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

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



**LEAD PLAINTIFFS' MOTION FOR PROTECTIVE ORDER QUASHING THE HOUSEHOLD DEFENDANTS' THIRD-PARTY SUBPOENAS**

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## I. INTRODUCTION

Pursuant to express leave of Court, lead plaintiffs and class representatives, the Glickenhaus Institutional Group, through this Motion for Protective Order Quashing the Household Defendants' Third-Party Subpoenas ("Motion"), hereby respectfully move this Court pursuant to Federal Rules of Civil Procedure 26, 45 and Local Rule 37.2 for an Order requiring the Household Defendants to withdraw their outstanding third-party subpoenas and prohibiting defendants from pursuing further discovery related to individual claims and defenses until after class-wide liability has been determined.

Lead plaintiffs seek this relief because the discovery the Household Defendants seek is related to the adequacy and typicality of PACE Industry Union-Management Pension Fund ("PACE") to represent the Class in this action. [1] At this stage of this litigation, the Household Defendants' inquiry is unnecessary given that defendants have stipulated to PACE's fitness as a Class representative, and the Court, by virtue of its December 3, 2004 Order, has agreed. Indeed, many of the documents sought by the third-party subpoenas were already produced by PACE to defendants in response to class certification discovery served by the Household Defendants.

Accordingly, Household Defendants' third-party subpoenas should be quashed because they (1) are irrelevant to any legal theory or defense impacting the Class as a whole (2) seek information already in defendants' possession and (3) were issued solely for the purpose of harassing plaintiffs and further delaying merits discovery on common issues related to the Class.

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[1] The Class is identified as "all persons who purchased or otherwise acquired the securities of Household International, Inc. (as defined in the [Corrected] Amended Consolidated Class Action Complaint for Violations of the Federal Securities Laws)("Household") between October 23, 1997 and October 11, 2002." *See* Stipulation and Order Regarding Class Action Certification ("Class Certification Stipulation"), ¶1.

## II. PROCEDURAL OVERVIEW AND STATEMENT OF COMPLIANCE WITH LOCAL RULE 37.2

On October 8, 2004, the parties in this litigation entered into a stipulation to certify a class. On December 3, 2004, the Court, "having fulfilled its independent duty to ensure that all of the requirements of Fed. R. Civ. P. 23 are met and having found the requirements are satisfied and that the interest of the unnamed class members will be adequately protected by the Class representative and class counsel," entered an order certifying the Class. *See* December 3, 2004 Minute Order.

On December 6, 2004, the Household Defendants served third-party subpoenas seeking documents from 14 current and former investment advisors and administrators of PACE which lead plaintiffs received on December 7, 2004 (the "Third-Party Subpoenas").[2] Ex. A.[3] The Third-Party Subpoenas seek production of documents related to investments in Household International, Inc. ("Household"), Beneficial Corporation ("Beneficial") and HSBC Holdings, plc ("HSBC") securities on behalf of Class representative PACE from January 1, 1997 to December 31, 2003. *Id.* The time period is significantly beyond the scope of the Class Period at issue in this litigation – October 23, 1997 to October 11, 2002. In addition, three of the subpoenas seek depositions pursuant to Fed. R. Civ. P. 30, without identifying any categories of testimony sought from the respective third party.[4]

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[2] The Third-Party Subpoenas were served on Alliance Capital Management, L.P., Bank of New York ("BONY"), Batterymarch Financial Management, Inc., Highland Capital Management, L.P., ICC Capital Management, Inc., Independent Fiduciary Services, Inc. ("IFS"), McMorgan & Company, Security Asset Management, Shields Associates, Thompson, Siegel & Walmsley, Inc., Thomson Financial, Valenzuela Capital Partners, LLC ("Valenzuela"), Weaver C. Barksdale & Associates ("Weaver Barksdale"), and Wright Investors' Service ("Wright").

