UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, *- against -* HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING ALL REMAINING CLAIMS OF THE CLASS

CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar

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The Household Defendants respectfully submit this Reply Memorandum in support of their motion for summary judgment.

PRELIMINARY STATEMENT

This motion presents a straightforward and narrow legal question: Have Lead Plaintiffs advanced sufficient evidence on this motion to prove "that the defendants' alleged misrepresentations artificially inflated the price of [Household's] stock" during the relevant period? *Ray* v. *Citigroup Global Markets*, *Inc.,* 482 F.3d 991, 995 (7th Cir. 2007). As shown in Defendants' opening submission, Lead Plaintiffs have failed on this essential element of their claim because their own expert has concluded, based on event studies Lead Plaintiffs have adopted in full, that not a single one of Defendants' alleged Class Period misstatements introduced or increased artificial inflation in the price of Household stock. As a consequence, Lead Plaintiffs also cannot prove the required causal connection between their stock market losses and any actionable fraud as required by *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 345-46 (2005).

Given the admission that no artificial inflation was introduced by alleged Class Period misstatements, no genuine issue of material fact is presented by Lead Plaintiffs' opposition papers, including their efforts to correlate specific declines in the price of Household stock with disclosures or events relating to the general subject matter of the alleged fraud. Even if proof that a given market loss "touches upon" the alleged fraud were sufficient to prove loss causation under *Dura* — which it is not, *see* 544 U.S. at 343; Def. Br. at 24-26[1] — a reasonable jury could not conclude that the decline in Household's stock price during the last year of the Class Period dissipated artificial inflation introduced by *Class Period fraud*. That is because Professor Daniel Fischel, the author of the very event studies Lead Plaintiffs cite for this "deflation" argument, confirmed in no uncertain terms that he "didn't find any statistically significant price increases that resulted in inflation from the beginning of the [class] period, and through November 15, 2001," the date on which Lead Plaintiffs now assert corrective disclosures began. (Def. St. ¶ 39) Lead Plaintiffs cannot create a triable issue by arguing that the expert whose reports they adopted was wrong.

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[1] References to "Def. Br." are to the "Memorandum of Law in Support of the Household Defendants' Motion for Summary Judgment Dismissing All Remaining Claims of the Class" (Dkt. 1231-2); "Def. St." refers to "Defendants' Statement Pursuant to Local Rule 56.1(a)(3) in Support of their Motion for Summary Judgment." (Dkt. 1228)

Faced with these incurable defects in their loss causation showing, Lead Plaintiffs first mount an effort to shift their own burden of proof on this motion to Defendants. That is one way to seek to escape a fundamental failure of proof, but it is not one permitted under controlling Supreme Court precedent. This issue is briefly addressed in Point I.

Point II addresses Lead Plaintiffs' "inflation maintenance" theory, a concept designed to avoid the consequences of Lead Plaintiffs' inability to identify any inflation *actually caused* by a Class Period misstatement. In promoting this concept, Lead Plaintiffs invite this Court to eviscerate the statute of repose and lower the bar for proving a § 10(b) violation by becoming the *first ever* to hold that conventional proof of loss causation can be dispensed with where a plaintiff alleges "maintenance" of previously existing inflation. In keeping with this untenable proposition, Lead Plaintiffs assert that every one of the Company's public SEC filings during the Class Period constituted actionable fraud — irrespective of its actual substance and its admitted lack of impact — because each filing allegedly "maintained" inflation arising from *pre*-Class Period fraud. (P.Br. at 3)[2] Lead Plaintiffs do not cite a single judicial opinion adopting this theory, and as shown in Defendants' opening brief and Point II below, the "inflation maintenance" approach has been rejected in every name, form or iteration under which it has been advanced — often by this same firm of plaintiffs' lawyers. Even if "maintenance of preexisting inflation" were a valid theory for satisfying *Dura* — which it is not — Lead Plaintiffs have not begun to establish the foundation for such a claim because they affirmatively elected, in discovery and in response to this motion, to forego presenting any proof of the existence and source of the artificial inflation they contend Defendants "maintained." Without more, this deliberate failure of proof also dooms their claim as a matter of law.

