IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

PHILIP E. BOYNTON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 1-02-1111-JPM-egb**
	)	
HEADWATERS, INC., *et al.*,	)	
	)	
Defendants.	)	**JURY DEMAND**

ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for Protective Order (Doc. 610) ("Motion"). Plaintiffs' Motion seeks to prohibit Defendant Headwaters from taking discovery from unnamed class members. By Order entered November 3, 2008, the Motion was referred for determination pursuant to Fed. R. Civ. Proc. 72(a).

Subjecting unnamed class members to discovery is generally not permitted. As one court recently noted, "one of the principal advantages of class actions would be lost if all class members were routinely subject to discovery." *Groth v. Robert Bosch Corp.*, 2008 WL 2704709, *1 (W.D. Mich. July 9, 2008) (internal citations omitted). Courts have allowed discovery to be taken from unnamed class members, however, when the information requested is relevant to the decision of common questions, the discovery is tendered in good faith and not unduly burdensome or harassing, the discovery does not require expert, technical or legal assistance to respond, and is not available from the representative parties. *See, e.g., Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340- 41 (7th Cir. 1974); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th Cir. 1986); *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977); *Collins v. International Dairy Queen*, 190 F.R.D. 629, 630-31 (M.D. Ga. 1999); *Hawkins v. Holiday Inns, Inc.* 1977 WL 1379 (W.D. Tenn. Feb. 28, 1977); *Kline v. First Western Government*

Securities, Inc.; 1996 WL 122717 (E.D. Pa. March 11, 1996). *But see Wainwright v. Kraftco Corp.*, 54 F.R.D. 532 (N.D. Ga. 1972) and *Fischer v. Wolfinbarger*, 55 F.R.D. 129 (W.D. Ky 1971) (holding that discovery against unnamed class members is never permitted because unnamed class members are not "parties" for discovery purposes). The party seeking discovery of unnamed class members bears the burden of proof as to why the discovery is necessary. The burden is heavy to justify asking questions by interrogatories, even heavier to justify depositions. *Clark v. Universal Builders, Inc.* at 340 - 41; *see also Groth v. Robert Bosch Corp.*, 2008 WL 2704709, *1 (W.D. Mich. July 9, 2008) ("The court should only allow discovery of absent class members upon a showing of 'particularized need'").

Here, Defendant Headwaters' proposed discovery includes depositions of all unnamed class members, twenty requests for documents, one set of interrogatories containing fourteen questions and over sixty sub-parts, and a second set of interrogatories containing nine questions and nineteen sub-parts. The exhaustive nature of the requests, their complex definitions and instructions, and legalese would certainly require the unnamed class members to obtain legal assistance in order to understand and answer the interrogatories and document requests at issue. *See Hawkins v. Holiday Inns, Inc.*; 1977 WL 1379, *2 (W.D. Tn. Feb. 28, 1977) (rejecting the defendant's complicated interrogatories because it was "difficult to conceive of the class members being willing or able to fully respond"); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532 (N.D. Ga. 1972) ("the usefulness of Rule 23 would end if class members could be . . . forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories."). In addition, many of the interrogatories require the class members to have an understanding of the law in order to answer them, such as listing the representations the class members assert were fraudulent. Answering such interrogatories would certainly require legal assistance, making

them unduly burdensome. In fact, in its Memorandum in Opposition to Plaintiff's Motion for Protective Order, Defendant Headwaters does not dispute that the unnamed class members would need legal assistance in order to respond to its proposed discovery.

The depositions Defendant Headwaters seeks to take would also require that the unnamed parties obtain legal counsel. As noted by the court in *Clark v. Universal Builders, Inc.*, because in a deposition "the passive litigants are required to appear for questioning and are subject to often stiff interrogation by opposing counsel," defendants must meet a more severe burden in showing why the depositions are needed. 501 F.2d 324, 341 (7th Cir. 1974). Defendant Headwaters has failed to make this showing; its arguments as to why the proposed discovery is necessary are not compelling in light of the burdensome nature of deposing all of the unnamed class members.

Because the discovery is unduly burdensome, the Court need not address whether Defendant Headwaters' discovery meets the additional criteria set forth above. Nevertheless, the Court notes that in spite of Defendant Headwaters' lengthy brief, it has failed to persuade the Court that the information sought is relevant to the decision of common questions rather than individual questions, and has failed to demonstrate that the information sought is not available from other sources. For example, Defendant Headwaters has provided no explanation as to why Interrogatories 8-10, which request information regarding attendees of Adtech's shareholder meetings and Adtech's officers and directors, could not be obtained from Adtech's records or from named class members.

The Court notes that Plaintiffs attempted to cooperate with defendant Headwaters' desire for information from unnamed parties by suggesting a non-mandatory questionnaire in lieu of the extensive discovery which is now at issue, which Defendant Headwaters summarily rejected.

Defendant Headwaters has not demonstrated any attempt to tailor the information it seeks, in spite of the fact that when courts have determined that discovery from unnamed class members is appropriate, it must be clear, concise, necessary and limited rather than burdensome. For this reason, non-mandatory questionnaires in plain language are often favored as an appropriate method of seeking discovery from unnamed class members. *See, e.g., Schwartz v. Celestial Seasonings, Inc.*, 185 F.R.D. 313 (D. Colo. 1999). In this case, this Court is of the opinion that such a non-mandatory questionnaire appropriately balances Defendant Headwaters' desire for information with Plaintiffs' concerns about the confusing and burdensome nature of Headwaters' proposed discovery.

For these reasons, the Motion for Protective Order (Doc. 610) is GRANTED. The discovery plan proposed by Defendant Headwaters is rejected. It is further ORDERED that Defendant Headwaters is permitted to serve unnamed class members with a non-mandatory questionnaire, not to exceed twelve questions including discreet sub-parts. The non-mandatory questionnaire should be in plain language, limited to common questions which do not require legal conclusions or assistance, and otherwise consistent with this Order. Defendant Headwaters is prohibited from taking any other discovery of unnamed class members absent a further order of this Court.

SO ORDERED this 30th day of January, 2009.

__s/ Edward G. Bryant__
EDWARD G. BRYANT
United States Magistrate Judge