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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE AT TRIAL ANY REFERENCE TO THE UNSUBSTANTIATED POST-CLASS PERIOD ALLEGATIONS OF VOTER FRAUD AGAINST ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW ("A.C.O.R.N.")

(PLAINTIFFS' MOTION *IN LIMINE* NO. 7)

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This Memorandum is respectfully submitted on behalf of Defendants Household International, Inc., ("Household"), William F. Aldinger, David A. Schoenholz and Gary Gilmer (the "Individual Defendants" and, collectively with Household, the "Household Defendants" or "Defendants"), in support of their opposition to Plaintiffs' Motion in Limine to Preclude at Trial any Reference to the Unsubstantiated Post-Class Period Allegations of Voter Fraud Against Association of Community Organizations For Reform Now ("A.C.O.R.N.") ("Plaintiffs' Brief").

INTRODUCTION

The thrust of Plaintiffs' argument is that at trial the Court should exclude any reference to "unsubstantiated post-Class Period allegations" against the self-appointed consumer activist organization ACORN because mere allegations from the post-Class Period are not relevant to this action and, even if they were, their prejudicial nature would far outweigh any possible probative value. Although Plaintiffs are latecomers to this view, Defendants could not agree more, as they would have told Plaintiffs had they asked before imposing this motion on Defendants and the Court.

Based on the same lack of relevance and undue prejudice that Plaintiffs now ascribe to post-Class Period events, Defendants successfully opposed Plaintiffs' motion for extensive post-Class Period discovery that Plaintiffs once claimed was essential to prove their claims. Memorandum Opinion and Order, Dkt. 534 (June 15, 2006), *adopted in full*, Memorandum Opinion and Order, Dkt. 785 (Nov. 22, 2006). On that same basis, Defendants also seek exclusion at trial of references to the Offer of Settlement and Consent Decree ("Consent Decree") Household entered into with the Securities and Exchange Commission ("SEC") on March 28, 2003 -- more than five months after the Class Period in this action ended

on October 11, 2002.[1] *See* Omnibus Motion, Section II.A, at 23-29. Further, based on the same valid premise endorsed in Plaintiffs' Brief that unproven allegations have no relevance to the claims or defenses in this action, Defendants' Omnibus Motion explains in detail why the unproven allegations that Plaintiffs want to use to prove their claims are not admissible. *See, e.g.*, Omnibus Motion, Section II.B., at 31 ("The 'findings' contained in a Report of Examination are not adjudicated and an examiner's preliminary findings and accusations, without more, are not comparable to proof of wrongdoing. . . . The Reports of Examination and related documents contain mere allegations, but their formal nature and tone could easily mislead a jury as to the significance of their contents."); Section II C., at 44-45 ("Complaints do not make it more or less probable that someone acted wrongfully or that he or she had knowledge of wrongful actions"); Section II.F., at 69 ("If Plaintiffs are permitted to introduce evidence of customer complaints, which consists only of inchoate allegations, there is a serious risk of unfair prejudice if the jury is induced to elevate mere allegations to the level of proof of wrongdoing.").[2]

Plaintiffs' instant motion reflects their concession that post-Class Period evidence and mere allegations are inadmissible at trial. Plaintiffs should be held to the precise standard they now espouse in connection with their impermissible efforts to prove their securities fraud claims through unsubstantiated allegations of "predatory lending" that were directed at Household by ACORN; unsubstantiated complaints in other litigations (including multiple

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[1] As set forth in Defendants' Memorandum of Law In Support Of Defendants' Omnibus Motion *in limine* To Exclude Or Limit 14 Categories Of Evidence ("Omnibus Motion") the Consent Decree falls squarely into the realm of settlements excluded by Federal Rule of Evidence ("Fed. R. Evid.") 408. *See* Omnibus Motion, Section II.A at 23.

[2] Defendants also agree with Plaintiffs' position that *if offered for the truth of their contents*, news articles and reports such as those repeating post-Class Period voter fraud allegations against ACORN are hearsay under Federal Rule of Evidence ("Fed. R. Evid.") 801(c). (Plaintiffs' Brief at 4). For the same reasons, the unsubstantiated allegations against Defendants reported in news articles, reports, and similar documents are inadmissible hearsay if offered for the truth of the allegations and not merely to show that certain information had been disclosed to the market.

lawsuits initiated or instigated by ACORN[3]); unsubstantiated biased or vindictive statements of disgruntled former employees; unsubstantiated preliminary exception reviews routinely conducted by various governmental regulatory agencies; unsubstantiated customer complaints; a post-Class Period settlement; and much more.