[3] All exhibits ("Ex.") are attached to the Declaration of Monique C. Winkler in Support of Lead Plaintiffs' Motion for Protective Order Quashing the Household Defendants' Third-Party Subpoenas ("Winkler Decl."), filed concurrently herewith.

[4] Defendants demanded depositions of PACE's custodian and investment advisor BONY, and investment advisors Weaver Barksdale and Valenzuela. *Id.* The Third-Party Subpoenas served on Thomson Financial and Shields Associates were subsequently withdrawn. Exs. B-C. Third parties Security Asset Management, Valenzuela, Weaver Barksdale, and Wright all have written counsel for Household to inform

On December 9, 2004, lead plaintiffs (through counsel Azra Mehdi, Monique Winkler, and Luke Brooks) met and conferred with Household Defendants (through counsel Landis Best, Josh Newville, and Josh Greenblatt) regarding the withdrawal of the Third-Party Subpoenas. During this meet and confer, the Household Defendants informed lead plaintiffs that the purpose of the Third-Party Subpoenas was to test plaintiffs' fraud-on-the market theory on an individual level. Winkler Decl., ¶3. Lead plaintiffs explained that the fraud-on-the-market theory was not rebuttable through a single class representative and where a class is already certified (especially pursuant to an agreed-upon stipulation, as in this case), the emphasis of merits discovery is on issues common to the Class as a whole, rather than individualized issues. *Id.*

The Household Defendants agreed to review the relevant caselaw, but declined to withdraw the Third-Party Subpoenas at that time. *Id.* In light of Household Defendants' position and the upcoming holiday season, lead plaintiffs requested on extension of time in order to prepare an appropriate response to the Third-Party Subpoenas, or seek relief from the Court. *Id.*

On December 10, 2004, the Household Defendants granted lead plaintiffs' request for an extension until January 14, 2005 for responses or objections to the Third-Party Subpoenas. Winkler Decl., ¶4. On December 13, 2004, the Household Defendants advised the third parties that the return date for the Third-Party Subpoenas had been extended to January 14, 2005.[5] *Id.*

On December 14, 2004, lead plaintiffs (Monique Winkler and Luke Brooks) again met and conferred with the Household Defendants (Landis Best) to ascertain what their position was with respect to withdrawing the Third-Party Subpoenas. Winkler Decl., ¶6. The Household Defendants

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them that they have ***no information*** regarding transactions in the securities identified in the subpoena and requested that Household withdraw its respective subpoenas. Exs. D-G. Household has refused to withdraw these subpoenas. Winkler Decl., ¶9.

[5] The Household Defendants separately granted an extension until January 19, 2005 to BONY at the request of that third party. Winkler Decl., ¶5.

informed lead plaintiffs that they were still considering their response. *Id.* Further, the Household Defendants agreed that motion practice related to the Third-Party Subpoenas, if any, should be before the Honorable Judge Nan R. Nolan in the Northern District of Illinois. Ex. H.

On December 16, 2004, lead plaintiffs (Monique Winkler and Sylvia Sum) met and conferred with the Household Defendants (Landis Best, Craig Kesch, and Josh Newville) again. Winkler Decl., ¶7. During this meet and confer, the Household Defendants refused to withdraw the Third-Party Subpoenas. *Id.* They claimed though that they would withdraw all Third-Party Subpoenas (including those where a deposition was noticed) where the third party had communicated to the Household Defendants that they did not have any responsive documents. *Id.* Lead plaintiffs informed the Household Defendants that they would move the Court for relief on those subpoenas that were not withdrawn. *Id.*

On January 5, 2005, lead plaintiffs (Monique Winkler) met and conferred with the Household Defendants (Josh Newville) regarding the withdrawal of all Third-Party Subpoenas (including those where a deposition was noticed) where the third party had communicated to the Household Defendants that they did not trade in Household, Beneficial or HSBC securities on behalf of PACE during the time period referenced in the Third-Party Subpoenas. Winkler Decl., ¶8. The Household Defendants indicated that they were still evaluating whether they might discover information from these entities, specifically information regarding advice to PACE not to purchase Household, Beneficial or HSBC securities. *Id.* Lead plaintiffs again sought the Household Defendants' position on this issue through a facsimile letter dated January 6, 2005. Ex. I.

