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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

HSINGCHING HSU, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

PUMA BIOTECHNOLOGY, INC., and ALAN H. AUERBACH,

Defendants.

CASE NO. 8:15-cv-00865-DOC-SHK

**DEFENDANTS' MEMORANDUM OF LAW REGARDING THE CLAIMS CHALLENGE PROCESS**

Date: November 23, 2020
Time: 8:30 a.m.
Courtroom: 9D
Judge: Hon. David O. Carter

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## I. INTRODUCTION

Since the passage of the Private Securities Litigation Reform Act in 1995 ("PSLRA"), just fifteen private securities class actions have reached a jury verdict. Two of those cases—*In re Vivendi Universal, S.A. Securities Litigation* ("*Vivendi*") and *Lawrence E. Jaffe Pension Plan v. Household International, Inc.* ("*Household*")—then progressed into post-trial proceedings. Those proceedings, it is important to note, pre-date the Supreme Court's ruling in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), 573 U.S. 258 (2014), which stressed that defendants in a securities class action must be afforded an opportunity to rebut the presumption of reliance. Consistent with *Halliburton II*, *Vivendi*, *Household*, fundamental notions of due process, and the Court's prior orders in this case, any claims-challenge process must preserve the defendants' ability to challenge reliance, an element of a Section 10(b) claim. Defendants' proposal, set forth below, preserves this important right in an efficient and orderly manner.

Defendants' right to contest reliance is a cornerstone of securities class actions, as initially set out in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), and expanded upon in *Halliburton II*. That Supreme Court precedent acknowledges that in order to prove reliance, plaintiffs may invoke the "fraud on the market" presumption, an economic theory that presumes that a company's stock price incorporates all publicly available information and that class members rely on the integrity of that market price in connection with their purchases of the company's stock. This presumption of reliance, however, is rebuttable on both a class-wide and an individual basis. At trial, the jury found that Defendants had not rebutted the presumption of reliance on a class-wide basis or as to the Lead Plaintiff. But the jury's verdict did not resolve the question of individual reliance by absent class members (nor could it, as their identities were not known), and therefore did not resolve class-wide liability or damages.

Individual class members have now had the opportunity to submit claims. As Judge Guilford held in denying Plaintiffs' request to enter a final judgment prior to the claims submission process, final judgment is premature because Defendants "have a right" to challenge individual class members' reliance and damages. Order Re: Proposed J., ECF No. 739 at 1. The only question for this Court to decide, albeit in relatively unchartered waters, is how the claims-challenge process should proceed. In accordance with the Court's September 9, 2019 Order, Defendants' proposal is laid out in Section III below. Defendants' proposal is fair and proportional under Rule 26, and will allow the parties to litigate individual liability and damages as expeditiously as possible.

Defendants propose a three-phased process. In Phase I, Defendants will serve claimants with narrow discovery (the scope of which will depend on the size of the claimed damages of each class member), proportionally designed to obtain information directly relevant to individual reliance and damages, and to minimize any burden. The law confirms that Defendants have the same right to litigate individual reliance as if they had been sued by each absent class member. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *see also Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017). As part of that right, Defendants are entitled to discovery, subject to the relevance and proportionality requirements of Rule 26. *Vivendi* and *Household* confirm that such discovery is an appropriate first step in adjudicating individual class members' claims. Indeed, the right to disprove reliance would be no right at all if Defendants had no means to exercise it. And it would make no sense to exercise the right to challenge absent class members' reliance any earlier than now—because it is only now that the parties know who is in the class, and trial might have obviated the need to challenge any class member's reliance. Nor will this procedural requirement come as a surprise to individual class members,

who acknowledged the possibility of and consented to further discovery when they submitted their claims.

