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

MEMORANDUM OF LAW IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION FOR IMPLEMENTATION OF THIS COURT'S FEBRUARY 28, 2006 ORDER

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This Memorandum is submitted on behalf of Defendants Household International, Inc., Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (referred to collectively herein as "Household" or "Defendants"), in support of their motion to implement this Court's February 28, 2006 Order (the "February 2006 Order") which precludes all remaining claims in this matter in view of Plaintiffs' recent admission that ***all*** of their securities fraud claims arise from alleged misrepresentations or omissions occurring prior to July 30, 1999.

PRELIMINARY STATEMENT

Plaintiffs originally asserted a five-year class period running from October 23, 1997 to October 11, 2002 (the "Originally Pled Class Period"). The Complaint alleged various misrepresentations and omissions during that five-year period, all relating to claimed misconduct taking place during that time. On February 28, 2006, applying the relevant statute of repose, this Court dismissed with prejudice all §10(b) claims based on any misrepresentation or omission that occurred before July 30, 1999, thus reducing the Class Period to July 30, 1999 through October 11, 2002 (the "Court Approved Class Period"). *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc.*, 2006 WL 560589, at *3 (N.D. Ill. Feb. 28, 2006) ("The Court dismisses with prejudice the § 10(b) claims based on any misrepresentation or omission that occurred before July 30, 1999 in connection with the sale or purchase of a security.").

When Plaintiffs recently served Defendants with the report of their expert Professor Daniel Fischel ("Report") and thereafter with their related interrogatory responses in which Plaintiffs adopted Professor Fischel's report, Plaintiffs finally confirmed the time-barred nature of their entire Complaint. Plaintiffs' theory of fraud is explicitly based solely on "artificial inflation" resulting from alleged misrepresentations and/or omissions that occurred *prior to July 30, 1999*. This time-frame for the alleged fraud directly contravenes this Court's February 2006 Order by seeking to assert only claims that arose ***before*** the Court Approved Class Period began. Because it is now clear that the February 2006 Order disposes of all of Plaintiffs' claims, Defendants ask the Court to dismiss the Complaint in its entirety pursuant to that Order.

Defendants respectfully ask the Court to give this motion its urgent attention, in the interest of justice and in keeping with the Court's duty under the Private Securities Litigation Reform Act ("PSLRA") to screen out patently unmeritorious claims. Indeed, the PSLRA imposes on district judges the obligation to serve as gatekeepers in order to protect issuers and their shareholders at the earliest possible stage from the notoriously high costs and extortionate potential of such claims. *See Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504-07 (2007) (explaining the district courts' gate-keeping role in light of the PSLRA's heightened pleading requirements); *Higginbotham* v. *Baxter International, Inc.*, 2007 WL 2142298, at *6 (7th Cir. July 27, 2007) (Easterbrook, C.J.) (explaining that costly additional proceedings must not be countenanced where plaintiffs' claims facially "flunked the PSLRA"). Deferring consideration would impose an unjust hardship on Defendants, given that the Court has already ruled as a matter of law that claims arising before July 30, 1999 may not proceed and Plaintiffs have now admitted that all their claims arose before July 30, 1999. No amount of additional expert proceedings or summary judgment practice will affect the straightforward application of that ruling to Plaintiffs' belated acknowledgement that the *only* alleged misrepresentations or omissions on which they rely as predicates for their claims occurred within what the Court has already held to be the time-barred period.

ARGUMENT

Plaintiffs' recent disclosures reveal — for the first time — that they seek to pursue *only* claims that this Court has already dismissed. According to Plaintiffs, *all* of their claims arise from alleged misrepresentations or omissions that "artificially inflated" Household's stock price *prior to July 30, 1999*. Because this pre-July 30, 1999 "artificial inflation" of the stock price forms the *sole* basis asserted by Plaintiffs for recovery, their Complaint should be dismissed in its entirety so as to implement this Court's February 28, 2006 Order.

