept. 2, 2005), attached hereto as Exhibit C.

2. All three cases, which were issued after Plaintiffs' Response was filed, analyze the Supreme Court's decision in *Dura* related to the standard for pleading loss causation and what plaintiff needs to allege under *Dura* in order to satisfy this standard. *Cisco*, 2005 U.S. Dist. LEXIS 25398, at **19-22; *Retek*, 2005 U.S. Dist. LEXIS 25986, at **5, 8-9; *Garvey*, 2005 U.S. Dist. LEXIS 19154, at **42-46.

B. REQUEST FOR JUDICIAL NOTICE

3. Lead plaintiffs also respectfully request that this Court take judicial notice of the following documents: (1) the May-August 2002 Investor Relations Report and (2) the September-October 2002 Investor Relations Report, attached hereto as Exhibits D and E, respectively.¹

¹ Although plaintiffs do not agree with defendants' designation of Exhibits D and E as "Confidential," plaintiffs file these exhibits under seal pursuant to the November 5, 2004 Protective Order. On November 14, 2005, plaintiffs specifically requested that the Household defendants remove the "Confidential" designation from these and all other Investor Relations Reports because the designation is improper under the Protective Order. The documents do not fall into any of the categories of Confidential Information set forth in the Protective Order. To date, the Household defendants have not responded to plaintiffs' request.

4. Plaintiffs do not seek judicial notice for the truth of the matters stated in the documents but rather the fact that defendants made the statements contained in these documents. The fact that defendants made these statements is indisputable and accordingly, capable of judicial notice. That defendants made these statements is relevant to the Court's consideration of defendants' pending motion to dismiss pursuant to *Dura*, they establish that defendants had contemporaneous knowledge regarding loss causation that directly refutes their counsel's factual arguments made in their *Dura* motion.

5. In the Seventh Circuit, a plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint, in order to show that there is a state of facts within the scope of the complaint that if proved (a matter for trial) would entitle him to judgment. *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 915 (7th Cir. 1985); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992). *See also Hrubec v. Nat'l R.R. Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir. 1992) (a plaintiff may add facts essential to the complaint by affidavit or brief – even a brief on appeal); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 386 nn.44 & 46 (D. Md. 2004) (court considered five documents proffered by plaintiffs even though documents were not referenced in the complaint where defendants did not contest authenticity and documents were consistent with the complaint). Based upon these points, the Court should take judicial notice as requested by plaintiffs.

6. Under Federal Rule of Evidence 201, judicial notice of a fact is proper where the accuracy of the fact cannot reasonably be questioned and is “capable of accurate and ready determination.” *See, e.g., Doris J. Petermon-Sanders, in His Hands, Inc. v. Evelyn T. Stone Univ.*, No. 04 C 3438, 2004 U.S. Dist. LEXIS 24051, at *4 & n.1 (N.D. Ill. Nov. 24, 2004) (taking judicial notice of information set out on defendant's website). This standard is met as to the fact at issue, namely that defendant Household International, Inc. (“Household” or the “Company”) made the

statements at issue. These statements are contained in corporate business records of defendant Household which were produced by the Household defendants during the course of discovery. Accordingly, under Seventh Circuit law, they are authentic. *United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982) (a party's "very act of production [is] implicit authentication"). *Accord International Paper Company v. Adroscoggin Energy*, 2002 U.S. Dist. LEXIS 18386 (N.D. Ill. 2002); *Renaldi v. Sears Roebuck & Co.*, No. 97 C 6057, 2001 U.S. Dist. LEXIS 3523 (N.D. Ill. Mar. 20, 2001); *Laborers' Pension Fund and Laborers' Welfare Fund of the Health and Welfare Dep't of the Constr. & Gen. Laborers' Dist. Council of Chi. & Vacinity v. Certified Midwest Construction, Inc.*, No. 98 C 543, 1998 U.S. Dist. LEXIS 17819, at *6 (N.D. Ill. Nov. 6, 1998); *South Cent. Bank & Trust Co. v. Citicorp Credit Servs., Inc.*, 863 F.Supp. 635, 645 (N.D. Ill. 1994). Because these statements are "indisputably" authentic and because defendants cannot reasonably dispute that Household made these statements, the Court should grant judicial notice as requested. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689-70 (9th Cir. 2001) (lower court may not take judicial notice of fact that is "subject to reasonable dispute," but may consider undisputed fact that party signed a document and made certain statements during a hearing); *Leslie v. United States*, 986 F. Supp. 900, 904 (D.N.J. 1997) (a court may consider undisputedly authentic documents attached to the motion papers of either party).

7. Further, the fact that defendants' made these statements is directly relevant to defendants' *Dura* motion, pending before this Court. The loss causation argument advanced by defendants in their *Dura* motion rests upon their false factual assertion that "Household's stock price did not decline (and in fact increased) in response to the revelation of *each* of the three so-called 'frauds.'" *See Household Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss Pursuant to the Supreme Court's Recent Decision in Dura Pharmaceuticals, Inc.*

v. Broudo (“Reply Brief”) at 1 (emphasis in original). As shown by the statements contained in Household’s own internal documents, however, the revelation to the market of the truth regarding Household’s fraud did in fact lead to a diminution of the stock prices. Indeed, these documents reveal Household’s own belief that each incremental revelation of the truth lead to incremental diminution in the stock price.

