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, *- against -* HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' THIRD SET OF INTERROGATORIES

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This reply memorandum is respectfully submitted on behalf of Defendants in further support of their Motion to Compel Responses to Defendants' Third Set of Interrogatories (the "Interrogatories").[1]

INTRODUCTION

The Federal Rules of Civil Procedure entitle litigants to discovery regarding any information that may itself be relevant or lead to other relevant discovery. For defendants in a class action securities fraud case such as this one, interrogatories posed to class counsel serve as virtually the only mechanism by which the defendants can obtain discovery into the nature of the claims alleged against them. Unlike defendants, the class itself typically has few, if any, documents or witnesses that can shed light on the claims asserted by the other side. Eager to deprive Defendants of even this narrow means of discovery, Plaintiffs' counsel in this case continue to refuse in bad faith to respect these Rules and respond to simple interrogatories.

Defendants asked Plaintiffs to identify the dates and disclosures by which the public learned the truth about the alleged "fraud." This information is indisputably relevant to securities fraud cases since the Supreme Court recently rejected reasoning that suggested that an alleged fraud need not have been actually revealed to the public. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 342 (2005) ("*Dura*") ("[If]. . . the purchaser sells the shares quickly before the *relevant truth* begins to leak out, the misrepresentation will not have led to any loss." (emphasis added)). Defendants seek a straight-forward factual identification of the disclosures that revealed the "relevant truth" and the dates when they were made. Supreme Court precedent establishes these facts as relevant and the Federal Rules require responses to this discovery. Plaintiffs have nevertheless refused, calling these vital details "irrelevant," requiring no response at all. (Plaintiffs' Brief ("PB") at 1, 6, 8, 9.)

Plaintiffs' counsel do not assert that they are unable for any reason to provide the dates and disclosures that revealed the alleged "relevant truth." Instead, Plaintiffs' brief purports only to excuse their refusal to respond with information they could clearly provide, if ordered. Although they vaguely assert that the general subject matter of these facts somehow relates to expert testimony,

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[1] "Interrogatories" refers to Household Defendants' Third Set of Interrogatories to Lead Plaintiffs served on May 26, 2006, which are annexed as Exhibit 1 to the Affidavit of Janet Beer accompanying Defendants' Motion. Plaintiffs' "answers" are annexed to the Beer Affidavit as Exhibit 2.

counsel's noncommittal argument offers no indication that they ever intend to provide the requested dates and disclosures. (PB at 10.) To the contrary, far from actually offering "expert" disclosure of these non-expert facts, counsel openly opposes responding at all to the Interrogatories, arguing that "requiring Plaintiffs to respond would create confusion not clarity." (PB at 13.)

Neither the relevance of this discovery nor Plaintiffs' ability to provide the dates and disclosures they rely upon can be seriously disputed. Plaintiffs have *twice* identified August 14, 2002 as one such date—the date "investors began to learn the true facts." First in their *Foss* brief, and again in their *Dura* brief.[2] These statements concede the relevance and discoverability of the information underlying their representations to the Court. In fact, to eliminate the obvious inconsistency in their position, Plaintiffs now purport to disavow these prior representations arguing (remarkably): "Plaintiffs cannot be bound by prior statements in legal briefs." (PB at 9.)

Absent an order of this Court, Plaintiffs will never respond to these simple Interrogatories and will continue to obstruct any discovery of their claims as long as they are permitted to do so. This discovery will greatly help Defendants to better understand Plaintiffs' claims and narrow the issues in this case to those covered by the disclosure of the "relevant truth" required by *Dura*. Plaintiffs' refusal to provide such basic facts also poses an obstacle to any possibility of settlement in this case. Interrogatories that ask a plaintiff to commit to a position and give factual support for that position are appropriate and require a response. *Ziemack* v. *Centel Corp.*, No. 92 C 3551, 1995 WL 729295, at *2 (N.D. Ill. Dec. 7, 1995). It is unfortunately necessary for the Court to compel Plaintiffs to fulfill their obligations under the Federal Rules.

