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' FOURTH SET OF INTERROGATORIES TO LEAD PLAINTIFFS

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This reply memorandum is respectfully submitted in further support of the Household Defendants' Motion to Compel Responses to Defendants' Fourth Set of Interrogatories To Lead Plaintiffs (the "Interrogatories").[1]

INTRODUCTION

It is axiomatic that a plaintiff alleging securities fraud must identify and prove the allegedly fraudulent misrepresentations giving rise to their claims. And if appropriate disclosures of a material nature are alleged to have been fraudulently withheld or omitted, a plaintiff must identify and prove each such omission. Each misrepresentation and omission is to be measured against what a reasonable executive would have fairly disclosed to avoid the claimed fraud. For every claim of fraud there must be an answer to the question "what should they have said?" The answer must be measured against the defendant's actual disclosures. A plaintiff that does not identify and prove a material difference between the two has failed to show any fraud at all. These are the things Defendants have asked Plaintiffs to identify as part of their required contentions in a securities fraud case. Plaintiffs have frivolously refused.

Instead of putting forth a substantive and coherent opposition to Defendants' motion, Plaintiffs' brief is a mere laundry list of conclusory boilerplate objections that Plaintiffs do not even attempt to support. In addition to having waived these meritless objections by failing to ever assert them in their responses to Defendants' Interrogatories, Plaintiffs absurdly attempt to shift their burden of identifying their own contentions on these matters onto Defendants. It is Plaintiffs' burden, as the party asserting securities fraud claims, to explain the basis of their contentions. And it is Plaintiffs' burden, as the party opposing discovery, to demonstrate why they should be excused from their duty to respond to these unquestionably relevant interrogatories. They clearly have not met this burden.

Plaintiffs chief argument is that asking them to identify the facts that they allege were withheld from the market is a speculative "hypothetical" question. However, asking Plaintiffs to state what facts Defendants ***should*** have disclosed to have avoided fraud is not asking Plaintiffs to

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[1] "Interrogatories" refers to Household Defendants' Fourth Set of Interrogatories to Lead Plaintiffs served on October 31, 2006. (See Affidavit of David R. Owen dated December 22, 2006 ("Owen Aff."), Ex. 5.)

speculate, but rather asking them in effect what they contend Defendants did wrong. Plaintiffs' counsel have alleged on behalf of a class of investors that Household's management did not properly inform investors of material facts — that if investors had been told X and Y then they could have averted injury. The X and Y in this case must be identified by Plaintiffs if their claim is to make any sense. To characterize such requests as "hypothetical" betrays the very lack of definition in Plaintiffs' claims that necessitated these Interrogatories.

The Interrogatories are designed to elicit the specific facts that Plaintiffs allege Defendants withheld from the market in order to determine whether such facts ever were disclosed, were misrepresented, were material, were omitted with scienter and/or caused economic loss to Plaintiffs. In opposing this straightforward inquiry, Plaintiffs are again abusing the Federal Rules, in keeping with their systematic and improper strategy of maintaining only ambiguous positions and offering only nonresponsive "answers" as long as permitted to do so. Such dilatory tactics and gamesmanship should not be permitted and Plaintiffs' objections to this discovery must be rejected.

ARGUMENT

A. Plaintiffs Must Identify Each Alleged Misrepresentation (Interrogatories No. 41-43)[2]

Plaintiffs' opposition brief does not dispute that Plaintiffs are required to identify each alleged affirmative misrepresentation that underlies their claim of fraud. (PB at 1) Indeed, subject only to their counting objection, Plaintiffs do not dispute this motion as it relates to Interrogatories 41-43 and have promised to respond to these interrogatories if Judge Guzman affirms this Court's September 19, 2006 decision overruling their proposed method of counting interrogatories. By withdrawing and failing to assert any substantive objections in opposition to this motion to compel, Plain-

