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 FURTHER 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

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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 (collectively, the "Defendants"),[1] in further 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

Nearly five years ago, the Court held that Plaintiffs' Amended Complaint pleaded alleged fraud with sufficient particularity to satisfy Rule 9(b) and the Private Securities Litigation Reform Act, ("PSLRA"). That was not a ruling that any of the hundreds of statements referenced in the complaint in fact was fraudulent, and Defendants are not seeking a second bite at that pleading sufficiency apple. Rather, now that Plaintiffs have finally specified for Defendants and the Court the particular statements they intend to submit to the jury as constituting the bases for their claims (*see* [Proposed] Final Pretrial Order Ex. B-1 (Jan. 30, 2009) ("Pl. Stmts. List")),[2] Defendants move to exclude several of the listed statements and portions of statements that are inactionable as a matter of law. As discussed in Defendants' moving brief and below, certain of the alleged false statements and portions of statements cannot support liability for securities fraud as a matter of law, and Plaintiffs should therefore be precluded from diverting valuable

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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 Plaintiffs' List of Allegedly False or Misleading Statements for Trial is attached to the Declaration of Thomas J. Kavaler in Support of Defendants' Motion *in Limine* to Preclude Plaintiffs from Advancing Certain Statements as a Basis for Any Defendant's Liability, dated January 30, 2009 ("Kavaler Decl.") at Ex. 5.

trial time and judicial resources by advancing inactionable statements as a basis for any Defendant's liability at trial.

ARGUMENT

I. STATEMENTS BARRED BY THE STATUTE OF REPOSE CANNOT SERVE AS A BASIS FOR ANY DEFENDANT'S LIABILITY

Notwithstanding the Court's clear Order dismissing "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" (Mem. Op. & Order, Dkt. 434, at 6 (Feb. 28, 2006)), Plaintiffs specify as one of the allegedly false statements they wish to prove at trial an alleged misrepresentation that occurred on July 22, 1999. In spite of the Court's clear Order dismissing claims based on violations that occurred before the July 30, 1999 start date of the shortened Class Period, Plaintiffs explicitly contend that "Defendants' Pre-Class Period Statements Are Actionable." (*See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion *in Limine* to Preclude Plaintiffs from Advancing Certain Statements as a Basis for Any Defendant's Liability ("Pl. Br.") at 2 (Feb. 10, 2009)).

In an attempt to justify their pursuit of a claim this Court has already dismissed, Plaintiffs argue that Defendants had a duty to correct the pre-Class Period statement during the Class Period, even though any claim arising from the statement is barred by the statute of repose. (Pl. Br. at 2-3). Plaintiffs' argument, if accepted, would render actionable *every* statement barred by the statute of repose and, consequently, would impose endless liability in direct conflict, not only with this Court's prior ruling, but also with the Supreme Court's mandate that the repose statute is intended to place an absolute outer limit on securities fraud claims. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). For that very reason, courts have rejected similar attempts to bootstrap statements out from under the repose statute by

invoking a so-called duty to correct. *See, e.g.*, *In re Openwave Systems Securities Litigation*, 528 F. Supp. 2d 236, 253-54 (S.D.N.Y. 2007); *In re the Warnaco Group, Inc. Securities Litigation*, 388 F. Supp. 2d 307, 315 (S.D.N.Y. 2005). This Court should do the same. (*See generally* Memorandum of Law in Support of Defendants' Motion for Summary Judgment Dismissing All Remaining Claims of the Class at 18-24).

II. PLAINTIFFS OFFER NO REASON TO IGNORE SETTLED PRINCIPLES THAT PRECLUDE SECURITIES FRAUD LIABILITY FOR STATEMENTS THAT ARE VAGUE

A. Portions of Statements Identified by Plaintiffs Are Inactionable Puffery and Should Not Be Submitted to the Jury as a Basis for Any Defendant's Liability

The list of allegedly false and misleading statements Plaintiffs propose to submit to the jury includes selective portions of statements that are inactionable because they are too vague and uncertain to support a claim of securities fraud, of which materiality is a necessary element. That these statements taken together with the countless other statements Plaintiffs allege in their prolix Complaint (which includes 398 numbered paragraphs) were sufficient to permit Plaintiffs to proceed with discovery does not in any way suggest that they are actionable. *See Tellabs*, 127 S.Ct. 2499, 2510 n.5 ("the test at each stage is measured against a different backdrop"). The fact that a claim survives a motion to dismiss, even under the heightened pleading standards of the PSLRA, does not insulate that claim from further challenge on valid legal grounds. *See*, *e.g.*, *Roth* v. *Aon Corp.*, No. 04 C 6835, 2008 WL 656069, at *9 (N.D. Ill. Mar. 7, 2008) (Norgle, J.) (noting that certain issues relevant to potential affirmative defenses could not be successfully challenged on a motion to dismiss but would be ripe for legal challenge at the summary judgment phase); *Ray* v. *Citigroup Global Markets, Inc.*, No. 03 C 3157, 2005 WL 2659102, at *6 (N.D. Ill. Oct. 18, 2005) (Kennelly, J.) (granting summary judgment after a motion to dismiss had previously been denied in part).