I. This Court's February 2006 Order Dismissed with Prejudice All Claims Based on Misrepresentations or Omissions That Occurred *Before July 30, 1999*

Plaintiffs' Complaint in this action alleged misrepresentations and/or omissions throughout the Originally Pled Class Period. Recognizing that the applicable statute of repose

was three years, this Court on February 28, 2006 dismissed with prejudice all claims based on any misrepresentation or omission that occurred *prior to July 30, 1999*. 2006 WL 560589, at *3 ("The Court dismisses with prejudice the § 10(b) claims based on any misrepresentation or omission that occurred *before July 30, 1999* in connection with the sale or purchase of a security.") (emphasis added).

As this Court held in its February 2006 Order, once the three-year statute of repose period expired, any action based on alleged misrepresentations or omissions made prior to that time was forever time-barred. *Id.* *See also Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 (1991) ("As there is no dispute that [plaintiffs' complaint] was filed more than three years after [the] alleged misrepresentations, [plaintiffs'] claims were untimely."); *Beard* v. *J.I. Case Co.*, 823 F.2d 1095, 1097 n. 1 (7th Cir. 1987) ("[A] period of repose bars a suit a fixed number of years after an action by the defendant . . ., even if this period ends before the plaintiff suffers any injury."); *Wafra Leasing Corp.* v. *Prime Capital Corp.*, 192 F. Supp. 2d 852, 864 (N.D. Ill. 2002) (holding that "the 'violation' for the purposes of the Rule 10b-5 statute of repose occurs when the defendant makes a misrepresentation in connection with the sale or purchase of securities"); *Antell* v. *Arthur Andersen LLP*, 1998 WL 245878, at *5 (N.D. Ill. May 4, 1998) (holding that "the repose period is triggered by the alleged misrepresentation").

II. Plaintiffs Have Recently Admitted in Their Interrogatory Responses That They Base Their Claims *Solely* on Misrepresentations and/or Omissions Allegedly Occurring *Before July 30, 1999*

Since February 2006, Defendants have endeavored to learn the details of Plaintiffs' theory of fraud by, *inter alia*, serving contention interrogatories expressly asking Plaintiffs to explain how the alleged fraud artificially inflated the price of Household's stock and whether the value of the stock declined once the market learned of the alleged deception. The Court of Appeals recently recognized the key significance of these factors in *Ray* v. *Citigroup Global Markets, Inc.*, 482 F.3d 991, 995 (7th Cir. 2007). Plaintiffs resisted these inquiries during fact

discovery, taking the position that they would require analysis and guidance by their expert witnesses in order to respond.[1] In an Order dated June 29, 2007, Magistrate Judge Nolan directed Plaintiffs to serve by August 15, 2007 all interrogatory answers which they had previously deferred — the same date she established as the deadline for service of Plaintiffs' expert reports.

The expert Plaintiffs retained to examine and explain their theory is Daniel R. Fischel, who is a Professor of Law and Business at Northwestern University School of Law and former Dean of The University of Chicago Law School.[2] Plaintiffs asked Professor Fischel to "analyze the economic evidence as it relates to their claims, determine whether it is consistent with these claims, and, if so, analyze the amount of alleged artificial inflation in Household's stock price during the Class Period attributable to such claims." *See* Fischel Report, Declaration of Thomas J. Kavaler, dated August 30, 2007 ("Kavaler Declaration") Exhibit A at 6. Professor Fischel prepared a report summarizing his findings, which Plaintiffs served on Defendants on the night of August 15, 2007.