[2] Plaintiffs continue to waste the Court's time asserting their previously rejected theory of interrogatory counting. The Court has already held that interrogatories that contain subparts that are directed at eliciting details of a "common theme" should be considered a single question. (November 10, 2005 Order, Owen Aff., Ex. 3 at 2n) Plaintiffs' practice of unreasonably dissecting Defendants' interrogatories into as many discrete parts as possible was specifically rejected by the Court in its September 19, 2006 Order. (Owen Aff., Ex. 4 at 2) Plaintiffs' attempt to divide Interrogatories No. 41-43 — which seek identification of all alleged affirmative misrepresentations — into as many separate interrogatories as there are alleged misrepresentations is logically backwards. Each interrogatory deals with one "common theme," Plaintiffs' alleged misrepresentations, and Plaintiffs' possible answers in no way determine the actual number of questions posed. (*See* Plaintiffs' Brief "PB" at 7)

tiffs have waived the right to assert any such objections in the future. *In re Industrial Gas Antitrust Litigation*, No. 80 C 3479, 1985 U.S. Dist. LEXIS 15646, at *4 (N.D. Ill. Sept. 24, 1985). Nevertheless, apparently in the interest of achieving further delay, Plaintiffs urge the Court to "defer any ruling on the Class' objections to these interrogatories" until after Judge Guzman has ruled on their objection to this Court's September 19, 2006 Order on the subject of counting interrogatories. (PB at 1) This is not a valid request. Failing to assert objections in opposition to a motion to compel and affirmatively agreeing to provide responses ***waives*** those objections, it does not preserve them. Moreover, this Court already considered and rejected this very proposal at the December 15, 2006 status conference, when Plaintiffs suggested that motion practice be delayed until after Judge Guzman's decision. The Court rejected that suggestion and instead ordered the parties to brief all objections that do not concern the counting of interrogatories in order to avoid creating additional delays in the completion of fact discovery. The Court has made clear that the time to address any other objections that Plaintiffs may have to Defendants' Interrogatories is now. Plaintiffs' failure to do so amounts to a binding waiver of those objections.

B. Plaintiffs Must Identify The Facts That They Allege Should Have Been Disclosed To The Market (Interrogatories No. 36-43)

The cornerstone of every fraud claim is the contention that during the class period material facts were misstated to or withheld from the market by Defendants, causing investors to lose money. Defendants in such cases are obviously entitled to know what the allegedly misstated or omitted facts were. In an attempt to pinpoint the specific facts that Plaintiffs claim Defendants should have disclosed, Defendants served Interrogatories No. 36-39. For example, Interrogatory 36 asks Plaintiffs to:

> "Identify the particular facts Plaintiffs contend would have been necessary and sufficient, if disclosed by Defendants, to inform the market that Household was engaged in "Illegal Predatory Lending Practices" as alleged and set forth in Part VI.A of the Complaint. (AC ¶¶ 50-106)"

(Owen Aff. Ex. 5 at 2)

Plaintiffs' opposition brief does not dispute that the identity of alleged omissions is a required predicate for every claim of securities fraud based on alleged failures to disclose. Nor do Plaintiffs argue that Interrogatories No. 36-39 are seeking anything but the facts that Plaintiffs allege were omitted. Instead, Plaintiffs dedicate over four pages of their brief to arguing that these interrogatories are somehow speculative "hypothetical" questions. (*Id*. at 2-5) Plaintiffs obviously have a

fundamental misunderstanding as to the distinction between a hypothetical question and a contention interrogatory. A hypothetical question (such as those typically propounded to an expert witness) is a question in which the examiner provides a factual foundation and asks the respondent to draw conclusions based on those hypothetical facts. Here, Defendants are not providing any facts on which they are requesting speculation. To the contrary, Defendants are asking ***Plaintiffs*** to state the facts that they contend were withheld from investors. The required response should not be speculation, but rather a good faith explanation of what Plaintiffs contend with respect to this essential aspect of their claims.

