UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

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I. INTRODUCTION

This motion seeks a protective order to limit unnecessary and burdensome discovery – including depositions – sent by the defendants to 98 institutional class members and the three lead plaintiffs. The discovery is overbroad, burdensome and beyond the scope of the discovery that defendants should be permitted to pursue in their attempt to rebut the presumption of reliance.[1] Under *Basic*, defendants must make a "showing that severs the link between the alleged misrepresentations and either the price received (or paid) by the plaintiff or his decision to trade at a fair market price," to rebut the presumption of reliance. *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988). The Supreme Court in *Basic* describes three methods in which a defendant can rebut the presumption of reliance. *Id*. In its November 22, 2010 Order, the Court ruled that defendants failed to rebut the presumption of reliance under the first two methods of *Basic* by trying that issue ("truth-on-the-market") on a class-wide basis before a jury, and would "not be afforded a second bite at the apple." 11/22/10 Order at 8. Under *Basic*, all that is left to possibly rebut the presumption is for defendants to show that a class member "traded or would have traded despite his ***knowing*** the statement was false," and therefore, did not rely on the integrity of the market. *Basic*, 485 U.S. at 248 (emphasis added).

After the trial, this Court found that, with the possible exception of Wells Fargo, "there is no evidence that any class member purchased Household stock with actual knowledge that its price had been artificially inflated by defendants' fraud." Order at 8. The evidence was undisputed at trial that defendants did not share any ***material non-public*** information with investors. The Court nonetheless gave defendants the opportunity to rebut issues of individual reliance. Plaintiffs believe that, in the

[1] Defendants have consistently represented to the Court that they intended to take discovery of only the top 10 to 15 institutions. *See, e.g.*, Docket No. 1623 at 8; January 5, 2011 Hrg. Tr. at 20:2-3 ("[defendants'] true interest was to inquire of the large institutional investors").

first instance, that discovery should be limited to interrogatories and document requests similar to the Proof of Claim Form interrogatory – which asks if class members would still have purchased Household stock if they ***knew*** it had been inflated by defendants' false and misleading statements. Order at 9. If a class member answers "no" to the claim form question, the presumption cannot be rebutted and there is no need to "discover" any further information. Order at 9. Only a "yes" answer should allow defendants to engage in further discovery to determine if price paid no part in the decision-making process and the class member did not rely on the integrity of the market. *Id.*

Since the January 5, 2011 status conference hearing, defendants have served 98 institutional investors and the three lead plaintiffs with nearly ***identical*** Rule 30(b)(6) deposition notices, requests for production of documents, and interrogatories (*see* Ex. 1, 2 and 3 attached which are samples of the identical requests).[2] The purpose of defendants' discovery is clear – to try to harass class members into not filing claims by serving burdensome and irrelevant discovery. The discovery is not designed to determine first the answer to discovery similar to the key claim form question or determine if class members had any material non-public information before seeking additional discovery. Additionally, the discovery seeks to relitigate reliance issues already determined by the jury, including the "truth-on-the-market" defense pursued at trial.[3]

Plaintiffs request that the Court enter a protective order clarifying the narrow scope of Phase II discovery. In particular, the Court should order defendants initially to limit their discovery to interrogatory responses and documents that determine whether these institutions had any material non-public information and still purchased or sold Household stock. Further discovery, including a

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[2] Defendants have served discovery on 101 institutional investors, as reflected in Ex. 4 attached hereto.

[3] Pursuant to Local Rule 37.2 and Fed. R. Civ. P. 26(c)(1), the parties met and conferred on January 21 and 24, 2011 concerning defendants' Phase II discovery but were unable to reach a resolution. Defense counsel's summary of these efforts is attached hereto as Ex. 5.

30(b)(6) deposition, should be allowed only upon a threshold showing that the investor had material non-public information ***and*** still purchased Household stock knowing it was inflated by defendants' false statements. Defendants should also be prohibited from asking interrogatories or deposition questions or requesting documents that cover the "truth-on-the-market" defense rejected by the jury, or other irrelevant topics such as whether a class member had a "firewall" policy to separate research and investment decisions. Further, the time period requested by defendants (July 30, 1999 to October 11, 2002) should be limited to March 22, 2001 to October 11, 2002.