The bottom line here is that the Court found in 2004 that Plaintiffs' Complaint stated a claim *in the aggregate*. *See* Order, Dkt. 135 (N.D. Ill. Mar. 22, 2004). If Plaintiffs had identified these 47 statements as the basis for their claims in 2004, the Court could have analyzed the 47 statements in light of applicable law at that time. Because Plaintiffs hid in the tall grass for the past five years, however, the Court did not have that opportunity.

Plaintiffs now disingenuously argue that "nothing has changed in the last five years." (Pl. Br. at 1). According to Plaintiffs, "Defendants' current motion to not allow plaintiffs to present the same type of statements to the jury is nothing more than a shallow attempt to bring back from the dead the same arguments about defendants' false statements this Court rejected almost five years ago." (*Id.*). The critical disconnect is apparent on the face of Plaintiffs' argument. What has changed is that Plaintiffs have, at long last, boiled their 400 paragraph Complaint down to a reasonable (though still large) number of false statements they intend to prove at trial. The issue presented on this motion is not whether a given "type of statement," taken in the context of a 400 paragraph Complaint, might be sufficient as a pleading matter to state a claim. The issue is whether each of 47 enumerated statements, taken individually, is an actionable basis for a claim of securities fraud. The statements identified in Defendants' Opening Brief on this motion are not.

Defendants' instant motion seeks to excise those inactionably vague statements. (*See* 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 ("Opening Br.") at 3-6 (citing *Searls* v. *Glasser*, 64 F.3d 1061, 1066 (7th Cir. 1995)).)[3] Plaintiffs respond that the

[3] Plaintiffs' accusation that Defendants are cherry-picking statements previously cherry-picked by Plaintiffs rings particularly hollow. (*See* Pl. Br. at 3).

context of those statements somehow renders them material. (Pl. Br. at 3). To the contrary, the contrast between the more definite portions of the statements identified by Plaintiffs and the inactionably vague portions identified by Defendants highlights how the latter are impermissibly vague and cannot support liability for securities fraud. Indeed, the Court of Appeals reached precisely the same conclusion in rejecting as proper bases for securities fraud liability portions of statements that used nearly identical language, as the following table shows:

Statements Held to be Inactionable by the Court of Appeals	**Statements Alleged by Plaintiffs**
Makor Issues & Rights, Ltd. v. *Tellabs, Inc.* (*Tellabs I*), 437 F.3d 588, 597 (7th Cir. 2006): "Demand for that product is exceeding our expectations."	Pl. Stmts. List ¶ 5: "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."
Id., at 597: "We feel very, very good about the robust growth we're experiencing."	Pl. Stmts. List ¶ 15: "Growth and profitability in the quarter were excellent . . ."
Id.: "Demand for our core optical products . . . remains strong."	Pl. Stmts. List ¶ 25: "Receivable and revenue growth were strong, and credit performance was within our expectations."

Unless the Court excises the statements at issue in this motion (and assuming *arguendo* that this case is tried to a verdict of liability as to at least some of the alleged false statements), there will be no way to determine whether it is the impermissibly vague statements upon which the jury bases its verdict.[4] In keeping with the guidance of the Court of Appeals in *Tellabs I*, then, this Court should preclude Plaintiffs from seeking to predicate any Defendant's

[4] This problem further highlights the importance of using a verdict form, such as the one proposed by Defendants, that requires the jury to specify particular findings as to the elements of Plaintiffs' claims for each alleged false statement.

liability on the inactionably vague portions of statements identified by Defendants in their moving brief. (*See* Opening Br. at 2 n.6; *see also* Kavaler Decl. Ex. 5, App. A (list of inactionable portions of Plaintiffs' statements for trial) (Jan. 30, 2009)).

B. No Argument Advanced by Plaintiffs Justifies Predicating Securities Fraud Liability on Defendants' Denials of Predatory Lending Accusations

Plaintiffs argue that the facts of the case before the Court of Appeals in *Searls* v. *Glasser* are distinguishable from the facts at issue here because the moniker "recession-resistant" is "a projection, or a loose prediction" (Pl. Br. at 6), while the moniker "predatory lender" is a "widely used and commonly understood term" (*id.* at 7). This too is false. Whereas the court in *Searls* found that the term "recession-resistant" was susceptible to two possible definitions, 64 F.3d at 1066, it appears that every single participant in this litigation — be they a party, lay witness, or expert — has a different definition of the term "predatory lender." Indeed, given (i) the dissertation by Plaintiffs' own "expert" concerning the various meanings of the term, (ii) her acknowledgement that she created her current definition specifically for this case, and that it differs from Defendants' Class Period use of the term, and (iii) Plaintiffs' admission in previous filings with the Court that "predatory lending, like fraud, is a term not susceptible to the concise, inflexible definition that defendants seek to extract from lead plaintiffs" (*See* Lead Plaintiffs' Response to the Household Defendants Motion to Compel Responses to Household Defendants' Second Set of Interrogatories ("Pl. Opp'n to Defs.' Mot. to Compel") at 9 (July 12, 2006))[5], Plaintiffs cannot be heard to argue — and indeed are judicially estopped from arguing — that the