Point III explains why Lead Plaintiffs' "inflation maintenance" construct is also barred by, and inherently inconsistent with, the governing statute of repose. Lead Plaintiffs' assertion that every Class Period filing "maintained" preexisting inflation, coupled with their own concession that no inflation entered the price of Household stock as a result of alleged Class Period misstatements, inescapably confirms that if any material misstatements or omissions occurred at

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[2] References to "P. Br." are to "Lead Plaintiffs' Memorandum in Opposition to Household Defendants' Motion for Summary Judgment Dismissing All Remaining Claims of the Class" (Dkt. 1239); references to "P. St." are to "[Corrected] Lead Plaintiffs' Rule 56.1 Statement of Additional Facts in Opposition to Summary Judgment" (Dkt. 1240); references to "P. Resp. St." are to Lead Plaintiffs' Response to Def. St. (Dkt. 1241).

all, by definition they occurred before July 30, 1999. This puts all of the Class' claims squarely within the scope of this Court's February 2006 Order dismissing as time-barred all claims arising from alleged misrepresentations or omissions that occurred before July 30, 1999. Although much of their relevant argument is buried at the end of their brief (P. Br. at 21-25), Lead Plaintiffs agree that they seek recovery for the dissipation of inflation that existed on day 1 of the Class Period (July 30, 1999) arising from what they call a "failure to correct" a quarterly results announcement made on July 22, 1999 that they allege was false when made. (P. Br. at 21-22). Confessing a concern that the alleged "failure to correct" the July 22 results announcement "is not actionable" (*id.* at 3), Lead Plaintiffs downplay this defect as an "anomaly" and offer a fall back date of August 16 (when those same quarterly results were repeated)[3] to allegedly revive the time-barred claim. *Id.* But they never show that the August 16 filing or any other Class Period filing introduced *so much as a penny* of artificial inflation into the price of Household's stock and they have adopted Professor Fischel's conclusion to the contrary. Their theory that silence following a time-barred misrepresentation "maintains" any related inflation is an impermissible argument for tolling, which is unavailable as a matter of law. Acceptance of their unsupported notion that each successive day of silence "breathes new life" into time-barred claims would completely nullify the statute of repose.

We end this Preliminary Statement as we began. Defendants' motion for summary judgment presents one narrow legal issue addressed to one essential element of the Class' § 10(b) claim. Lead Plaintiffs' response to the motion was to offer a confused and confusing dissertation on a host of facts and theories, the classic "throw the spaghetti against the wall to see if something will stick" approach to opposing summary judgment. We will not be responding to much of what has been offered by Lead Plaintiffs — much as we may disagree with it. That is because the failure of Lead Plaintiffs' claim is fundamental. No amount of obfuscation can obscure the fatal defect. There is no debate about the fact that Lead Plaintiffs cannot prove that artificial inflation was introduced by any alleged Class Period misstatement. There is no battle of the experts. There is quite literally *nothing* for the trier of fact to decide on this issue. Lead Plaintiffs cannot cure this defect and no trial can make it go away. Either the law allows a plaintiff to pursue a fraud on the marketplace claim where the alleged class period misstatements or omissions caused no inflation

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[3] At point II.B.2 of our opening brief, we demonstrated that the repetition of prior disclosures is not separately actionable. Plaintiffs have offered no response.

or it does not. The Court of Appeals has told us it does not. Defendants are therefore entitled to summary judgment dismissing the remaining claims of the Class as a matter of law.

ARGUMENT

I. Lead Plaintiffs' Arguments on Burden Are Erroneous

Lead Plaintiffs' inability to demonstrate that any Class Period misstatement or omission introduced artificial inflation into Household's stock price, as required under *Dura* and *Ray*, constitutes a "complete failure of proof concerning an essential element of [Plaintiffs'] case [that] necessarily renders all other facts immaterial."[4] *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Summary judgment for Defendants is therefore mandated by Rule 56(c). As the Supreme Court explained in *Celotex*:

> "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial."

Id. at 322. In view of this controlling law, it is simply specious for Lead Plaintiffs to argue that Defendants shoulder the burden on this motion to disprove the claims of the Class. (*See* P. Br. at 4-5). As the Supreme Court has instructed, there is "no express or implied requirement in rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex*, 477 U.S. at 323 (emphasis in original). *Celotex* required Lead Plaintiffs to come forward in response to Defendants' motion and make a showing sufficient to establish the element of loss causation or suffer dismissal of their claim. Because they have not made that showing their claim must be dismissed.

Seeking to evade the Supreme Court's clear instructions in *Celotex,* Lead Plaintiffs place great reliance on *dictum* in *Caremark, Inc*. v. *Coram Healthcare Corp.*, 113 F.3d 645 (7th Cir. 1997). The effort is unavailing. The Court of Appeals in *Caremark* rendered no ruling on the proper application of Rule 56(c); the case was before the Court on the issue of the sufficiency of pleadings. Significantly, in *Ray* — where the Court affirmed summary judgment because "plain-

