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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.	)	No. 02 C 5893
HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

NOTICE OF FILING

To: Counsel on the Attached Service List

PLEASE TAKE NOTICE that on Tuesday, February 8, 2005, we filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois, the following documents:

Reply Brief in Support of Lead Plaintiffs' Motion for Protective Order Quashing the Household Defendants' Third-Party Subpoenas

Supplemental Declaration of Monique C. Winkler in Support of Lead Plaintiffs' Motion for Protective Order Quashing the Household Defendants' Third-Party Subpoenas

Compendium of Unreported Cases

copies of which are hereby served upon you.

Dated: February 8, 2005

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, Lori A. Fanning, one of the attorneys for plaintiffs, hereby certify that I caused the following documents:

Reply Brief in Support of Lead Plaintiffs' Motion for Protective Order Quashing the Household Defendants' Third-Party Subpoenas

Supplemental Declaration of Monique C. Winkler in Support of Lead Plaintiffs' Motion for Protective Order Quashing the Household Defendants' Third-Party Subpoenas

Compendium of Unreported Cases

to be served upon all counsel on the attached service list by sending a copy in pdf format by electronic mail this 8th day of February, 2005, except the following which was served by placing a copy in the United States Mail at 30 North LaSalle Street, Chicago, Illinois:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AG

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. 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 BRIEF IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR PROTECTIVE ORDER QUASHING THE HOUSEHOLD DEFENDANTS' THIRD-PARTY SUBPOENAS

I. INTRODUCTION

This securities class action with hundreds of thousands of Class members was certified by this Court on December 3, 2004. Yet, the Household Defendants have propounded subpoenas seeking discovery from the third-party investment advisors of one single plaintiff, PACE Industry Union-Management Pension Fund ("PACE").[1]

The Household Defendants' response brief to plaintiffs' motion to quash underscores the impropriety of the discovery they seek. Incredibly, they contend that "[i]f PACE's claim has a

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[1] The Household Defendants originally propounded 14 subpoenas. *See* Ex. A to the Winkler Decl., filed on January 11, 2005. Since then, they have withdrawn three subpoenas: Shields Associates, Highland Capital Management, L.P., and Thomson Financial. PACE amended its interrogatory responses to inform the Household Defendants that neither Shields Associates nor Thomson Financial served as an outside advisor to PACE. *See* Best Decl., Ex. 1. Highland Capital Management, formerly known as First Tennessee Investment Management, Inc., did serve as an outside advisor to PACE management (*see id.*; Ex. A at 10-13 to the Supplemental Declaration of Monique C. Winkler ("Supp. Winkler Decl.") filed concurrently herewith); however, the Household Defendants served the wrong "Highland Capital" entity. *See* Supp. Winkler Decl., Ex. B.

defect for want of proving reliance, then not only does PACE's claim fail, but defendants will argue that the class that PACE represents cannot rely on the fraud on the market theory." Defs' Mem. at 10. The entire premise for the discovery sought by the Household Defendants is based upon a significant misconception of the law. Even if the Household Defendants can rebut the presumption of one plaintiff's reliance – which they cannot for PACE – it is not sufficient to defeat the fraud-on-the-market theory for the Class. A single plaintiff's reliance or non-reliance on the market does not represent the experience of a class of hundreds of thousands of individuals of which this Class is comprised. *In re Lucent Techs. Inc. Sec. Litig.*, Civil Action No. 00-621 (JAP), 2002 U.S. Dist. LEXIS 8799, at **4-5 (D.N.J. May 7, 2002) (discovery as to the investment behavior of 41 plaintiffs in a class of hundreds of thousands held not to be probative of the question of classwide reliance on the market). Short of discovery from every single plaintiff, or a majority of them, defendants cannot rebut the presumption of fraud on the market on a Classwide basis through the use of individual plaintiff's investment histories. The Household Defendants' assurances that they do not intend to propound discovery on every Class member further highlight the futility of the discovery sought.

