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) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE HOUSEHOLD DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE NOLAN'S NOVEMBER 13, 2006 ORDER

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This reply memorandum is respectfully submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar ("Household Defendants"), in further support of their objections to Magistrate Judge Nolan's November 13, 2006 Order denying the Household Defendants' motion for leave to depose the named Plaintiffs and certain investment advisors (the "November 13 Ruling").

INTRODUCTION

In light of Magistrate Judge Nolan's April 18, 2005 and November 13, 2006 decisions, the Household Defendants have been all but shut out of the discovery process and relegated to a passive role, responding to an incessant barrage of requests from the Plaintiffs with few meaningful avenues to explore possible defenses — both on a class wide basis and as against the Named Plaintiffs individually. The Household Defendants have now spent over two years responding to Plaintiffs' oppressive document demands, interrogatories, and hundreds of requests for admission, and have produced more than 40 witnesses (to date) for deposition testimony and close to 5 million pages of documents in hard copy and electronic format. In contrast, Plaintiffs have stonewalled on what little discovery the Household Defendants have been able to serve on them.[1]

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[1] Given this overwhelming imbalance in discovery thus far, the Plaintiffs apparently feel compelled to misrepresent and inflate the scale of discovery that the Household Defendants have actually obtained. For instance, in their December 18, 2006 Response to Household Defendants Objection to Magistrate Judge Nolan's November 13, 2006 Order ("Pl. Br."), Plaintiffs assert that ". . .defendants have served more than 100 different interrogatories." Pl. Br. at 14. This is untrue. On September 19, 2006 Magistrate Judge Nolan expressly rejected Plaintiffs' irrational numbering of the interrogatories served by the Household Defendants, placing the number served well within the limits prescribed by Judge Nolan. September 19, 2006 Order at 2 (Docket No. 677). Plaintiffs have filed "The Class' Objection to the Magistrate's September 20, 2006 [sic] Order," October 4, 2006 (Docket No. 700) and granted themselves an unauthorized stay of answering fur-

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Nothing in Plaintiffs' response changes the following points about the overwhelming one-sided nature of discovery in this class action noted in the Household Defendants' opening brief:

- While the parties have been given 55 depositions each, this is an empty gesture from Defendants' perspective. Under the Magistrate Judge's rulings, the Household Defendants are precluded from taking any of the depositions they noticed.

- Plaintiffs have taken 40 depositions to date and will take their 55 before the end of fact discovery. The Household Defendants have taken only one deposition, at the class certification stage, of a designated representative of a Named Plaintiff, who claimed to have no relevant information.

- The Household Defendants will have to file their summary judgment motion without having conducted a single merits deposition of the Named Plaintiffs.

- Defendants would have to face any trial in this matter without ever having questioned the Named Plaintiffs about their claims.

- The ruling elevates form over substance. The Magistrate Judge has authorized Defendants to take depositions of third-party stock analysts to discover what information about Household was on the market at relevant times (Best Decl. Ex. 7 at 47), [2] but has foreclosed the same questioning of the Named Plaintiffs and their financial advisors, notwithstanding that these entities are at least as likely (if not more likely) to have pertinent information about the factors affecting the price of Household securities.

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ther interrogatories while that Objection is pending. The few interrogatory answers provided by Plaintiffs have been wholly inadequate, necessitating Household to file multiple motions to compel to the Magistrate Judge as well as a motion to compel compliance and a motion for sanctions. Defendants' Motion to Compel Responses to Defendants' Second Set of Interrogatories to Lead Plaintiffs, June 29, 2006 (Docket No. 543); Defendants' Motion to Compel Responses to Defendants' Third Set of Interrogatories to Lead Plaintiffs, August 18, 2006 (Docket No. 642); Motion for Sanctions Including Recommendation of Dismissal for Failure to Respond and to Compel Responses to Defendants' Court Authorized Supplement to Defendants' Second Set of Interrogatories (Docket No. 857).

[2] "Best Decl." refers to the Declaration of Landis C. Best that was submitted with the Household Defendants' opening brief.