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[4] It is for precisely this reason that Defendants focused their motion narrowly and exclusively on this one fatal defect in the Class' case, eschewing the "omnibus" motion for summary judgment they had previously considered, Status Conf. Tr. Jan. 10, 2007, at 18, and the Court had cautioned against. *Id.*

tiffs did not introduce enough evidence on the loss causation element to create a genuine issue of material fact," 482 F.3d at 996 — the Court cited *Caremark* as support for "requiring the plaintiff to prove that 'it was the very facts about which the defendant lied which caused its injuries'." 482 F.3d at 995 (citation omitted). *In re Motorola Securities Litigation*, 505 F. Supp. 2d 501 (N.D. Ill. 2007) (Pallmeyer, J.), also cited by Lead Plaintiffs, is not controlling here. As the court explained in *In re Williams Securities Litigation*, 496 F. Supp. 2d 1195, 1264 n.50 (N.D. Okla. 2007), "[t]he February, 2007 *Motorola* decision (casting the burden on the defendant, on [a] motion for summary judgment, to negate loss causation as a matter of law) appears to have been undermined by the Seventh Circuit's decision two months later in *Ray* v. *Citigroup Global Markets, Inc*." (citations omitted). Finally, Lead Plaintiffs' reliance on *Ray* itself (P. Br. at 9), a case in which summary judgment was *affirmed* based on the plaintiffs' failure to demonstrate loss causation, is hardly of help to them here. As much as Lead Plaintiffs would like to escape the burden imposed by Rule 56, it was their burden to make their loss causation case by now and that is a burden they have failed to meet.

II. Lead Plaintiffs' Own Evidence Establishes That No Class Period Misstatements Caused the Decline in Household's Stock Price

As the Court of Appeals has explicitly stated, plaintiffs must prove "*both* that the defendants' alleged misrepresentations artificially inflated the price of the stock *and* that the value of the stock declined once the market learned of the deception." *Ray*, 482 F.3d at 995 (emphasis added). *Ray* compels summary judgment in favor of Defendants because Lead Plaintiffs' theories fail in various ways to meet this standard.

A. Lead Plaintiffs Concede That No Class Period Statement Introduced Artificial Inflation Into the Price of Household's Stock

Lead Plaintiffs have identified more than 80 Class Period "misstatements," citing to virtually every SEC filing Household made during the Class Period irrespective of its actual text or subject matter. Consistent with the Court of Appeals' command in *Ray*, Lead Plaintiffs' expert, Professor Fischel, set about to examine each of these statements to identify whether any of them introduced any artificial inflation into the price of Household stock. Professor Fischel stated:

> My understanding is that the plaintiffs allege that all public statements from the beginning of the class period contained material nondisclosures relating to the three different areas that I discuss in my report.
>
> . . . And what I've attempted to do is, based on that assumption, *attempt to quantify the amount of inflation that resulted, and how that inflation varied over time as dif-*

> *ferent disclosures occurred, which either increased or decreased inflation during the class period.*

P. St. ¶ 8 (quoting Fischel Tr. 127:18-128:4) (emphasis added).

As his own testimony demonstrates, Professor Fischel's "attempt to quantify the amount of inflation that resulted" from alleged Class Period misstatements was entirely unavailing. He was unable to attribute *any* increase in inflation to *any* of the Class Period misstatements or omissions Lead Plaintiffs identified.[5] Indeed, the first inflation-changing date Professor Fischel *was* able to identify was November 15, 2001, the date on which he concluded that the previously "baked-in" inflation began to *dissipate* as a result of alleged corrective disclosures. (P. St.¶ 1, Tab C, Fischel Tr. 132:21-133:7) ("the inflation *remained constant*, until there was a disclosure either increasing the amount of inflation or decreasing the amount of inflation which, based on my analysis, occurred on November 15th of 2001") (emphasis added). *See* P. Br. at 3, 23; Def. St. ¶ 42.

In a futile attempt to overcome this fatal problem, Lead Plaintiffs offer little more than a play on words. While conceding that the amount of inflation actually *remained constant*, they contend that statements or omissions during the Class Period "maintained" Household's artificially inflated stock price "by preventing it from falling to its true value" (P. Br. at 3). In other words, Defendants supposedly "inflated" the stock price by not changing the inflation that Plaintiffs insist was there before. Plaintiffs cite no authority supporting this patently spurious reasoning, reasoning which is the touchstone of their opposition to summary judgment. *Ray*'s requirement that plaintiffs prove "that the defendants' alleged misrepresentations artificially inflated the price of the stock" is entirely ignored in this exercise and is entirely inconsistent with it.