II. A PROTECTIVE ORDER IS NEEDED TO SHIELD CLASS MEMBERS FROM DEFENDANTS' ABUSIVE DISCOVERY TACTICS

A. Standards for a Protective Order

Federal Rule of Civil Procedure 26(c)(1) permits "any party . . . from whom discovery is sought [to] move for a protective order in the court where the action is pending." Fed. R. Civ. P. 26(c)(1). Under the Rule, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c)(1)(D).

Furthermore, discovery under Rule 26 is limited by relevance. "Discovery under Fed. R. Civ. P. 26(b) is not without limits; the manner and scope of discovery must be tailored to some exten[t] to avoid harassment or being oppressive." *Ocean Atl. Woodland Corp. v. DRH Cambridge Homes, Inc.*, 262 F. Supp. 2d 923, 926-27 (N.D. Ill. 2003) (Guzman, J.). For this reason, Federal Rule of Civil Procedure 26(b)(2)(C) gives courts discretion to "limit the frequency or extent of discovery" if, among other reasons, "the discovery sought is unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(C). As set forth herein, good cause exists for entry of a protective order.

B. Defendants Cannot Meet the Burden of Demonstrating that Their Overbroad and Irrelevant Discovery from Absent Class Members Is Necessary

"Discovery from nonnamed class members is not warranted 'as a matter of course.'" *Rogers v. Baxter Int'l, Inc.*, No. 04 C 6476, 2007 U.S. Dist. LEXIS 74268, at *4 (N.D. Ill. Oct. 4, 2007) (denying motion for leave to serve interrogatories on absent class members). "Postcertification discovery directed at individual class members (other than named plaintiffs) should be conditioned on a showing that it serves a legitimate purpose." *Manual for Complex Litigation* (*Fourth*) §21.41 (2004). Thus, before defendants are allowed to conduct overbroad, burdensome and irrelevant discovery from over 100 institutional class members, the Court "must be assured that the requested information is actually needed" and that the "discovery devices are not used to take unfair advantage of 'absent' class members." *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1006 (7th Cir. 1971). Moreover, where, as here, the discovery sought includes the extraordinary measure of deposing absent class members, "the burden confronting the party seeking deposition testimony [is] more severe than that imposed on the party requesting permission to use interrogatories."[4] *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974); *Manual for Complex Litigation* (*Fourth*) §21.41 ("Deposing absent class members requires greater justification than written discovery.").

Here, defendants have not and cannot meet the burden of "demonstrating the meritorious nature of their [discovery] requests." *Clark*, 501 F.2d at 340-41 (recognizing that the party seeking discovery from absent class members "has the burden of showing necessity and absence of any motive to take undue advantage of the class members"). As discussed below, defendants seek discovery regarding information that is not relevant to demonstrating whether a class member

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[4] Defendants have made no showing that their attempt to depose over 100 absent class members is in any way justified or necessary.

"traded or would have traded despite his knowing the statement was false." *Basic*, 485 U.S. at 248. Absent a threshold showing that defendants' discovery is necessary to rebut the presumption of reliance, and not merely a tactic to deter class members from filing valid claims, defendants should not be permitted to proceed with discovery from absent class members. *See, e.g.*, *Clark*, 501 F.2d at 341 (finding the record "devoid" of any showing that defendants met their burden of demonstrating the necessity of discovery from absent class members); *Halling v. Hobert & Svoboda, Inc.*, Case No. 87-C-912, 1989 U.S. Dist. LEXIS 18115, at * (E.D. Wis. July 24, 1989) (denying discovery from absent class members because "[t]he speculation by the defendants that absent class members ***might*** have invested even knowing of the alleged [fraud] is simply insufficient to satisfy the threshold burden of demonstrating the necessity required to justify discovery of absent class members") (emphasis in original).

C. Defendants' Phase II Discovery Is an Improper Attempt to Relitigate Reliance Issues Decided by the Jury

In *Basic Inc. v. Levinson*, the United States Supreme Court identified three methods by which a defendant can rebut the presumption of reliance: (1) a "show[ing] that 'market makers' were privy to the truth . . . thus that the market price [was] not [] affected by [defendants'] misrepresentations"; (2) a showing that the truth had "credibly entered the market and dissipated the effects of the misstatements"; or (3) showing that a plaintiff believed the defendants' statements were false but still sold (purchased) the stock and did not rely on the integrity of a price "he knew had been manipulated." *Basic*, 485 U.S. at 248-49.