RELEVANT PROCEDURAL HISTORY

Plaintiffs' assertion that Defendants did not meet and confer in good faith is meritless. (PB at 3.) Plaintiffs have outright refused to respond to Defendants' Interrogatories and made every at-

[2] Affidavit of Janet Beer dated August 18, 2006, Ex. 3 at 8 (*Foss* Brief) (identifying August 14, 2002 as "the earliest date that plaintiffs could have discovered the essential facts underlying defendants' fraud."; Ex. 4 at 10 (*Dura* Brief)). "*Foss* Brief" refers to Lead Plaintiffs' Response to Household Defendants' Motion Pursuant to the Seventh Circuit's Decision in *Foss v. Bear, Stearns Co*., filed August 18, 2005. "*Dura* Brief" refers to the Lead Plaintiffs' Response to Household Defendants' Motion Based on the Supreme Court's Decision in *Dura Pharmaceuticals, Inc. v. Broudo* filed August 18, 2005, excerpted.

tempt to evade what few discovery obligations they have. As the Court may recall, Plaintiffs waited until the deadline for responses had passed and then demanded a three week extension for *six simple interrogatories*. Defendants requested that Plaintiffs at least provide them with their objections on the original deadline so that any disputes could be resolved expeditiously. Plaintiffs refused. Instead, Plaintiffs took the three weeks and "responded" to only one of Defendants' Interrogatories—objecting to the remainder.

On August 1, 2006, Defendants conferred with Plaintiffs regarding their refusal to answer. Contrary to Plaintiffs' assertion, and as a reading of the *44-page transcript* reveals, the parties discussed each Interrogatory in turn and Plaintiffs refused to provide any further information. (Aug. 1, 2006 Transcript, Beer Aff., Ex. 5 at 31:9-13 ("I think we agree that on [29], we've reached an impasse, okay. We just moved passed that. So to the extent you're now saying that this [30] is interrelated with [29], I think that our position remains the same."), 18:6-7 ("Well, I suppose then for those three [31-33] that we are at an impasse.").) Plaintiffs took absurd positions, even feigning ignorance about what information the Interrogatories were seeking. (*Id*. at 16:14-15 ("You want us to reiterate the allegations in the complaint then?"), 15:13-15 ("So you're not talking about someone else alleging during the class period that ***counsel*** was engaged in certain practices?") (emphasis added).) Among the silliest of Plaintiffs' proposed "modifications," which Defendants rejected, was to eliminate references to the Complaint. (*Id*. at 17:13-15 ("Why don't you modify the interrogatory so that it doesn't, you know -- it doesn't refer to the complaint"), 17:17-21 ("We're not going to modify the interrogatory so that it doesn't mention the complaint. The complaint is at the heart of what the interrogatory seeks to understand.").) Plaintiffs' argument that more "meeting and conferring" might have persuaded them to provide responses is totally lacking in credibility. It is also belied by the absence of any offer to provide the requested responses either now or in the future.

Interrogatories are effectively the only mechanism whereby Defendants in a securities class action can obtain discovery of the claims made against them. Indeed, as this Court is well aware, merits discovery in this case has been an entirely lopsided affair. Plaintiffs' counsel's refusal to respond to six such simple and plainly relevant interrogatories is a thinly veiled attempt to keep this case afloat by refusing to disclose even the most basic factual support for their claim. they should not be allowed to disregard the Federal Rules to further their litigation strategy.