As the Court of Appeals explained in *Ray, Dura* made clear that a plaintiff must plead and prove both that *a misstatement introduced artificial inflation into a company's stock price* and that inflation was removed when the truth became known. *Dura,* 544 U.S. at 345-46 (2005) (proof of artificial inflation following a misrepresentation or omission is necessary but not sufficient to establish liability under Rule 10b-5). *See also In re Northfield Laboratories, Inc. Securi-*

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[5] The "artificial inflation" Professor Fischel was looking for could have arisen in two ways: (1) a company makes a false statement which increases the company's stock price while the true value of the stock remains unchanged; or (2) a company omits to disclose negative information which causes the true value to decline while the company's stock price remains unchanged.

ties Litigation, 527 F. Supp. 2d 769, 789 (N.D. Ill. 2007) (Marovich, J.) (dismissing plaintiffs' claims for failure adequately "to allege both that the defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception") (citations and internal quotation marks omitted). Lead Plaintiffs do not even try to identify the source of the supposedly "maintained" artificial inflation, having resisted any discovery on this subject based on their insistence that it is irrelevant. The resulting imprecision was quite deliberate: If the original source of the alleged inflation is unknown, literally any public statement could be accused, without any evidence, of "maintaining" the alleged inflation. And the allegedly "maintained" inflation (existing since the first day of the Class Period and before) cannot be linked with either the generic SEC filings Lead Plaintiffs cite or any stock price declines that might later take place. This is not a result contemplated — or countenanced — by *Dura* and *Ray*.

But this imprecision is precisely what has led every court that has considered such an "inflation maintenance theory" to reject it. It is a theory that can neither be proved nor disproved. In *In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Securities Litigation*, No. 03 Civ. 2467, 2008 WL 512779, at *7 (S.D.N.Y. Feb. 26, 2008), the plaintiffs pressed the same theory advanced by Lead Plaintiffs here, claiming that certain statements "maintained" a company's stock price at an inflated level. The court rejected this argument, finding that "there is no way to test for this maintenance effect," because "it is based not on facts but on speculation."[6] *Accord In re Northern Telecom Ltd. Securities Litigation*, 116 F. Supp. 2d 446, 461 (S.D.N.Y. 2000) ("It would be an odd rule to allow greater leeway to an expert's speculative and hypothetical analysis about what would have happened to a company's stock price if certain information had been disclosed than to an expert's analysis about what in fact happened to a company's stock price when certain representations were actually made.").

Ravens v. *Iftikar*, 174 F.R.D. 651 (N.D. Cal. 1997), is also instructive here. The plaintiffs in *Ravens* alleged a series of misleading statements beginning on October 21, 1994, the first

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[6] Lead Plaintiffs' argument that the Court should disregard *Credit Suisse* because it was decided at the class certification stage rather than on summary judgment (P. Br. at 15) overlooks that the *Credit Suisse* court expressly found the speculative "maintenance"/"booster shot" theory to be "patently deficient" as a matter of law. 2002 WL 512779, at *7. A theory too "speculative" to permit certification of a class is certainly doomed to fail at the summary judgment stage. *See Avery* v. *Mapco Gas Products, Inc.*, 18 F.3d 448, 453-54 (7th Cir. 1994) (plaintiffs must offer evidence to raise a genuine issue of material fact to avoid summary judgment because "speculation will not do").

day of the class period. They claimed that as of that day (and every day thereafter) the "true-value" of the stock was $5.50. *Id*. at 667. The trading price of the stock as of October 21, 1994, however, was $13.00. Thus, the stock price was already inflated by $7.50 on the first day of the class period as a result of non-actionable pre-class period statements. *Id*. The court determined that the plaintiffs could not recover this $7.50, stating that "more than 40 percent of the 76 percent price increase referred to in the complaint occurred *before* the class period began and, thus, can form no part of plaintiffs' claim for class damages." *Id*. (emphasis added) Lead Plaintiffs employ the same rejected tactic here. Their expert calculated an amount of artificial inflation assertedly present in Household's stock price as of July 30, 1999 (the first day following the period of re-pose, and the first day of the Class Period). As the expert confirmed that the source of the alleged inflation was not any statement made on July 30, 1999, its origin necessarily preceded that date. As the Court in *Ravens* concluded, such pre-Class Period inflation can form no part of a plaintiff's claim for damages. Here, according to Lead Plaintiffs, it accounts for *all* of it.

B. Lead Plaintiffs Cannot Connect Any Decline in Household's Stock Price to Any Particular Misstatement That Inflated the Stock Price

Lead Plaintiffs focus a substantial portion of their opposition on the undisputed 2002 decline in Household's stock price in an effort to establish that "the value of the stock declined once the market learned of the deception" as *Ray also* requires.[7] 482 F.3d at 995. Their effort fails because Lead Plaintiffs do not — and cannot — link any stock price decline to any "deception" that introduced artificial inflation into Household's stock price either during the Class Period, when Professor Fischel confirms there was no new inflation, or for the period before July 30, 1999, for which Lead Plaintiffs declined to advance any information. This evidentiary gap is another fatal defect of their "inflation maintenance" theory.