In its November 22, 2010 Order regarding Phase II, the Court correctly found that defendants attempted to rebut the presumption under *Basic's* first two methods when they raised a "truth-on-the-market" defense at trial. Order at 5. Specifically, "defendants presented evidence that the investors in Household stock were among the most sophisticated in the world and could not have been fooled

by the alleged misrepresentations regarding Household's predatory lending and re-aging practices and their impact on its credit quality." Order at 8. Unfortunately for defendants, the jury rejected their truth-on-the-market defense, finding that "the truth did not enter the market and dissipate the effects of defendants' false statements or omissions." *Id*. Accordingly, the Court ruled that:

> The issues with regard to the first two of the three methods of rebutting the presumption of reliance have been litigated and ***defendants will not be afforded a second bite at the apple, regardless of how they frame the issue***.

Id. (emphasis added).

Notwithstanding the jury's (and the Court's) clear findings and in direct contravention of the Court's November 22 Order, defendants now seek to relitigate these and other irrelevant issues via their discovery requests propounded on the Lead Plaintiffs and absent class members. For the Court's convenience, plaintiffs have set forth below defendants' actual discovery requests and the basis for plaintiffs' objections.

1. Defendants' Interrogatories:

INTERROGATORY	PLAINTIFFS' POSITION
1. For each Transaction by You in Household Securities during the Relevant Period, state: (i) the date of the Transaction; (ii) the number of shares that were the subject of the Transaction; (iii) whether the Transaction was an open-market purchase, acquisition other than an open-market purchase, open-market sale, or disposition other than an open-market sale; (iv) the price per share; (v) the amount of commission paid (if any); (vi) whether the Transaction was made for Your own account or made by You as a nominee for a beneficial owner or in any other capacity; and (vii) any Trading Strategy employed by You or on Your behalf with respect to such Transaction.	Interrogatory 1 (vii) is objectionable because an investor's trading strategy is not relevant unless the investor answers "yes" to the claim form-type question. The remainder of the interrogatory is burdensome. In lieu of answering the rest of the interrogatory, those absent class members should be permitted to produce responsive documents.

INTERROGATORY	PLAINTIFFS' POSITION
2. For each Transaction in Household Securities identified in Your response to Interrogatory No. 1, identify the Person(s) primarily responsible for Your decision to engage in such Transaction.	Defendants have targeted many large institutional investors with their requests. Such class members may have engaged in hundreds or thousands of transactions during the Damages Period. Plaintiffs object to the interrogatory as unduly burdensome.
3. Identify all Documents that You reviewed or relied upon in making any decision to engage in any Transaction with respect to Household Securities.	Objectionable to the extent it calls for publicly available information. Defendants litigated truth-on-the-market at trial and should not be given a second bite at the apple. Further, class members should not have to respond further, if they answer "no" to the claim form-type question. A response to this Interrogatory should be deferred until a class member answers "yes" to the claim form-type question.
4. Identify all Communications between You and Household or between You and HFC during the Relevant Period regarding Your purchases, holding, or sales of Household Securities.	In attempting to rebut the presumption of reliance, class members should only have to identify material non-public information communicated by Household to the class member.
5. Identify all persons employed by or retained by You during the Relevant Period who prepared any research report or other analysis of Household Securities.	Irrelevant.
6. State the total number of shares of Household Securities, by type, held by You (for Your accounts and for every account over which You exercised investment discretion or provided investment advice) as of the close of trading on March 22, 2001, October 11, 2002 and January 9, 2003.	Plaintiffs do not object to this interrogatory to the extent it only seeks information regarding Household common stock.

2. Defendants' Request for Production of Documents:

DOCUMENT REQUEST	PLAINTIFFS' OBJECTION
1. Documents sufficient to show each Transaction by You in Household Securities during the Relevant Period, whether for Your own account or as nominee for any beneficial owner.	The request should be limited to transactions in Household common stock.