On January 7, 2004, during a telephone conversation regarding various pending issues, the Household Defendants (Landis Best) confirmed to lead plaintiffs (Azra Mehdi) that they would not withdraw the Third-Party Subpoenas. Winkler Decl., ¶9. Lead plaintiffs informed the Household Defendants that they would move the Court for relief. *Id.*

As demonstrated above, lead plaintiffs have satisfied the requirements of L.R. 37.2 by detailing their attempts to resolve this issue with the Household Defendants.

## III. ARGUMENT

### A. Legal Standard

Trial courts "have broad discretion in matters relating to discovery." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002). And, the Court is expressly authorized to take steps to manage the litigation before it in an efficient and expeditious manner. *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004).

Pursuant to Fed. R. Civ. P. 26(b)(2), the Court may limit discovery

> if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2).

Further, under Rule 26(c), it is clear that "for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (1) that the disclosure or discovery not be had." Fed. R. Civ. P. 26(c)(1). The Court has discretion to decide when a protective order is appropriate and what degree of protection is required. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Only good cause is required in determining whether or not to issue a protective order. *Id.* at 37.

"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 unreasonable or unduly burdensome or expensive for the reasons indicated." *Builders Ass'n of Greater Chicago v. City of Chicago*, 215 F.R.D. 550, 554 (N.D. Ill. 2003).

### B. The Third-Party Subpoenas Seek Information Not Relevant to Common Class Issues

The Household Defendants seek information through the Third-Party Subpoenas, ostensibly to explore individualized defenses against Class representative PACE's claims. Such information, however, has no bearing on Household's liability to the Class as a whole. Thus, the Household Defendants have no discernable purpose for issuing the Third-Party Subpoenas at this time, other than delay and harassment.

The Household Defendants' claimed intention is to discover information potentially related to PACE's presumed reliance on defendants' false and misleading statements to the market. Winkler Decl., ¶3. In a securities fraud class action, plaintiffs are permitted to rely on the integrity of the market in proving reliance. *Basic v. Levinson*, 485 U.S. 224, 247 (1988). Under the fraud-on-the-market theory, "an investor's reliance on any public material misrepresentations ... may be presumed." *Id.* Lead plaintiffs here intend to invoke the fraud-on-the-market theory to establish Class-wide reliance on defendants' false and misleading statements. The presumption of reliance established by the fraud-on-the-market theory can be rebutted only by a "showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at fair market price." *Id.* at 248.

Throughout the meet-and-confer process, the Household Defendants confirmed that the only purpose of the Third-Party Subpoenas was to explore individualized issues related to PACE's reliance. Winkler Decl., ¶3. As a general matter, in class actions, "[d]iscovery on individual issues should be postponed until a decision on the common questions of law and fact has been made." *Robertson v. Nat'l Basketball Ass'n*, 67 F.R.D. 691, 700 (S.D.N.Y. 1975). Thus, while discovery of information related to PACE's investment decisions and those of its investment advisors might, in

theory, give rise to a defense against PACE, such discovery will not further ***any*** defense against the Class as a whole, and, if allowed, will only distract from litigation of the primary issues in this case. *In re Lucent Techs. Inc. Sec. Litig.*, No. 00-621 (JAP), 2002 U.S. Dist. LEXIS 8799, at *5 (D.N.J. May 7, 2002).