8. In its internal Investor Relations Reports, Household summarized “significant events affecting the stock price.” The two Reports plaintiffs seek judicial notice of, the May-August 2002 Investor Relations Report and the September-October Investor Relations Report, each set out Household’s internal assessment of the impact of discrete public disclosures regarding Household’s fraudulent consumer lending practices on the stock price. Significantly, as noted in those Reports, some of the disclosures causing stock price drops were made by Household while others by third parties, such as consumer groups and governmental entities. Plaintiffs highlight some of the statements made in these Reports.

9. The May-August 2002 Investor Relations Report is particularly applicable. In that Report, Household makes statements that support plaintiffs’ allegations as stated in the Corrected Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws (“Amended Complaint”) and contradict Household’s own factual arguments as advanced in the Reply Brief. For example, paragraphs 21 and 22 of the Amended Complaint allege that “Household’s stock price declined from over \$53.00 per share in June 2002 to approximately \$30.00 per share in late August 2002, as the magnitude and pervasiveness of defendants’ fraud leaked to investors.” *See* Plaintiffs’ Response at 11. In their motion, defendants dismissed this allegation regarding causation baldly asserting that “the actual facts [regarding disclosure and stock price movement] do not aid Plaintiffs.” Reply Brief at 8.

10. However, the May-August 2002 Investor Relations Report demonstrates that defendants' own contemporaneous beliefs were in accord with plaintiffs' allegations as set forth in paragraph 21 and 22 based on Household's own assessments regarding the connection between revelations regarding its business frauds and the stock price movements. According to the statements in that report, Household attributed its stock price decline in August of 2002 to the numerous negative disclosures regarding the legality of Household's business practices, such as the August 14, 2002 restatement of earnings and the negative press articles in Forbes, The New York Times, Barrons, The American Banker and The Bellingham Herald regarding potential threats to Household's business model due to the Company's alleged predatory lending practices, outstanding lawsuits and the Department of Financial Institutions ("DFI") regulatory report. The Report specifically noted that [REDACTED]

[REDACTED] Ex. D at HHS 02075632. The May-August Report assessed the impact of the negative August 2002 disclosures as follows: [REDACTED]

[REDACTED] *Id.* During that week, Household's stock price dropped from \$39.08 on August 26, 2002 to \$36.11 on August 30, 2002 a drop of almost \$3.00. *See* Daily Closing Prices and Volume for Household Stock 10/23/1997-12/31/2002 at 26, Exhibit A to the Affidavit of Thomas J. Kavalier in Support of the Household Defendants' Motion to Dismiss Pursuant to the Supreme Court's Recent Decision in *Dura Pharmaceuticals, Inc. v. Broudo*.

11. Other portions of the May-August 2002 Report are equally explicit with respect to defendants' recognition of the link between revelations regarding Household's fraudulent business practices and its stock price. For example:

- [REDACTED]

[REDACTED]
Ex. D at HHS 02075630.

- [REDACTED]
Id. at HHS 02075631.

- [REDACTED]
Id.

12. The September-October 2002 Investor Relations Report highlights a different but related defect in the defendants' arguments regarding loss causation. In their motion, defendants assert that the relevant disclosure date for revelation of their predatory lending practices was October 11, 2002, the date on which Household announced its settlement with the Attorneys General. *See* Reply Brief at 17. Because the stock price closed up that day, Household argues that no loss could accrue to Household's investors as a result of the disclosure of its improper lending practices. *Id.* However, as plaintiffs allege in the Amended Complaint, the market had already become aware of the pervasive nature of Household's illegal lending practices and reacted before October 11, 2002. Indeed, the Report incorporates two analysts' reports that reflect this awareness:

- In a September 3, 2002 analyst report, Bernstein Research discusses the likely widespread nature of the illegal practices described in the DFI Report. *See* Ex. E at HHS 02075761. That report also references the [REDACTED]
[REDACTED] *Id.* In its own summary of this analyst report, Household noted that the analyst [REDACTED]
[REDACTED] *Id.* at HHS 02075738.
- In a October 10, 2002 analyst report, Morgan Stanley revised its target price for Household to \$34 based on [REDACTED]
[REDACTED] *Id.* at HHS 02075758. The Morgan Stanley October 10 report of a global settlement in the area of \$500 million, thus, fully

anticipates the October 11 announcement by Household of a global settlement of \$484 million. Moreover, it explains why there was a stock price increase when the settlement amount came in under the “adequately conservative” estimate by Morgan Stanley.²

13. In sum, the contemporaneous statements made by Household in its Investor Relations Reports support plaintiffs’ factual allegations as set forth in the Amended Complaint regarding the causal connection between the declining stock price and the numerous negative disclosures about Household’s business practices. Thus, they refute defendants’ own factual arguments as articulated to the Court in their motion papers asserting a lack of causal connection. *See, e.g.*, Reply Brief at 6.

14. Because the statements at issue are both indisputable and relevant, the Court should take judicial notice of the fact that Household made them and should consider this fact in ruling on the pending motion.

DATED: December 14, 2005

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² One wonders just exactly how Morgan Stanley was able to come up with this remarkably accurate estimate of a national settlement based upon one state’s analysis of Household’s lending practices within that state.

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on December 14, 2005, declarant served by email the: **MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' REQUEST FOR NOTICE OF RECENT AUTHORITY AND REQUEST FOR JUDICIAL NOTICE IN FURTHER SUPPORT OF LEAD PLAINTIFFS' RESPONSE TO HOUSEHOLD DEFENDANTS' MOTION BASED ON THE SUPREME COURT'S DECISION IN *DURA PHARMACEUTICALS, INC. V. BROUDO*** to the parties listed on the attached Service List. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of December, 2005, at San Francisco, California.

/S/ Carolyn Burr

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