ARGUMENT

"The Federal Rules of Civil Procedure contemplate liberal discovery, and 'relevancy' under Rule 26 is extremely broad." *For Your Ease Only, Inc.* v. *Calgon Carbon Corp.*, No. 02 C 7345, 2003 U.S. Dist. LEXIS 20267, at *4 (N.D. Ill. Nov. 10, 2003) (Nolan, M.J.). "Under Fed. R. Civ. P. 26(b)(1) parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. Information need not be admissible at trial, it is sufficient if the discovery request appears reasonably calculated to lead to the discovery of admissible evidence. Discovery encompasses matters that actually or potentially affect any issue in the litigation." *Trading Technologies International, Inc.* v. *eSpeed, Inc.*, No. 04 C 5312, 2005 U.S. Dist. LEXIS 10686, at *2 (N.D. Ill. Apr. 28, 2005) (citations and quotations omitted).

Defendants' Interrogatories request that Plaintiffs indicate how and when the market learned of the "relevant truth" regarding the alleged fraud. *Dura*, 544 U.S. at 342. These are appropriate interrogatories covering facts that are indisputably relevant to the litigation and Plaintiffs must respond.

A. Defendants Have Not Exceeded Their Interrogatory Limit (Interrogatories No. 29-34)

Although Defendants appreciate the Court's disfavor of debates about the proper count of interrogatories, they must protest Plaintiffs' current arguments on this subject because these egregious distortions, if accepted, would literally deprive Defendants of their principal means of discovery, and create a severe and unjustified imbalance in the parties' respective discovery rights. Plaintiffs assert as one of their excuses for ignoring Interrogatories No. 29-34 that "by Lead Plaintiffs' count" Defendants have previously served 101 interrogatories. (PB at 4.) Plaintiffs provide absolutely no explanation for how the "101" figure was calculated, instead arguing without any explanation or evidentiary support that "the Court should accept lead plaintiffs' count that defendants have served over 100 interrogatories". (*Id.* at 5.) In fact, during the merits phase of discovery, Defendants had only served 28 interrogatories prior to this set of six. (Reply Affidavit of Janet Beer dated September 8, 2006 ("Beer Reply Aff."), Ex 3 at 1-2 and Ex. 4 at 1-5.)

What their brief describes as "lead plaintiffs' count" is a complete and total fabrication. If Defendants had actually interposed 101 interrogatories or anything close to that absurd estimate, Plaintiffs' numbering of their actual responses would reflect this "count."[3] (In their responses, plaintiffs invariably renumber the interrogatory to which they are responding—or, more often, objecting—according to their count of the questions.) It does not. To the contrary, Plaintiffs' "responses" to Defendants' previous set of interrogatories renumbered the questions to end *at 38 (not 101)*. (Beer Reply Aff., Ex. 5.) Plaintiffs' objections to the latest set of six interrogatories picks up at 39 (under their own renumbering) and runs to only 44—seriously undermining Plaintiffs' unexplained and irresponsible contention that Defendants had previously served 101 interrogatories. (Beer Aff., Ex. 2.) Even passing Plaintiffs' own admissions to the contrary on this subject, a simple review of Defendants' interrogatories to date, including these latest six, confirms that they do not approach even half of Plaintiffs' baseless new count.

Although Plaintiffs mention their disagreement with Defendants' position that their 85 interrogatory allowance should not include the class certification interrogatories served over two years ago (PB at 4),[4] Plaintiffs fail to mention that that set included *only 10 interrogatories* that focused exclusively on class certification issues. (Beer Reply Aff. Ex. 1 at 6-7, Ex. 2 at 6-7.) These 10 class certification interrogatories account for the only difference in Defendants' numbering (28) and Plaintiffs' numbering (38) until now. The other 63 Plaintiffs implicitly add to reach their new purported count of 101 are a hoax without explanation or support.

Even if the Court were inclined to include the 10 class certification interrogatories within the 85 interrogatory limit, by Plaintiffs' count of actual "responses" Defendants were still entitled to 47 additional interrogatories at the time they served these six. As a matter of parity and basic fairness,

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3 Both Plaintiffs and Defendants have undertaken to renumber responses to interrogatories based upon the number of responses actually provided.