The court's treatment of a nearly identical issue in *Lucent*, also a securities fraud class action, is instructive. In *Lucent,* defendants sought discovery of documents concerning the investment history of 41 named plaintiffs, arguing, like defendants here, that such discovery was necessary to rebut the fraud-on-the-market theory. *Id.* Even at the pre-class certification stage, the court rejected this argument, correctly pointing out that "discovery as to the investment behavior of the 41 named, non-lead plaintiffs is ***not ... probative*** of the question of class-wide reliance on the market." *Id.* (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3rd Cir. 1985)) (emphasis added). Reasoning that, "***[c]onclusions drawn from the experience of this handful of named parties cannot be extrapolated to represent the experience of a class of hundreds of thousands of individuals of which the ... class is comprised,***" the court in *Lucent* denied defendants' motion to compel, allowing that the discovery sought "may be appropriate at a later stage in the case ... ***once the matter of liability has been adjudicated.***" 2002 U.S. Dist. LEXIS 8799, at **5-6 (emphasis added).

Similarly, here, inquiries into PACE's investment decisions and patterns have no bearing on Class-wide issues, and should be left until such time as liability has been determined, if at all. Allowing defendants to seek discovery related to individualized claims of reliance and damages will unduly burden plaintiffs (and the subpoenaed parties) and unnecessarily divert class resources. This is made apparent by the Household Defendants' claimed inability to timely and adequately respond to plaintiffs' first set of interrogatories propounded on July 16, 2004, as well as their inability to produce employee organizational charts and directories and documents sufficient for plaintiffs to understand Household's corporate organizational structure, a request that has been outstanding since

May 17, 2004. Exs. J-L; Winkler Decl., ¶2. Lead plaintiffs have repeatedly informed the Household Defendants that these two pieces of discovery, among others, are essential to lead plaintiffs' efforts to narrow the focus of discovery.

Despite a meet and confer on October 21, 2004, and two subsequent letters, the Household Defendants have thus far failed to respond to the interrogatories by giving the factual basis for the affirmative defenses asserted by them. On December 7, 2004, the Household Defendants indicated they were finalizing their responses. To date, they have not been served. Winkler Decl., ¶2. In addition, with respect to organizational charts, the Household Defendants continually delayed production and then produced only minimal documents in a piecemeal fashion, despite lead plaintiffs' countless reminders that a complete set of these documents is needed. Ex. L. The Household Defendants' time and attention is better focused on responding to these and other requests which will serve to streamline discovery going forward, not seeking untimely, duplicative and distracting information unrelated to Class-wide issues.

More importantly, if the Household Defendants are permitted to pursue this line of inquiry, it will open the door for defendants to seek endless discovery against the other Class representatives, their investment advisors, and even more egregiously, each of the hundreds of thousands of absent Class members, before liability has even been established. Indeed, the parties sought to avoid this result by stipulating to certify a class. The Household Defendants should not be permitted to take this case hostage by issuing subpoenas seeking duplicative and irrelevant information, while delaying merits discovery on the merits of Class-wide issues.

### C. Despite Having Deposed PACE and Reviewed Documents Related to Its Investments in Household, Defendants Cannot Justify Their Request for the Information Sought from the Third-Party Subpoenas

The Third-Party Subpoenas are also duplicative, burdensome and unlikely to lead to the discovery of admissible evidence – Class representative PACE already has produced to defendants

all documentation of its trades in Household and Beneficial securities from January 1, 1997 to December 31, 2003. Defendants have offered no compelling reason why they require further information. Certainly they have made no showing that PACE's investment activity is somehow suspicious or otherwise gives rise to an available defense.

In September, 2004, pursuant to discovery requests served at the class certification stage, PACE produced to defendants more than 400 pages of transactional and other information related to its investments in Household securities. On September 24, 2004, defendants took the deposition of Maria Wieck, the Fed. R. Civ. P. 30(b)(6) designee for PACE.[6]

After deposing PACE and reviewing documents related to PACE's transactions in Household securities, defendants stipulated to appoint PACE, along with two other institutions, as Class representative. *See* Class Certification Stipulation at 1. In so doing, defendants specifically relied on the information and testimony PACE and other Class representatives already had provided:

> Whereas, plaintiffs have produced documents for all proposed class representatives and defendants have taken the deposition of one of the proposed class representatives [PACE]; and
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> Whereas, ***based upon the information made available to defendants*** and the parties' ongoing discussions [the parties stipulate to certify the class].

