**UNITED STATES DISTRICT COURT**

**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 (Consolidated)<br><br>CLASS ACTION<br><br>Judge Ronald A. Guzman |

**PLAINTIFFS' RESPONSE TO THE COURT'S NOVEMBER 1, 2012 ORDER REGARDING CLAIMANTS WITH CLAIMS OF LESS THAN $250,000**

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Lead Plaintiffs submit this position paper in response to this Court's Orders dated September 21, 2012 and November 1, 2012 regarding claimants with allowed losses less than $250,000.

## I. PLAINTIFFS' POSITION

As set forth below, the record establishes without a doubt that this Court excused claimants, who filed through a third-party with an allowed loss less than $250,000, from answering the reliance question. During an April 7, 2011 status conference to discuss this issue, the Court concluded: "I'm not inclined to bar claims or possible relief for tens of thousands of individual investors by virtue of the actions of custodian banks that hold the record ownership of their stock. That, it seems to me, would be a catastrophic and repugnant conclusion to this process." April 7, 2011 Hrg. Tr. at 19-20; *see also id*. at 25-26 ("[I]t's not my intention to punish the beneficial holders of the stock, that is, the people who were actually damaged by the fraudulent conduct for the presumed lack of diligence of institutions that they have literally no control over. That, I'm not going to do."). In its May 31, 2011 Order adopting plaintiffs' proposal that a one-page supplemental notice be sent only to claimants with a loss in excess of $250,000, the Court recognized that such a resolution struck a sensible balance: "This, coupled with the other avenues of discovery the Court has already approved, constitutes a reasonable approach to balancing the needs of the defendants for discovery with the need to protect class members from discouragement and the need to move this already 9 year-old case towards a conclusion." Docket No. 1763 at 7.

Clearly, plaintiffs understood that these claimants were excused from performance. And defendants knew it too – defendants have conceded the issue on no fewer than six occasions. *See, e.g.*, Defs' Oct. 14, 2011 brief ("[o]ver Defendants' objection, the Court held that nominees who filed claims on behalf of beneficial holders with claims of $250,000 or less did not need to obtain answers to the reliance question, thus allowing recovery by such claimants without affording Defendants any opportunity whatsoever to rebut the presumption of reliance"). Docket No. 1780 at

28 n.17. More importantly, third-party filing services and custodian banks relied on this Court's adoption of plaintiffs' proposed plan. Put simply, these institutions did not pursue answers from these class members because they were not required to do so. Therefore, the September 21, 2012 Order can not stand with respect to these claimants. If it were allowed to stand, 22,607 class members with claims valued at $178,907,639 would have their right to recover eviscerated by a lack of due process. Already victimized by the defendants, they would now be victimized again by their reliance on this Court's prior rulings. This portion of the Order must be reversed and the claims reinstated.

It would be a denial of due process to reject these claims on this record. It is well-settled that "notice and an opportunity to be heard [are] fundamental requisites of the constitutional guarantee of procedural due process" and the "express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided" to class members "who are identifiable through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 157, 174-75 (1974) (noting that notice to class members is not "discretionary" but an "unambiguous requirement of Rule 23"); *see also Hansberry v. Lee*, 311 U.S. 32, 42 (1940) ("there has been a failure of due process . . . in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it"); *Ziemack v. Centel Corp.*, 164 F.R.D. 477, 481 (N.D. Ill. 1995) ("At the heart of Rule 23(a)(4) is the concern that absent class members should not be deprived of due process in an action that conclusively determines their legal rights."); 7B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, §1791, at 6 (3d ed. 2012) (noting that any "alteration or amendment of an outstanding order that could have a significant effect on the action may have to be brought to the attention of all class members. Otherwise, class members may remain

inactive in reliance on the earlier determination by the court when action is advisable for the protection of their rights.").[1]

Clearly, these claims can not be rejected. The question is whether the reliance issue has been properly addressed with respect to these claims if no further response is required, as ordered by the Court in May 2011. Initially, based on the November 21, 2010 Opinion and Order, the reliance issue was to be addressed through the use of the claim form question. The Court recognized in that Opinion that defendants may be permitted later to follow up with discovery directed at class members that answered "yes" to the reliance question. Thereafter, in light of defendants' objections to this procedure, the Court granted defendants' request for discovery independent of the claim form question. The defendants thereafter embarked on 120 days of unfettered discovery directed at in excess of 100 absent class members and third parties. In short, defendants pursued the only discovery that they truly wanted – information from the largest claimants. As demonstrated by the Court's September 21, 2012 Opinion and Order, defendants came up empty-handed. They were unable to rebut the presumption of reliance as to a single class member based on the discovery that they received. Their failure is not surprising. As this Court noted, there was only a "remote possibility" that a class member would have purchased Household stock for reasons unrelated to its value. Docket No. 1703 at 8-9.

In adopting the plaintiffs' plan for dealing with the class members with claims less than $250,000, the Court recognized that after the claim form question was approved, defendants were

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[1] *See also Arleth v. FMP Operating Co.*, Civil Action No. 90-1663, 1991 U.S. Dist. LEXIS 14566, at *16 (E.D. La. Oct. 8, 1991) (refusing to dismiss absent class members who failed to respond to defendants' interrogatories because "[t]he court has a responsibility to safeguard the interests of the absentee members and denying their day in court is clearly not consistent with this responsibility"); *Gorden v. Kaleida Health*, No. 08-CV-378-S, 2012 U.S. Dist. LEXIS 100557, at *27 (W.D.N.Y. July 19, 2012) (denying request to dismiss class members who failed to comply with defendants' discovery requests where no warning that the failure to comply with requested discovery had been given).

given an alternative form of discovery – in fact, the form that they wanted all along. The Court struck a balance between the concept of a class action and defendants' need for discovery to rebut the presumption of reliance. Defendants wanted discovery from large class members and they got it. They also got an answer to (or failure to answer) the reliance question from all beneficial owners who submitted a claim directly and all class members with claims over $250,000 who filed through a third party. The Court thereby struck a fair balance between defendants' interests and the interests of absent class members, particularly in a class action case where the Court has broad discretion to manage litigation. *See* Rule 23(d)(1)(A) (permitting courts to "issue orders that determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence of argument"); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues.").