Strangely, defendants stipulated to class certification ***after*** deposing the PACE Fed. R. Civ. P. 30(b)(6) witness Maria Wieck. Nonetheless, the Household Defendants attempt to relitigate class certification by attacking PACE's adequacy as a Class representative because it delegated its investing functions to investment advisors. In this District, PACE's conduct is not only appropriate, it is considered a fulfillment of a pension fund's fiduciary duties. *See In re NeoPharm, Inc. Sec. Litig.*, No. 02 C 2976, 2004 U.S. Dist. LEXIS 16287 (N.D. Ill. Aug. 17, 2004). Although counsel for the Household Defendants are well aware of this authority, they fail to present it to the Court. Supp. Winkler Decl., ¶2. Instead, they use up several pages attacking PACE. Even more egregious is the fact that defendants have most of the documents they now seek from the third-party subpoenas.

"A subpoena is obviously unduly burdensome if the ***information is wholly irrelevant under any reasonable legal theory***, if the subpoena was issued for the purpose of harassment or if the party issuing the subpoena did not, in good faith, believe, after reasonable inquiry, that the subpoena was not unduly burdensome or expensive ...."[2] *Builders Ass'n of Greater Chicago v. City of Chicago*, 215 F.R.D. 550, 554 (N.D. Ill. 2003). Because the Household Defendants' discovery of PACE's investment advisors cannot rebut the Class' presumption of reliance, defendants' need for this discovery is clearly outweighed by the burden imposed on the third-party investment advisors, and, more significantly, the Class as a whole. *See Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 559 (7th Cir. 1984). Thus, good cause exists to issue a protective order. Moreover, because this Court is authorized under Fed. R. Civ. P. 26(b)(2) to manage the litigation in an efficient and expeditious manner, it should order the Household Defendants to withdraw their outstanding third-party subpoenas and to halt further discovery into individualized issues until after Classwide liability has been determined.

II. ARGUMENT

A. The Household Defendants Cannot Defeat the Classwide Fraud-on-the-Market Theory Through Evidence of One Plaintiff's Lack of Reliance

The Household Defendants' assertion that "[i]f PACE's claim has a defect for want of proving reliance, then not only does PACE's claim fail, but defendants will argue that the class that PACE represents cannot rely on the fraud on the market theory" tellingly demonstrates the flawed legal theory upon which they seek discovery. Defs' Mem. at 10. The United States Supreme Court has held that plaintiffs in a securities fraud class action are permitted to rely on the presumption of the fraud-on-the-market theory in proving reliance. *Basic Inc. v. Levinson*, 485 U.S. 224, 247

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[2] All citations and internal quotations are omitted and all emphasis is added.

(1988).[3] The Seventh Circuit and courts in this District have recognized the viability of the fraud-on-the-market theory. *See, e.g., Eckstein v. Balcor Film Investors,* 8 F.3d 1121, 1129-30 (7th Cir. 1993); *Tatz v. Nanophase Techs. Corp.,* No. 01 C 8440, 2003 U.S. Dist. LEXIS 9982, at **21-22 (N.D. Ill. June 12, 2003). The Household Defendants have cited ***no*** authority supporting their argument that they can defeat Classwide reliance by rebutting the presumption against one solitary plaintiff.[4]

The Household Defendants contend that they "may rebut the presumption of reliance that results from the 'fraud on the market' theory by exploring the investment history and decision-making of plaintiffs." Defs' Mem. at 9. But certainly, one plaintiff's investment behavior and decision-making cannot constitute a defense against the Class as a whole. "[A] rebuttal of reliance by a particular class member must necessarily be on an individual basis because there can be no class presumption of nonreliance." Alba Conte and Herbert B. Newberg, 7 *Newberg on Class Actions*, §22:61, at 285 (4th ed. 2002).[5] This is true particularly in light of the fact that this attempt of rebuttal is likely meritless as it is doubtful that "a defendant would be able to prove in many

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[3] The presumption is also supported by common sense and probability. "[I]t is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" *Id.* at 246-47.