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[7] As shown in Defendants' opening submission, public stock price information (of which this Court may take judicial notice) confirms that the prices of Household's competitors' stock suffered a similar fate in response to negative press in 2002 about the subprime lending industry in general. This trend illustrates that a stock price decline in response to negative press does not prove that fraud was the cause of the decline. The recognition that stock prices frequently decline in response to bad news that is not the product of fraud is a key focus of the Supreme Court's analysis in *Dura*. In order for Lead Plaintiffs to demonstrate that the stock price decline reflected the dissipation of fraud-induced "artificial inflation" from Household's stock price, they were required to provide evidence on this motion sufficient to prove that some actionable misrepresentation introduced the inflation into the stock price. They have provided no such evidence.

Lead Plaintiffs concede that Household's stock price *increased* on the very days the Complaint alleges the fraud was "revealed" (P. Br. at 17) — resulting in no out of pocket loss to investors. Nevertheless, Lead Plaintiffs argue that they can recover based on their speculation that the stock price would have increased more on these three days if not for the alleged fraud. P. Br. at 17-18. Lead Plaintiffs cite no authority for this proposition because it has no basis in logic or law. A plaintiff that prevails on a claim under Rule 10b-5 is entitled to recover only for out of pocket losses, *i.e.*, only for stock price declines caused by corrective disclosures linked to particular fraudulent statements or omissions. *See Dura*, 544 U.S. at 347 (finding that plaintiffs had insufficiently pled loss causation given their failure "to claim that *Dura's* share price fell significantly after the truth became known"); *see also* 15 U.S.C. § 78-bb(a) ("no person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages on account of the act complained"). These principles allow no room for speculation that an actual price increase was somehow too low.

In *In re Impax Laboratories, Inc. Securities Litigation*, No. C 04-04802 JW, 2007 U.S. Dist. LEXIS 723, at *20 (N.D. Cal. Jan. 3, 2007), the court granted the defendants' motion to dismiss because the company's stock price closed "up" on each of the three days after the truth regarding the company's financial condition was revealed, holding that "there was no loss associated with Impax's announcement . . . because the stock price increased after the truth was disclosed." *Id.* The court rejected the plaintiffs' argument that the stock price had increased after the corrective disclosure only because the company had also released unrelated positive news on that day. *Id.* The court held that "Impax's November 9 disclosure of positive news does not alter a simple reality: there was no loss associated with Impax's announcement that it would restate its 1Q04 and 2Q04 revenues, because the stock price increased after the truth was disclosed." *Id.* Given that Household's stock price increased the day of each of the three alleged corrective disclosures, these disclosures were not the cause of any loss as a matter of law.

Lead Plaintiffs seek to avoid the dispositive effects of such stock price increases by arguing that earlier "partial" corrective disclosures revealed the truth of the alleged fraud (while saying, at the same time, that Defendants continued to "conceal" the whole truth). P. Br. at 19-20. However, Lead Plaintiffs have still failed to *connect* these supposed "partial" disclosures to any alleged misstatement. Their expert Professor Fischel does not evaluate whether any alleged corrective disclosures related to the alleged misstatements; he cannot because he found that none of the alleged Class Period misstatements introduced artificial inflation. Instead, he simply assumed that any disclosure that so much as mentioned "re-aging," "predatory lending," or the "restatement" *must* have contained some facts that were previously unknown. (P. St.¶ 1, Tab C, Fischel

Tr. 138:14-18) ("I am *assuming* that the information that came out during the period about these three different areas was *something* that the company did not disclose during the class period beginning from the first day of the class period.") (emphasis added)).

Having failed to identify any Class Period misstatement that introduced inflation into Household's stock price, Lead Plaintiffs and Professor Fischel cannot hope to link the stock price declines at the end of the Class Period to any alleged Class Period misstatement as they are explicitly required to do. *Dura*, 544 U.S. at 342 (loss causation is the "connection between the material misrepresentation and the [plaintiff's] loss"); *Tricontinental Industries, Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, 843-44 (7th Cir. 2007) (to establish that a misstatement was the cause of a loss, plaintiffs must demonstrate a connection between the particular alleged misstatement and their later loss).

Without the requirement that plaintiffs link a decline removing inflation from a company's stock price to an earlier actionable misstatement or omission that introduced the inflation, securities fraud plaintiffs would be free to claim Rule 10b-5 damages whenever bad news about a company resulted in a stock price decline, in flagrant contravention of *Dura*. This is why the Court of Appeals requires that securities fraud plaintiffs prove "*both* that the defendants' alleged misrepresentations artificially inflated the price of the stock *and* that the value of the stock declined once the market learned of the deception." *Ray*, 482 F.3d at 995 (emphasis added). Lead Plaintiffs' failure to do so here entitles Defendants to dismissal of the Class' claims.

