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-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* TO PRECLUDE PLAINTIFFS FROM ADVANCING CERTAIN STATEMENTS AS A BASIS FOR ANY DEFENDANT'S LIABILITY

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

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Avenue
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

TABLE OF CONTENTS

This memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz and Gary Gilmer (collectively, the "Household Defendants" or "Defendants"),[1] in support of their motion for an Order precluding Plaintiffs from advancing as a basis for any Defendant's liability at trial certain allegedly false or misleading statements that are inactionable as a matter of law.

INTRODUCTION

Plaintiffs' Amended Consolidated Class Action Complaint spanned 154 pages and referenced countless allegedly false statements made by Household. Asked during discovery to identify which statements in particular they intended to prove were false or misleading, Plaintiffs refused, instead providing another seemingly interminable list of Household press releases, government filings and media reports that Plaintiffs alleged constituted the bases for their claims. (*See* Pls.' Third Resp. to Defs.' [Seventh] Interrogs., dated Feb. 1, 2008, at 39-66 (Nos. 140[41]-144[43]).)[2] At the December 16, 2008 presentment of Defendants' Motion Pursuant to Local Rule 16.1 to Require Plaintiffs to Identify the Allegedly False and Misleading Statements to be Proved at Trial, Plaintiffs again eschewed the opportunity to narrow the issues for trial, representing to the Court their intention to introduce evidence concerning each of the 100-plus allegedly false or misleading statements identified in their interrogatory responses. (*See* Transcript of

---

1 Defendants Joseph A. Vozar and Household Finance Corporation ("HFC") join in this motion and expressly reserve the right to amend, supplement or re-assert objections to Plaintiffs' proposed "Household International False Statements" to the extent that at any future time Plaintiffs propose to use these statements in a trial of claims asserted against Mr. Vozar and HFC.

2 A copy of the relevant portions of Plaintiffs' Third Response to Defendants' [Seventh] Interrogatories is attached as Exhibit 1 to the Declaration of Thomas J. Kavaler ("Kavaler Declaration"), dated January 29, 2009, which was submitted in connection with this motion.

Proceedings Before the Hon. Ronald A. Guzman at 16, *Jaffe* v. *Household Int'l, Inc.*, No. 02 Civ. 5893 (Dec. 16, 2008)[3] ("The Court: So your assertion is that you are going to present evidence as to each of the statements alleged in your interrogatory answers? Ms. Medhi: Yes.").)

Nevertheless, on January 15, 2009 Plaintiffs amended their proposed Statement of Contested Issues of Fact and Law to include a pared-down list of 46 alleged misstatements and three alleged omissions. Defendants requested confirmation of Plaintiffs' intent to present evidence at trial to support their allegations with respect to each of the newly-identified 46 allegedly false statements (*see* Letter of Joshua Newville (Jan. 16, 2006)),[4] and Plaintiffs replied on January 20, 2009 by providing an amended list of 47 statements. (*See* E-Mail of Spence Burkholz (Jan. 20, 2009).)[5] The list of allegedly false statements provided by Plaintiffs as an attachment to the January 20, 2009 Burkholz E-Mail is attached to the Declaration of Thomas J. Kavaler ("Kavaler Decl.") as Exhibit 6.[6] Plaintiffs say that is now—finally—their list for trial.

For the reasons discussed below, many of the statements finally identified by Plaintiffs are inactionable as a matter of law. Consequently, this Court should omit those state-

---

3 A copy of the relevant portions of the transcript of the December 16, 2008 presentment of Defendants' Motion Pursuant to Local Rule 16.1 to Require Plaintiffs to Identify the Allegedly False and Misleading Statements to be Proved at Trial is attached to the accompanying Kavaler Declaration as Exhibit 2.

4 A copy of the January 16, 2009 Letter of Joshua Newville is attached to the accompanying Kavaler Declaration as Exhibit 3.

5 A copy of the January 20, 2009 E-mail of Spence Burkholz is attached to the accompanying Kavaler Declaration as Exhibit 4.

6 For the Court's convenience, Defendants also attach to Exhibit 5 of the Kavaler Declaration a reduced copy of Plaintiffs' January 20, 2009 list of allegedly false statements that includes only those statements and portions of statements that are inactionable as a matter of law.

ments from its verdict form and jury instructions and preclude Plaintiffs from advancing them as a basis for any Defendant's liability at trial.