[4] The Household Defendants and Arthur Andersen LLP's ("Andersen") contention that the Class Certification Stipulation provision that "nothing herein precludes the parties from making any and all substantive arguments concerning the claims of named plaintiffs and/or the Class," somehow expressly sanctions the discovery sought, makes little sense. Defs' Mem. at 9; AA Mem. at 2-3. This provision merely articulates rights defendants already had. It does not permit them to engage in discovery that has no basis in law or fact.

[5] The Household Defendants emphatically assure this Court they are not seeking discovery from the "hundreds of thousands of absent Class members," but "merely seek discovery from the investment advisors of one of the plaintiffs who has assumed the responsibility of serving as a Class Representative." Defs' Mem. at 6. In light of this, the discovery they seek makes even less sense.

instances to a jury's satisfaction that a plaintiff was indifferent to a material fraud." *Blackie v. Barrack*, 524 F.2d 891, 906, n.22 (9th Cir. 1975).

Moreover, the Household Defendants concede that it would be preposterous for them to drag every Class member through discovery. *See* Defs' Mem. at 6 ("Plaintiffs ... raise the specter of the Household Defendants seeking discovery of 'hundreds of thousands of absent Class members.' ***Of course, this is not the case.***"). The only possible conclusion to be drawn from this is that the Household Defendants either misunderstand the law or truly intend to distract from proper merits discovery. If this Court were to allow the Household Defendants to sidetrack Class discovery, and they are unsuccessful in rebutting the presumption of reliance against PACE, would they propound discovery on the investment advisors/brokers of every absent Class member? There would be no utility of the class action device if the discovery sought by the Household Defendants were allowed to proceed.[6]

Defendants cite *Easton & Co. v. Mutual Benefit Life Ins. Co.*, Civ. No. 91-4012 (HLS), 1994 U.S. Dist. LEXIS 12308 (D.N.J. May 18, 1994), for the argument that "courts have recognized that defendants can defeat the fraud on the market theory of reliance on a ***class wide basis*** by showing that ***many of the class members*** did not rely on the integrity of the market in purchasing and selling the securities in question." Defs.' Mem. at 10 (first emphasis in original). Significantly, the class in *Easton* consisted of only 160 members, in contrast to the hundreds of thousands of members at issue here. 1994 U.S. Dist. LEXIS 12308, at *4. Similarly, in *In re Folding Carton Antitrust Litig.*, 83

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[6] Assuming *arguendo* that the Household Defendants successfully showed that PACE did not rely on the market, there are two other Class representatives and any one of the hundreds of thousands of Class members would have the opportunity to substitute itself as Class representative. *See Birmingham Steel Corp. v. TVA*, 353 F.3d 1331, 1339 (11th Cir. 2003); *Schlick v. Penn-Dixie Cement Corp.*, 551 F.2d 531, 533 (2d Cir. 1977) ("there may be a readily available substitute class representative if the court finds the named plaintiff to be in a conflicting or untenable position").

F.R.D. 260 (N.D. Ill. 1979), the size of the class was only 66 members. Defs' Mem. at 11.[7] In an *Easton* or *Folding Carton*-type situation, it might be possible that "if the discovery shows that a ***significant number of class members*** who were purchasers in the market had information ..., it would tend to prove that the market was not defrauded, and thus the benefit of the 'fraud on the market' presumption would be unavailable on a common basis to any of the class members." *Easton*, 1994 U.S. Dist. LEXIS 12308, at **9-10. Discovery as to the investment behavior of a handful of plaintiffs in a class of hundreds of thousands has been held not to be probative of the question of classwide reliance on the market. *Lucent*, 2002 U.S. Dist. LEXIS 8799, at **4-5. In fact, the *Lucent* court explicitly distinguished *Easton* noting that in that case "[t]he small class size established a strong possibility that discovery of individual class members would be probative of the overall class experience," but found that there was no basis for concluding that the 41 non-representative named plaintiffs could fulfill the same purpose as to a class of thousands. *Id.* at **5-6.