Phase II will involve all asserted claims over $100,000. Based on the discovery responses received, Defendants may elect to challenge individual reliance or damages for any of these claimants, by conducting limited follow-up discovery and dispositive motion practice, or (if necessary) trial, until all claims challenged in Phase II are resolved. During Phase II, Defendants will meet and confer with Plaintiffs regarding deficiencies in individual class members' claims unrelated to individual reliance that are nonetheless grounds for challenges because those class members have not proved damages (for instance, class members who submitted late claims, produced no trading records or insufficient records, or claim damages that are unsupported by the evidence submitted). If these issues are not resolved, Defendants will move for summary judgment on those claims. Phase III will involve all remaining claims (i.e., claims under $100,000) and follow the same structure as Phase II (Phase III may be further streamlined or modified to take into account any rulings issued in Phase II). Once all claims challenged in Phase III have been resolved, Plaintiffs may move for entry of a final judgment that encompasses all claims and damages in the case, including any remaining unchallenged claims.

Defendants accordingly request that the Court adopt Defendants' proposal for the claims-challenge process.

## II. BACKGROUND

This is a securities class action in which Plaintiffs alleged that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Securities & Exchange Commission Rule 10b-5, by making misrepresentations about Puma's life-saving breast-cancer drug, neratinib (marketed as NERLYNX®). Plaintiffs claimed that Defendants made false or misleading statements regarding the safety and efficacy of neratinib in its Phase 3 trial, called the ExteNET trial. In 2017,

neratinib received FDA approval, and it is now being used to treat breast cancer patients globally.

A claim under Section 10(b) requires a plaintiff to establish six elements: (1) a material misrepresentation or omission, (2) scienter, (3) a connection with the purchase or sale of a security, (4) reliance, (5) damages, and (6) loss causation. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). The element of reliance requires that the shareholder show that he or she relied on the alleged misstatement or omission in question. A shareholder may meet this burden by invoking the fraud-on the-market presumption of reliance established by the U.S. Supreme Court in *Basic, Inc. v. Levinson,* 485 U.S. 224 (1988). The presumption posits "that the market price of shares traded on well-developed markets reflects all publicly available information," and therefore that investors who trade at the market price "do[] so in reliance on the integrity of that price." *Basic*, 485 U.S. at 246-47.

Notwithstanding *Basic*'s presumption of reliance, the U.S. Supreme Court has made clear that defendants in private securities class action cases can rebut the presumption with respect to individual class members by introducing evidence that "severs the link between the alleged misrepresentation" and either (1) "the price received (or paid) by" the class member, or (2) the class member's "decision to trade at a fair market price." *Halliburton II*, 573 U.S. at 268-69; *see also Basic*, 485 U.S. at 248. Defendants are entitled to rebut the presumption of reliance both on a *class-wide* basis (by showing that the challenged representations did not affect the price of Puma's stock) and on an *individualized* basis (by showing that individual class members did not rely on the integrity of the market price when purchasing Puma's stock). *See Halliburton II*, 573 U.S. at 279-80.

Before trial, the Court and the parties agreed that issues of individual reliance as to absent class members would be resolved after trial. Judge Guilford recognized that "[e]ven Plaintiffs have stated that if there is 'evidence of individual reliance issues, that is an issue that will be raised after a verdict.'" Order Re: Proposed J.,

ECF No. 739 at 2 (quoting Oct. 22, 2018 Pretrial Conf. Tr. (ECF No. 615) at 10:11-17); *see also* Proposed Final Pretrial Conf. Order (ECF. No. 585-1) ¶ 14 ("[I]n the event that liability is established at trial, individual class member damages will be determined later. It is Defendants' position that they have reserved the right to challenge the individual reliance of absent class members following any determination of liability."); Pl.'s Reply in Supp. of Mot. for Summ. J. (ECF. No. 464) at 5 (Plaintiffs arguing that rebutting "reliance by a particular class member must necessarily be on an individual basis because there can be no class presumption of non-reliance").

The case proceeded to trial in January 2019. On February 4, 2019, a jury delivered a verdict in Defendants' favor on three of four alleged misstatements. *See* ECF No. 718 (Verdict Form). The jury found in Plaintiffs' favor on the fourth alleged misstatement and awarded per-share damages of $4.50 for shares purchased after July 22, 2014, and held through May 13, 2015 (the "Damages Period")—amounting to roughly 5% of Plaintiffs' asserted damages of $87.20 per share. *Id.* With respect to reliance, the jury found that Plaintiffs had satisfied their burden to invoke the *presumption* of reliance as to the class, and that Defendants had not rebutted the presumption on either a class-wide basis or with respect to the Lead Plaintiff. *Id.* ¶ 5.1. However, the verdict did not settle the question whether Defendants had rebutted the presumption of reliance with respect to individual absent class members. As a result, questions of individual reliance and resulting damages remain unresolved for each absent class member with respect to the single remaining challenged misstatement.