DOCUMENT REQUEST	PLAINTIFFS' OBJECTION
2. All Documents evidencing any Trading Strategy employed by You or on Your behalf with respect to each Transaction by You in Household Securities during the Relevant Period.	Objectionable because an investor's trading strategy is not relevant unless the investor answers "yes" to the claim form-type question.
3. All other Documents in Your possession, custody or control relating to Household during the Relevant Period, including all Documents relating to Your decision(s) to purchase, hold, or sell any Household Securities during the Relevant Period.	Objectionable to the extent it calls for publicly available information. Defendants litigated truth-on-the-market at trial and should not be given a second bite at the apple. Further, class members should not have to respond further, if they answer "no" to the claim form-type question. A response to this Request should be deferred until a class member answers "yes" to the claim form-type question.
4. All Communications between you and Household or between You and HFC during the Relevant Period.	In attempting to rebut the presumption of reliance, class members should only have to identify material non-public information communicated by Household to the class member.
5. Documents sufficient to show any "firewall" policy implemented by You during the Relevant Period to establish or enforce separation between research and advisory functions performed by You (or any affiliated entity) or mergers or acquisitions considered by You (or any affiliated entity), on the one hand, and investment decisions made or considered by You, on the other hand.	Irrelevant.

3. Defendants' Deposition Notices:

SUBJECTS OF EXAMINATION	PLAINTIFFS' POSITION
1. All information known by You regarding HFC, Household, and/or Household Securities.	Overbroad. Should be limited to Household common stock. Also, only material non-public information is relevant. As discussed above, the truth-on-the-market "defense" has already been litigated at trial.

SUBJECTS OF EXAMINATION	PLAINTIFFS' POSITION
2. The individuals, departments, groups and/or entities who participated in each decision made by You to purchase or sell Household Securities, including all individuals, departments groups and/or entities (including but not limited to advisors, brokers or dealers) with responsibility for recommending and/or approving such Transaction.	Plaintiffs have no objection to this topic, assuming a class member answers "yes" to the claim form-type question.
3. The information on which You relied with respect to each of Your Transactions in Household Securities.	Objectionable to the extent it calls for publicly available information. Defendants litigated truth-on-the-market at trial and should not be given a second bite at the apple. Further, class members should not have to respond further, if they answer "no" to the claim form question. This topic of examination should be deferred until a class member answers "yes" to the claim form-type question.
4. Any non-public information obtained by You about Household, HFC, or Household Securities, including information obtained pursuant to any confidentiality agreement, non-disclosure agreement, or other agreement by which You obtained access to non-public information about Household, HFC, or Household Securities.	To the extent that the topic of the examination is anything other than Household International and Household common stock, plaintiffs object. Plaintiffs believe that a deposition on this topic should await either interrogatory or document responses indicating a class member had non-public information.
5. Any Communications between You and Household or between you and HFC regarding Your purchases, holding, or sales of Household Securities.	In attempting to rebut the presumption of reliance, class members should only have to identify material non-public information communicated by Household to the class member.
6. Any "firewall" policy implemented by You to establish or enforce separation between research and advisory functions performed by You (or any affiliated entity) or mergers or acquisitions considered by You (or any affiliated entity), on the one hand, and investment decisions made by You, on the other hand.	Irrelevant.

SUBJECTS OF EXAMINATION	PLAINTIFFS' POSITION
7. Whether You purchased or sold any Household Securities pursuant to a Trading Strategy and, if so, the nature of any such Trading Strategy.	Objectionable because an investor's trading strategy is not relevant unless the investor answers "yes" to the claim form-type question and has material non-public information.
8. Any information known by You that indicated or tended to indicate that the price of Household Securities was inflated as a result of false and misleading statements or omissions by Household or any of its officers or employees, or that otherwise reflects any belief by You that the market price of Household Securities was not accurate or did not accurately reflect all facts or factors believed by You to exist.	No objection. This topic should be "sequenced" to be addressed first via interrogatory.