The Fischel Report (which accepts Plaintiffs' allegations as true) reflects Professor Fischel's conclusion that *by July 30, 1999*, Household's stock price was "artificially inflated" as a result of misrepresentations and/or omissions in the amount $7.97 per share over and above the "true value" of the stock on that day. *See* Kavaler Declaration Exhibit A at Ex. 53. Professor Fischel's Report demonstrates that ***no additional inflation*** occurred between July 30, 1999 and November 15, 2001, when, according to Plaintiffs, the "truth" of Household's alleged fraud began to be revealed to the market. *Id.* "Chart A" below provides a graphic representation of data

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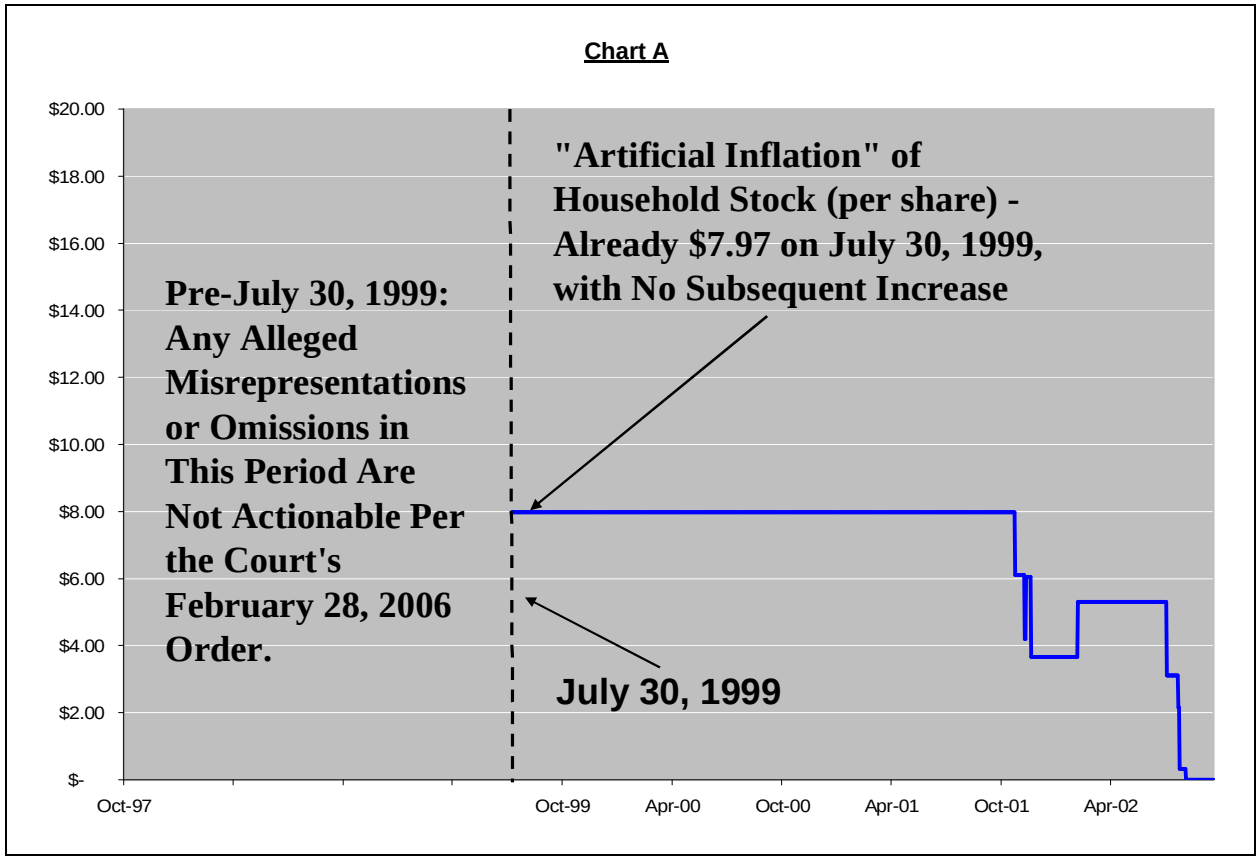
[1] For example, in their January 29, 2007 response to Defendants' Interrogatory No. 31, Plaintiffs objected "that the information sought by this investigation is properly the subject of expert testimony."