Moreover, if defendants had developed any facts in discovery rebutting the presumption of reliance, this Court would almost certainly have entertained further proceedings. Defendants failed to adduce any such evidence. On this record, the Court was correct to balance the class action device against defendants' needs and excuse performance from smaller claimants.[2] These claims must be reinstated. If defendants lodged other objections – not based on reliance issues – to these claims, they can be resolved by the Special Master.

Alternatively, if the Court decides that the balance it struck in May 2011 was inappropriate, it should approve a supplemental notice to be sent to all 22,667 claimants in this category, requiring an

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[2] Defendants harped on the fact that they had no intention of seeking discovery from smaller class members. Nevertheless, of the 22,667 claims in this category, 18,087 are valued at less than $5,000; 8,569 are valued at less than $1,000; 1,342 are valued at less than $200; and 71 are valued at less than $20. Such are the claims for which defendants now seek discovery in the form of an answer to the reliance question.

answer to the proof of claim form question. As discussed with the Court in April 2011, the third-party filers indicated that this process could take in excess of 12 months to complete. Whether 12 months, 6 months or some shorter period, the Court must allow time for these claimants to receive a supplemental notice and respond. There is no reason that the claims objections procedure cannot proceed in the interim. As the Court is aware, Household is in run-off mode, and continues to liquidate and sell off assets which places at risk the right of plaintiffs to recover on their jury verdict. Any additional period of time for another notice to claimants with claims less than $250,000 should coincide with the Special Master's identification of claimants to whom defendants have not lodged an objection (approximately $1.5 billion in claims) and his resolution of defendants' remaining objections so a judgment on the other claims can be entered as soon as possible.

## II. THE COURT EXCUSED PERFORMANCE BY CLASS MEMBERS WITH CLAIMS LESS THAN $250,000 IN AN EFFORT TO BALANCE DEFENDANTS' ATTEMPT TO REBUT THE PRESUMPTION OF RELIANCE WITH THE CLASS ACTION PROCEDURE

The record establishes that class members with an allowed loss of less than $250,000 who filed through third parties were not required to answer the proof of claim form question. In addition, unlike larger claimants, they never received the supplemental notice, which was approved by this Court on May 31, 2011. The Court's decision to excuse these class members was driven by circumstances unique to third party filers, the nature of class action litigation and the defendants' efforts to gather discovery regarding reliance issues. The Court's decision came as the result of a number of rulings, status conferences and decisions that revolved around the class notice and defendants' requests for discovery. The resolution of the reliance question moved to the forefront shortly after the verdict. In this section, we attempt to address the subsequent procedural history.

### A. After the Trial, the Parties Submit Their Competing Views on Phase II Proceedings and the Court Issues Its Initial Ruling

At the conclusion of the trial, the Court ordered the parties to submit recommendations with respect to dealing with the reliance issue in a second phase of the proceedings. On May 28, 2009, Lead Plaintiffs filed their Post-Verdict Submission. Docket No. 1622. In the submission, Lead Plaintiffs proposed that the Proof of Claim form include a question to be sent to class members, in lieu of further discovery regarding reliance. In defendants' Recommendation for Phase II Proceedings (Docket No. 1623), they proposed that the Court permit additional discovery of absent class members. In their response to plaintiffs' submission, defendants objected to plaintiffs' proposal that the claim form include a reliance question. Docket No. 1630.[3]

On November 22, 2010, the Court issued its Memorandum Opinion and Order regarding Defendants' Phase II Proceedings. Docket No. 1703. The Court recognized that defendants were entitled to an opportunity to rebut the presumption of reliance. However, the Court held that defendants' attempts to rebut the presumption on a class-wide basis at trial on the "truth-in-the-market" prong of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), had been rejected by the jury's verdict. While rejecting defendants' other arguments for additional discovery, the Court noted, "however, that does not foreclose the remote possibility that some class member may have purchased Household stock for a reason totally unrelated to its value as reflected by the market

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[3] In pressing for discovery in their Post-Verdict Submission, defendants stated:

> Moreover, contrary to Plaintiffs' prediction of "thousands of mini-trials," Defendants have no incentive, intention or need to proceed in an inefficient manner (especially given the high concentration of stock ownership in the hands of a small number of institutional investors), and they have represented to the Court that they will isolate and pursue only material contested facts.

*Id*. at 3. Needless to say, defendants' representations about the limited discovery that they would need are belied by the positions that they have subsequently taken.

price." Docket No. 1703, at 8-9. The Court acknowledged that "plaintiffs ask the Court to approve a notice to be sent to class members advising them of the verdict and their right to file a claim for recovery along with an interrogatory addressing the issue of reliance." *Id*. at 3. The Opinion went on to hold, "accordingly, the Notice and Preliminary Claim Questionnaire to plaintiffs will require each class member to answer, under the penalty of perjury, the following question."

Specifically, the Court held:

> This question goes to the heart of the issue of individual reliance. If the answer is "no," it does not matter whether the individual plaintiff purchased or sold any Household share (1) via an options contract, (2) as a day trader, (3) to hedge another tracking strategy, (4) through an automatic dividend reinvestment program, or (5) pursuant to a proprietary trading model. However, if the answer is "yes," defendants will have evidence that helps them rebut the presumption of reliance. Defendants may issue additional interrogatories to plaintiffs answering "yes" to obtain convincing proof that price paid no part whatsoever in their decision-making. This protocol sensibly resolves the tension between the rebuttable presumption of reliance and the practicalities and purposes behind Federal Rule of Civil Procedure 23.