On February 21, 2019, Plaintiffs filed a Notice of Proposed Judgment. ECF No. 729. Defendants objected, arguing that entry of judgment was premature because the verdict did not resolve absent class members' individual reliance, and therefore that liability had not been adjudicated. ECF No. 732. Defendants pointed

out that damages could not yet be calculated and would require a close examination of each claimant's transactions in Puma stock. *Id*.

Judge Guilford agreed with Defendants and denied Plaintiffs' request. Order Re: Proposed J. (ECF No. 739). In doing so, Judge Guilford concluded that (i) "Defendants have a right to challenge reliance"—a necessary element of liability—"on an individualized basis," and (ii) individual findings of "reliance (a precursor to Defendants' liability) and a method of calculating offsets must be established" before judgment may be entered. *Id*. at 1, 3. Because it "is not just the damages amount that has yet to be solidified for these absent class members, but ***liability***," Judge Guilford determined that "the case is not ripe for final judgment or appeal." *Id*. at 2-3 (emphasis added).

Following a meet-and-confer process, the Court set a schedule for resolving the remaining pre-judgment, post-verdict matters, including individualized reliance disputes. *See* Order Granting Post-Verdict, Prejudgment Briefing Schedule (ECF No. 744). The parties thereafter engaged in extensive briefing and argument regarding questions of prejudgment interest, the proper methodology for calculating damages, and the notice and claims administration process. *See* ECF Nos. 746, 749, 754, 758, 775, 776, 777. On September 9, 2019, the Court ordered an award of prejudgment interest, approved a proposed notice of verdict to the class (the "Notice") and a claims process, and established a methodology for calculating damages. Order Re: Pl.'s Mot. for Prejudgment Interest, Approval of Notice of Verdict & Claims Administration Procedure, and Unsealing Documents (ECF No. 778). The Court set a comprehensive schedule for continued post-verdict proceedings. *Id*. at 6. Pursuant to this order, claims administrator Gilardi & Co. LLC ("Gilardi") mailed the Notice to members of the class on September 30, 2019. *Id.* The Notice contained a claim form which included an acknowledgment that each claimant "agree[s] to furnish additional information to the Claims Administrator, counsel for the parties, or the Court to support this claim if required to do so." Pl.'s

Proposed Claim Form, ECF No. 749-2 at 3; *see* Order, ECF No. 778 at 9-10. Over the next 120 days, shareholders submitted claims for damages allegedly incurred in connection with Puma stock purchases during the Damages Period. ECF No. 778 at 9. Gilardi completed its review of these claims and filed a list of potentially valid damages claims on September 8, 2020. ECF No. 793. Gilardi filed its supplemental claims report on October 9, 2020. ECF No. 800.

Under Judge Guilford's September 9, 2019 Order, following the filing of the claims report, the parties were directed to either (1) agree to a post-trial claims process or (2) propose a briefing schedule to present each side's proposal for challenging claims. In accordance with that order, on September 14, 2020, Defendants sent Plaintiffs' counsel a letter outlining their proposal for the claims-challenge process. Cook Decl. Ex. 1. As here, Defendants proposed a tiered process, in which they reserved their right to challenge any claim, but agreed to begin with claimants whose claimed damages exceed $100,000. *Id.* Plaintiffs responded on September 25, 2020, rejecting Defendants' proposal and countering with their own, which did not allow for any discovery or any process that would preserve Defendants' right to a judicial determination of liability on each claim. *Id.* Ex. 2. Ultimately, the parties were unable to reach an agreement. *Id.*

## III. DEFENDANTS' CLAIMS-CHALLENGE PROPOSAL

Defendants' claims-challenge proposal uses a phased approach for adjudicating claims, starting with the highest-value claims. Proposed phases are:

- **Phase I**: Written Discovery (All Claims);
- **Phase II**: Individual Challenges (Claims at or over $100,000); and
- **Phase III**: Individual Challenges (Claims below $100,000).