ARGUMENT

I. PLAINTIFFS SHOULD BE PRECLUDED FROM ADVANCING PRE-CLASS PERIOD STATEMENTS AS A BASIS FOR ANY DEFENDANT'S LIABILITY

Among the allegedly false or misleading statements as to which Plaintiffs assert they will present evidence is a Household press release date July 22, 1999. (*See* Kavaler Decl. Ex. 5 ¶ 1.) As this Court has dismissed as time-barred all § 10(b) claims based on any alleged misrepresentation or omission that occurred before July 30, 1999, Plaintiffs should be precluded from advancing this statement as a basis for any Defendant's liability. *See* Memorandum Opinion & Order at 6, *Jaffe* v. *Household Int'l, Inc.*, 02 Civ. 5893 (Feb. 28, 2006).[7]

II. PLAINTIFFS SHOULD BE PRECLUDED FROM ADVANCING AS A BASIS FOR ANY DEFENDANT'S LIABILITY STATEMENTS THAT ARE INACTIONABLY VAGUE

To sustain a claim for securities fraud under § 10(b) and Rule 10b-5, a plaintiff must show, among other things, a material misrepresentation or omission made by the defendant. *See Pugh* v. *Tribune Co.*, 521 F.3d 686, 693 (7th Cir. 2008). A statement is material if there is "'a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact.'" *Makor Issues & Rights, Ltd.* v. *Tellabs, Inc.* (*Tellabs I*), 437 F.3d 588, 596 (7th Cir. 2006) (quot-

---

[7] A copy of the Court's Memorandum Opinion & Order, *Jaffe* v. *Household Int'l, Inc.*, No. 02 Civ. 5893 (Feb. 28, 2006), is attached to the accompanying Kavaler Declaration as Exhibit 6.

ing *Longman* v. *Food Lion, Inc.*, 197 F.3d 675, 682-83 (4th Cir.1999)), *vacated and remanded on other grounds*, 127 S. Ct. 2499 (2007). A vague statement is inactionable as a matter of law, therefore, because "[i]ts lack of specificity precludes it from being deemed material; it contains no useful information upon which a reasonable investor would base a decision to invest." *Searls* v. *Glasser*, 64 F.3d 1061, 1066 (7th Cir. 1995); *see also Stransky* v. *Cummins Engine Co., Inc.*, 51 F.3d 1329, 1332 (7th Cir. 1995) ("'Soft,' 'puffing' statements . . . generally lack materiality because the market price of a share is not inflated by vague statements predicting growth.'" (quoting *Raab* v. *General Physics Corp.*, 4 F.3d 286, 289-90 (4th Cir.1993))).

Many of the statements advanced by Plaintiffs are unspecific expressions of enthusiasm that no reasonable investor would even remotely consider as altering the mix of available information. For instance, Plaintiffs attempt to fasten liability to the following statements:

> "We are very pleased to report another record quarter, the culmination of an absolutely outstanding year for Household. Growth and profitability in the quarter were excellent and exceeded our expectations. Revenues were particularly strong." (*See* Kavaler Decl. Ex. 5 ¶ 5 (Jan. 19, 2000 Household Press Release).)
>
> "These strong fourth quarter results cap off a terrific year in which we delivered on all or our earnings and growth goals. . . . Growth and profitability in the quarter were excellent, while credit quality and our balance sheet remained strong." (*See* Kavaler Decl. Ex. 5 ¶ 15 (Jan. 17, 2001 Household Press Release).)
>
> "Household's performance this year has been outstanding, even as the economy has continued to weaken. . . . The third quarter was no exception. Receivable and revenue growth were strong, and credit performance was within our expectations." (*See* Kavaler Decl. Ex. 5 ¶ 25 (Oct. 17, 2001 Household Press Release).)

As the Court of Appeals has noted, however, such statements are "precisely the type of statement that the marketplace views as pure hype, and accordingly discounts entirely." *Tellabs I*, 437 F.3d at 598 (discussing defendant's statement that "demand for that product is exceeding our expecta-

tions") (quotation marks omitted). As such, the above statements cannot support a claim for securities fraud as a matter of law and Plaintiffs should be precluded from advancing them and others like them at trial as a basis for any Defendant's liability. *See* Kavaler Decl. Ex. 5 ¶¶ 1, 5, 7, 9, 11, 15, 18, 21, 25, 30, 35; *see also Tellabs I*, 437 F.3d at 597-98 (holding that the statements "we feel very, very good about the robust growth we're experiencing" and "demand for our core optical products . . . remains strong" were too vague to support liability).