*Id*. at 9. In short, the Court rejected defendants' request for open-ended discovery and held that the reliance issue would be addressed by the question in the Proof of Claim form with the possibility that defendants would be entitled to seek additional information from class members who answered "yes" by way of follow-up interrogatories, if necessary.[4]

### B. Defendants Renew Their Opposition to the Claim Form Question As A Way to Deal with Reliance and the Court Reconsiders and Grants Defendants' Request for Discovery

Defendants never wanted the reliance issue decided by the question in the claim form, as proposed by plaintiffs and approved by the Court on November 22, 2010. Defendants wanted discovery from absent class members. Therefore, on December 20, 2010, defendants filed their

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[4] In response to the Court's Opinion and Order, plaintiffs filed a document entitled Lead Plaintiffs' Submission of Proposed Notice of Verdict, Summary Notice, and Proof of Claim Form on December 16, 2010. Docket No. 1705. The document contained a proposed Proof of Claim Form with the reliance question.

Motion for Reconsideration of the Court's November 22, 2010 Order or, Alternatively, for Certification for Interlocutory Appeal, and Objection to Issuance of Proposed Notice to Class Members. Docket No. 1710. In their motion, defendants requested that the Court defer consideration of plaintiffs' proposed notice and Proof of Claim Forms until the issues presented in defendants' motion for reconsideration or certification for interlocutory review had been decided. Defendants argued that if the notice and proof of claims forms were mailed to class members, and this Court or the Seventh Circuit subsequently decided that limiting discovery to the single interrogatory to class members proposed by plaintiffs effectively precluded defendants from exercising their Seventh Amendment right to a jury trial in Phase II, then revised forms would need to be issued to the class. Defendants also argued that this would result in a substantial waste of time and resources and likely confuse class members.

On January 5, 2011, the Court held a status hearing to consider defendants' motion. At the hearing, the Court addressed defendants' jury trial rights and discovery. As to the claim form interrogatory, the following colloquies took place:

> MR. STOLL: Well, your Honor, because the notice here is predicated upon a Phase II protocol under your November 22nd order which deprives the defendants of their jury right with regard to all elements on the claim, including individual reliance.
>
> THE COURT: I don't understand that part of your submission at all really. It seems that in every other paragraph you decry the process as somehow of depriving you of a jury trial; and it doesn't say anything about jury trials. It doesn't even address the issue of trial. It essentially addresses the issue of discovery is what it addresses. And it says one of the ways that we can do this discovery succinctly is to pose this question.
>
> You've indicated in your brief for reconsideration that you don't think that's going to be sufficient. Even if that's true, I don't know what that has to do with a jury trial; but taking you at your word, that you don't think that's sufficient, I'm saying maybe we'll give you an opportunity to do some more discovery while we're getting an answer to that very important question and notifying the class. And you're telling me you don't want to do that?

Transcript of Proceedings held on January 5, 2011 ("1-5-11 Tr.") at 6.

Later in the January 5 proceedings, the Court again addressed defendants' request for discovery and the claim form question:

> THE COURT: So we should have the answer to that interrogatory for all claimants by May 24th?
>
> MR. DOWD: Yes, your Honor. If there are late claimants, which sometimes happens, that could be addressed to the Court.
>
> THE COURT: And if we allowed discovery during that period, then that would be essentially 120 days or more of discovery.
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> Given that at least the initial position of the defendants was that it was not their intention – that they deemed it would be wasteful – to seek discovery from small individual investors and that their true interest was to inquire of the large institutional investors, that should be more than sufficient time to conduct discovery, which from my written opinion I think you can see I think is not really all that necessary in this case given the issues that have already been resolved by the jury, truth and any issues of individual knowledge over and above what was publicly known, leaving only really one major issue to be determined, which is addressed directly by the interrogatory we've included in the notice.
>
> But certainly then I think that 120 days of discovery would be more than sufficient to allow the defendants to delve into whatever issues of reliance they wish to address. And I think that would be a fair way to address the defendants' concern regarding discovery.

1-5-11 Tr. at 19-20.

In short, the Court provided defendants with the relief that they sought in their request for reconsideration and permitted defendants to conduct additional discovery. At that point, the Court had essentially decided that the reliance question would be one form of discovery, but granted defendants' request for open-ended discovery of any class member. Defendants had never wanted the reliance question – they wanted discovery. They had consistently claimed that, given an opportunity for discovery of a select number of absent class members, they would develop evidence to rebut the presumption of reliance. As time would tell, defendants were dead wrong. They got their discovery and failed to develop evidence that rebutted the presumption of reliance, as discussed in this Court's September 21, 2012 Order.

In any event, on January 11, 2011, the Court entered an order approving the form and manner of notice, including the Proof of Claim Form containing the reliance interrogatory. Docket No. 1721. On January 14, 2011, the Court entered a Minute Order granting in part the defendants' motion for reconsideration and allowing defendants 120 days to conduct discovery "as stated in open court" at the January 5, 2011 hearing. Docket No. 1724. The Court also granted the motion insofar as amendments were made to the language of the notice to class members "as stated in open court."

### C. Plaintiffs' Lead Counsel Is Advised That Obtaining An Answer to the Question by the May 24, 2011 Deadline Is Not Practical and Immediately Advises the Court and Requests A Status Conference

In the January-March time frame, as defendants engaged in discovery of absent class members – well beyond the parameters that they had led the Court to believe was necessary – an issue arose with the claims process. Lead Plaintiffs were advised by members of the Bank Depository User Group, an organization of custodial banks that routinely filed class action claims on behalf of their clients, that it would be a monumental task to obtain an answer to the question from each and every client. Lead Plaintiffs also learned that the same problem existed for other third-party claims filing services. Lead Plaintiffs wasted no time in bringing the issue to the Court's attention, immediately filing Lead Plaintiff's Motion Requesting a Status Conference for April 7, 2011. Docket No. 1743. Lead Plaintiffs fully explained the issue raised by the Bank Depository User Group member institutions and their inability to answer the Claim Form question for their clients. The Court granted the request for the status conference, which was held on April 7, 2011.

### D. The April 7, 2011 Status Conference: The Court Considers the Problem Faced By Third-Party Filers

At the April 7, 2011 Status Conference, Lead Counsel explained the issue raised by the custodian banks, members of the Bank Depository User Group. In brief, although the third-party filers could file claims for their victim clients by the May 24, 2011 deadline, they could not obtain an

answer to the reliance question in that short of a time frame. Rare are securities cases that go to trial, rarer still are those that reach this point and the third-party filers were simply not set up to get answers from thousands of clients in 120 days.