4 Plaintiffs dispute the common-sense approach of separating class certification and fact discovery for the purpose of testing compliance with this Court's limit of 85 interrogatories per side for merits discovery. (PB at 4.) Presumably distinct discovery limits will also be placed upon the expert discovery phase of this case, and prior merits discovery limits will not carry over. Class certification matters are even more distinct procedurally, and Plaintiffs do not suggest that the class certification interrogatories relate to anything other than certification of the class.

Defendants should therefore have at a minimum 41 left to ask between now and the completion of fact discovery. Given that interrogatories are virtually the only means for Defendants to discover the specifics of Plaintiffs' claims going forward, Plaintiffs' unsupported (and counterfactual) effort to deprive Defendants of this critical discovery device should be summarily rejected by the Court.

B. Defendants Are Entitled to Discovery Relating to Disclosure of the "Relevant Truth" to the Public, Including Any Prior Representations By Plaintiffs on This Subject (Interrogatories No. 29-34)

Plaintiffs next contend that the discovery into factual representations relating to disclosure of the relevant truth to the public are "irrelevant" and that "Plaintiffs cannot be bound by prior statements in legal briefs." (PB at 1, 6, 8, 9.) These arguments are absurd on their face. First, Plaintiffs' attempted disavowal of their own representations to this Court are contrary to law and common sense. Courts "cannot permit litigants to adopt an alternate story each time it advantages them to change the facts." *See Feldman* v. *American Memorial Life Insurance Co.*, 196 F.3d 783, 791 (7th Cir. 1999). Second, Defendants are only seeking discovery. Interrogatories may be posed upon facts and theories proffered by either side, and disagreement with the legal theory upon which discovery is based is not a basis for refusing to respond. 8A Charles A. Wright et al., Federal Practice and Procedure § 2168, at 255 (2d ed. 1994) ("A party may base interrogatories on its theory of the case. The interrogatories cannot be objected to because, on the interrogated party's theory, they are based on a false assumption.").

Although the brief purports to deny it, Plaintiffs' brief repeatedly concedes the relevance of the disclosure of the "relevant truth" to the public to this case. (*See*, *e.g.*, PB at 10 (noting the relevance of "days when disclosures of company-specific information influence the price of a stock"), 13 ("Investors' economic loss may occur as the *relevant truth* begins to leak out or after the truth makes its way into the market place.") (emphasis added, citations and quotations omitted)); *see also Dura*, 544 U.S. at 342.

Other submissions by Plaintiffs also confirm the relevance and import of these revelations. Plaintiffs have twice represented that August 14, 2002 was the "earliest" day that the market allegedly began to learn of the "fraud." In opposition to Defendants' *Dura* motion, Plaintiffs stated:

> The Complaint also pleads the requisite 'causal connection' between defendants' scheme and plaintiffs' economic loss: On August 14, 2002, investors ***began to learn***

> of the true facts about Household's financial and operating condition concealed by the multi-component fraud scheme

(Beer Aff., Ex. 4 at 10 (*Dura* Brief) (emphasis added).). In response to Defendants' *Foss* motion, Plaintiffs likewise asserted that:

> [P]laintiffs' claims did not arise until at least August 14, 2002, the earliest date that plaintiffs could have discovered the essential facts underlying defendants' fraud.

(Beer Aff., Ex. 3 at 8 (*Foss* Brief).)

Interrogatories No. 29 and 30 seek the factual record that Plaintiffs relied upon to make these statements. Each of these statements (1) concerns the issue of when "truth" of the alleged fraud was revealed to the market and (2) were made by Plaintiffs in support of their claims. Likewise, Interrogatories No. 31-33 seek the dates and disclosures that revealed the "relevant truth" relating separately to each of the three theories of fraud alleged in the Complaint. (Beer Aff., Ex. 1 at 2.) Each is tied directly to statements made by Plaintiffs, including particularized allegations in the Complaint. (*Id.*; AC Part VI.A, VI.B, and VI.C).) Plaintiffs do not cite to a single case that even remotely suggests that such matters are outside the broad bounds of discovery encompassed by the Federal Rules. Indeed, the very purpose of interrogatories is to require a plaintiff to commit to a position and give factual support for that position. *See Ziemack*, 1995 WL 729295, at *2.