III. Lead Plaintiffs Cannot Escape the Statute of Repose By Mischaracterizing Their Own Expert's Opinion Which They Have Adopted

This Court has already held that Lead Plaintiffs are barred from recovery based on any misstatement that introduced inflation into Household's stock price before July 30, 1999. *Lawrence E. Jaffe Pension Plan* v. *Household International, Inc.*, No. 02 C 5893, 2006 WL 560589, at *3 (N.D. Ill. Feb. 28, 2006) (Guzman, J.) ("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.") (Dkt. 434). Lead Plaintiffs seek to resist the preclusive effect of this Order by misstating the substance of Professor Fischel's opinion and retreating from their prior representations to this Court. P. Br. at 7-8; 24. Lead Plaintiffs' desire to flee from the consequences of this Court's repose bar order is understandable, albeit unavailing.

Lead Plaintiffs argue in their opposition papers that Professor Fischel's analysis "establishes inflation as of July 30, 1999," and that he "made no assumption about 'inflation' on that date." P. Resp. St. ¶¶ 40, 41; *see also* P. Br. at 7 ("Professor Fischel's testimony was that he as-

sumed a disclosure defect on the first day of the Class Period, *not that he assumed artificial inflation was present in the stock as of the first day*") (emphasis added). This is an incorrect statement that misrepresents Professor Fischel's findings on the subject, all of which were adopted by Lead Plaintiffs in their sworn answers to interrogatories.

In his Reply Report Professor Fischel stated: "I further understand that the Class Period was shortened to begin on July 30, 1999, making this date the first day that Plaintiffs allege the stock price was artificially inflated because they allege that Defendants failed to reveal the adverse information on July 22, 1999 when the Company announced its second quarter financial results."(D. St. ¶ 40, Tab 12 ¶ 36)[8] Professor Fischel specifically acknowledged his assumption that inflation was already present on *whatever* the first day of the Class Period might turn out to be: "My analysis is premised on my assumption that artificial inflation in Household's stock price began on July 30, 1999 or no later than August 16, 1999." (*Id.*)[9]

It is undisputed that Professor Fischel identified no misstatements that increased inflation *during* the Class Period. (P. St. ¶ 1, Tab C, Fischel Tr. 132:21-133:7) ("the inflation remained constant, until there was a disclosure either increasing the amount of inflation or decreasing the amount of inflation which, based on my analysis, occurred on November 15th of 2001"). Accordingly, any artificial inflation in place at the outset of the Class Period was introduced by time-barred misstatements or omissions that occurred in the pre-July 30, 1999 period of repose.[10]

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[8] Lead Plaintiffs confused and confusing "explanations" of their expert's position are rife with contradictions and incoherencies. For example, Lead Plaintiffs' brief insists that the Class Period inflation they claim is not the product of the time-barred July 22 statement that they allege was false when made (Complaint ¶ 233). *See* P. Br. at 24 (refusing to "concede" that Class Period inflation "was caused by the July 22, 1999 statements"). The brief then contradicts itself, conceding that "plaintiffs acknowledge that inflation on July 30, 1999 resulted from the failure on July 30, 1999 to correct the [time-barred] July 22, 1999 statements." *Id*. at 24. Elsewhere, Lead Plaintiffs' protestations are virtually nonsensical, asserting "First, there is no pre-Class Period inflation that permeates throughout the Class Period. There is only inflation on the first day of the Class Period – July 30, 1999." (*Id*. at 22). These illogical statements and positions have not been "concocted" or "distorted" by Defendants (*id*. at 6, 8); they are the product — indeed, the essence — of Lead Plaintiffs' theory. *Id*. (decrying Defendants' verbatim use of Professor Fischel's opinion).

[9] The fact that artificial inflation existed prior to July 30, 1999 is outcome determinative regardless of whether the first actionable misstatement occurred on July 30, 1999 or August 16, 1999. Inflation resulting from a misstatement either exists on a given day or it does not exist. The existence of inflation is not dependent on the start date of the Class Period — whether judicially determined or otherwise.

[10] The Complaint itself also supports this conclusion. It alleges that the Company's financial statements were false and misleading going back to 1997 (AC at ¶¶ 192 - 342), contending that each statement

Footnote continued on next page.

Addressing Magistrate Judge Nolan, counsel for Lead Plaintiffs conceded as much:

> "Now we don't know when there is zero inflation in Household stock before the class period. First of all, it is not relevant to our case. Household stock may have been inflated — may have been inflated going back to the beginning of our old class period in 1997 or even before that."