Initially, Plaintiffs' Counsel explained that the issue for third-party filers was one of timing and their ability to get an answer to the question by May 24, 2011. The banks could get a claim on file by the deadline, but since they were not the person who made the investment decision, they could not answer for their clients. The following discussion of the problem ensued:

> MR. DOWD: . . . The question becomes, what do they do now. I mean, they filed the claim. They can't check the box "yes" or "no." They're the ones that file the claims. From talking to them, even if they were to find out which of those claimants have a claim under the Court's netting analysis – have damages – it seems to me that ***they were trying to tell me pretty clearly, we can't go back to 2,000 people all over the country, all over the world and get answers "yes" or "no" by May 24th***. I told them you better move as fast as you can because I'm not sure what the Court is going to do. I also told them that I would bring the matter to the Court's attention as soon as I could so that they would at least have some idea of what was going to happen.
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> I mean, I think ultimately, your Honor, it's – you know, whether they check the box "yes" or "no," the claim is on file. [Tr. at 6]
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> * * *
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> THE COURT: So what you are telling me is that ***the custodial banks and the institutional investors are essentially telling us that even that form of discovery – which I think we included in the notice and claims form for the purpose of trying to get the most simple and direct kind of discovery to the issue of reliance – is deemed onerous by the custodian banks***?
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> MR. DOWD: Yes, your Honor, because they are just simply not in a position to check the box one way or the other because they don't know why that person made a decision.
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> THE COURT: Okay. And I guess the – if we didn't have this structure with these custodian banks, if we went back to the times of yore when people wallpapered their apartments with these certificates of stock and kept them that way, we'd still have a numbers problem. [Tr. at 7]
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> * * *

> THE COURT: Let me just make sure I understand. I don't think they said they can't do it. I just think they said it would take longer than we gave them; is that right?
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> MR. DOWD: And, your Honor, I think we're confusing two issues. The point about sending it out to the clients, they're making their claim. I mean, two of the three institutions that were on the phone with me made their claims on April 1st. The question is checking the box and answering the question that I read into the record earlier.
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> THE COURT: But the problem they brought up to you is a question of time?
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> MR. DOWD: Yes, your Honor, absolutely.
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> THE COURT: Nobody said they weren't going to do it or they wouldn't do it or –
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> MR. DOWD: No.
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> THE COURT: As I understand it, they are custodial banks so they have an obligation to pass on to the people they're holding the paper for whatever processes that are in place. So what we're talking about here is they say they can't do it in the amount of time we gave them. [Tr. at 11-12]

Once the issue was explained, the Court and counsel discussed its resolution. The Court wanted to ensure that the claims themselves were filed, but recognized that there would have to be some extension of time granted to obtain answers to the reliance question:

> ***It seems to me that given what a tremendous undertaking this is going to be, that what we ought to do is supplement our notice to the custodian banks asking them – directing them to make the analysis so that we know how many real claims we have out there using the netting formula so that we narrow down the numbers as much as we can. And then we'll just have to make time for the questionnaire to be sent out to those claimants***. That's all. ***It need only be that one question really***. [Tr. at 8-9]
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> THE COURT: ***I think that the period of time for answering the question which goes to the discovery on the issue of reliance – which is not a claims issue; it's really a liability issue that's still out there – may need to be extended for whatever period of time is reasonable*** given what we now know to be the structure of the ownership, different forms of ownership, of the actual stock. [Tr. at 20]
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> * * *

MR. RAKOCZY: And I would ask – your Honor asked me what I would request. I would request that if your Honor is going to extend the period at all, that it only be as to some unknown group of people that counsel has pointed out to us in his motion and this morning.

THE COURT: Well, see, the problem is that we're working somewhat in the dark. We're asking these institutions apparently – the existence of which wasn't made clear to me by either side when the notice was prepared and sent out or any time since – to do something they have not been asked to do before. ***They can file a claim without having to send out a discovery question to the people for whom they hold these stocks. This is something they're not accustomed to doing, and they're telling us it's going to take a long time to do. As to how many, I don't know. But it seems clear that there's a large chunk of claimants here that are in that situation. And I don't see a problem with extending the period as to everyone***, unless you can tell me – or somebody can tell me which beneficial owners aren't included in this process that the custodian banks are telling us is going to take a long time. How do we do that? [Tr. at 22-23]

* * *

THE COURT: ***I am going to extend the process for answering the question***, which we included in the notice of the need to file a claim, for the reasons that have been given here. [Tr. at 26-27]

While assuring the third-party filers that their clients' answers would not be expected by May 24, the Court wanted to gather more information about the extent of the problem before arriving at a long-term solution. However, the Court was adamant that the May 24 deadline and the unexpected development with respect to the problems faced by custodian banks and third-party filers would not result in the rejection of claims. The following colloquies took place:

THE COURT: Okay. So it seems to me that what we want to do then is to restructure this portion of the notice and process that we sent out to obtain from the custodian banks a pure list – that is, a list of those claimants who actually would have a claim after being put through the netting process – and then to utilize the most effective means – which I assume would be through the custodian banks as well since their databases are already set up in the mailing procedures and so on – to send that portion of the notice with the question. ***And we may have to produce another piece of paper to send explaining that they have to answer this question if they want their claim to be processed***.

* * *

MR. DOWD: I think we can certainly try to find it out. And I think it's going to vary from among the thousands of class members. There's no question in my

mind, from speaking to some of the class members, that it would vary. But I think what I can do, your Honor, is in the next probably three weeks I would say – two to three weeks – try to find out – at least with this first wave of custodian banks that filed in the last few days – ***to try to find out what kind of numbers we're talking about with those major institutions. And then perhaps make a proposal for what's the best way to get the question answered from their clients***. [Tr. at 16-17]

* * *

MR. DOWD: Your Honor, there's been complete follow-through in every way by lead counsel on this case. And, you know, one option would have been for me to wait until May 26th and tell the defendants, here's the claims; knock yourselves out; they didn't check "yes" or "no"; go do whatever you think you need to do. But, instead, we brought it to the Court's attention and defendants' attention when we became aware of it and tried to figure out how big an issue it was.