Other cases cited by the Household Defendants are similarly inapposite. Defs' Mem. at 9-10. All but the *In re Grossman v. Waste Mgmt., Inc.*, 589 F. Supp. 395 (N.D. Ill. 1984) case are pre-class certification cases focusing on the use of a plaintiff's investment history to challenge a plaintiff's adequacy or typicality to represent the class. *See, e.g., In re SciMed Life Sec. Litig.*, Civil No. 3-91-575, 1992 U.S. Dist. LEXIS 22144 (D. Minn. Nov. 20, 1992); *In re Grand Casinos, Inc. Sec. Litig.*, 181 F.R.D. 615 (D. Minn. 1998); *Roseman Profit Sharing Plan v. Sports & Recreation*, 165 F.R.D. 108 (M.D. Fla. 1996); *In re Harcourt Brace Jovanovich, Inc. Sec. Litig.*, 838 F. Supp. 109 (S.D.N.Y. 1993); *Feldman v. Motorola, Inc.*, No. 90 C 5887, 1992 U.S. Dist. LEXIS 8157 (N.D. Ill. June 9,

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[7] Significantly, the fraud-on-the-market theory has no application in antitrust cases.

1992).[8] The reasoning in those cases is simply inapplicable here because the Household Defendants not only agreed to class certification but, indeed, suggested certification by stipulation and entered into the stipulation after deposing the PACE Fed. R. Civ. P. 30(b)(6) witness, Maria Wieck.

Grossman, 589 F. Supp. 395, cited by defendants, is also inapposite. Defs' Mem. at 10. Information bearing upon a plaintiff's investment history is relevant ***only*** to rebut the presumption of reliance by that individual plaintiff, not to rebut fraud on the market or in other words – classwide reliance. Indeed, the court in *Grossman* found that the "fraud on the market" theory of recovery was a viable means of proving 10b-5 liability and allowed the class the presumption of reliance even where one of the three class representatives was found not to have relied. 589 F. Supp. at 403-15.

Because the discovery sought by the Household Defendants will not support any reasonable legal theory to rebut classwide reliance, it should not be allowed.

B. The Household Defendants' Attempts to Relitigate the Propriety of Class Certification Evidences Bad Faith and Should Not Be Countenanced

The Household Defendants' argument that PACE invited the discovery at issue here (i) is an improper after-the-fact attempt to relitigate class certification issues and (ii) blatantly ignores on-point case law from this District. Using almost three pages of argument, the Household Defendants attack PACE and Ms. Wieck, implying that the documents produced and the testimony given was somehow inadequate.

Significantly, a court in this district recently found a similar plaintiff to be an adequate class representative. In *NeoPharm,* 2004 U.S. Dist. LEXIS 16287, lead plaintiff Local 66 Operating Engineers Construction Industry and Miscellaneous Pension Fund-Pittsburgh ("Operating

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[8] Additionally, in some of these cases, common law causes of fraud or negligent misrepresentations were asserted requiring proof of direct or actual reliance. *See SciMed Life*, 1992 U.S. Dist. LEXIS 22144; *Harcourt Brace Jovanovich*, 838 F. Supp. 109; *Easton*, 1994 U.S. Dist. LEXIS 12308.

Engineers") sought class certification and appointment as class representative in a securities fraud case against NeoPharm, Inc. and two individual defendants (collectively, "NeoPharm"). In opposition, NeoPharm argued that Operating Engineers did not satisfy the typicality and adequacy of representation requirements under Fed. R. Civ. P. 23(a) because it delegated the decision to purchase or sell Neopharm stock to an investment advisor as PACE did here. *NeoPharm*, 2004 U.S. Dist. LEXIS 16287, at **8-15. NeoPharm also argued that Operating Engineers did not produce a qualified representative to testify on its own behalf because the representative had no specific knowledge about the transactions in NeoPharm stock, similar to PACE's representative here. *Id.* at *10.