Plaintiffs argue that discovery regarding this issue is improper because one of their prior factual references to August 14th related only to the legal doctrine of "inquiry notice" and therefore should be disregarded in every other context, including discovery. (PB at 6-8.) Apart from proposing an impossibly narrow standard of relevance, this argument ignores the fact that Plaintiffs made an equivalent statement in their *Dura* Brief, in a context having nothing to do with "inquiry notice" and a great deal to do with their ability to comply with the loss causation element of their claims. (*See* Beer Aff., Ex. 4 at 10 (*Dura* Brief) (alleging that "[o]n August 14, 2002, investors began to learn of the true facts about Household's financial and operating condition concealed by the multi-component fraud scheme").)

Even were "inquiry notice" the only context in which Plaintiffs had previously made representations about the dates of relevant disclosures, Plaintiffs' argument that the facts relevant to inquiry notice are different from those relevant to loss causation under *Dura* is without merit. *Dura* requires that the alleged "relevant truth" be revealed to the market or "the misrepresentation will not

have led to any loss." *Dura*, 544 U.S. at 342-43. "Inquiry notice" exists when "the victim of the alleged fraud became aware of facts that would have led a reasonable person to investigate whether he might have a claim." *Tregenza* v. *Great American Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993) (Posner, C. J.). In securities cases, "[a] reasonable investor is presumed to have information available in the public domain." *Whirlpool Financial Corp.* v. *GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995). Clearly both legal doctrines look to the same facts.

Plaintiffs' statement that "August 14, 2002 [is] the earliest date that plaintiffs could have discovered the essential facts underlying defendants' fraud" is undeniably a factual representation relating to some disclosure of the "relevant truth" on that date. These are precisely the facts that are sought by the Interrogatories. That the Court rejected Plaintiffs' legal position in *Foss* (but accepted it in *Dura*) does not render any supporting factual statements "irrelevant." To the contrary, the relevance becomes even more apparent.[5]

C. Identification of The Disclosures By Which the Public Learns the "Relevant Truth" Does Not Require Expert Testimony (Interrogatories No. 31-33)

Arguing only with respect to Interrogatories No. 31-33, Plaintiffs assert that a mere allusion to unspecified "expert testimony" permits them to refuse to respond to interrogatories seeking only the factual identification of the disclosures that revealed the truth to the market. (PB at 9-11.) This argument is carefully crafted with no assurances that identification of these disclosures will be made later. Indeed, such an assurance would be contrary to everything else Plaintiffs argue to justify their non-responses. Plaintiffs make explicitly clear their view that the Interrogatories themselves are improper and need never be answered. (*See, e.g.*, PB at 1 (the Interrogatories are "designed to confuse not clarify"), 2 ("the interrogatories remain ambiguous"), 6 ("the facts [sought by Defendants] are

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[5] Plaintiffs' invocation of the "judicial estoppel" doctrine is inapposite. (PB at 8-9.) Defendants are not attempting to enforce judicial estoppel; they are seeking *the discovery of relevant facts.* Given that the representation was also made in Plaintiffs successful *Dura* Brief, however, estoppel would also seem to apply under Plaintiffs' explicit reasoning. (*See* PB at 9 (asserting that estoppel "is about abandoning winning, not losing, grounds" (quoting *Patz* v. *St. Paul Fire & Marine Insurance Co*. 15 F.3d 699, 702 (7 th Cir. 1994))).) Since the Court presumably relied on Plaintiffs' *Dura* Brief in denying the motion it opposed, this doctrine would appear to preclude Plaintiffs' statement that "Lead Plaintiffs cannot be bound by prior statements made in legal briefs." (PB at 9.)

irrelevant."), 12 ("Interrogatories 41-43 are based upon a misstatement of the law."), 13 ("requiring lead plaintiffs to respond would create confusion.").)