Nor should this Court allow Plaintiffs to predicate any Defendant's liability on statements denying accusations that Household was a "predatory lender" because, as Plaintiffs themselves concede,[8] that term has no meaningful definition. The Court of Appeals rejected a similar effort in *Searls*, declining to impose securities fraud liability on a corporate executive who labeled his company "recession-resistant." *See* 64 F.3d at 1066. The court held that the term was too vague to support liability because it could have meant 'impervious to recession' or 'sufficiently situated to survive a recession.' *See id.* The holding in *Searls* could not apply more squarely to the facts of this case: if there can be no liability for labeling oneself with an undefined term, so too can there be no liability for refusing to label oneself with an undefined term. Nevertheless, Plaintiffs ask this Court to impose liability on each Defendant for statements deny-

---

[8] Plaintiffs have explicitly admitted that predatory lending does not have a "concise, inflexible definition." (*See* Kavaler Decl. Ex. 7 (Excerpts from Lead Plaintiffs' Response to the Household Defendants' Motion to Compel Responses to Household Defendants' Second Set of Interrogatories at 9, *Jaffe* v. *Household Int'l, Inc.*, No. 02 Civ. 5893 (July 13, 2006)).) Further, Plaintiffs own expert listed multiple varying definitions of predatory lending in her report and admitted at her deposition that there was no one definition of predatory lending. (*See* Kavaler Decl. Ex. 8 (Excerpts from the Expert Witness Report of Catherine A. Ghiglieri at 12-22, App.D (Aug. 15, 2007)); *id.* Ex. 9 (Excerpts from the Deposition of Catherine Ghiglieri 48:22-49:3 (Feb. 13, 2008)) ("Ghiglieri Dep.").) In fact, Ms. Ghiglieri created her own brand new definition of predatory lending for the purpose of her deposition. (*See* Ghiglieri Dep. 47:13-48:15.)

ing accusations that Household was a "predatory lender" or engaged in "predatory" lending practices:

> "Household's long-standing view has been that unethical lending practices of any type are abhorrent to our company, employees, and most importantly our customers. So-called 'predatory lending' practices undermine the integrity of the industry in which we compete." (*See* Kavaler Decl. Ex. 5 ¶ 13 (Nov. 7, 2000 Household Press Release).)

> "'Household's position on predatory lending is perfectly clear,' said Gary Gilmer, president and CEO of HFC and Beneficial. 'Unethical lending practices of any type are abhorrent to our company, our employees, and most importantly, our customers.' . . . The company reaffirmed that it fully complies with all applicable federal and state laws and regulations." (*See* Kavaler Decl. Ex. 5 ¶ 16 (Mar. 12, 2001 Household Press Release).)

> "Megan Hayden, a Household spokeswoman, said that terms of loans are disclosed to all customers, as required by state and federal laws. 'Frankly, you don't stay in business in this industry by taking advantage of your customers,' she said. 'So I take exception to any characterization that we engaged in predatory lending practices.'" (*See* Kavaler Decl. Ex. 5 ¶ 23 (July 27, 2001 Star Tribune Article).)

The ramifications of *Searls* are clear and inescapable: Plaintiffs should be precluded from advancing as a basis for any Defendant's liability at trial statements denying accusations that Household was a "predatory lender" or that it engaged in "predatory" lending practices. (*See* Kavaler Decl. Ex. 5 ¶¶ 12, 13, 16, 19, 23, 26, 32, 37, 39.)

III. PLAINTIFFS SHOULD BE PRECLUDED FROM ADVANCING AS A BASIS FOR ANY DEFENDANT'S LIABILITY STATEMENTS MADE BY REPORTERS

Plaintiffs advance as a basis for each Defendant's liability several statements that were made by reporters who either quoted or paraphrased Household's spokespersons. The law is settled, however, that a defendant cannot be liable for securities fraud based upon statements