If Plaintiffs cannot allege and prove that any facts were omitted from the market then their claims of securities fraud must fail. *Spicer* v. *Chicago Board Options Exchange, Inc*., No. 88 C 2139, 1990 U.S. Dist. LEXIS 14469, at *25-31 (N.D. Ill. Oct. 24, 1990. *See Spatz* v. *Borenstein*, 513 F. Supp. 571, 578-80 (N.D. Ill. 1981) (on a motion for summary judgment, analyzing each alleged "affirmative misrepresentation" and each alleged omission (e.g. that defendant "failed to disclose that 25 of 562 units in the Laurel Glen apartment complex were 'below grade' and thus uninhabitable")). Similarly, Plaintiffs' claims must fail if Defendants are able to demonstrate that allegedly omitted facts ***were disclosed*** to the market. *Searls* v. *Glasser*, No. 91 C 6796, 1994 U.S. Dist. LEXIS 13509, at *39 (N.D. Ill. Sept. 24, 1994) (granting defendants' motion for summary judgment and stating that under the "truth on the market" doctrine "[a]llegedly misleading statements will not support a securities violation once truthful information has already been effectively disclosed") It follows that identification of the particular facts Plaintiffs contend would have been necessary and sufficient, if disclosed by Defendants, to inform the market is critical to Plaintiffs' ability to prosecute their claims and to Defendants' ability to prepare a defense.[3]

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[3] The cases cited by Plaintiffs do not support their position. For example, Plaintiffs cite *Mobil Oil Corp.* v. *Department of Energy*, No. 81-CV-340, 1982 U.S. Dist. LEXIS 9553, *6 (N.D.N.Y. Mar. 8, 1982) for the irrelevant proposition that "[i]nterrogatories calling for an opinion based on hypothetical facts are improper." However, as stated above, Defendants have asserted no hypothetical facts and have asked for no related opinion. Rather, Defendants have only asked Plaintiffs to clarify what facts ***Plaintiffs are alleging***.

Plaintiffs also half-heartedly argue that Defendants' failure to define "necessary and sufficient" prevents Plaintiffs from responding. (PB at 5) This argument is particularly unpersuasive. The terms "necessary" and "sufficient" are terms which are not only well understood in common parlance but

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It is frivolous for Plaintiffs to argue that this is not a proper subject for discovery, as virtually every claim asserted in lawsuits for damages involves allegations and attempted proof of what the defendant should have done. Breach of contract claims assert that one party should have performed according to the contract. *See, e.g., Dyna-Tel, Inc.* v. *Lakewood Engineering & Manufacturing Co.*, 946 F.2d 539 (7th Cir 1991) (Posner, J.). Tort claims assert that the tortfeasor should have taken additional precautions. *See, e.g., Glenview Park District* v. *Melhus*, 540 F.2d 1321, 1328 (7th Cir. 1976) (adjudicating claims "that the failure to check water conditions and to warn the participants about overhanging branches were negligent omissions which acted as proximately causative factors resulting in the Melhus canoe being among the branches"). Products liability claims assert that a company should have provided a specific warning to their customers. *See, e.g., Vhora,* v. *Michelin North America, Inc.*, No. 98 C 2657, 1999 U.S. Dist. LEXIS 1246, at *8-9 (N.D. Ill. Feb. 3, 1999) (granting defendants motion for summary judgment in part because "Nonamaker testified that he believes an 'appropriate' warning should have been included . . . [but] does not specify what information [defendants] ought to have provided Plaintiffs to avoid these injuries"). Similarly, securities fraud claims turn on allegations that the company should have disclosed certain information to the market. *See, e.g., Spicer* v. *Chicago Board Options Exchange, Inc.*, 1990 U.S. Dist. LEXIS 14469, at *31 ("An allegation of an omission alleges what it is that allegedly was not said"). In each one of these situations plaintiffs assert that defendants should have done something that they did not. It is spurious to argue that in such situations a defendant has no right to inquire what omitted act or statement "would have" avoided the violation or other breach of duty — especially as a plaintiff's failure to make such a showing is fatal to its claim.

Plaintiffs repeat the tired argument that their satisfaction of Rule 9(b) pleading requirements excuses them from any duty to respond to contention interrogatories that pertain to the factual basis of their claims. (PB at 3)[4] This is meritless. As this Court previously held:

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> also have significant meaning in logic and law. Plaintiffs' supposed inability to understand the commonplace terms "accurately" and "insufficient" (PB at 5-6) is also spurious.