Plaintiffs' reference to future "expert testimony" on damages is not a substitute for the identification of the key facts that underpin their claims. "[I]f Plaintiffs possess factual information independent of that to be furnished by their experts, it should be provided in Plaintiffs' responses to Defendants' contention interrogatories. This is required even if Plaintiffs have conveyed this information to their experts. . . ." *See, e.g.*, *Roberts* v. *Heim*, 130 F.R.D. 424, 428 (N.D. Cal. 1989).

Plaintiffs' argument conflates distinct issues regarding loss causation. To prove loss causation Plaintiffs must demonstrate that: (1) the "relevant truth" was revealed to the market (2) the stock price of the company subsequently decreased, and (3) the decrease in stock price was caused by the revelation of that "truth." *Dura*, 544 U.S. at 342-44, 347. Defendants' Interrogatories seek only basic facts relating to the first element. Providing the dates and the public disclosures by which Plaintiffs allegedly learned the alleged "truth" requires no specialized expertise. The disclosures are what they are, and either the alleged fraud was revealed or it was not.

Plaintiffs' arguments relate only to the second and third elements—i.e., the defendant's stock price movement and the causal connection between that movement and the disclosure of the alleged fraud. Plaintiffs explain:

> This approach assumes that the price and value of a security move together except when disclosures . . . influence the price of a stock. The analyst then looks at the days when the stock moves differently than anticipated solely based upon market and industry factors-so-called days of 'abnormal returns.' The analyst then determines whether those abnormal returns are due to fraud or non-fraud related factors. . . .

(PB at 10.) The damages expert therefore does not establish the dates and disclosures of the "relevant truth," which are provided by counsel. The expert only determines whether the given information affected the stock price and by how much. Of course, not all information that causes a decrease in stock price is the result of fraud. *See, e.g.*, *In re IPO Securities Litigation*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) (holding that plaintiffs failed to plead loss causation where the identified disclosure was only "bad news" and did not disclose any fraud). As noted above, information that is not the product of the experts' analysis but is in the possession of a plaintiff and provided to the expert to

conduct his or her research must be disclosed to defendants during fact discovery. *See, e.g.*, *Roberts* v. *Heim*, *supra*, 130 F.R.D. at 428.[6]

Plaintiffs assert unpersuasively and without explanation that the disclosures and dates they rely upon are "inextricable from the expert's loss causation analysis." (PB at 11.) Plaintiffs' failure to explain how the two are unavoidably intertwined entitles the Court to disregard their argument because it seeks to foreclose any scrutiny. Nevertheless, case law confirms that Plaintiffs' reasoning is flawed. A party must provide the requested factual disclosures prior to the expert conducting his or her analysis where, as here, such facts are distinct and easily separable from the results of that analysis.

Litigants have been compelled to answer interrogatories with the facts they have at hand, even if experts will later analyze this information to offer an opinion. *See Ziemac*k, 1995 WL 729295, at *3 (ordering plaintiffs to answer interrogatories about the "*fact* of their [securities] damages" and finding this would not interfere with the domain of experts who may be called in to analyze the cause of a stock price drop) (emphasis in original); *King* v. *E.F. Hutton & Co.*, 117 F.R.D. 2, 5-6 (D.D.C. 1987) (finding that plaintiffs should have answered interrogatories about their securities losses because they "must have had some factual basis for concluding they had sustained losses at the time the complaint was filed," and it was "no answer for the plaintiffs to assert that they [needed]. . .to consult with an expert."). "While an expert may be helpful to the plaintiffs, the value of this expert's opinions will depend upon the facts upon which his opinions are predicated. For this reason, it is important to have the facts upon which the plaintiffs personally rely . . . in order to test the factual basis for the expert's opinions." *King*, 117 F.R.D. at 6 n.4. (compelling answers to interrogatories).[7]

Finally, Plaintiffs' own defective "responses" also contradict their assertion that an expert is required to identify the disclosure of the truth. For example, in lieu of answering Interrogatory No.