Judge Joan Humphrey Lefkow disagreed with NeoPharm finding:

> Congress anticipated and ***intended large institutional investors to oversee securities cases***. Because Operating Engineers is a pension fund, it lacks the investment expertise and, more likely than not, its fiduciary duties would preclude it from making investment decisions on behalf of its beneficiaries. Thus, ***to prohibit such an institutional investor from serving as a class representative merely because it delegated investment responsibilities to a money manager would appear be [sic] in tension with the PSLRA....***
>
> Operating Engineers (1) promulgated detailed investment guidelines which its money managers followed when making investments on its behalf; (2) conducted periodic reviews of its money managers' investments so as to monitor and control their activity; (3) used an investment advisor to monitor the money managers, compare their performance and regularly report directly to the trustees of the Fund; and (4) retained counsel on an on-going basis to monitor its investment portfolio in order to gain advice as to any potential securities laws violations. The court finds this ... ***more than sufficient in the case of a [sic] institutional investor to illustrate involvement in and awareness of the financial affairs at issue.***

Id. at **13-15.

Similarly here, PACE's representative testified that PACE had detailed investment guidelines for its money managers, reviewed its money managers' investments so as to monitor and control their activity, used an investment consultant to monitor the managers, and retained counsel on an on-going basis to monitor its investment portfolio. Supp. Winkler Decl., Ex. A. Thus, the *NeoPharm*

case makes clear that PACE is an adequate class representative, notwithstanding that it delegated its investment-making decisions to professionals in fulfillment of its fiduciary duties. Any suggestion by the Household Defendants to the contrary is much ado about nothing.

Further, the Household Defendants' argument begs the question: If the Household Defendants in fact believed that PACE invited the discovery at issue here, *i.e.*, that the information provided by PACE was wholly inadequate, why did the Household Defendants not seek this information prior to stipulating to certify the Class? Defendants were given an opportunity to seek additional discovery to oppose class certification. They chose – after hearing Ms. Wieck's testimony – to stipulate to a class.

Finally, not only do the Household Defendants ignore this case law directly on point, but they also selectively ignore documents produced by PACE. PACE already has produced much of the information the Household Defendants seek through the subpoenas at issue here. PACE produced documents reflecting all its trades in the securities at issue in this case, its detailed investment guidelines outlining policies, procedures and criteria for investing and its agreements with investment managers.[9] Even with all these documents, the Household Defendants are unable to specifically provide an iota of evidence indicating that PACE somehow did not rely on the integrity of the market and suggesting the need for further discovery. Accordingly, the Household Defendants' efforts to harass PACE and its investment advisors should not be tolerated.

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[9] These documents are confidential PACE financial information. Protective Order, ¶3. Should the Court wish to examine these documents, PACE would gladly submit them *in camera* for the Court's inspection.

C. The Household Defendants Should Not Be Permitted to Sidetrack Merits Discovery Since Issues of Classwide Liability Take Precedence Over Individualized Issues of Reliance

Even if this Court finds the Household Defendants' discovery is arguably relevant to the merits of the case, it should order that discovery not be conducted until after Classwide liability has been determined. The class action device was designed to promote judicial efficiency and to provide aggrieved persons a remedy when individual litigation is economically unrealistic, as well as to protect the interests of absentee class members. *In re Initial Pub. Offering Sec. Litig.*, 21 MC 92 (SAS), 2004, WL 2297401, at *17 n.210 (S.D.N.Y. Oct. 13, 2004). The Household Defendants should not be allowed to erode the efficiency thereby created by wasting valuable resources of the Class on individualized issues prior to Classwide liability having been determined. *See Newberg on Class Actions*, §22.61, at 283-85 ("rebuttal of individual reliance ... may be resolved after trial on common issues," and "judicial economy is better served by a focus upon the materiality of the challenged representations or omissions rather than on individual reliance").