THE COURT: ***Well, I'm not inclined to bar claims or possible relief for tens of thousands of individual investors by virtue of the actions of custodian banks that hold the record ownership of their stocks. That, it seems to me, would be a catastrophic and repugnant conclusion to this process***. [Tr. at 19-20]

* * *

THE COURT: Well, to the extent that there are claims submitted by individual beneficial owners that don't include a response to the question, we'll deal with that during the claims procedure process. I'm certainly not going to deal with that now.

I don't see any basis for extending the deadline for the filing of those claims by individual beneficial holders of the stock, beneficial owners who hold the stock individually. I do see a need to extend the period of time, as I said before, for custodian banks and other intermediaries that are being asked to send this question out to thousands, maybe tens of thousands, of individual customers, a process they haven't done before in the past.

To the extent that your point goes to the fact that the custodian banks have not been diligent in informing us of this problem until now, I'm not sure if that's true or not. I don't know to what extent – I don't know how you measure diligence with such entities. I don't know what their processes entail. ***But even assuming that there's been some lack of understanding as to the importance of the deadlines for these custodian banks, it's not my intention to punish the beneficial holders of the stock, that is, the people who were actually damaged by the fraudulent conduct for the presumed lack of diligence of institutions that they have literally no control over. That, I'm not going to do***. [Tr. at 24-26]

In making these rulings, the Court recognized that the claim form question – once a critical component of Phase II – had been rendered only one form of potential information, supplemented by the Court's decision to permit defendants to engage in discovery:

> THE COURT: ***And, of course, based upon our January order, we already have ongoing a parallel course of discovery as well***. [Tr. at 8-9]
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> * * *
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> [THE COURT:] I don't really see a large problem here. First, we have in the past revised our orders to take into account developments as they happen. ***For example, on a motion to reconsider, we significantly amplified the discovery process to allow you folks to go ahead and take some direct discovery even before these responses came back, which, as it turns out, was really a good thing because it appears that the responses are going to be more difficult to get than we anticipated***. I clearly anticipated – or did not anticipate that there would be so many levels of ownership here, so many levels between the actual beneficial owners of the stock. I guess in my simplistic view, I expected that whoever was actually holding the paper for the beneficial owners would also be the decision-maker in deciding how and when to invest, that is, to purchase the Household stock. It turns out that's not so. It turns out that's not so. ***So the process that we put in place, specifically the time limits, are not appropriate for the realities of the situation. And I don't have any problem adjusting the time frame to allow that to be done***.
>
> It seems to me that the – well, to address your other concern, I think the time limit set on the discovery process that you're in the middle of, in the midst of right now, was as to that process. It wasn't meant to preclude follow up of any negative answers to the discovery question that we're posing to the entire class. I think you have – you will have the right to follow up on any investors who say, yes, I would have bought it anyhow; I didn't care about the price. You have a right to follow up on that. So you're not going to be limited in that regard. You still have the original track for discovery that we envisioned when we included that question in the notice, which is essentially a discovery tool is all that is, and the supplemental track that we provided for when we granted, in part at least, your motion to reconsider. [Tr. at 14-15]
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> * * *
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> THE COURT: Well, I think as I made clear in that order, it was made crystal clear to me by your co-counsel here that they already knew who the large institutional investors were; that there were 10 to 15 of them and that's who they had to target for discovery. And I assume they're doing that now because I assume they weren't misrepresenting to me when they said that. And the language they used to say it is crystal clear. It's in my order.

I was somewhat taken aback when it was represented to me later after the trial that such a representation had never been made, and it appears that we're getting that representation again in some other form. Not so. The representation was made. I was told 10 to 15, the large institutional investors, that's all we have to do, Judge. I assume that statement was not made in the dark; that some thought process went into it, some investigation, some knowledge that that was actually so. So you take your discovery of those 10 to 15 institutional investors. Don't tell me you don't know who they are yet because I don't buy that based upon the prior representations made by counsel. [Tr. at 27-28]

* * *

THE COURT: Well, I said that, and I guess I'll have to take some of it back. What I should have said was, the only person – and I thought this was so obvious that I probably shouldn't even have been saying it and it turns out that I shouldn't have been saying it – the only person that can check that box is the person who has knowledge to answer it. If the beneficial owner of the stock was not involved in the decision-making and doesn't have knowledge of it, that person can't – it would make no sense to check the box.

If the custodian bank did nothing but transmit the paperwork and had nothing to do with the decision-making, then I guess they can't check the box either, unless they otherwise know.

What I should have said was, the only person that can check that box is someone who has knowledge of it. Okay. I assumed that that person would always, or in most cases, be the person who actually held the stock. But apparently it's not so.

I am not one of the premier class action securities litigation law firms in the country. You guys are. So I don't presume to know as much about the structure as you do. I do rely upon what you say. And what you told me was what I put in my order. And that's what I relied upon. And I tell you this: I reconsidered my decision to allow only this one track of discovery based upon that information. If that information is incorrect, then I probably ought not to have reconsidered my decision as to how much discovery to allow. ***Because it's clear – it's clear – that the one thing we cannot do is allow discovery to become a form of harassment or obstruction to the claims procedure for the people who have purchased this stock pursuant to fraudulent misrepresentations. If we do that, what we do is we totally destroy class action lawsuits. It becomes just another lawsuit with tens of thousands of plaintiffs instead of a class action lawsuit***.

So the discovery has to be conformed to some extent to make it reasonable for both sides, the need to conduct this as a class action and the need for reasonable information to be gathered by the defendants. The determination I made was based upon the representations that you made. And it stands.

Tr. at 33-35.

Finally, contrary to the September 21, 2012 Opinion and Order, the Court opined that a failure to answer the reliance question alone would not result in the invalidation of any claim, stating:

> THE COURT: ***I don't see the answer to that question or failure to answer it to be an invalidation of any claim. That question was put there as a form of – one form of discovery. It doesn't have anything to do with the computation of the number of shares or the loss or gain from trading shares during the class period, which is what the claims procedure is about***. It goes to the one remaining issue, which is, the – on the question of liability, which is the defendants' right to rebut the presumption of reliance. ***It's put there to gather information in that regard. To the extent that we need to extend the process to do that, I will extend the process***. [Tr. at 22.]