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6 Basic factual information such as dates and disclosures are easily distinguished from Plaintiffs' previously served Request for Admission seeking admissions that certain price changes in Household's stock were "statistically significant." (PB at 11.) Statistical significance is a determination that is very clearly within the province of an expert. *See Bazemore* v. *Friday*, 478 U.S. 385, 399 n.9 (1986).

7 Contrary to Plaintiffs' assertion, determination of the first day in which the "relevant truth" was revealed will significantly clarify Plaintiffs' claims and limit damages. *Dura*, 544 U.S. at 342.

32, Plaintiffs unhelpfully taunt: "[T]he complaint on file in this proceeding identifies certain instances in which there was public disclosure of Household's engagement in improper reaging of delinquent accounts." (Beer Aff., Ex. 2 at 8-9.) Plaintiffs' Complaint likewise indicates that "[i]t was not until mid-2002 that investors began to learn of the true facts about Household's financial and operating condition." (AC ¶ 5; s*ee also Dura* Brief at 10 (asserting that the Complaint adequately alleges loss causation by indicating that revelations began on August 14, 2002) (Beer Aff., Ex. 4.).) In keeping with the requirements of Rule 11 Plaintiffs must have had a factual basis for making these statements and allegations irrespective of any expert analysis. Plaintiffs should be required to provide this information without further delay.

D. Plaintiffs' Purported Disagreement With Defendants' Legal Position is Not a Valid Basis For Refusing Discovery (Interrogatories No. 31-33)

Plaintiffs finally argue that they are excused from responding because Defendants' discovery is "based upon a misstatement of the law." (PB at 12.) Even if Plaintiffs were correct in their legal analysis, this is not a valid objection to discovery. Plaintiffs' disagreement with a legal position that they *anticipate* Defendants will take at trial is not a valid reason to refuse responding to *discovery request*s that seeks factual information that is relevant to the litigation. *See Union Carbide Corp.* v. *State Board of Tax Commissioners*, 161 F.R.D. 359, 366 (S.D. Ind. 1993) (granting motion to compel discovery despite opposing party's objection that the information sought was irrelevant because the moving party was misinterpreting the applicable statute); 8A Charles A. Wright et al., Federal Practice and Procedure § 2168, at 255 (2d ed. 1994) ("A party may base interrogatories on its theory of the case."). If such a practice were permitted then no party would ever have to respond to any discovery request as parties rarely agree on the applicable legal theory.

In any event, however, Plaintiffs' legal theory objection is without merit. To demonstrate loss causation Plaintiffs must prove that the "share price fell significantly after the truth became known." *Dura*, 544 U.S. at 347. Even Plaintiffs admit that "[i]nvestors' economic loss may occur as the relevant truth begins to leak out or after the truth makes its way into the market place." (PB at 13.) (quotations and citations omitted) It is precisely this information that Defendants are seeking through Interrogatories No. 31-33.

Plaintiffs do not explain why this information was relevant when drafting their Complaint but irrelevant when Defendants requested factual support. Plaintiffs also fail to explain why they in-

tend to provide this information to an expert (PB at 11) if it is irrelevant to the litigation. Such inherent contradictions in all of Plaintiffs' objections expose Plaintiffs' gamesmanship. Plaintiffs' bad faith refusal to answer any of Defendants' Interrogatories should not be tolerated. Plaintiffs should be ordered to provide complete responses immediately.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Defendants' motion to compel be granted, that Plaintiffs be ordered substantively to respond forthwith to Interrogatories No. 29 and 31-33 and that Plaintiffs be ordered to provide new and substantively responsive answers to Interrogatories No. 30 and 34.

Dated: September 8, 2006
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