*See id.* Defendants already have admitted, therefore, that none of the information from PACE's deposition and/or documents gives rise to any potentially sustainable defense. Defendants cannot now, in good faith, take the position that more is needed to make this determination. *See, e.g., Carnegie*, 376 F.3d at 663 (Defendants that stipulated to certification of settlement class were estopped from relying on previous case holding that class certification was not appropriate after the

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[6] Ms. Wieck testified that IFS was not a portfolio manager, but rather an independent consultant whose role is to establish and monitor compliance with investment guidelines, and which were already produced to the Household Defendants. Ex. N. Nonetheless, the Household Defendants subpoenaed third party IFS knowing that IFS did not advise PACE in making decisions related to the purchases or sales of any securities.

Seventh Circuit overturned settlement. "They prevailed in the present litigation, until the settlement was finally rejected, by arguing that *Buford* was wrong. They are estopped to argue now that it was right.").

Defendants have not made ***any*** showing that the information they already have gives rise to a cognizable legal theory. Indeed, they cannot. It is clear, then, that rather than seeking information relevant to the defense of their case, defendants are intent on sidetracking the prosecution of plaintiffs' case with duplicative and unnecessary discovery.

### D. The Household Defendants Cannot Justify Their Demands for Documents and Depositions Relating to Investments in HSBC and Beneficial Securities

Further confirming their dubious intentions, the Household Defendants inexplicably seek not only documents and testimony regarding PACE investments in Household securities, but HSBC and Beneficial securities as well. Such information is neither relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence. This case is about plaintiffs' purchases of fraudulently inflated Household securities, not HSBC or Beneficial securities. Indeed, the Class was only certified as to Household securities. Although some Class members acquired Beneficial shares in an exchange pursuant to the merger of Beneficial and Household in 1998, because plaintiffs were damaged when they acquired Household securities, information regarding how and why plaintiffs acquired Beneficial securities is completely irrelevant.

HSBC securities have an even more tangential relationship to this case – HSBC did not acquire Household until five months ***after*** the end of the Class Period. The Class Period here is October 23, 1997 to October 11, 2002. HSBC did not acquire Household until March 23, 2003. Indeed, neither HSBC nor its employees were identified by defendants in their Initial Disclosures as having discoverable information. Ex. M. Yet, instead of spending time reviewing and producing documents related to the common issues, defendants continue to pursue this irrelevant information.

## IV. CONCLUSION

In sum, the Household Defendants, by stipulating to class certification have admitted that individual issues do not predominate – yet now they seek to bring them to the forefront. Such tactics should not be permitted. Plaintiffs' Motion for a Protective Order Quashing the Household Defendants' Third-Party Subpoenas should be granted and an Order entered (1) requiring the Household Defendants to withdraw their outstanding Third-Party Subpoenas and (2) prohibiting defendants from pursuing further discovery related to individual claims and defenses until after Class-wide liability has been determined.

DATED: January 11, 2005

Respectfully submitted,

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LEXSEE 2002 US DIST LEXIS 8799

**Re: In re Lucent Technologies Inc. Securities Litigation**

**Civil Action No. 00-621 (JAP)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

***2002 U.S. Dist. LEXIS 8799***

**May 7, 2002, Decided**
**May 9, 2002, Entered on the Docket**

**SUBSEQUENT HISTORY:** [*1] Affirming Order of July 15, 2002, Reported at: *2002 U.S. Dist. LEXIS 24973.*

**DISPOSITION:** Defendants' request to compel production of documents denied.

**LexisNexis(R) Headnotes**

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**JUDGES:** Stanley R. Chesler, U.S.M.J. [*3]

**OPINIONBY:** Stanley R. Chesler

**OPINION:**

LETTER OPINION AND ORDER

Dear Counsel:

The Court writes to address a matter brought before the Court on the correspondence of the parties concerning a discovery dispute in the above-captioned case. Specifically, defendants (hereinafter collectively referred to as "Lucent") seek to compel all named plaintiffs to produce documents in response to Lucent's Third Request for Production of Documents and Things ("Third Request"). Lead plaintiffs have submitted a letter in opposition to this request. For the reasons discussed below, the Court denies Lucent's request to compel discovery of all named plaintiffs.