During Phase I, Defendants will seek discovery of information about all claimants' individual reliance and alleged damages by serving proportional, targeted discovery requests. Defendants will serve not more than five requests for production and seven interrogatories to each claimant. *See* Exs. 3, 4 (setting forth language of

proposed requests and interrogatories). Defendants propose that responses to written discovery be due within sixty days of service.

Following receipt of responses, Phase II of the claims-challenge process would commence, involving only claims over $100,000. In the six months following receipt of claimants' discovery responses, the parties will resolve any issues with those responses (including following up on incomplete answers), and may take up to one deposition of the claimant or their investment advisor. Defendants will use this time to meet and confer with Plaintiffs' counsel regarding claims with insufficient or missing documentation of particular claimants' purported loss. Once that discovery is complete, Defendants will identify the claims they intend to challenge, and within thirty days after that date, any party may file a motion for summary judgment on those claims. Defendants reserve the right to seek a jury trial on any challenged claim that survives summary judgment. The parties would resolve any claims that Defendants choose *not* to challenge by stipulation. Once all claims over $100,000 are resolved (by adjudication or stipulation), the claims-challenge process would move to Phase III.

Phase III would address the remaining claims under $100,000. While Defendants propose following the same process as in Phase II, Defendants acknowledge that this phase will be guided by the process and the Court's rulings in Phase II. Defendants propose that Phase III begin immediately after the final resolution of claims addressed in Phase II. Phase III discovery, and any subsequent motions for summary judgment, would follow the same schedule proposed for Phase II. As with Phase II, Defendants reserve the right to seek a jury trial on any challenged claims in Phase III that survive summary judgment, and the parties would stipulate to the resolution of any claims that are not challenged. Defendants expect that—given the size of the claims in Phase III—the majority of these class members' claims will be resolved by stipulation.

At the end of the Phase III, the parties would move the court to enter a final judgment reflecting the liability determinations for all class members, as determined in Phases II and III, and total amount of damages owed.

## IV. ARGUMENT

Defendants' claims-challenge proposal should be adopted for two reasons. *First*, Defendants' proposal provides an orderly, efficient, and fair process for determining Defendants' liability as to absent class members. It is a cornerstone of due process and the securities laws that Defendants have the right to rebut class members' individual reliance. Defendants' proposal protects Defendants' rights by means of narrow, proportional discovery in order to determine whether class members may rely on the fraud-on-the-market presumption of reliance. *Second*, Defendants' proposal provides a mechanism for confirming class members' loss. Class members are entitled to recover only for actual losses, and Defendants' proposal specifies a straightforward and sensible process for resolving and adjudicating issues of proof related to class members' alleged losses.

### A. Defendants' Right to Rebut Class Members' Individual Reliance Means That Defendants' Liability to the Class Remains Unresolved

The jury decided several class-wide issues, but an essential element of Plaintiffs' claims—individual reliance—was not adjudicated by the jury. As Judge Guilford held after the trial, "the verdict doesn't settle the question of whether Defendants may rebut the [fraud-on-the-market] presumption [of reliance] as to absent class members." Order Re: Proposed J., ECF No. 739 at 1. Indeed, Plaintiffs agree that Defendants' liability remains unresolved. *See* Ex. 2 (Plaintiffs' claims-challenge proposal). Thus, as part of the claims-challenge process—consistent with *Basic*, 485 U.S. at 248-49, and *Halliburton II*, 573 U.S. at 269-70, 276—"Defendants have a right to challenge reliance on an individualized basis." ECF No. 739 at 1; *see also Johnson v. Gen. Mills, Inc.*, 276 F.R.D. 519, 524 (C.D. Cal. 2011) ("The fact that liability under the CLRA may be established classwide by an

inference of reliance does not deprive Defendants[] of their opportunity to challenge each member[']s claim."). To challenge reliance, Defendants are entitled to discover, among other things, whether a particular class member relied "on the integrity of the market price in trading stock," *Halliburton II*, 573 U.S. at 276, or "would have transacted in [Puma stock] regardless of what was known . . . about [Puma] or its stock," *GAMCO Inv'rs, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 (S.D.N.Y. 2013).