The foregoing discovery requests necessarily include information about Household that was publicly available to investors during the Damages Period, including news articles, press releases and SEC filings.[5] But as the jury determined, defendants failed to prove at trial that these and other publicly available documents made investors aware of the truth about Household's predatory lending practices and credit quality manipulation. Order at 5. In light of the jury's finding, defendants should only be allowed to conduct discovery concerning material non-public documents or material non-public communications with Household and whether the institution had actual knowledge that defendants were issuing false statements and inflating Household's stock. In the meet-and-confer sessions, defense counsel made it clear that they believe they are entitled to ask absent class members about publicly available information. Defendants' backdoor attempt to relitigate their failed truth-on-the-market defense on an investor-by-investor basis should not be permitted.

[5] Defendants will use these discovery requests as an excuse to question class members about press coverage of Household's use of origination points, prepayment penalties, second mortgages and high LTV ratios, or investigations into Household's lending practices by ACORN and state attorneys general. *See, e.g.*, Order at 5-6. Defendants might also try to reargue, as they did at trial, that securitization prospectuses disclosed certain of Household's practices. Order at 6.

Defendants also demand that class members produce highly sensitive and propriety information concerning their Trading Strategies, including:

- Whether You purchased or sold any Household Securities pursuant to a Trading Strategy and, if so, the nature of any such ***Trading Strategy*** (30(b)(6) Subject of Examination No. 7);

- For each Transaction by You in Household Securities during the Relevant Period, state: (i) the date of the Transaction; (ii) the number of shares that were the subject of the Transaction; (iii) whether the Transaction was an open-market purchase, acquisition other an open-market purchase, open-market sale, or disposition other than an open-market sale; (iv) the price per share; (v) the amount of commission paid (if any); (vi) whether the Transaction was made for Your own account or was made by You as a nominee for a beneficial owner or in any other capacity; and (vii) any ***Trading Strategy*** employed by You or on Your behalf with respect to such Transaction (Interrogatory No. 1); and

- All Documents evidencing any ***Trading Strategy*** employed by You or on Your behalf with respect to each Transaction by You in Household Securities during the Relevant Period (Document Request No. 2).

See Exs. 1-3 (emphasis added).

This discovery is not relevant unless defendants can establish that the class member would have purchased the stock even if they knew it was inflated.

D. The Relevant Time Period for Discovery Should Be Limited to March 22, 2001 through October 11, 2002

The jury found that defendants violated the federal securities laws with respect to statements made from March 23, 2001 to October 11, 2002, and found no liability for statements made prior to March 23, 2001. *See* Docket No. 1611. Despite this fact, defendants' Phase II discovery defines the relevant period as "July 30, 1999 through October 11, 2002." In light of the jury's finding, however, class members should not be required to produce documents from July 30, 1999 through March 21, 2001. Demanding that class members search for and produce documents more than a decade old – when those documents no longer have any relevance to this case – would impose an undue burden on them. This is exactly the type of undue burden and annoyance that Fed. R. Civ. P. 26(c)(1) was

designed to prevent. Plaintiffs, therefore, request that the Court limit the relevant time period for defendants' discovery to March 22, 2001 through October 11, 2002.

III. CONCLUSION

Defendants' Phase II discovery is well outside the scope of discovery envisioned by the Court's November 22, 2010 Order and serves only to harass class members and discourage them from filing valid claims. Good cause therefore exists for entry of a protective order. Specifically, plaintiffs request an order: (1) limiting defendants to interrogatory and document requests that address whether institutional class members had any material non-public information, and whether they knew of the fraud and still purchased Household stock; (2) allowing for depositions only upon a threshold showing from the responses to the interrogatory and document requests that the institutional class member had material non-public information and still purchased Household stock knowing it was inflated; (3) prohibiting defendants from seeking discovery regarding reliance issues such as the "truth-on-the-market" defense already rejected by the jury; (4) disallowing any discovery regarding any "firewall" policy separating analyst and investment decisions; (5) disallowing any discovery of trading strategies or models absent a showing that the institutional class member knew Household's stock was inflated due to defendants' false statements and still purchased the stock; and (6) limiting the relevant period for discovery to March 22, 2001 through October 11, 2002. Plaintiffs also request that a deposition protocol be established that limits defendants' questioning at any depositions to the issue of whether plaintiff did not rely upon price at all in buying or selling Household common stock.

DATED: January 25, 2011

Respectfully submitted,

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