(D. St. ¶ 44). Putting aside its deliberate imprecision, this statement admits what is in any event undeniable from their expert's own analysis: that the so-called inflation arose during the period of repose. That Lead Plaintiffs now seek to retract this concession only confirms how revealing it is.

Courts consistently reject efforts by securities fraud plaintiffs to use novel legal theories to evade a statute of repose by repackaging time-barred violations. *See, e.g.*, *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 154 (2d Cir. 2007) ("if we were to adopt plaintiffs' endless breach argument, all knowing misstatements made before the class period, which remain uncorrected, would be actionable within the class period on an omission theory") (internal citations and quotation marks omitted); *Caviness* v. *DeRand Resources Corp.*, 983 F.2d 1295, 1302 (4th Cir. 1993) ("fraudulent concealment based on a continuing violation of the securities laws does not apply to toll the three-year period of repose"); *In re Affiliated Computer Services Derivative Litigation*, 540 F. Supp. 2d 695, 701 (N.D. Tex. 2007) ("[I]t is unclear whether Plaintiffs allege that later filings contained false statements based on events not barred or whether they merely constitute the issuance of a further financial statement that failed to correct the prior false statement made in time-barred filings. . . . [T]his Court would view the latter approach as one based on a continuing wrong theory, which this Court rejects, and this Court would find such claims time-barred.") (citations and internal quotation marks omitted); *see also Green v. Fund Asset Management*, L.P., 19 F. Supp. 2d 227, 233 (D.N.J. 1998) ("the allegation that defendants committed a continuing violation . . . by failing to correct prior misleading statements in subsequent reports is unavailing to toll the statute of limitations").

Footnote continued from previous page.

was false for the same reason — *i.e.*, because Defendants failed to disclose the existence of the alleged three-pronged "fraud." (AC at ¶¶ 196, 217, 242, 271, 302, 342). Thus, whether Lead Plaintiffs' effort to avoid repose focuses on a failure to correct a time-barred financial statement issued on July 22, 1999, or a repetition of those financial results on August 16, 1999 (or any later statement that allegedly suffers from this same non-disclosure defect), the argument cannot escape the fact that Lead Plaintiffs' claim relates to a disclosure defect that this Court has already ruled to be time-barred.

Faced with this substantial contrary authority, Lead Plaintiffs offer only their "maintenance" or "booster shot" theory. P. Br. at 23 ("Plaintiffs do not rely on the 'concept of a continuing wrong'"). They contend that each of the 83 alleged misstatements during the Class Period "independently caused the inflation in Household's stock" (*id*. at 21), even though none of the 83 alleged misstatements corresponds to any increase in the amount of artificial inflation identified by Professor Fischel. Lead Plaintiffs' reasoning cannot be reconciled, however, with their expert's conclusion, adopted as their own, that no inflation went in or out before November 15, 2001, when the corrective disclosures allegedly began. (*See*, *e.g*., P. St. ¶ 1, Tab C, Fischel Tr. 132:21-133:7). If each statement "independently" caused new inflation in Household's stock price (P. Br. at 21), why was Professor Fischel unable to identify it? If Lead Plaintiffs' theory is that "new" inflation was introduced while the "old" dissipated, with no over-all effect, neither they nor Professor Fischel have said so. Moreover, Lead Plaintiffs' approach would eviscerate the statute of repose and would expose companies to endless securities fraud liability based on any and all time-barred alleged misstatements because of a company's continued nondisclosure of a time-barred misstatement.[11] In analogous circumstances, the plaintiffs in *Avery* v. *Mapco Gas Products, Inc.*, 18 F.3d at 453, argued at summary judgment that a valve was installed on their furnace during the actionable period, despite evidence identified by the defendants that it was installed during the time-barred period. The defendants argued that absent speculation the plaintiffs could not prove that it was installed during the actionable period rather than in the time-barred period. *Id.* The Court of Appeals agreed with the defendants, holding that a defendant is "not required to negate each and every possibility that might enable the [plaintiffs] to avoid the statute of repose." *Id.* ("[H]owever theoretically possible it might be . . . [plaintiffs] must flesh out their theory with evidence.").

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[11] Lead Plaintiffs refer to Circuit Judge Calabrese's *concurring* opinion in *Stolz* for the proposition that the operation of the statute of repose in this case would "give repose to a defendant who continued his wrongful conduct." P. Br. at 23-24. What their brief fails to note is *that the Stolz majority expressly rejected Judge Calabrese's equity-based reservations*. *Id*. at 23-24 (citing *P. Stolz Family Partnership L.P.* v. *Daum*, 355 F.3d 92, 104 n.8 (2d Cir. 2004)). In *Stolz*, the Second Circuit determined that the repose period under § 12(a)(1) of the 1933 Act begins when a security is *first* offered and not when it is *last* offered. The majority opinion explained that although beginning the repose period at the time of the first offer could allow a defendant who avoids suit for three years to secure a sort of immunity to continue illicit offers without civil liability, such concerns resemble equitable tolling and are thus "not congruent with the repose principle that the actions of the defendant cannot toll the statute." *Id.* at 104 n. 8.