Consistent with the principles set forth in their Omnibus Motion, Defendants will not seek affirmatively to introduce evidence of any unsubstantiated post-Class Period voter fraud allegations against ACORN. However, pursuant to Fed. R. Evid. 405 and applicable case law, the Court should deny Plaintiffs' motion insofar as it would preclude Defendants from introducing evidence relating to those allegations if Plaintiffs first "open the door" at trial by introducing evidence of what they view as ACORN's "good" character. *Defendants have no objection to the entry of an order limiting their use of the post-Class Period voter fraud allegations to that effect, nor do they object to the entry of an order stating that no party may introduce evidence of unsubstantiated allegations for any purpose.*

BACKGROUND

The self-appointed community activist organization ACORN describes itself as "the nation's largest grassroots community organization of low and moderate income people with over 400,000 member families organized into more than 1,200 neighborhood chapters in 110 cities across the country." www.ACORN.org. ACORN claims that its members take on issues relating to discrimination, affordable housing, quality education or better public services. *Id.* That is just one view of what ACORN does. There are others. ACORN often advocates for

[3] That the unsubstantiated allegations contained in the lawsuits initiated or instigated by ACORN against Household are inadmissible is demonstrated by the doctrines set forth in Plaintiffs' Brief.

issues that are championed by liberal politicians, a political alignment that has made ACORN the source of political controversy and has often called its motives and tactics into question.

During the Class Period, ACORN members often demonstrated with what some Household executives viewed as myopic fervor against the fees that Household charged to its subprime customers. When Household did not accede to its demands for changes in the Company's loan products and lending practices, ACORN initiated or instigated a series of putative class action lawsuits against the Company. In the view of Household's management ACORN would have had Household "give away the store" and completely disregard the credit performance of its subprime customers when it determined the fees on its loan products, without regard to whether Household could have operated profitably or even whether it could have remained in business. Operating under the mantle of "consumer advocacy," ACORN was viewed by Household management as irresponsibly indifferent to the high risks that Household took on when it issued loans to subprime customers with precarious credit histories. Household and its senior management served, first and foremost, the interest of the Company's shareholders, and thus had an obligation to protect the shareholders from the high risks inherent in subprime lending when setting Household's fees on its loan products. Although ACORN was apparently indifferent to management's obligation to the Company's shareholders, the securities market was always aware of ACORN's views: when ACORN demonstrated, Household disclosed it; when ACORN sued, Household disclosed it; and when ACORN demonstrated and sued, contemporaneous media coverage of those events provided disclosure of those events to Household's shareholders.

ACORN's conduct throughout the Class Period validates Plaintiffs' belated recognition that evidence of mere unsubstantiated allegations is inadmissible. That premise is

supported by the facts surrounding regulators' investigation into ACORN's allegations against Household during the Class Period. For example, during the Class Period ACORN personnel assembled various unsubstantiated Household customer complaints and forwarded them to the Minnesota Department of Commerce, which launched an investigation into those complaints and found no evidence of violations of law by Household. (*See* Declaration of Thomas J. Kavaler in Opposition to Plaintiffs' Motions *In Limine* Nos. 1, 3-10 ("Kavaler Decl.") Ex. 43, HHS 02904674 -- HHS 02904682). (Plaintiffs and their expert, of course, treat the allegations as true and ignore Household's exoneration). Such evidence of ACORN's lack of reliability is relevant to the state of mind of Household and its senior management when they assessed the legitimacy, *vel non*, of ACORN's allegations against Household, and the attendant litigation, political, and other types of risks to the Company posed by ACORN.

During the Class Period, Household and its senior management had good reason not to give credence to ACORN's allegations, as reflected in the following deposition excerpts:

- "With respect to my recollection involving the ACORN Institution or Association, or club, or whatever that was, or whatever it was called, I found that it was — that I overwhelmingly disagreed with virtually everything that they said — virtually. I will back up and fill in the blanks — virtually everything they said about Household, about its people, about its lending policies, about its customers, about its practices. It is fair to say I didn't agree with them. I didn't agree with their conclusions. I didn't like their tactics. ***I feared for the safety of my employees who were exposed to the ACORN organization in a face-to-face scenario***." (*See* Kavaler Decl. Ex. 12, Gilmer Tr. 513:2-15 (January 2, 2007)) (emphasis added).