[2] Professor Fischel states in his report that he has "published approximately fifty articles in leading legal and economics journals and [is] coauthor, with [Chief] Judge Frank Easterbrook of the Seventh Circuit Court of Appeals, of the book *The Economic Structure of Corporate Law* (Harvard University Press)." Fischel Report, Kavaler Declaration Exhibit A at 1. He adds that courts at all levels have "cited [his] articles as authoritative." *Id.*

reported by Professor Fischel, describing the "artificial inflation" of Household's stock claimed by Plaintiffs. *See* Kavaler Declaration Exhibit A at Ex. 53.



In supplemental interrogatory responses served by Plaintiffs several hours after the Fischel Report, Plaintiffs adopted Professor Fischel's conclusions in their entirety. Plaintiffs explicitly incorporated Professor Fischel's Report in their responses to numerous contention interrogatories by which Defendants sought to learn the basis of Plaintiffs' claims, including their theory of the alleged "inflation" and "deflation" of the stock price. *E.g.*, Lead Plaintiffs' Response to Defendants' Interrogatory No. 64 ("Lead Plaintiffs incorporate by reference and identify the Expert Report of Daniel R. Fischel, served concurrently herewith, and all documents referenced therein."). *See also* Lead Plaintiffs' Responses to Defendants' Interrogatories Nos. 6, 15, 17, 27, 30, 31, 32, 33, and 35. The language of Defendants' interrogatories and the relevant excerpts of Plaintiffs' responses are reproduced in Exhibit B to the Kavaler Declaration.

Taking Plaintiffs' contentions and their expert's conclusions regarding the alleged "artificial inflation" of Household's stock price as true for purposes of this motion, at some unspecified point in time *prior to July 30, 1999* certain misrepresentation(s) or omission(s) caused Household's stock price to become "artificially inflated" by $7.97 per share. Although Professor Fischel does not specify the nature or timing of the pre-July 30, 1999 inflation reflected in his Report, by definition the alleged misrepresentation or omission that caused the "artificial inflation" of $7.97 per share ***did not occur on or after July 30, 1999*** — the bright line cut-off date for application of the statute of repose and inception date for the Court Approved Class Period, as previously held by this Court as a matter of law. *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc.*, 2006 WL 560589, at *3.

As this Court has recognized, a securities fraud plaintiff must base his claims on misrepresentations or omissions that artificially inflated the defendant's stock price during the time period not barred by the statute of repose. *Id. See also Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 (1991). Here, Plaintiffs have explicitly adopted their expert's conclusion that the full measure of any "artificial inflation" caused by Defendants' alleged fraud was already present in Household's stock price *on July 30, 1999.* The ineluctable consequence of this position is that because the alleged misrepresentations or omissions that caused the "artificial inflation" necessarily occurred *before July 30, 1999,* the statute of repose and this Court's February 28, 2006 Order of dismissal with prejudice operate to bar all claims.

Although Plaintiffs purport to allege various additional misrepresentations and omissions subsequent to the repose date, they do not attribute any additional inflationary impact to such subsequent incidents. Had any misrepresentations or omissions in the period after July 30, 1999 been material to and relied upon by the market, those misrepresentations or omissions would necessarily have increased the amount of "artificial inflation" in Household's stock price. *See Basic, Inc.* v. *Levinson*, 485 U.S. 224, 246 (1988) (explaining that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations") (citing Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 4 n.9 (1982)). *See also Dura*

Pharmaceuticals, Inc. v. *Broudo*, 544 U.S. 336, 345-46 (2005) (holding that proof of artificial inflation following a misrepresentation or omission is necessary but not sufficient to establish liability under Rule 10b-5). Any alleged misrepresentations or omissions after July 30, 1999 are therefore *per se* insufficient to establish liability under § 10(b). *See, e.g.*, *Ray* v. *Citigroup Global Markets, Inc.*, 482 F.3d 991, 995 (7th Cir. 2007) (holding that to show a recoverable loss in a fraud on the marketplace claim, plaintiffs must demonstrate, *inter alia*, "that the defendants' alleged misrepresentations artificially inflated the price of the stock").