Lucent's Third Request seeks documents concerning plaintiffs' investment history. Lucent takes the position that the decision of plaintiffs' counsel to limit the response to the Third Request to documents from the files of Lead plaintiffs only shirks the discovery obligations owed by the 41 other named plaintiffs. See *In re Folding Carton Antitrust Litigation, 83 F.R.D. 260, 264 (N.D. Ill. 1979).* It argues that discovery as to the investment history and background of all named plaintiffs is necessary to rebut the presumption that arises [*4] in a fraud on the market case of an investor's reliance on misrepresentations as reflected in the market. See *Basic v. Levinson, 485 U.S. 224, 246-47, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988).* Lucent also contends that this discovery is relevant to any opposition that Lucent may file to a motion by plaintiffs for class certification.

In opposition, Lead plaintiffs contend that the named plaintiffs from whom discovery is sought are not proposed as class representatives and as such, remain on equal footing with absent class members, who are not generally not subject to discovery. See *In re Carbon Dioxide Industry Antitrust Litigation, 155 F.R.D. 209, 211-12 (M.D. Fla. 1993).* Discovery with respect to the behavior of this handful of plaintiffs, they contend, cannot shed any light on the overall issue of liability, in particular on whether the entire class acted in reliance on the market price of Lucent stock.

The Court agrees with Lead plaintiffs' position. Though one way to rebut the presumption of reliance involves "proving that an individual plaintiff purchased the stock despite knowledge of the falsity of a representation," *Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 301 (D.N.J. 1989)* [*5] (quoting *Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975)),* individualized questions of reliance will not in this case illuminate a determination of class-wide liability or bear on the inquiry into whether the class representative's claims are typical of the entire class. See *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985).* In other words, discovery as to the investment behavior of the 41 named, non-lead plaintiffs is not be probative of the question of class-wide reliance on the market. Conclusions drawn from the experience of this handful of named parties cannot be extrapolated to represent the experience of a class of hundreds of thousands of individuals of which the putative class is comprised.

The situation presented in this case is distinct from that in *Easton & Co. v. Mutual Benefit Life Ins. Co., 1994 U.S. Dist. LEXIS 12308, No. 91-4012, 92-2095, 1994 WL 248172* (D.N.J. May 18, 1994). In Easton, the court allowed defendants to take discovery of absent class members' investment history and background in order to rebut the presumption of fraud-on-the-market reliance. In stark contrast to this case, Easton involved a total of 160 class members. [*6] The small class size established a strong possibility that discovery of individual class members would be probative of the overall class experience. This factor undoubtedly influenced the Easton court's finding that such discovery would be relevant to the issue of class-wide reliance.

In the Lucent matter, there is no basis for concluding that the 41 non-representative named plaintiffs could fulfill the same purpose as to a class of thousands. 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 has been adjudicated. See *Eisenberg, 766 F.2d at 786; Jaroslawicz, 724 F. Supp. at 302-303.*

Therefore, for the aforementioned reasons, the Court will treat the non-lead named plaintiffs as absent class

members and will not compel them to respond to Lucent's Third Request.

Accordingly, IT IS on this 7th day of May, 2002:

ORDERED that Lucent's request to compel the production of documents in response to the Third Request for Production of Documents and Things is DENIED.

Stanley R. Chesler, [*7] U.S.M.J.