**1. Defendants' Right to Rebut Reliance Entitles Defendants to Reasonable Discovery from Claimants**

Defendants' right to challenge reliance on an individualized basis entitles them to reasonable discovery from absent class members. After all, "due process affords every party against whom a claim is stated" the "actual opportunity to defend" against that claim. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000). This principle applies with equal force to class actions. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (reiterating in class action that "[d]ue process requires that there be an opportunity to present every available defense"); 3 William B. Rubenstein, *Newberg on Class Actions* § 9:11 (5th ed. June 2020 Update) (class-action defendant has "a due process right to . . . defend itself and should not be unfairly prejudiced by being unable to develop its case" (citing cases)). A class action "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits"—but it "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).

Class actions thus do not prevent defendants from "litigat[ing] [their] statutory defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *see also Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017) (class action defendant

is entitled "to individually challenge the claims of absent class members if and when they file claims for damages"); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."). Indeed, the Rules Enabling Act—the source of statutory authority for all the Federal Rules of Civil Procedure—makes clear that Rule 23 does "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (The "enlargement or modification of substantive statutory rights by procedural devices [such as class actions] is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure.").

The discovery provisions of the Federal Rules of Civil Procedure are therefore an integral means of implementing a defendant's due process rights. *See Nelson*, 529 U.S. at 465 ("The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees."); 3 *Newberg* § 9:11 (class-action "defendant is entitled to develop the facts of its case utilizing the formal mechanisms of discovery contained in the Federal Rules of Civil Procedure"). "The fundamental requirement of due process," after all, "is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). And an opportunity to be heard in a meaningful manner requires an opportunity to develop a defense—by use of discovery. *See* 3 *Newberg* § 9:11. Thus, "most [courts] have recognized that discovery" from class members as though they are parties to the suit "is proper." 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1796.1 (3d ed. Oct. 2020 Update); *see also* 3 William B. Rubenstein *Newberg on Class Actions* § 9:12 (5th ed. June 2020 Update) ("[T]he general authority that Rule 23(d) vests in class action courts enables discovery from absent class members in appropriate circumstances.").

These due process principles have particular significance in the context of securities class actions. *Basic* and *Halliburton II* confirm (as Judge Guilford held) that Defendants have the right to challenge each absent class member's individual reliance on the sole remaining misrepresentation in the case. *See Basic*, 485 U.S. at 248; *Halliburton II*, 573 U.S. at 269-70. Both decisions stress that the fraud-on-the-market presumption, even when established on a class-wide basis, is *rebuttable* on an individual basis. *See Halliburton II*, 573 U.S. at 276; *Basic*, 485 U.S. at 248-49. And without an opportunity to obtain reasonable post-trial discovery from absent class members, any right to challenge individual reliance would be meaningless. Depriving Defendants of their right to obtain discovery would prevent them from testing whether a particular class member actually relied "on the integrity of the market price in trading stock," *Halliburton II*, 573 U.S. at 276, or instead, "would have transacted in [Puma stock] regardless of what was known or not known about [Puma] or its stock," *GAMCO*, 927 F. Supp. 2d at 99 (granting judgment to defendants on individual reliance following bench trial); *see also id.* at 97, 101. Such information is entirely within the possession and control of each class member. Hamstringing Defendants by preventing them from pursuing this discovery would contravene the core holding of both *Basic* and *Halliburton II*. *Cf. Halliburton II*, 573 U.S. at 296 (Thomas, J., concurring in the judgment) (noting that preventing a defendant from challenging individual reliance after class certification improperly serves to render the presumption conclusive).