- "[I]t was frustrating to have to live to a high standard and be shot at by ***people who are dishonest, disreputable and have no regard for the facts***." (*See* Kavaler Decl. Ex. 41, Aldinger Tr. 150:2-5 (January 29, 2007)) (emphasis added).

- "My view is ***their tactics were not honorable. They were not accurate in the facts that they portrayed to the public***. I didn't think they were good people. They weren't looking to compromise, in my view. I didn't have a constructive

relationship with them, period." (*See* Kavaler Decl. Ex. 41, Aldinger Tr. 150:20-25 (January 29, 2007)) (emphasis added).

- "I think that there were some increased complaints, usually driven by ACORN. Their style was to go to a specific part of town, call a hundred people and say, Do you have a loan with Household? Could they have possibly said this to you? Could you they have possibly done that? By the way, maybe your rate is high. Would you like us to represent you, and we'll get it fixed? And — and then we would have five people saying, yes. A year ago he said this to me. So, yes, there was some modest increase. The bigger issue, though, was their getting the recognition with the press, where you would get the press, hit the stock price, hit the morale of the employees, et cetera. So the — you know, the protests and other — as Gary says here, latest — latest ***efforts to defame our good reputation, meaning factually most of — well, they weren't correct***. But it was very effective." (*See* Kavaler Decl. Ex. 41, Aldinger Tr. 206:15-207:7 (January 29, 2007)) (emphasis added).

- "When we say protests, I think that ACORN had different tactics. They had a couple of instances where I generally remember somebody would go and be confrontive with customers in a branch. That would be fairly small scales and short lived. I recall they had an episode where they came and kind of ***brought in bus loads of people to demonstrate and kind of be embarrassing at the homes of some of the directors***. And I think something that was intended to be more higher visibility — some of that probably got some local press, but I don't recall specifically." (*See* Kavaler Decl. Ex. 20, Schoenholz Tr. 99:22-100:10 (February 28, 2007)) (emphasis added).

These views are by no means inconsistent with reports that both before and after the Class Period, ACORN personnel have been accused -- and even convicted -- of engaging in what has been described in the press as fraudulent activity (most recently alleged voter registration fraud).[4] In connection with the 2008 presidential election, for example, it was widely reported that ACORN personnel had admitted and pleaded guilty to submitting 2,000 fraudulent voter registration cards in the state of Washington. Claire Suddath, *A Brief History of ACORN*, Time, Oct. 14, 2008. It was also reported that eight ACORN employees had admitted

[4] Plaintiffs seek preclusion of the "post-Class Period" voter fraud allegations. Plaintiffs do not seek preclusion of any Class Period or pre-Class Period allegations.

and pleaded guilty to federal election fraud in Missouri.[5] David M. Brown, *Obama to Amend Report on $800,000 in Spending*, Pittsburgh Tribune Review, Aug. 22, 2008. These are among the reports that Plaintiffs characterize in their motion (accurately or not) as "unsubstantiated post-Class Period allegations of voter fraud."

ARGUMENT

A. Evidence of Post-Class Period Voter Fraud Allegations Against ACORN Should Be Admitted if Plaintiffs Open the Door by Seeking to Introduce Evidence of ACORN's Putative "Good" Character

Plaintiffs' trial exhibit list and their Proposed Description of the Case To Be Read To Prospective Jurors in the [Proposed] Final Pre-Trial Order, as well as the report of their "expert" witness on predatory lending, Catherine A. Ghiglieri, confirms that, if allowed, they fully intend to paint a picture of systematic predatory lending at Household based largely on unsubstantiated and statistically insignificant allegations, many of which were procured or instigated by ACORN. Plaintiffs' instant motion presents a strong indictment of trial by unsubstantiated allegations, whose relevance, if any, is outweighed by their prejudicial nature. Should Plaintiffs be allowed to introduce such unsubstantiated and statistically insignificant hearsay into evidence, Defendants would be entitled to introduce evidence relating to: the aggressive tactics that ACORN employed during the Class Period in its campaign against Household; Defendants' valid reasons for giving little credence to ACORN's allegations; the headline risk produced by ACORN's invalid allegations; and the undisputable and dispositive fact that ACORN's allegations were disclosed to the market. Defendants do not understand Plaintiffs to be arguing against their right to do so, nor could they.