# TAB 1

LEXSEE 2002 US DIST LEXIS 8799

**Re: In re Lucent Technologies Inc. Securities Litigation**

**Civil Action No. 00-621 (JAP)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

***2002 U.S. Dist. LEXIS 8799***

**May 7, 2002, Decided**
**May 9, 2002, Entered on the Docket**

**SUBSEQUENT HISTORY:** [*1] Affirming Order of July 15, 2002, Reported at: *2002 U.S. Dist. LEXIS 24973.*

**DISPOSITION:** Defendants' request to compel production of documents denied.

**LexisNexis(R) Headnotes**

**COUNSEL:** For ROBERT ELAN, plaintiff: JOSEPH E. SAUL, GELLERSTEIN & SAUL, ESQS., TEANECK, NJ.

For JOHN M. RAZZANO, WAYNE E. MEYER, consolidated plaintiffs: WILLIAM J. PINILIS, KAPLAN, KILSHEIMER & FOX, LLP, MORRISTOWN, NJ.

For ZIPORA BARON WEBER, DONALD PRESS, consolidated plaintiffs: JAMES V. BASHIAN, LAW OFFICE OF JAMES V. BASHIAN, PC, FAIRFIELD, NJ.

For OREN GISKAN, BERNICE BERNICE SEIDEN, consolidated plaintiffs: ANDREW ROBERT JACOBS, EPSTEIN, FITZSIMMONS, BROWN, RINGLE, GIOIA & JACOBS, PC, CHATHAM TOWNSHIP, NJ.

For JOHN P. CLIFFORD, JR., JAMES COURTRIGHT, MIRIAM SARNOFF, DAVID PLOTKIN, DENNIS PASPARAGE, DANIEL MURPHY, consolidated plaintiffs: GARY S. GRAIFMAN, KANTROWITZ, GOLDHAMER & GRAIFMAN, ESQS., MONTVALE, NJ.

For STEPHEN SCHOEMAN, RACHEL STERN, consolidated plaintiffs: ROBERT J. BERG, BERNSTEIN LIEBHARD & LIFSHITZ, LLP, FORT LEE, NJ.

For SUSAN KAUFMAN, FMWL ENTERPRISES, INC., ELLIOTT MAYERHOFF, DAVID PLOTKIN, THOMAS PEARLMAN, consolidated plaintiffs: ROBERT A. HOFFMAN, BARRACK, RODOS & BACINE, ESQS., HADDONFIELD, NJ. [*2]

For JAMES V. BIGLAN, JACQUELINE BRAGIN, JOHN J. WIZBICKI, NAOMI RAPHAEL, DAVID M. FEDER, consolidated plaintiffs: JOSEPH J. DEPALMA, LITE, DEPALMA, GREENBERG AND RIVAS, LCC, NEWARK, NJ.

For PETER S. POWERS, DOMINIE MORELLI, consolidated plaintiffs: LISA J. RODRIGUEZ, TRUJILLO, RODRIGUEZ & RICHARDS, LLC, HADDONFIELD, NJ.

For TOM CHAPLINSKI, consolidated plaintiff: LEO W. DESMOND, SPARTA, NJ.

For JEFFREY MARKS, RALPH M. STONE, THE PARNASSUS FUND, consolidated plaintiffs: ELLEN M. MCDOWELL, WHITTLESEY MCDOWELL & RIGA, MAPLE SHADE, NJ.

For HOWARD DAVIS, consolidated plaintiff: MICHAEL J. KANE, MAGER WHITE & GOLDSTEIN, LLP, WESTMONT, NJ.

For HOWARD DAVIS, consolidated plaintiff: BRUCE G. MURPHY, VERO BEACH, FL.

For MILTON ABOWITZ, consolidated plaintiff: PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, SADDLE BROOK, NJ.

For FLORIDA STATE BOARD OF ADMINISTRATION, consolidated plaintiff: ANDREW J. ENTWISTLE, ENTWISTLE & CAPPUCCI LLP, PRINCETON, NJ.

For LUCENT TECHNOLOGIES INC., RICHARD A. MCGINN, DONALD K. PETERSON, defendants: JOHN H. SCHMIDT, JR., LINDABURY, MC CORMICK & ESTABROOK, WESTFIELD, NJ.