[4] Plaintiffs argue for the first time in their opposition brief that the identification of omissions is irrelevant to this litigation. Since Plaintiffs never made this bizarre argument in their responses and objec-

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"[c]ontention interrogatories are interrogatories that seek to clarify the basis for or scope of an adversary's legal claims." (November 10, 2005 Order, Owen Aff., Ex. 3 at 3) If surviving a motion to dismiss eliminated a plaintiff's obligation to respond to contention interrogatories, then contention interrogatories would *never* have to be answered. For obvious reasons the law is exactly the opposite. "[C]ourts have held that where the allegations are pled with particularity, the parties may then rely upon interrogatories for specific details." *EMC Corp.* v. *Storage Technology Corp.*, 921 F. Supp. 1261, 1264 (D. Del. 1996) (citing cases). In fact, the details of the alleged misrepresentations and omissions are precisely the type of information contention interrogatories are expected to discover. *See Towers Financial Corp.* v. *Soloman*, 126 F.R.D. 531, 536 (N.D. Ill. 1989) (denying motion to dismiss for failure to plead the details of each alleged misrepresentations and omissions and noting that "this information is the type of evidentiary detail more properly required to be disclosed during discovery").

Plaintiffs assert that stating which facts Defendants should have disclosed to the market would put an undue burden on Plaintiffs because Interrogatories No. 36-38 are ambiguous as to time.[5] They argue that because the alleged omissions may have changed over the course of the class period they need not respond. Instead, Plaintiffs suggest that Defendants should be required to craft a

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tions to Defendants' Interrogatories, it has been waived. The only objection to relevance in their responses is a boilerplate objection contained in Plaintiffs' general objections. (Owen Aff., Ex. 7 at 3) It is well settled that such boilerplate is insufficient to preserve the objection. *Burkybile* v. *Mitsubishi Motors Corp.*, No. 04 C 4932, 2006 U.S. Dist. LEXIS 57892, at *20 (N.D. Ill. Aug. 2, 2006) (holding that a party opposing discovery cannot preserve their objections "by a reflexive invocation of 'the same baseless, often abused litany' that the requested discovery is 'vague, ambiguous, overly broad, unduly burdensome' or that it is 'neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.'" (citations omitted)). As a matter of law and fairness, the Court cannot entertain such waived arguments.

5 This also is a new argument that Plaintiffs never asserted in their responses and objections. As Plaintiffs admit (PB at 3n), the only reference to Interrogatories No. 36-38 being ambiguous or burdensome are conclusory statements that do not state why the requests are ambiguous or burdensome. (Owen Aff., Ex. 7 at 3, 5, 10, 12, 13) It is well settled that such boilerplate objections do not preserve a party's objections. A "[n]aked assertion that the requested discovery is 'burdensome', without a 'specific showing' of the burden involved, is insufficient to preserve the objection." *Clark Equipment Co.* v. *Lift Parts Manufacturing. Co.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, at *17 (N.D. Ill. Sept. 30, 1985) (granting motion to compel responses to contention interrogatories). The lack of merit of this argument aside, the Court should not entertain such waived objections.

separate interrogatory for every day of the class period, asking what information was omitted on that particular day. Such a position, if accepted by the Court, would turn discovery on its head. The very purpose of contention interrogatories is for Plaintiffs to provide the specifics of and factual basis for their allegations. *Ziemack* v. *Centel Corp.*, No. 92 C 3551, 1995 WL 729295, at *2 (N.D. Ill. Dec. 7, 1995). The fact that the omissions that provide the basis for Plaintiffs' claims may have changed over time is precisely why Plaintiffs ***should*** be required to disclose — stating specifically what facts they contend Defendants withheld during each time period they deem relevant to their claims. It would be impossible for Defendants to limit the interrogatories to a particular day or omitted disclosure since the identification of the alleged omissions is precisely what they are seeking to learn. Plaintiffs, and Plaintiffs alone, know the details of their claim, and these Interrogatories seek no more or less than that essential clarification. Requiring Plaintiffs to reveal the details of a required element of their claims cannot be deemed unduly burdensome in any event. *Bell* v. *Woodward Governor Co.*, No. 03 C 50190, 2005 U.S. Dist. LEXIS 19602, at *6-7 (N.D. Ill. Sept. 8, 2005) ("[T]his court expects to find, at least, in answers to contention interrogatories those facts that a party intends to offer to prove their case-in-chief. . . .").