It is well established that individualized issues of reliance ought to be adjudicated at a later stage after classwide issues have been determined. *See Lucent*, 2002 U.S. Dist LEXIS 8799, at *6 ("The discovery sought by Lucent instead may be appropriate at a later stage in the case, in which individualized rebuttal proceedings may be pursued to determine whether a claimant may recover, once the matter of liability had been adjudicated."); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985) (court recognized that individual questions as to reliance lurk in every 10b-5 action and, rather than eliminate securities class actions, it would be more efficient to order separate trials, if necessary, limited to the issue of reliance); *Biben v. Card*, 789 F. Supp. 1001 (W.D. Mo. 1992) (court ordered that the ***first phase of trial should address liability*** and the true value of the shares and the second proceeding should determine individual class member's damages and to hear any evidence rebutting the presumption of reliance individually as to each class member); *Seidman v.*

Stauffer Chem. Corp., Civil No. B-84-543 (TFGD), 1986 U.S. Dist. LEXIS 30264, at *17 (D. Conn. Jan. 17, 1986) (the court is free to hold separate trials on the issues of reliance and damages); *In re Laser Arms Corp. Sec. Litig.*, 794 F. Supp 475 (S.D.N.Y. 1989) (after finding that individualized issues of reliance did not predominate in a class certification context, court stated that, "[i]f at a later stage of the proceedings the Court determines that the fraud on the market theory is not applicable because [the company's] securities did not trade in an efficient market, the Court could simply order separate hearings on the reliance issue"); *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479, 485-89 (S.D. Fla. 1996) (in a case dealing with the commodities corollary to Rule 10b-5, court permitted action to proceed as a class action on the common issues, *i.e.*, all issues except reliance, and ***subsequent to the jury verdict***, court would confer with the parties to develop an appropriate, manageable and lawful procedure to allow the defendants to present proof of non-reliance on an individual basis).

Thus, the discovery sought by the Household Defendants is improper at this stage of the litigation and good cause exists for entry of the protective order requested by plaintiffs. *See Builders Ass'n of Greater Chicago*, 215 F.R.D. at 554.

D. Because There Is No Discernable Purpose for the Subpoenas, the Discovery Sought Results in Undue Delay and Constitutes Harassment

As established above, the Household Defendants discovery of PACE's investment advisors is not designed to rebut the presumption of fraud on the market. Rather, it is designed to forestall proper discovery by the plaintiffs, thereby wasting valuable Class resources and burdening the Class as a whole.

Plaintiffs' concerns regarding waste of valuable Class resources are far from a red herring. Defs' Mem. at 14-15. While the Household Defendants point out that they produced over 2.4 million pages in response to Plaintiffs' First Request for Production of Documents from Household

Defendants ("Plaintiffs' First Request"), propounded on May 17, 2004, they neglect to inform the Court that the vast majority of these documents had already been previously produced in other proceedings. Supp. Winkler Decl., Ex. C. They also neglect to inform the Court that it has taken them over eight months to produce these documents, despite the fact that the documents had already been assembled, reviewed for privilege and produced before. *Id.* The Household Defendants have not even completed production of previously produced documents let alone documents unique to this case. Further, the Household Defendants have not even begun production on approximately 19 of the requests in Plaintiffs' First Request. *Id.*

Moreover, to date, despite numerous meet and confers between the parties, the Household Defendants have been unable to provide adequate interrogatory responses giving the factual bases for their affirmative defenses or to produce complete sets of organizational charts. Supp. Winkler Decl., Exs. C-D. Given the excruciatingly slow progress of Class discovery, the parties should not be further distracted by discovery on individualized issues when the Household Defendants have no realistic possibility of success in rebutting the presumption of the fraud-on-the-market theory for the Class by attacking PACE's reliance.

E. The Third-Party Subpoenas Are Also Improperly Overbroad and Vague

As discussed above, the third-party subpoenas are improper and should be quashed. If the Court determines that the Household Defendants should be permitted this discovery, it should limit the scope of the discovery to the Class Period and for Household securities only.