- There is no question that the Household Defendants would have been permitted to depose the Named Plaintiffs on merits issues at the class certification stage. In effect, the Household Defendants are being penalized for stipulating to a class action, and Plaintiffs' arguments to the contrary are insubstantial.

While it may be true that discovery in securities class actions is inherently one-sided, this case has taken asymmetry to a patently unfair extreme. As a result of the Magistrate Judge's decision, the Household Defendants are foreclosed from one of the few avenues of discovery usually afforded class action defendants — depositions of the Named Plaintiffs. If the decision is permitted to stand, the Household Defendants will be denied timely and meaningful discovery on subjects of unquestioned relevance to summary judgment, trial, and evaluation of settlement. Plaintiffs' assertion that Household's showing to this effect is "vague" is simply mistaken.

The Named Plaintiffs (or their financial investment advisors) may well have information regarding what information about Household was on the market at various relevant times. Such evidence may be relevant to mounting a truth on the market defense, which is a recognized *class wide* defense that could defeat the fraud-on-the-market presumption of reliance invoked by Plaintiffs on behalf of the class. Moreover, if the claims of one or more of the Named Plaintiffs are fatally defective, Household and the Court are entitled to know that now, both because the propriety of class certification is always open for reevaluation under Federal Rule of Civil Procedure 23(c)(1)(C) ("an order under Rule 23(c)(1) may be altered or amended before final judgment"), and because the strength or weakness of Plaintiffs' own claims may help inform Defendants' evaluation of their alleged exposure and defense strategy. Indeed, the parties' stipulation allowing class certification explicitly reserves Defendants' right to pursue

such defenses, in keeping with Plaintiffs' obligation under the PSLRA to make themselves available for depositions and trial.

Plaintiffs' other main basis for opposition — that Defendants have somehow waived the right to depose Plaintiffs by failing to file an Objection to the April 2005 Order is a red herring at best. As set forth below, Household raised the issue of its right to take the depositions of the Named Plaintiffs many times after that decision (which was limited to subpoenas served on certain investment advisors as opposed to Named Plaintiffs themselves), and the Magistrate Judge continued to defer consideration of the subject, finally requesting additional briefing and assuring Defendants that their right to file an objection would run from the issuance of her new opinion, which was entered on November 13, 2006. The Household Defendants' Objection was filed within 10 business days of that November 2006 ruling and is timely.

ARGUMENT

A. The Household Defendants Did Not Waive Their Right to Object to Judge Nolan's November 13, 2006 Ruling.

During the October 19, 2006 status conference before Magistrate Judge Nolan, the Household Defendants again raised the topic of deposing the Named Plaintiffs in this litigation, after repeated renewals of their request at prior status conferences. *See* Defendants' Br. at 5.[3] For example, the Household Defendants inquired about deposing the named Plaintiffs at status conferences held on April 18, 2006 and April 26, 2006.[4] After reserving the issue several

[3] "Defendants' Br." refers to the Household Defendants' opening brief.

[4] Relevant excerpts are attached at Exhibits 1 and 2, respectively.

times, Judge Nolan set a briefing schedule at the October 19, 2006 conference and specified that the time to object "would start from [a ruling on] this oral motion." Best Decl. Ex. 8 at 82. Contrary to Plaintiffs' assertions, and consistent with the instructions of the Court, the Household Defendants promptly filed Objections within the 10-day period prescribed by Fed. R. Civ. P. 72(a) after receiving notification of Magistrate Judge Nolan's November 13 Order.