It is well-settled that a plaintiff may not evade an interrogatory requesting specific information by referring to general propositions or vague references to other materials. *Bell* v. *Woodward Governor Co.*, 2005 U.S. Dist. LEXIS 19602, at *9-10, 13 ("Defendant is not asking Plaintiffs about their case in a general matter. Defendant is after specifics." *Id.* at *10. "Defendant is entitled to the information that Plaintiffs have identified as specific material or principal facts supporting their prima facie case." *Id*. at *13). When ordering Plaintiffs to identify the alleged misrepresentations and omissions, the Court should therefore instruct Plaintiffs to do more than make vague references to public filings or general topics. "[F]raudulent misrepresentations must be separately identified. An allegation of fraudulent misrepresentation is not sufficient if it merely states that misrepresentations were made." *Spicer* v. *Chicago Board Options Exchange, Inc.*, 1990 U.S. Dist. LEXIS 14469, at *25-31 (dismissing all allegations of fraud by misrepresentation in view of Plaintiffs' failure to identify "a single false or misleading statement" and analyzing each of the three alleged omissions separately.)

It is the particulars of Plaintiffs' contentions that the Court will need to evaluate at the summary judgment stage. *See, e.g.*, *Spatz* v. *Borenstein*, 513 F. Supp. at 578-80 (on a motion for

summary judgment, analyzing sentence by sentence each alleged "affirmative misrepresentation[]" and each alleged omission). Defendants and the Court should not have to search through hundreds of pages of vaguely identified public documents in order to guess the specifics of Plaintiffs' allegations. The Court should order Plaintiffs to provide specific statements that they contend were misrepresentations and specific facts that Plaintiffs allege should have been revealed. If the facts that were allegedly withheld changed over the course of the class period, Plaintiffs should be required to identify which facts were omitted during each time period.

C. Plaintiffs Must Respond to Interrogatory No. 40.

Plaintiffs argue that Interrogatory No. 40 is improper since it asks for information regarding events after the class period. Interrogatory No 40 asks whether Plaintiffs contend that "Household's March 19, 2003 8-K accurately informed the market of Household's restructure policies and practices." As Plaintiffs are aware, having sought and obtained voluminous post-class period discovery, the fact that an event occurred after the class period does not necessarily render that event irrelevant to the litigation. Indeed, Plaintiffs have specifically requested and have been provided documents pertaining to and including the post-class period SEC cease and desist order that related to this March 19 2003 8-K.[6] They cannot seriously claim that this issue is not discoverable.

According to *Dura*, Plaintiffs must prove, as a condition of satisfying their burden on the essential element of loss causation, that the alleged misrepresentations and omissions were revealed to the market at some relevant point in time. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) ("*Dura*"). Plaintiffs have asserted that Household failed to disclose certain facts regarding the Company's reage and restructure policies. Defendants are entitled to know whether Plaintiffs contend that this information was ever revealed to the market. A plaintiff may not recover for any declines in stock price occurring prior to the corrective disclosure. *Id.* at 342-343. If the alleged "reaging" scheme was never revealed to the market then the alleged misrepresentations and omissions could not have caused Plaintiffs' loss, foreclosing their recovery. *See Id.* As this Court

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[6] Plaintiffs misrepresent the SEC's March 13, 2003 consent decree as an order that found Household's 2002 10-K "false and violative of the federal securities laws". (PB at 5) However, the March 13, 2003 consent decree was not the result of adjudicative proceedings and specifically states that Household made no admission as to the falsity of any of their public disclosures.

has already held in its September 19 Order, Plaintiffs are required to provide the specifics of their loss causation allegations. (Owen Aff., Ex. 4 at 3-4) Defendants are entitled to know Plaintiffs' position as to whether the post-class and post-SEC disclosure was sufficient to reveal any prior alleged fraud.