**E. At the Court's Request, Plaintiffs Submit A Plan for Addressing the Issue – A Plan the Court Subsequently Adopts**

On April 11, 2011, in the aftermath of the April 7 Status Conference, the Court issued an order referencing the status hearing held on April 7, 2011. Docket No. 1753. The Court noted that plaintiffs notified the Court that several custodian banks expressed concern regarding the difficulty of obtaining the investor clients' answers to the discovery inquiry on the Claim Form prior to the claim deadline of May 24. The Court stated: "This difficulty arises from the fact that although these custodian banks are authorized to file claims on behalf of their clients, they were not the decision-makers regarding the relevant investments as to those clients." *Id*. at 1. The Court noted that the custodian banks would have to identify and transmit the discovery inquiry to each relevant decision maker, which was complicated by the sheer volume of class members for whom they would be submitting claims. The Court continued that plaintiffs "now seek guidance from the Court as to whether additional time may be granted in order for the custodian banks to obtain answers to the discovery inquiry after their investor clients' claims have been timely filed." *Id*. at 2. The Court went on to state that there was no reason to extend the claim deadline for filing the "claimants' identification and schedule of transactions." *Id*. The Court then directed plaintiffs to propose a plan

by May 6 as to the most efficient way to proceed in order to obtain responses to the discovery inquiry.

On May 6, 2011, Lead Plaintiffs filed a proposed plan for obtaining responses to the discovery inquiry on the Proof of Claim Form. Docket No. 1756. Lead Counsel advised the Court that "in our telephonic conversations with these representatives, we were informed that obtaining an answer to the Proof of Claim Form question from each class member with an allowed loss would constitute 'a herculean task.'" *Id*. at 3. Moreover, plaintiffs told the Court that their understanding was that to reach out to "each and every class member could take in excess of 12 months." *Id*. Plaintiffs also noted that assuming the Court granted such a lengthy period to obtain responses, the banks believed that their success rate in terms of obtaining a response would be low. In proposing an alternative plan, plaintiffs argued "[i]t seems distinctly unfair for these institutions to bear this burden and cost without a scintilla of evidence that it will help defendants rebut the presumption of reliance." *Id*. at 5. Plaintiffs pointed out that defendants had indicated on a number of occasions that they were not concerned with contesting the individual claims of small claimants. Plaintiffs argued that it would make little sense to ask third-party filers to undertake the massive task of obtaining an answer to the Claim Form question from individuals or entities with smaller claims. Thereafter, Lead Counsel proposed that the custodian banks and third-party filers limit their efforts to entities and individuals that have claims with an allowed loss in excess of $250,000. Plaintiffs stated "***[a] monetary limitation will reduce the number of claimants that need to be contacted and asked for an answer from 12,506 to 746 for the claims submitted to date, while still capturing information from claimants who, based on the current data, will receive approximately 81.3% of the damages***." *Id*. at 5-6. Instead of demanding an answer to the reliance question from every class member, Lead Counsel suggested that the Court issue a one-page notice to be sent to each $250,000 plus claimant.

On May 13, 2011, defendants filed their response to plaintiffs' proposed plan. Docket No. 1757. Defendants noted "[p]laintiffs have not provided a meaningful or appropriate plan for obtaining answers; instead, they propose that no answer should be required from 94% of the beneficial owners on whose behalf nominees have filed purported Proof of Claim forms that contain no answer to the Court-ordered question." *Id*. at 1. Defendants also noted that the Court:

> should reject plaintiffs' inadequate proposal and direct that the Proof of Claim Form, or a Court-approved follow up notice, be sent to all beneficial owners on whose behalf custodian banks or other nominees submitted Proof of Claim forms that do not contain an answer to the reliance question. The Court also should hold that if after receiving the Proof of Claim Form or follow up notice, and following a reasonable time period to respond, a class member still does not provide a verified answer to the Proof of Claim Form's reliance question, that class member's claim should be deemed invalid.

*Id*. at 3. In short, there was no confusion: plaintiffs' proposed plan contemplated that no answer would be required from persons with claims of $250,000 or less who filed through a third-party. Defendants' response was the first of six occasions on which defendants would acknowledge that the adoption of plaintiffs' plan by the Court would excuse smaller claimants from answering the reliance question.

On May 31, 2011, the Court entered an order approving plaintiffs' plan with a modification of the language of the proposed supplemental one-page notice. Docket No. 1763. The Court noted that the banks estimated it would take a great deal of effort and in excess of 12 months to reach out to each and every class member with an allowable claim and that such an effort was likely to result in a low percentage of responses. The Court reasoned that the process, if adopted, would be not only expensive but prolonged. The Court noted that time was extremely important. The Court also stated, "the Court has previously voiced its concern that the longer the process takes the less likely it is that defendants will actually have sufficient assets available to satisfy any final judgment that might result from what has already been a long, difficult and expensive process." *Id*. at 4. The

Court pointed out that the Federal Rules of Civil Procedure recognize and provide for limitations on discovery, especially in class action cases. The Court opined that one of the principle advantages of a class action lawsuit would be entirely lost if all class members were routinely subjected to discovery. The Court stated:

> From the description given by the Bank Depository User Group, it has become clear that the burden placed on class members by the interrogatory which the Court has previously approved is significant, as would be the time involved in obtaining responses from all possible class members with allowable claims. The burden, and most likely the time required to respond, will be greater for the 11,760 smaller claims – these claimants are much more likely to be discouraged from following through on a claim if it requires a burdensome response. The 746 large claims are not likely to be discouraged by a discovery request that requires a substantial effort to fulfill. Dealing with a smaller number of claims will, of course, increase the speed and likelihood of a meaningful response.