made by reporters -- even statements that quote or paraphrase the defendant -- unless "the defendants 'adopted the statements or were entangled with them.'" *Ong* v. *Sears Roebuck & Co.*, 388 F. Supp. 2d 871, 908 (N.D.Ill. 2008) (Pallmeyer, J.) (quoting *In re Neopharm, Inc. Sec. Litig.*, No. 02 Civ. 2976, 2003 WL 262369, at *12 (N.D.Ill. Feb.7, 2003) (Lefkow, J.)); *see also Eisenstadt* v. *Centel Corp.*, 113 F.3d 738, 744 (7th Cir.1997) ("Obviously a corporation has no duty to correct rumors planted by third parties."); *Raab*, 4 F.3d at 288 ("The securities laws require [defendants] to speak truthfully to investors; they do not require the company to police statements made by third parties for inaccuracies . . . ."). The logic of that rule is as simple as it is compelling: "[Third parties] might quote corporate spokespersons out of context or inaccurately interpret remarks made by corporate insiders. In addition, [third parties] can be expected to bring to bear other knowledge and opinions about the defendants' industry in writing their reports." *In re Gupta Corp. Sec. Litig.*, 900 F. Supp. 1217, 1237 (N.D.Cal. 1994).

Precisely that danger is illustrated by the articles now advanced by Plaintiffs. For instance, Plaintiffs advance as a basis for each Defendant's liability an article published in the St. Louis Dispatch that purports to quote and paraphrase Household spokesperson Craig Streem:

> "ACORN cited a loan made in July by another subprime lender, HFC Mortgage Corp. According to loan documents, HFC charged a University City couple 12.5 percent interest on a $76,900 loan. Added in were $5,700 for credit life insurance and an origination fee of $5,200, adding nearly $11,000 to the cost. . . . Mainstream lenders were charging 8 percent in interest on such 15-year loans at the time. HFC spokesman Craig Streem said that the loan was 'not a predatory loan by any definition.' Streem says HFC never pressures people to buy credit life insurance." (*See* Kavaler Decl. Ex. 5 ¶ 12 (Article in St. Louis Dispatch, Nov. 1, 2000).)

Mr. Streem testified at his deposition, however, that he never recalled giving any such quote for that particular article or providing any such information in connection therewith. (*See* Deposition of Craig A. Streem[9] 210:5-212:1 (Feb. 21, 2007).) Plaintiffs also advance as a basis for each Defendant's liability an article written for the Associated Press that purports to paraphrase Household spokesperson Megan Hayden-Hakes:

> "Household spokeswoman Megan Hayden denied the company engaged in predatory lending through its Beneficial and Household Finance subsidiaries, even as she pointed to steps the company took this year to end some of its most criticized practices. Hayden said the problem involved not her company, but 'rogue lenders.' Government regulators say predatory lenders often target the poor, racial and ethnic minorities, seniors and single women." (*See* Kavaler Decl. Ex. 5 ¶ 26 (Associated Press, Oct. 31, 2001).)

Again, however, Ms. Hayden-Hakes testified at her deposition that she could not recall giving any information for that particular article. (*See* Deposition of Megan Hayden-Hakes ("Hayden-Hakes Dep.")[10] 105:2-107:5 (Aug. 18, 2006) ("I don't know that I ever specifically said what's attributed to me right here.").) Indeed, as Ms. Hayden-Hakes further testified, the same Associated Press author—Don Thompson—had taken her statements out of context in the past. (*See id.* 101:1-101:7.)[11]

---

9 A copy of the relevant portions of the Streem Deposition is attached to the accompanying Kavaler Declaration as Exhibit 10.

10 A copy of the relevant portions of the Hayden-Hakes Deposition is attached to the accompanying Kavaler Declaration as Exhibit 11.

11 The Associated Press reporter's assertion that "[g]overnment regulators say predatory lenders often target the poor, racial and ethnic minorities, seniors and single women" amply demonstrates the injustice in holding any Defendant liable for the opinions of a third party who has brought "to bear other knowledge and opinions about the defendants' industry in writing their reports." *In re Gupta Corp.*, 900 F. Supp. at 1237.

Of course, it is to guard against this very possibility that courts require an indicium of acknowledgment by the defendant, either by way of its ratification of or entanglement with the reporter's statement. *See In re Neopharm,* 2003 WL 262369 at *12[12] ("[P]laintiff must plead specific facts demonstrating that defendants adopted the statements or were entangled with them, or have put their imprimatur, express or implied, on the projections." (citations and quotation marks omitted)). Where such acknowledgement is founded upon the defendant's entanglement with the third party, courts require a showing that the defendant exerted some level of control over the third party.[13] *See In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (9th Cir. 2002) (entanglement shown by alleging "that the defendants used the analysts as a conduit, making false and misleading statements to securities analysts with the intent that the analysts communicate those statements to the market"); *see also In re Gupta*, 900 F. Supp. at 1237 ("It is not sufficient to allege that defendants provided analysts with the information on which the analysts' reports were based. Plaintiffs must also allege that defendants had some measure of control over the content of the final report or projection issued by the analysts."). Because there is no suggestion that any Defendant ratified any statement of or exerted any control over the various media outlets whose statements are now advanced by Plaintiffs, those third party statements are inactionable as a matter of law. *See, e.g., In re ATI Techs. Inc. Sec. Litig.*, No. 05 Civ. 4414, 2007