Notwithstanding the clear timeframe for filing Objections as established by Magistrate Judge Nolan, Plaintiffs devote several pages of their response arguing that the time to object to the Magistrate Judge's decision about whether Named Plaintiffs may be deposed came and went once Judge Nolan issued her April 18, 2005 ruling on the subject of subpoenas addressed to persons other than Plaintiffs (namely certain non-party investment advisors of Named Plaintiff PACE). Plaintiffs are mistaken. Given Magistrate Judge Nolan's clear inclination to consider the issue of Defendants' deposition rights, and the unambiguous schedule set forth at the October 19, 2006, status conference, Plaintiffs' argument merely highlights the inherent unfairness of denying Defendants the right to examine the Named Plaintiffs about their own claims and about common issues on which they purport to represent the class.[5]

[5] The Household Defendants' time for filing Objections could not have run from the Magistrate Judge's April 2005 Order. First, the April 2005 Order was directed only to subpoenas that had been served on Named Plaintiff PACE's investment advisors. The Household Defendants had not served their Rule 30(b)(6) deposition notices on the Named Plaintiffs yet — those notices were served on April 24, 2006, one year later. Second, in quashing the subpoenas served on the third party investment advisors, the April 2005 Order indicated that the "need for discovery *at this time* is outweighed by the burden imposed on the third-parties and the Class." Best Decl. Ex. 2 at 10 (emphasis added). Thus, the Order's language left open the possibility that the Magistrate Judge would permit discovery at a later time in the discovery process. Indeed, in serving their Rule 30(b)(6) notices on the Named Plaintiffs in April 2006, Household noted that the depositions would take place "[a]t such time as the Household Defendants are allowed by the Court to take discovery of the individual named plaintiffs and their agents." Best Decl. Ex. 6 at 1.

The cases cited by Plaintiffs to bolster their assertion of waiver are inapposite. In *Ploog* v. *Homeside Lending, Inc.,* No. 00 C 6391, 2001 U.S. Dist. LEXIS 15697 (N.D. Ill. Sep. 28, 2001), [6] the plaintiff was held to have waived his right to object to the Magistrate Judge's decision because he never filed any written objections. 2001 U.S. Dist. LEXIS 15697 at *14. Here, in contrast, the Household Defendants did not remain silent after Judge Nolan issued her November 13, 2006 ruling, but, rather, promptly submitted timely Objections to this Court.

Espinoza v. *Northwestern Univ.,* No. 02 C 7563, 2004 U.S. Dist. LEXIS 1203 (N.D. Ill. Jan. 28, 2004) involved a pro se defendant who, in an attempt to show good cause for filing late objections, maintained that he had never received a copy of the Magistrate Judge's order and also cited "'many changes in his personal and work related environments.'" 2004 U.S. Dist. LEXIS 1203 at *7-8. The court found these statements "dubious" given Espinoza's "reckless approach" to the litigation. *Id.* at *8. Further, Plaintiffs cite *Espinoza* for the proposition that a party that fails to object on a timely basis must "demonstrate sufficient cause." Pl. Br. at 3, citing *Espinoza*, 2004 U.S. Dist. 1203 at *7. This analysis does not apply to the Household Defendants in the present situation because their objections were submitted in full compliance with the schedule set forth by Magistrate Judge Nolan and within 10 days of notification of the November 13 Order. *See* Best Decl. Ex. 8 at 82. Even if a showing of good cause were required in this context, Defendants' right and need to question the Named Plaintiffs before the opening day of any trial in this matter provide ample good cause for the Court to entertain — and sustain — this Objection.

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[6] All unreported cases cited herein can be found at Exhibit 3.

B. Plaintiffs Improperly Conflate the Truth-On-the-Market Defense with Defenses Relating to Individualized Reliance

The Household Defendants are entitled to depose the Named Plaintiffs and any relevant investment advisors to explore the truth-on-the-market defense, which is a *class-wide defense* that is not limited to issues of individualized reliance. Although the Household Defendants have emphasized that their main purpose for deposing the Named Plaintiffs and their surrogates is to discover *facts about Household that were known to the market* — an indisputably common issue — Plaintiffs insist on reducing this dispute to a question of whether evidence as to an individual's own reliance or lack of reliance is germane to a class-wide litigation based on fraud on the marketplace allegations.