**2. Defendants' Proposed Discovery Is Timely and Proportionate**

Discovery from absent class members is appropriate at this stage. Indeed, until now, discovery directed at absent class members was neither feasible nor sensible. Because "absent class members ha[d]n't been counted or identified" yet (Order Re: Proposed J., ECF No. 739 at 2), Defendants could not have sought discovery from them before trial. Nor would pre-trial discovery from absent class

members have made sense, as the trial might have obviated the need for any such discovery. *Cf.* Fed. R. Civ. P. 1 (purpose of the Federal Rules of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action and proceeding"). To the extent Plaintiffs argue, as they have before, that the final pretrial order forecloses post-trial discovery because that order states that "[a]ll discovery is complete," Pl.'s Mem. in Supp. of Mot. for Approval of Notice of Verdict & Claims Admin. Proc., ECF No. 749 at 18-20 (citing Proposed Final Pretrial Conf. Order, ECF No. 585-1 ¶ 9), that argument is wrong. Defendants in the pretrial order "reserved the right to challenge the individual reliance of absent class members following any determination of liability" by the jury, ECF No. 585-1 ¶ 14, and the *pretrial* order does not govern *post*-trial proceedings. *Id*. Even if it did, Rule 16(e)'s standard for modifying the pretrial order is satisfied here. *See* Defs' Mem. in Opp'n to Pl's Mot. for Approval of Notice of Verdict & Claims Admin Proc., ECF No. 754 at 11; Fed. R. Civ. P. 16(e).

Defendants flagged throughout this case that individual-reliance proceedings—which inherently involve discovery directed at that issue—would be conducted after trial. As Defendants made clear at summary judgment, "the most appropriate time to gather any necessary information from individual class members" would be after trial. Defs' Opp'n to Pl.'s Mot. for Partial Summ. J., ECF No. 428 at 20 (quoting *McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 519–20 (S.D. Cal. 2008)). And as noted in the final pretrial order, Defendants explicitly "reserved the right to challenge the individual reliance of absent class members following any determination of liability" by the jury. ECF No. 585-1 ¶ 14. Plaintiffs have likewise repeatedly acknowledged that class members' individual reliance would be addressed and adjudicated at this stage of the case. *See* Oct. 22, 2018 Pretrial Conf. Tr., ECF No. 615 at 10:11-17 (Plaintiffs' counsel stating that "issues of individual reliance are dealt with after a trial. . . . So if [Defendants] have evidence of individual reliance issues, that is an issue that will be raised after a

verdict."); Pl.'s Reply in Supp. of Mot. for Summ. J., ECF No. 464 at 5 (Plaintiffs arguing that rebutting "reliance by a particular class member must necessarily be on an individual basis because there can be no class presumption of non-reliance").

Securities class actions rarely go to trial, and few cases—and even fewer in recent history—have reached the same procedural posture as this case. But precedent confirms that discovery from class members is appropriate at this stage. *Vivendi* and *Household*—the only recent securities class actions that have reached a similar procedural stage—both permitted post-trial discovery of class members. *See In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 584-85 (S.D.N.Y. 2011) ("[C]ourts in securities fraud actions have consistently recognized that issues of individual reliance can and should be addressed after a class-wide trial, through separate jury trials if necessary."); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02-cv-5893, 2005 WL 3801463, at *4 (N.D. Ill. Apr. 18, 2005) (finding that "delay[ing] discovery into individualized issues until after class-wide liability has been determined" was "the most efficient and expeditious" way to manage case). The *Vivendi* and *Household* courts did, however, substantially limit the scope of discovery—and that was improper. Both courts addressed post-trial discovery before *Halliburton II* and *Tyson Foods* were decided, and the courts' recognition that discovery is proper at the post-trial stage is sensible and correct.

*Vivendi*'s and *Household*'s sequencing of discovery on individual-reliance issues is fully consistent with how other courts have tackled this issue (in cases that ultimately settled). *See, e.g.*, *McPhail*, 251 F.R.D. at 519 (requiring class members in a securities class action to "provide . . . information regarding their individual claims" during the post-trial phase is appropriate "[]with adequate time allowed for discovery[]"); *In re Lucent Techs. Inc. Sec. Litig.*, No. 00-cv-621-JAP, 2002 WL 32818345, at *2 (D.N.J. May 9, 2002) (delaying individual discovery until "the matter of liability has been adjudicated," when "individualized rebuttal proceedings may be pursued to determine whether a claimant may recover"). As one court put

it, "the most appropriate time to gather any necessary information from individual class members is generally after a determination of liability and before payment of individual claims." *On the House Syndication, Inc. v. Fed. Express Corp.*, 203 F.R.D. 452, 458 (S.D. Cal. 2001). *Vivendi*, *Household*, and these cases illustrate that Defendants are entitled to obtain reasonable discovery on reliance from absent class members—and are entitled to do so at this phase of the case.