By their recent interrogatory responses, Plaintiffs have revealed their contention that all of the "artificial inflation" they claim was already present in Household's stock price on July 30, 1999 and, therefore, that any actionable fraud had occurred before July 30, 1999. Because Plaintiffs' claims are explicitly based solely on misrepresentations that allegedly inflated the stock price prior to July 30, 1999, the statute of repose as applied by this Court's February 2006 Order requires the dismissal of those claims. 2006 WL 560589, at *3 ("The Court dismisses with prejudice the § 10(b) claims based on any misrepresentation or omission that occurred before July 30, 1999 in connection with the sale or purchase of a security.").

III. **Plaintiffs Are Bound by Their Adoption of the Fischel Report**

As Magistrate Judge Nolan has repeatedly reminded Plaintiffs in this case, the purpose of contention interrogatories is "to clarify the basis for or scope of an adversary's legal claims.'" *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc.*, No. 1:02-cv-05893, [Dkt. No. 339] at 3 (Nov. 10, 2006) (quoting *Starcher* v. *Correctional Medical Systems, Inc.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998). *See also Bell* v. *Woodward Governor Co.*, 2005 U.S. Dist. LEXIS 19602, at *6 (N.D. Ill. Sept. 8, 2005) ("interrogatories are useful because they, amongst other things, aid the propounding party in 'pinning down' a party's position"); *Ziemack* v. *Centel Corp.*, 1995 WL 729295, at *2 (N.D. Ill. Dec. 7, 1995) (noting that the very purpose of contention interrogatories is to "require the answering party to commit to a position and give factual specifics supporting its claims").

A party's answers to contention interrogatories are a proper subject for judicial notice. Fed. R. Evid. 201(d) ("A court shall take judicial notice if requested by a party and sup-

plied with the necessary information."); *see B. Milborn & Associates* v. *Trident Press International, Inc.*, 2004 U.S. Dist. LEXIS 22561, at *4 (N.D. Ill. Nov. 5, 2004). Moreover, contention interrogatory responses constitute judicial admissions. *Prince Group, Inc.* v. *MTS Products*, 1998 U.S. Dist. LEXIS 7835, at *8 (S.D.N.Y. May 27, 1998) ("judicial admissions, such as stipulations or answers to contention interrogatories, are answered with the assistance of counsel and have the effect of precluding entire legal issues from a case") (citing *Keller* v. *United States*, 58 F.3d 1194 (7th Cir. 1995)). *See also Transportation Insurance Co.* v. *Thyssenkrupp Elevator Corp.*, 2007 WL 2359764, at *3 (N.D. Ill. Aug. 13, 2007) ("[a] judicial admission is any deliberate, clear and unequivocal statement, either written or oral, made in the course of judicial proceedings") (quoting *In re Lefkas General Partners Number 1017*, 153 B.R. 804, 807 (N.D. Ill. 1993)) (internal quotation marks omitted); *Constellation Power Source, Inc.* v. *Select Energy, Inc.*, 2007 WL 188135, at *5 (D. Conn. Jan. 23, 2007) ("answers to contention interrogatories constitute judicial admissions that generally estop the answering party from later seeking to assert positions omitted from, or otherwise at variance with, those responses") (citation and internal quotation marks omitted). As the Court of Appeals has explained, judicial admissions "are not evidence at all but rather have the effect of withdrawing a fact from contention." *Keller* v. *United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir. 1995) (quoting Michael H. Graham, *Federal Practice and Procedure: Evidence* § 6726 (Interim Edition)) (internal quotation marks omitted).

Because Plaintiffs' long-awaited contention interrogatory responses constitute judicial admissions in the form of a clear and deliberate adoption of Professor Fischel's conclusions that the creation of alleged stock price inflation occurred only during the statutory period of repose, the Court can and should consider their answers as binding upon Plaintiffs for all purposes.

CONCLUSION

For the foregoing reasons, all securities fraud claims alleged by Plaintiffs are precluded as a matter of law by this Court's February 28, 2006 Order and the Complaint asserting these time-barred claims should be dismissed with prejudice to give effect to this Court's decision as reflected in that Order.

August 30, 2007

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Respectfully submitted,

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