Magistrate Judge Nolan has already implicitly confirmed the relevance of information known to participants in the market by authorizing Defendants to depose various non-party stock analysts on this subject so long as they did not serve as investment advisors for the Named Plaintiffs. *See* Best Decl. Ex. 7 at 47. However, as direct participants in "the market" for Household securities, the Named Plaintiffs and their financial investment advisors (if any) can speak on the basis of their own due diligence to what information was known to the market, and may shed light on which allegedly omitted facts were in fact known to the market at relevant times.

Plaintiffs do not contest the significance of this type of information, but rather insist that Defendants may seek it only from persons other than the Named Plaintiffs or entities that advised them in connection with their purchase of Household securities. This distinction is both illogical and contrary to law. Federal Rule of Civil Procedure 26(b)(1) contemplates party discovery on "any matter, not privileged, that is relevant to the claim or defense of any party," and

it is well-settled that *any* truthful material information from *any* market or public source is relevant to the truth-on-the-market defense. *See Ley* v. *Visteon Corp.,* No. 05-Cv-70737-DT, 2006 U.S. Dist. LEXIS 65326, at *20-21 (E.D. Mich. Aug. 31, 2006)(finding that "the market was made aware of the [the company's] various deficiencies" through publications by market analysts, newspaper articles, and the company's prospectus which all could be said to provide knowledge attributable to the market); *In re Yukos Oil Co. Securities Litigation*, No. 04 Civ 5243, 2006 U.S. Dist. LEXIS 78067, at *66-71 (S.D.N.Y. Oct. 25, 2006) (finding that investors could not have been misled about the company president's political activities since his "secret" meeting with Vladimir Putin was reported in the news media, and newspapers were "saturated with references to [the president's] pro-Yeltsin, anti-Putin proclivity").

Plaintiffs' assumption that they and their advisors alone are immune from merits discovery until after a hypothetical liability round without their participation cannot be squared with their obligations under the Federal Rules or the PSLRA, which affirmatively requires purported class representatives to make themselves available to be deposed. 15 USC 78u-4(a)(2)(A)(iii) (The required certification of the representative party must state "that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary.").

Plaintiffs advance two additional arguments against permitting such discovery, neither of which is well-taken. They argue that Defendants do not need this discovery because Household tracked the public information affecting Household's stock price in its quarterly Investor Relations reports. Pl. Br. at 2. It is outrageous for Plaintiffs, as the recipients of a vast amount of burdensome discovery from Defendants, to suddenly demand a showing of "need" as a condition of the modest reciprocal discovery Defendants require. As Rule 26 imposes no such

condition, but rather allows discovery on "any" relevant, non-privileged matter, Plaintiffs' proposal of a one-sided good cause standard must be summarily rejected.

Plaintiffs also argue, unconvincingly, that the discovery is not "necessary" because the subject is more suitable for expert discovery. (These same Plaintiffs have suggested to the Court that Defendants be required to file their summary judgment motion *before* Plaintiffs have presented any expert evidence. *See* Plaintiffs' Status Conference Statement to Honorable Ronald A. Guzman In Advance Of January 10, 2007 Status Conference, submitted Jan. 8, 2007.) While expert discovery may well be helpful in evaluating the causative link between certain facts and stock price movement, expert testimony is not necessary on the subject of what facts were known to the market at a given time. *See King* v. *E.F. Hutton & Co., Inc.*, 117 F.R.D. 2, 5-6 (D.D.C. 1987)(finding that plaintiffs must answer interrogatories on the factual basis on which plaintiffs conclude they suffered a loss, even if later an expert will analyze the cause because "it is important to have the facts upon which the plaintiffs personally rely in claiming they had losses in order to test the factual basis for the expert's opinions"). Indeed, the case law discussing the truth on the market defense credits information from any public source, including newspaper articles and the like. *See In re Yukos Oil Co. Securities Litigation,* No. 04 Civ 5243, 2006 U.S. Dist. LEXIS 78067, at *66-71 (noting that because of "the wealth of publicly available information" about the company president's political activities and the fact that the newspapers were "saturated" with references to his political proclivities, reasonable investors could not have been misled if the company failed to disclose the company president's political activities). There is no valid basis for insulating the Named Plaintiffs and their advisors from questioning about the facts known to them to have been on the market at times relevant to Plaintiffs' claims.