D. Plaintiffs Must Identify the Facts They Contend Support Their Allegations of Loss Causation (Interrogatory No. 35)

Plaintiffs do not contest the relevance to this litigation of either loss causation, "corrective disclosures," or their statements in their *Dura* Brief. Rather, Plaintiffs' only opposition to Interrogatory No. 35 is that they claim it is cumulative of Interrogatories No. 30-33 because they too concern Plaintiffs' claims of loss causation. (PB at 6-7)

This is yet another new argument by Plaintiffs, asserted for the first time in their opposition brief. Nowhere in Plaintiffs' responses and objections to Interrogatory No. 35 do Plaintiffs claim that the interrogatory is cumulative. (Owen Aff., Ex. 7 at 7-8) Under Fed. R. Civ. P. 33(b)(4), failure to assert such specific objections in Plaintiffs' response is waiver of those objections. Since this is the ***only*** argument put forth by Plaintiffs, they must be ordered to respond immediately.

Waiver aside, the Court made very clear in its September 19 Order that information relating to loss causation and Plaintiffs' contentions in their *Dura* Brief is relevant and discoverable. (*See* September 19, 2006 Order of Magistrate Judge Nan R. Nolan (Owen Aff., Ex. 4 at 2-3)) In its Order, the Court noted that Plaintiffs had invoked the August 14, 2002 date in both their *Dura* Brief and their *Foss* Brief, and held that the former was relevant while the latter was not. (*Id*. at 3) In ordering Plaintiffs to answer all of Defendants' interrogatories that were "not limited to statements made in the *Foss* Brief" (*id*), the Court stated "[s]ignificantly, Plaintiffs also raised the August 14, 2002 date in their *Dura* Brief, which had nothing to do with inquiry notice and instead addressed the pleading requirements for loss causation. . . . The court agrees that facts and documents setting forth the disclosures that purportedly put the market on notice of Household's alleged fraud . . . are relevant and discoverable." (*Id.* at 3-4) In this holding, the Court made it abundantly clear that if Interrogatory No. 29 had requested information regarding Plaintiffs' *Dura* Brief instead of Plaintiffs' *Foss* Brief, Plaintiffs would be required to respond. That is precisely what Interrogatory No. 35 does.

To succeed in this litigation, Plaintiffs must prove "loss causation." *Dura* at 342. To demonstrate loss causation Plaintiffs would have to prove that the "share price fell significantly after

the truth became known." *Id*. at 347. Simply put, if "plaintiffs do not allege that the scheme was ever disclosed, they fail to allege loss causation." *In re Initial Public Offering Securities Litigation*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005). In fact, this district has recently held that "the economic loss occurs upon the decline in the value of the security after a defendant's ***corrective disclosures***. Because of the loss causation requirement, the Plaintiffs must then tie that decline to the disclosure." *Ong* v. *Sears, Roebuck & Co.*, No. 03 C 4142, 2006 U.S. Dist. LEXIS 80294, at *65-66 (N.D. Ill. Oct. 18, 2006) (emphasis added). Plaintiffs may not recover for any declines in stock price occurring prior to the corrective disclosure. *Dura* 544 U.S. at 342-343.

Having affirmatively represented to the Court in their *Dura* Brief that August 14, 2002 was the first day that investors "began to learn of the true facts" regarding the company, Plaintiffs cannot now refuse to provide Defendants with the basis for that assertion, especially since the Court relied on this statement in finding that Plaintiffs adequately pled loss causation. *See Feldman* v. *American Memorial Life Insurance Co.*, 196 F.3d 783, 791 (7th Cir. 1999) (Courts "cannot permit litigants to adopt an alternate story each time it advantages them to change the facts."). Defendants are entitled to know the basis for Plaintiffs' factual representations about the level of information available to the market on August 14, 2002, as requested in Interrogatory 35.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Defendants' motion to compel be granted and that Plaintiffs be ordered to respond forthwith to Interrogatories No. 35-43.

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New York, New York

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