With a few limited exceptions, the Household Defendants have refused to produce documents outside the Class Period. Supp. Winkler Decl., ¶3. This same standard should be imposed on them.

The Household Defendants' argument that PACE's transactions in HSBC Holdings, plc ("HSBC") securities can properly be discovered, is inconsistent. On the one hand, in their

opposition, the Household Defendants argue that PACE's investment in HSBC is relevant because HSBC became related to Household via corporate merger; yet, on the other hand, the Household Defendants did not identify HSBC in their Initial Disclosures as having discoverable information even though HSBC would surely possess information as to whether PACE held HSBC securities.

In any event, whether or not PACE held HSBC securities in 2002 is irrelevant. The Household Defendants' contention that such holding would arguably signify confidence in Household is absurd. Defs' Mem. at 13. HSBC is Europe's largest bank and any holding in HSBC surely signifies an investor's confidence in that bank but certainly not in Household, which according to *Barron's* was grabbed by HSBC at a "slender price." [Corrected] Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("Complaint"), ¶31. Furthermore, the Complaint alleges that only after the Class Period and after the revelations of two charges totaling over $1 billion, did Household decide to sell to HSBC at a bargain-basement price.[10] Complaint, ¶¶6, 30-31.

Finally, PACE has already produced documents reflecting transactions in Beneficial Corporation securities. Again, even with this information, the Household Defendants are unable to articulate any argument that PACE may not have relied on the integrity of the market and suggesting the need for further discovery.

III. Andersen's Arguments Lack Merit

Andersen has not served any third-party subpoenas or any other discovery requests in this litigation. Yet Andersen complains that plaintiffs have not satisfied their obligations to meet and

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[10] Although these facts indicate that production of documents by the Household Defendants regarding the HSBC merger would be relevant to plaintiffs' claims, they do not support the argument that production of information regarding PACE's transactions in HSBC securities would be relevant to any defense. Thus, plaintiffs are not trying to "have it both ways;" rather plaintiffs recognize the different burdens of proof and that different types of information are necessary to prove versus defend a securities fraud case. Defs' Mem. at 14.

confer with Andersen prior to filing their motion seeking a protective order quashing the Household Defendants' third-party subpoenas. AA Mem. at 1. Because the dispute at issue here arose as a result of discovery served by the Household Defendants, neither plaintiffs nor the Household Defendants deemed Andersen's presence necessary at meet and confers. Thus, plaintiffs did not violate any obligation to meet and confer with Andersen.

Also, plaintiffs are not attempting to preclude defendants from making any and all substantive arguments concerning the claims of the named plaintiffs and/or the Class. *See* Stipulation and Order Regarding Class Action Certification; AA Mem. at 2-3. However, where discovery that has the specific stated purpose of rebutting the presumption of reliance, but is in fact irrelevant to rebut that presumption, it should not be permitted to go forward. *See Lucent*, 2002 U.S. Dist. LEXIS 8799. Further, while the Court has not bifurcated discovery into Classwide liability and individualized defense issues, it has discretion to manage this litigation and all matters relating to discovery. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002); *Eisenberg*, 766 F.2d 770 (rather than eliminate securities class actions, it would be more efficient to order separate trials, if necessary, limited to the issue of reliance). It follows then that Andersen's argument that plaintiffs' attempt to challenge this Court's May 25, 2004 order, is nonsense. Thus, in a class of hundreds of thousands of Class members, where individualized discovery will certain require great time and resources of the plaintiff Class, it is more efficient and expeditious to focus discovery on Classwide liability.

IV. CONCLUSION

Plaintiffs have shown good cause for entry of a protective order. For all the foregoing reasons and arguments outlined in their opening brief, plaintiffs respectfully request this Court order the Household Defendants to withdraw the outstanding third-party subpoenas and prohibit further individualized discovery until after Classwide liability has been determined.

DATED: February 8, 2005

Respectfully submitted,

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