As discussed earlier, courts considering the issue have rejected "inflation maintenance" theories because they are speculative and incapable of proof. *E.g.*, *In re Credit Suisse*, 2008 WL 512779, at *7. Lead Plaintiffs cannot use such speculation to defeat the repose afforded by *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the 1934 Act, and this Court's 2006 Order dismissing all claims arising in the period of repose.

LEAD PLAINTIFFS' RULE 56.1 STATEMENT IS DEFECTIVE

Defendants provided the Court with a Local Rule 56.1(a)(3) statement of facts that presents a clear, uncontestable record. Many statements therein were limited to direct quotations from Professor Fischel's R. 26 reports and sworn deposition testimony. Lead Plaintiffs do not and cannot dispute the quoted findings of Professor Fischel, their own expert. Rather, they attempt to manufacture an issue of fact by arguing in their Response to Defendants' Statement about the import of those facts and interjecting additional irrelevant facts. As this Court has held, such responses should be stricken and the facts advanced by Defendants deemed admitted. *See, e.g., Johal* v. *Little Lady Foods, Inc.*, No. 02 C 8481, 2004 WL 1745749, at *7 (N.D. Ill. July 30, 2004) (Guzman, J.) (responses will be stricken where they "deny the asserted facts but fail to support the denials with *specific and accurate references* to the record, affidavit, or other supporting material.") (emphasis added); *see also Quinn* v. *Pauley*, No. 04 C 6581, 2006 WL 752965, at *3 (N.D. Ill. Mar. 21, 2006) (Guzman, J.); *Trainor* v. *SBC Services, Inc*., No. 04 C 779, 2006 WL 644483, at *5 n.7 (N.D. Ill. Mar. 7, 2006) (Guzman, J.) ("[I]ncluding a statement of additional facts in their response to the movant's statement of facts violates the local rule and robs [the movant] of the opportunity to admit or deny her statement of additional facts because Local Rule 56.1(a) does not permit the movant to reply to the nonmovant's responses. . .").[12]

Lead Plaintiffs' Rule 56.1(b) statement of additional facts is likewise flawed. Most entries take the form of arguments rather than objective facts. For example, Lead Plaintiffs state "Professor Fischel's analysis and testimony establish that defendants' misrepresentations between July 30, 1999 and November 14, 2001 were inflationary events in that they caused inflation to exist". (P. St. at ¶ 1) This legal conclusion is followed by unparticularized references to over 40 paragraphs and/or pages from Professor Fischel's reports and deposition testimony, forcing the

[12] In ruling on every motion for summary judgment, this Court "conducts its own examination of the parties' Local Rule 56.1 submissions to determine whether they comply with the local rule." *Quinn*, 2006 WL 752965, at *1 n.1.

Court to scour the references to evaluate Lead Plaintiffs' argument. Lead Plaintiffs also assert that "Professor Fischel made no assumption about 'inflation' on [July 30, 1999]" (P. Resp. St. at ¶ 41). They cite no support for this statement because there is no support to be found. To the contrary, Professor Fischel explicitly stated that "[m]y analysis is premised on my *assumption* that artificial inflation in Household's stock price began on July 30, 1999 or no later than August 16, 1999" (Rebuttal at ¶ 36) (emphasis added) and that "the inflation remained constant, until there was a disclosure either increasing the amount of inflation or decreasing the amount of inflation which, based on my analysis, occurred on November 15th of 2001" (P. St. ¶ 1, Tab C, Fischel Tr. 132:21-133:7).

Professor Fischel's conclusions speak for themselves. Plaintiffs cannot manufacture a new record or an "issue of fact" by mischaracterizing their expert's conclusions to add their own speculative gloss. *See Johal*, 2004 WL 1745749, at *7 (striking Rule 56.1(b) statements that are "argumentative, non-responsive, or legal conclusions").

CONCLUSION

As there is no genuine dispute of material fact, and the Class's admissions and other indisputable facts entitle Defendants to summary judgment on all remaining Class claims, Defendants respectfully submit that this motion should be granted in full as to Household, HFC, Aldinger, Schoenholz and Gilmer, and the Class's claims should be dismissed.

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Respectfully submitted,

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar

CAHILL GORDON & REINDEL LLP

By: s/ Thomas J. Kavaler
Thomas J. Kavaler
Peter Sloane
Patricia Farren
Susan Buckley
Landis C. Best
David R. Owen

80 Pine Street
New York, New York 10005
(212) 701-3000