Moreover, each claimant has explicitly consented to providing further information in support of his or her claim. The claim form includes an acknowledgment that reads, "I agree to furnish additional information to the Claims Administrator, counsel for the parties, or the Court to support this claim if required to do so." Pl.'s Proposed Claim Form, ECF No. 749-2 at 3; *see* Order, ECF No. 778 at 9-10 (approving Plaintiffs' proposed claim form). There is nothing unfair or surprising about requiring reasonable discovery at this stage of the case.

Moreover, Defendants' discovery requests are reasonable. Defendants' discovery requests are directed at individual reliance, an essential element of the class members' claims. *See* Exs. 3, 4. Defendants' discovery proposal is carefully tailored using Rule 26(b)(1)'s the proportionality principle, which instructs that the scope of discovery encompasses "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Under Rule 26(b)(1), proportionality is assessed by considering "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Applying these factors confirms that Defendants' proposal is reasonable. Defendants propose a narrow set of five requests for production and seven interrogatories. *See* Exs. 3, 4. The responses to those discovery requests will permit Defendants to eliminate unobjectionable claims and determine whether to notice

depositions of particular class members or their investment advisors or seek limited follow-up discovery. Defendants' discovery, coupled with their proposals for Phase II and Phase III, allows for the adjudication of any disputes over individual claims, while at the same time creating a distinction between large claims and small claims to maximize efficiency and an opportunity for stipulated resolution of undisputed claims. This orderly and efficient approach ensures that liability will ultimately be determined in a fair process consistent with Article III.

### B. Defendants Are Entitled to Challenge Claims That Are Defective for Other Reasons

Due process affords Defendants the right to challenge claims that are deficient on grounds other than lack of reliance, including claims that were submitted late, claims that were submitted without complete or any trading records, and claims where the class member actually profited. *See, e.g.*, *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012) ("Forcing [class-action defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."). *Cf. Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015) ("As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected.").

The PSLRA limits any particular class member's recovery to "actual damages" incurred. *See* 15 U.S.C. § 78bb(a); *see also Dura*, 544 U.S. at 345. This limitation requires that losses suffered as a result of purchasing stock at an inflated price be reduced, or "offset," by any gains enjoyed as a result of selling the stock at the inflated price. *See, e.g.*, *Dura*, 544 U.S. at 345 (Securities law statutes serve "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause."); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 756 F. Supp. 2d 928, 935-36 (N.D. Ill. 2010) ("[O]ut-of-pocket damages are limited to actual damages such that

Plaintiffs' losses must be netted against any of their profits attributable to the same fraud."). Judge Guilford recognized that damages are limited to actual damages by ruling that the last-in-first-out method of damages, or "LIFO," is the appropriate measure of damages in this case. *See* Order, ECF No. 778 at 9. LIFO "accounts for profits resulting from class period sales" and therefore the majority of courts that have adjudicated this issue generally agree it is the appropriate means of calculating losses in securities class actions. *Id.*

Even though the method of calculating damages is settled, there may be other deficiencies in individual class members' claims unrelated to individual reliance that are nonetheless grounds for challenges, such as a failure of proving damages. *See Household*, 756 F. Supp. 2d at 934 (noting "damages cannot be based on pure speculation" and are limited to "actual damages" incurred). Defendants are still evaluating the claims administrator's report, but, upon initial review, there are deficiencies that, if not addressed, would provide certain class members with a windfall. For instance, there are class members who have produced no trading records or insufficient records, and class members whose claimed damages do not match the records submitted. These types of issues would be grounds for a claims challenge. As laid out in Defendants' proposal, Defendants will meet and confer with Plaintiffs' counsel regarding deficiencies or missing evidence related to class members' claimed losses during the follow-up discovery period. If those issues are not resolved, Defendants will move for summary judgment on those claims as well within the relevant phases.

## V. CONCLUSION

For all of these reasons, Defendants request that the Court approve and adopt Defendants' proposal for the claims challenge process.

Dated: October 28, 2020

Respectfully submitted,

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