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[5] Thus, Plaintiffs' contention that the voter fraud allegations against ACORN in connection with the 2008 presidential election "were never substantiated" is not correct. (Plaintiffs' Brief at 2). It should be noted that Plaintiffs seek preclusion of "unsubstantiated post-Class Period allegations" but not "substantiated" post-Class Period allegations.

In addition, if Plaintiffs should attempt to bolster ACORN's putative legitimacy by introducing evidence of the organization's purported "good" character, Defendants would also have the right to respond by any appropriate means, including exploring the subject of ACORN's involvement in voter fraud and voter registration fraud. Plaintiffs' introduction of such character evidence would "open the door" for Defendants' introduction of evidence to the contrary including, but not limited to, admissible evidence relating to ACORN's complicity in voter fraud. *See Telewizja Polska USA, Inc.* v. *Echostar Satellite Corp.*, 2004 WL 2367740, at *8 (N.D. Ill. Oct. 15, 2004) (Keys, M.J.) ("[W]here a movant place[s] its character at issue, evidence of reputation or specific instances of conduct may be admitted to prove character."). Plaintiffs' argument that under Fed. R. Evid. 602 Defendants would be barred from introducing such evidence because "[t]here is no evidence that any witness on defendants' trial witness list has personal knowledge of voter fraud committed by ACORN" is beside the point. (Plaintiffs' Brief at 4). The public record of admissions and convictions of ACORN personnel would constitute admissible rebuttal evidence if Plaintiffs should attempt to prejudice the jury by making an issue at trial of ACORN's character and reputation.

Further, should Plaintiffs be permitted to introduce evidence of ACORN's "good" character, pursuant to Fed. R. Evid. 405(a) Defendants would be entitled to cross-examine any witness used by Plaintiffs to offer such character evidence on "relevant specific instances of conduct." Fed. R. Evid. 405(a). As the Court of Appeals has noted, once Plaintiffs open the door, "the possibility that specific acts may be inquired into on cross-examination . . . is hardly of concern, since the door to such evidence is already open." *United States* v. *Manos*, 848 F.2d 1427, 1431 (7th Cir. 1988). As in *Manos*, should Plaintiffs open the door through a witness testifying to what they view as ACORN's "good" character, on cross-examination Defendants

may choose, *inter alia*, to probe that witness as to whether knowledge of ACORN-related voter fraud admissions and convictions would change the witness' views. *See Manos*, 848 F.2d at 1430 (permitting the prosecution to question a defense character witness as to whether he was aware that the defendant "had been reprimanded on the job for falsifying time sheets and if this might change his testimony regarding [defendant's] honesty").[6]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion *In Limine* No. 7. Defendants respectfully submit to the Court that the most appropriate response to Plaintiffs' motion is an order clarifying that Defendants may not affirmatively introduce evidence of the post-Class Period voter fraud allegations unless Plaintiffs "open the door" by trying to introduce evidence of ACORN's putative "good" character, in which event pursuant to Fed. R. Evid. 405 and the applicable case law, Defendants will be allowed to present evidence to the contrary, including but not limited to the post-Class Period voter fraud allegations.[7] Alternatively, Defendants do not object to an order stating that no party may introduce evidence of "unsubstantiated allegations" for any purpose.

Dated: February 10, 2009
New York, New York

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[6] Although Plaintiffs make much of the "unsubstantiated" nature of the allegations of post-Class Period voter fraud against ACORN, should Plaintiffs open the door, on cross-examination Defendants would also be permitted to ask about the voter fraud allegations at issue, regardless of whether or not the allegations are substantiated. *See United States* v. *Holt*, 170 F.3d 698, 701 (7th Cir. 1999) (permitting the prosecution to question a defense character witness about "rumors circulating that [defendant] was involved in sexual harassment at [the] workplace.").

[7] Defendants will not do so by relying on "unsubstantiated" hearsay for the same reasons that Plaintiffs should not be permitted to use that ACORN-patented method. Defendants recognize that whatever "bad character" evidence they introduce if Plaintiffs first "open the door" must conform to the requirements of the Federal Rules of Evidence, and have no objection to the entry of an order to that effect.

Respectfully submitted,

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