The fallacy in Plaintiffs' logic is underscored by the fact that Named Plaintiff Glickenhaus is itself a sophisticated money manager likely to be a valuable source of information regarding facts available to the market regarding Household International and the factors that influenced the price of its securities at relevant time periods. According to its website, Glickenhaus manages a fund worth $1.3 billion, specializing in management of equity, balanced and fixed-income portfolios through a "professional staff [that] averages in excess of twenty years of investment experience." Moreover, Glickenhaus identifies itself as a "research house" and describes the intensive process that leads to the inclusion of a stock in its portfolio[7] (relevant pages are attached hereto at Exhibit 4). As it is undisputed that Household may ask truth on the market type questions to stock analysts that are strangers to this litigation, there is no principled basis for prohibiting Defendants from exploring the same line of questioning with a sophisticated Named Plaintiff such as Glickenhaus.

Requiring the named Plaintiffs and their surrogates to disclose the information in their possession on this and other relevant subjects is also consistent with the goals of the PSLRA, which envisioned an active role for Named Plaintiffs in securities fraud class actions. *See Mayo* v. *Apropos Technology, Inc.,* No 01 C 8406, 2002 U.S. Dist. LEXIS 1924, at *6 (N.D. Ill. Feb. 7, 2002)(explaining the PSLRA was designed to "curb perceived abuses in the litigation process—widespread initiation and manipulation—of securities class-actions by 'professional plaintiffs and lawyers").

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[7] Glickenhaus & Co., http://www.glickenhaus.com (last visited Jan. 8, 2007); *see also* Glickenhaus & Co., www.glickenhaus.com/philo_research.html (last visited Jan. 8, 2007) (noting the firm's strategy for research which involves "intensive due diligence on each company").

That the Household Defendants may learn information relating to individual defenses during depositions on class-wide issues is no reason to deny them this discovery. Without question the Lead Plaintiffs would have been subject to routine merits discovery during the class certification stage if Defendants had not stipulated to certification here, and their use of that stipulation as a shield against merits discovery flies in the face of its express terms, which affirmatively preserve all of Defendants' "substantive arguments concerning the claims of the named plaintiffs and/or the class." Best Decl. Ex. 3 at ¶ 4. Plaintiffs are in effect asking this Court to preserve all of the rights afforded to them under that stipulation while relieving them from their attendant obligations, including their duty to provide discovery that may well have an effect on summary judgment, trial, and even settlement strategy. Making the Household Defendants wait to take merits discovery of the Plaintiffs until after an envisioned trial limited to common issues of liability amounts to denying the right to take these depositions at all. By then, in the vernacular, the train of this litigation will have long left the station.

Magistrate Judge Nolan seems to have been persuaded to protect the Named Plaintiffs from pre-trial discovery in part by Plaintiffs' stated concern of diverting their resources in the few weeks remaining for the completion of fact discovery. Pl. Br. at 4. However, this supposed concern can be easily allayed by permitting the Household Defendants to pursue their depositions during a brief period after Plaintiffs have completed their discovery of the Household Defendants. Such a schedule would accommodate Defendants' discovery rights while allowing Plaintiffs to complete their discovery undistracted by the small number of depositions Defendants seek. Given the enormous burden Plaintiffs have imposed on Defendants through their oppressive discovery campaign over the last few years, Plaintiffs cannot seriously argue that this minor level of reciprocal discovery is too onerous, especially as the PSLRA requires named

plaintiffs to certify their willingness to "provid[e] testimony at deposition and trial, if necessary." 15 U.S.C. 78u-4(a)(2)(A)(iii).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Household Defendants' December 1, 2006 Objections, the Household Defendants respectfully request that this Court. sustain the Household Defendants' Objections to the Magistrate Judge's November 13, 2006 Memorandum Opinion and Order.

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Chicago, Illinois

Respectfully submitted,

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