**JUDGES:** Stanley R. Chesler, U.S.M.J. [*3]

**OPINIONBY:** Stanley R. Chesler

**OPINION:**

LETTER OPINION AND ORDER

Dear Counsel:

The Court writes to address a matter brought before the Court on the correspondence of the parties concerning a discovery dispute in the above-captioned case. Specifically, defendants (hereinafter collectively referred to as "Lucent") seek to compel all named plaintiffs to produce documents in response to Lucent's Third Request for Production of Documents and Things ("Third Request"). Lead plaintiffs have submitted a letter in opposition to this request. For the reasons discussed below, the Court denies Lucent's request to compel discovery of all named plaintiffs.

Lucent's Third Request seeks documents concerning plaintiffs' investment history. Lucent takes the position that the decision of plaintiffs' counsel to limit the response to the Third Request to documents from the files of Lead plaintiffs only shirks the discovery obligations owed by the 41 other named plaintiffs. See *In re Folding Carton Antitrust Litigation, 83 F.R.D. 260, 264 (N.D. Ill. 1979).* It argues that discovery as to the investment history and background of all named plaintiffs is necessary to rebut the presumption that arises [*4] in a fraud on the market case of an investor's reliance on misrepresentations as reflected in the market. See *Basic v. Levinson, 485 U.S. 224, 246-47, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988).* Lucent also contends that this discovery is relevant to any opposition that Lucent may file to a motion by plaintiffs for class certification.

In opposition, Lead plaintiffs contend that the named plaintiffs from whom discovery is sought are not proposed as class representatives and as such, remain on equal footing with absent class members, who are not generally not subject to discovery. See *In re Carbon Dioxide Industry Antitrust Litigation, 155 F.R.D. 209, 211-12 (M.D. Fla. 1993).* Discovery with respect to the behavior of this handful of plaintiffs, they contend, cannot shed any light on the overall issue of liability, in particular on whether the entire class acted in reliance on the market price of Lucent stock.

The Court agrees with Lead plaintiffs' position. Though one way to rebut the presumption of reliance involves "proving that an individual plaintiff purchased the stock despite knowledge of the falsity of a representation," *Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 301 (D.N.J. 1989)* [*5] (quoting *Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975)),* individualized questions of reliance will not in this case illuminate a determination of class-wide liability or bear on the inquiry into whether the class representative's claims are typical of the entire class. See *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985).* In other words, discovery as to the investment behavior of the 41 named, non-lead plaintiffs is not be probative of the question of class-wide reliance on the market. Conclusions drawn from the experience of this handful of named parties cannot be extrapolated to represent the experience of a class of hundreds of thousands of individuals of which the putative class is comprised.

The situation presented in this case is distinct from that in *Easton & Co. v. Mutual Benefit Life Ins. Co., 1994 U.S. Dist. LEXIS 12308, No. 91-4012, 92-2095, 1994 WL 248172* (D.N.J. May 18, 1994). In Easton, the court allowed defendants to take discovery of absent class members' investment history and background in order to rebut the presumption of fraud-on-the-market reliance. In stark contrast to this case, Easton involved a total of 160 class members. [*6] The small class size established a strong possibility that discovery of individual class members would be probative of the overall class experience. This factor undoubtedly influenced the Easton court's finding that such discovery would be relevant to the issue of class-wide reliance.

In the Lucent matter, there is no basis for concluding that the 41 non-representative named plaintiffs could fulfill the same purpose as to a class of thousands. 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 has been adjudicated. See *Eisenberg, 766 F.2d at 786; Jaroslawicz, 724 F. Supp. at 302-303.*

Therefore, for the aforementioned reasons, the Court will treat the non-lead named plaintiffs as absent class

members and will not compel them to respond to Lucent's Third Request.

Accordingly, IT IS on this 7th day of May, 2002:

ORDERED that Lucent's request to compel the production of documents in response to the Third Request for Production of Documents and Things is DENIED.

Stanley R. Chesler, [*7] U.S.M.J.