

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

|                              |   |                       |
|------------------------------|---|-----------------------|
| Joseph Shanks,               | : |                       |
|                              | : |                       |
| Plaintiff,                   | : |                       |
|                              | : |                       |
| v.                           | : | Case No. 2:08-cv-1059 |
|                              | : |                       |
| Honda of America Mfg.,       | : |                       |
| et al.,                      | : | JUDGE FROST           |
|                              | : |                       |
| Defendants.                  | : |                       |
|                              | : |                       |
| Phillip M. Salyer, et al.,   | : |                       |
|                              | : |                       |
| Plaintiffs,                  | : |                       |
|                              | : |                       |
| v.                           | : | Case No. 2:08-cv-1060 |
|                              | : |                       |
| Honda of America Mfg., Inc., | : | JUDGE FROST           |
| et al.,                      | : |                       |
|                              | : |                       |
| Defendants.                  | : |                       |

ORDER

A discovery issue which has arisen in these cases is before the Court by way of letter briefs filed on August 31, September 1, and September 4, 2009 (#86-89 in Case No. 2:08-cv-1059). The Court also held a telephone conference with all counsel concerning this issue. For the following reasons, Honda's request that the Court compel plaintiff Shanks to provide certain documents will be denied.

I. The Issue

The issue presented by the parties' letter briefs is a discrete one. As explained in Honda's opening letter brief, the defendants have served document requests on the named plaintiffs for documents relating to those parties' investment activities

other than their investments in the Honda-sponsored 401(k) plan which is the subject of this litigation. Although the document requests are not attached to any of the letter briefs, they are described in Document #86 as a request for "documents relating to Plaintiffs' investment activities outside their 401(k) plan accounts during the putative class period," and the pertinent language from those requests is quoted in Document #87. The putative class period is, according to the complaint, the time from November 7, 2002 through the present. Complaint, ¶1. The parties have advised the Court that named plaintiff Joseph Shanks is the only named plaintiff who has engaged in outside investment activities during the class period, and therefore the only named plaintiff who has documents responsive to the requests.

The parties' positions on the relevance of these documents can be summarized thusly. Plaintiffs' claims are that Honda mismanaged their 401(k) accounts by allowing Merrill Lynch to charge excessive fees for its services to the Plan and that it concealed from the true costs charged to their accounts. According to Honda, if an ERISA plans offers to its participants (as this one does) the option to exercise control over their accounts, the claims of each potential class member must be analyzed on an individualized basis, and the level of sophistication of the plan participants is a factor relevant to their ability to recover damages. Thus, whether Mr. Shanks showed, in relation to his other investments, the type of sophistication that might undermine his claim against Honda is relevant both to the merits of his damage claim and to his suitability as a class representative.

Mr. Shanks, on the other hand, contends that the sole focus of this case will be on the actions of the defendants, and that any outside investment activities on his part, or on the part of other plan participants, is totally irrelevant. He also argues,

as an alternative basis for denying relief, that he had no outside investment activity during the time that he was a plan participant. According to his most recent submission (#89), although he has engaged in outside investment activity during the class period, all of it occurred after he withdrew his money from the 401(k) plan. As he puts it, “[t]he only outside investments Mr. Shanks possesses are those he currently has, created when he removed all assets from the Honda Plan and transferred them to another financial vehicle.” Thus, according to plaintiffs, even if the outside investment activity of a plan participant during that person’s status as a plan participant is relevant to the class claims, Mr. Shanks did not engage in any such activity and his outside investment documents would not be relevant.

## II. Discussion

Honda has cited to two decisions in support of its claim that the documents it has requested from Mr. Shanks are relevant. One of them, Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009), clearly holds that a particular affirmative defense (the “safe harbor” defense provided under 29 U.S.C. §1104(c) for plans which allow a participant “to exercise control over the assets in [the] account”) is available in a case involving similar allegations of breach of fiduciary duty under ERISA. However, that decision analyzed the defense from the standpoint of the allegations in the complaint and the plan documents alone, making no reference to the question of whether the sophistication or conduct of any individual plan participant has a bearing on the safe harbor defense.

The other case cited by Honda is Langbecker v. Electronic Data Systems, 476 F.3d 299 (5th Cir. 2007). That case also holds that a safe harbor defense is available in a class action challenging a plan fiduciary’s decision to offer certain allegedly unsuitable investments as part of the plan, but that it

does not necessarily defeat certification of a class or limit the ability of the court to grant equitable relief. Rather, it serves to limit the class members who are entitled to recovery; "the potential recovery is limited to those class members whose claims have not prescribed." Id. at 312. Thus, part of the focus of the case will necessarily be how participants reacted to information once they were provided with it, and, according to the Court of Appeals, the District Court must take into account "the extent to which §404(c) (29 U.S.C. 1104(c)) decisions by participants undermine the feasibility of class action treatment." Id. at 313.

Taken together, these cases simply point out that this Court will be called upon at some point to decide if a safe harbor defense is available to Honda under the particular facts of this case (which will include an inquiry into whether Honda provided adequate information to the plan participants concerning their investment options), and, if so, whether the availability of that defense either counsels against certifying a class action or permitting individual class members to recover. That still does not answer the question of whether information about Mr. Shanks' outside investment activity - which, as his letter brief asserts, occurred during the class period but only after he withdrew the money in his plan account - has any relevance either to the certification of a class, or to any individual damage claim he might later present (assuming that the Court certifies a class, finds Honda liable, and invites class members to present their claims).

Although Langbecker stands for the proposition that the availability of a §404(c) defense is pertinent to the issue of whether class treatment is appropriate, it does not go so far as to say that a named plaintiff to whom that defense might apply would not be a suitable class representative. In fact, it

appears to suggest just the opposite - that the defense might preclude individual class members from recovering damages, but that they would be permitted to participate in the case up to the point of asserting a damage claim, and could seek equitable relief on behalf of the class. Moreover, it is now known that Mr. Shanks did not simultaneously engage in both investment activity within the plan and investment activity outside of the plan, so the documents in question would not demonstrate anything about his level of awareness of the particulars of the plan-sponsored investments at the time he was a participant. Honda is certainly free to argue that the possibility that a §404(c) defense would apply individually to each class member militates against class certification, but information which might confirm that, at some point, any particular class member or even a named plaintiff may be subject to the defense seems unrelated to whether Mr. Shanks is an appropriate class representative or whether a class ought to be certified. The Court is not persuaded, at this point, that information about his outside investment activities subsequent to his participation in the plan would even bear on any damage claim he might have, but that type of discovery can certainly be postponed until such time, if ever, that the plaintiffs prove liability on a classwide basis and the Court may be called upon to evaluate individual damage claims.

### III. Disposition

Based on the foregoing, the Court, construing the letter briefs filed (and particularly Document #86) as a motion to compel responses to document requests #8 and #9, denies the motion.

Any party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The

motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp  
United States Magistrate Judge