*Id*. at 5-6. The Court acknowledged that a small minority of the claims accounted for 80% of the allowable losses. The Court stated, "we now know that discovery of 80% of the claimed losses can be achieved by addressing only 6% of the claims. ***This, coupled with the other avenues of discovery the Court has already approved, constitutes a reasonable approach to balancing the needs of defendants for discovery with the need to protect class members from discouragement and the need to move this already 9-year-old case towards a conclusion***." *Id*. at 7. The Court went on to approve plaintiffs' proposed one-page supplemental notice with a modification to the Claim Form. The Court ordered that,

> The claims administrator is authorized to prepare the customized one-page notice for each claimant and provide the forms to the third-party filers for dissemination to their claimants. The third-party claims filer will be instructed to send the notice to each entity and individual that has a claim with an allowed loss in excess of $250,000 and obtain an answer to the question and the signature of the person who provided the answer and submit the executed notices to Gilardi, as they are received. The Court concurs with Lead Plaintiff's suggestion that the third-party filers should be given 90 days from receipt of the one-page notice form to obtain executed forms.

*Id*. at 7-8. In adopting plaintiffs' plan, there is no question that claimants with allowed losses less than $250,000 were excused from answering the reliance question.

### F. After the May 31, 2011 Order, the Parties Clearly Understood That the Court Had Excused Performance By the Smaller Claimants

On June 15, 2011, the Court held a status conference to discuss a number of issues. The parties filed status conference reports in advance of that hearing. Plaintiffs provided an update regarding the notice process. Docket No. 1766. In their status report, defendants objected to the Court's May 31, 2011 Order stating that it should be reversed or modified for several reasons. Docket No. 1764. Among other things, defendants noted that the order "completely denies Defendants their constitutional right to obtain evidence to rebut the presumption of reliance as to at least 11,760 members of the class with aggregate potential claims . . . of nearly $250 million." *Id*. at 5 n.2. Defendants reiterated their arguments regarding the May 31 order, and stated "it is Defendants' position that, as a matter of fundamental due process, an answer to the Proof of Claim form's reliance question must be obtained from all claimants – not just from those with potential allowable losses of over $250,000." *Id*. at 14 n.10. Once again there was no confusion in the parties' minds: the May 31, 2011 order excused claimants with claims less than $250,000 who filed through a third-party from answering the claim form question.

On August 16, 2011, the Court issued an order following up on the June 15, 2011 status conference and addressing defendants' request for an extension of discovery. In rejecting defendants' request for an extension of the discovery period, in part due to defendants' lack of diligence, the Court noted that in its November 22, 2010 Order, it outlined a discovery procedure to address defendants' right to rebut the presumption of reliance. The Court stated:

> The process consisted of an interrogatory in every claims form to be answered by every claimant in order to determine whether the claimant would have purchased Household stock even if it had known, at the time, that the price of the stock was inflated by defendants' false and misleading statements. As to any claimant who answered yes, defendants would then be allowed to conduct additional discovery in order to prove that price played no part in the decision to purchase the Household stock. This protocol, as explained in the Order, was meant to resolve the tension between the defendants' right to rebut the presumption of reliance which had been

> established by the jury's finding in the initial phase trial and the purpose behind Federal Rule of Civil Procedure 23.

*Id*. at 3-4. Thereafter, the Court noted that defendants filed a motion for reconsideration claiming that limiting discovery to those who answered "yes" to the interrogatory unfairly limited their ability to discover the evidence needed to rebut the presumption. The Court went on to state that while it did not agree with much of defendants' argument, it had nevertheless allowed an additional 120 days of discovery of class members without regard to whether they answered yes or no. The Court then went on to state that the defendants engaged in extensive discovery which was contrary to every representation defendants had made to the Court.

The Court issued an order on August 24, 2011 addressing reliance issues. In the conclusion of the Order, the Court observed that there were two tasks that remain: the final adjudication of the claims, a mechanical administrative process that would be referred to a Magistrate Judge, and a final determination on the presumption of reliance. The Court set a schedule for the reliance briefing, which would address that issue in its entirety.

On October 14, 2011, defendants filed their brief attempting to rebut the presumption of reliance. Buried among defendants' many unfounded arguments, they conceded that the Court's May 31, 2011 Order excused class members with claims less than $250,000 from answering the reliance question. Defendants wrote:

> Over defendants' objection, the Court held that nominees who filed claims on behalf of beneficial holders with claims of $250,000 or less did not need to obtain answers to the reliance question, thus allowing recovery by such claimants without affording Defendants any opportunity whatsoever to rebut the presumption of reliance as to such claimants. (Docket No. 1763.) Defendants renew and incorporate their objections to this procedure herein.

Docket No. 1780, at 28 n.17.

On December 19, 2011, defendants again set forth their understanding that claimants with an allowed loss less than $250,000 were not required to answer the claim form question. In their reply

to the reliance briefing, defendants wrote: "the Court has excused claimants with claims of $250,000 or less whose Claim Forms were submitted by third-party filers and did not contain an answer to the Claim Form's question from any requirement that they provide an answer to the question." Docket No. 1787 at 26.

The parties' mutual understanding that performance for those class members was excused by the Court was reiterated in the briefing regarding defendants' objections to certain claims earlier this year. On February 27, 2012, defendants filed their objections to claims approved by Gilardi. Docket No. 1800. In §D.4, they object to claims filed by third-parties on behalf of beneficial owners with claims of $250,000 or less. Defendants noted that plaintiffs advised the Court of the problem on April 7, 2011 and proposed a plan that custodians and third-party filers limit their efforts to claims with a loss in excess of $250,000. Defendants noted that the Court approved the plan over defendants' objections. *Id*. at 3-4. Defendants also stated that the "Court refused to require third parties . . . from making any effort to obtain answers to the reliance question from these beneficial owners." *Id*. at 15-16. In plaintiffs' March 28, 2012 response to defendants' objections, Lead Counsel wrote that "[t]he Court's May 31, 2011 Order mandated that these 22,667 claimants were not required to answer the reliance question." Docket No. 1802 at 51. On May 9, 2012, defendants confirmed that plaintiffs were correct. In defendants' Update Regarding the Claims Objections, defendants acknowledged that this category had been previously ruled on by the Court and this objection specifically was stated "for record purposes." Docket No. 1817 at 10.