---

12 A copy of the unreported decision in *In re Neopharm, Inc. Sec. Litig.*, No. 02 Civ. 2976, 2003 WL 262369 (N.D.Ill. Feb.7, 2003) (Lefkow, J.) is attached to the accompanying Kavaler Declaration as Exhibit 12.

13 Of course, were it sufficient alone that the third party quoted or otherwise cited a defendant's spokesperson, the exception would swallow the rule: a defendant would be made liable for the false statements of a third party who had the self-serving foresight to attribute its fraudulent views to the defendant. That is precisely what the rule is intended to prevent. *See In re Gupta*, 900 F. Supp. at 1237.

WL 2301151, at *9 (E.D.Pa. Aug. 8, 2007) (O'Neill, J.)[14] (no entanglement because "the complaint fails to state who allegedly supplied this information to the [third party], how it was supplied, or how [defendants] could have controlled the content of the [third party's] statement"); *In re Dura Pharmaceuticals, Inc. Sec. Litig.*, 452 F. Supp. 2d 1005, 1035 (S.D.Cal. 2006) (entanglement not established where plaintiffs merely "alleged the [third parties'] reports were based on and repeated information Defendants provided"), *on remand from Dura Pharmaceuticals Inc.* v. *Broudo*, 544 U.S. 336 (2005); *In re Odyssey Healthcare, Inc. Sec. Litig.*, 424 F. Supp. 2d 880, 887 (N.D.Tex. 2005) (no entanglement upon plaintiffs' allegations "merely that the [third parties] repeated Odyssey's projections [because plaintiffs] do not specify how the defendant was entangled with or manipulated the information and the analyst"); *In re NTL, Inc. Sec. Litig.*, 347 F. Supp. 2d 15, 36 (S.D.N.Y. 2004) ("To the extent defendants made misleading statements to the public, they are already subject to liability. That analysts absorbed these statements does not establish an independent basis of liability."); *Frazier* v. *VitalWorks, Inc.*, 341 F. Supp. 2d 142, 151 (D.Conn. 2004) (no entanglement where third party's report "relies on 'conversations with the company,' and says that 'management stated that'"); *Albert Fadem Trust* v. *Am. Elec. Power Co., Inc.*, 334 F. Supp. 2d 985, 1027 (S.D.Ohio 2004) (no entanglement because "[g]eneralized statements such as, 'following conversations with management regarding the Company's significant growth in wholesale operations,' are insufficient, as a matter of law, to hold Defendants liable for the [third party's] opinion"). Accordingly, Plaintiffs should be precluded from advancing those statements as a basis for any Defendant's liability at trial. (*See* Kavaler Decl. Ex. 5 ¶¶ 12, 19, 22-23, 26, 28, 31-32, 36-37, 39-42, 46-47.)

---

[14] A copy of the unreported decision in *In re ATI Techs. Inc. Sec. Litig.*, No. 05 Civ. 4414, 2007 WL 2301151 (E.D.Pa. Aug. 8, 2007) (O'Neill, J.) is attached to the accompanying Kavaler Declaration as Exhibit 13.

CONCLUSION

For the foregoing reasons, the Court should enter an Order precluding Plaintiffs from attempting at trial to predicate liability on the non-actionable statements identified herein and should omit those statements from the Court's jury instructions and verdict form.

Dated: January 30, 2009
Chicago, Illinois

Respectfully submitted,

CAHILL GORDON & REINDEL LLP

By: /s/ Thomas J. Kavaler

Thomas J. Kavaler
Howard G. Sloane
Patricia Farren
Susan Buckley
Landis C. Best
David R. Owen
80 Pine Street
New York, NY 10005
(212) 701-3000

-and-

EIMER STAHL KLEVORN & SOLBERG LLP
Nathan P. Eimer
Adam B. Deutsch
224 South Michigan Avenue
Suite 1100
Chicago, Illinois 60604

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