As demonstrated above, the Court initially decided that the claim form question would be the keystone for the Phase II proceedings. If class members checked "no," their reliance was established. If class members checked "yes," defendants may have been entitled to additional discovery of some type. Thereafter, at defendants' request, the Court reconsidered. Defendants got their discovery and used it. At that point, the claim form question was simply one of the means to

get discovery – and by no stretch of the imagination was it defendants' preferred method. When issues arose with respect to the claims process, the Court arrived at a solution. Recognizing that defendants had insisted that they could rebut the presumption of reliance if allowed to pursue discovery from 10-15 class members and recognizing that defendants' wish had been granted, the Court excused smaller class members from answering the question. The decision was purely an attempt to balance the need for discovery with the recognition that there must be limits to that discovery in a class action. The decision was correct.

## III. CLAIMANTS THAT WERE UNABLE TO ANSWER THE RELIANCE QUESTION

In responding herein to the Court's November 1, 2012 Order, plaintiffs want to ensure that the record reflects their continued objection to other portions of the September 21, 2012 Opinion and Order, as well. Plaintiffs continue to object to that portion of the September 21, 2012 Opinion and Order that denies the claims of any class member who failed to answer the question, whether they filed through a third party or not, and any class member who responded that they were unable to answer the question. Defendants have the burden of proof to rebut the presumption of reliance. They have failed to do so as to class members who failed to answer or as to class members who asserted that they could not answer and provided an explanation for their failure to do so.

The Court's ruling is particularly unfair to class members who provided explanations in lieu of a "yes" or "no" answer – assuming the Court intended to reject their claims. Plaintiffs' counsel first raised this issue with the Court at the April 7, 2011 conference:

> MR. DOWD: Your Honor, my recommendation would be this: I mean, I think that ***it's still worth, you know, an effort for me to tell people, You should try to go back out and get the box checked by the appropriate person***.
>
> I can tell you, for example, we had one class member that called me and said, well, we're a pension fund – ***Taft-Hartley pension fund*** – we don't make investment decisions. It's set up to not make investment decisions. ***We use an outside investment adviser. They said, we have new outside investment advisers now and***

> ***who made this decision ten years ago, we're trying to find out. We can't check the box because we don't know.*** And we don't know if the person is still going to be at this outside investment adviser.
>
> THE COURT: Sure, I still can't find the receipt to my printer. I wouldn't even be able to make a claim.
>
> MR. DOWD: And, you know, I think the question becomes, ***if they don't check the box at all, I believe it's still a valid claim***. I mean, I guess the defendants could look at it as the same as checking the "yes" box and follow suit thereafter like they would with anyone else who checked a "yes" box.
>
> THE COURT: ***Well, let's not cross any hypothetical bridges. I think we have enough real bridges to deal with.***

*Id*. at 8-9.

As it happened, the hypothetical bridge was a real one. There are approximately 41 claims in excess of $250,000 alone, valued collectively at over $30,000,000 that fall into this category. Docket No. 1802 at 51 and Ex. D-3. The Court's decision potentially sweeps these claims aside despite the class members' response to the reliance question, albeit without checking the "yes" or "no" box, and defendants' complete lack of any evidence rebutting the presumption. Although the Court may decide to deny claims based on a failure to respond to "discovery" if the claimant refused to respond – these claimants do not fall into that category. They responded that they simply could not answer the question. It is unconceivable that their claims can be summarily rejected on that record.[5] The Court should reconsider its ruling as to all claimants who provided no answer, but at a

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[5] The class members in this category are identified in Appendix D-3 of Plaintiffs' Response to Defendants' Objections filed on March 28, 2012. For example, the Court's ruling arguably denies a $442,848 claim by a class member who did not check "yes" or "no" but returned the supplemental form with this explanation:

> The purchase of Household stock was made by an investment manager retained by the Foundation to make investments on its behalf subject to investment guidelines. The Foundation asserts, based on the guidelines and knowledge of the manager, that the manager would not have purchased the stock if it had known that false and misleading statements had inflated the price of the stock.

minimum for those class members who tried to answer and were unable to do so. The claimants who provided an explanation should have their claims referred to the Special Master for further proceedings.

## IV. CONCLUSION

The Court's May 31, 2011 adoption of plaintiffs' proposed plan for dealing with the third-party filers and custodian banks excused their clients with claims less than $250,000 from answering the reliance question. The Court's decision appropriately resolved the tension between the defendants' need for additional discovery and the need to place reasonable limitations on discovery, particularly in the class action context. Although the decision affected 22,667 claimants, their allowed losses collectively are only 8% of the class-wide total losses ($178,907,639 of $2,225,984,588), as calculated by Gilardi. This percentage is entirely consistent with the prediction made by plaintiffs' counsel in connection with the proposed plan in May 2011. The combination of the unfettered discovery granted defendants by the Court in January 2011 and the receipt of claim form answers from claimants who suffered 92% of the losses was an appropriate balance of defendants' desire for discovery with practical limits on that desire. In any event, it would be a denial of due process for the Court to exclude these 22,667 claims on this record.

If the Court believes that an answer should be obtained from these 22,667 claimants – recognizing that it will be costly and the response rate will be low for smaller claims – it can approve a supplemental notice to be sent to these class members. The supplemental notice can be modeled on the supplemental notice sent to larger class members in June 2011. However, the Court must grant a substantial amount of time for that process to take place. Clearly, that process, if adopted,

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Clearly, the class member did what they could and just as clearly defendants have wholly failed to rebut the presumption of reliance.

can proceed simultaneously with the Special Master's resolution of defendants' objections to claims on other grounds.

DATED: November 15, 2012

Respectfully submitted,

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I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 W. Broadway, Suite 1900, San Diego, California 92101.

2. That on November 15, 2012, declarant served by electronic mail and by U.S. Mail to the parties the following documents:

PLAINTIFFS' RESPONSE TO THE COURT'S NOVEMBER 1, 2012 ORDER REGARDING CLAIMANTS WITH CLAIMS OF LESS THAN $250,000

The parties' e-mail addresses are as follows:

| | |
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and by U.S. Mail to:

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New York, NY 10022

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of November, 2012, at San Diego, California.

Deborah S. Granger

DEBORAH S. GRANGER