[5] In this Opposition to Defendants' Motion to Compel, Plaintiffs also acknowledged that company witnesses were unable to define predatory lending, and repeated Defendants' assertion that "A 'predatory' loan is not a legally defined term and does not have a commonly recognized definition." (Pl. Opp'n to Defs.' Mot. to Compel Responses at 9).

term "predatory lending" is so "commonly understood" as to escape the rule of dismissal enunciated in *Searls*. *See New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) ("'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'") (quoting *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895)).

Moreover, Plaintiffs' admissions that predatory lending is an indefinable term were not limited to the earlier phases of this litigation. Among the documents Plaintiffs filed on February 10, 2009 was their opposition to a *Daubert* motion to exclude "predatory lending" analysis by their "expert" Catherine Ghiglieri. There again, Plaintiffs concede that no single definition of predatory lending exists. (*See* Lead Plaintiffs' Memorandum in Opposition to Household Defendants' *Daubert* Motion to Exclude the Expert Testimony of Catherine Ghiglieri at 21 n.15 ("Numerous regulators have analogized predatory lending to pornography in that 'you know it when you see it.'") (citing Ghiglieri Dep. Tr. at 49:14-16; Cross Dep. Tr. 110:1-5)). At every turn in the long history of this case — from the earliest stages of discovery, through depositions, in expert discovery, and finally in the context of pretrial motions — Plaintiffs have resisted defining the term "predatory lending" despite the fact that many of the supposed false statements are predicated on this term. Now, on the eve of trial, they assert that "predatory lending" is "a widely used and commonly understood term" and "conveyed to the market" specific information about Household's business practices. This argument flies in the face of Plaintiffs' previous judicial admissions on the subject and cannot be allowed to prevail.

Notwithstanding the inherent vagueness of the "predatory lending" denials Plaintiffs allege, Plaintiffs argue that those statements should nevertheless be actionable because they are "so discordant with reality that they would induce a reasonable investor to buy the stock at a higher price than it was worth *ex ante*." (Pl. Br. at 7 (quoting *Lindelow* v. *Hill*, No. 00 C 3727,

2001 WL 830956, at *4 (N.D. Ill. July 20, 2001) (Holderman, J.)). In support of that dubious proposition, Plaintiffs rely on the decision in *Lindelow*, where a defendant corporate officer publicly stated that his company "look[ed] forward" to implementing a particular technology in 1999, notwithstanding internal memoranda and an independent auditor's conclusion that implementation that year would be impossible. *See id.* at *1-2. Plaintiffs also rely on the decision in *In re Countrywide Financial Corp. Securities Litigation*, where the plaintiffs based their allegations of securities fraud in part on defendant Countrywide's public statements touting its loan underwriting systems and its extensive quality control mechanisms. 588 F. Supp. 2d 1132, 1153 (C.D. Cal. 2008). Neither of these Rule 12(b)(6) opinions, however, has any application here. In each of those cases, the defendant made a statement about ascertainable facts (that a particular technology was expected to be implemented in the following year, and that loan underwriting and quality control mechanisms were adequate) and plaintiffs alleged that the fact contained by the statement was definitively untrue.

Plaintiffs' reliance on the Rule 12(b)(6) opinion in *Countrywide* is particularly misplaced and misleading. In the course of ruling that most of a vast complaint, when read as a whole, fairly put the defendants on notice of the claims against them, the *Countrywide* court strongly ratified the principle that imprecise statements "such as 'high quality' are generally not actionable." *Id.* at 1144. As the court said of such statements:

> "They are vague and subjective puffery not capable of being material **as a matter of law**. On an individual level, this is because a reasonable person would not rely on such descriptions; on a macro scale, the statements will have little price effect because the market will discount them."

Id. (emphasis added) [6] The court then took great pains to explain why certain statements of Countrywide touting an electronic risk management system that reportedly would "improve the consistency of underwriting standards" "may be" actionable under the unique circumstances of that case, even though they would normally be considered non-actionable puffery. *Id.* at 1181. The court's rationale for considering an exception highlights the stark differences between the facts of *Countrywide* and this lawsuit, notwithstanding Plaintiffs' wishful thinking.

First and foremost, "throughout the class period, Countrywide officers . . . expressly said they would not lower underwriting standards in service of the market share goal. *Id.* at 1146. Contrary to those express representations, "Countrywide's highest-level managers [had] authored official documents — underwriting matrices and guidelines — such as those for Countrywide's Corresponding Lending Department ("CLD") that memorialized Countrywide's systematically lowered lending standards." *Id.* at 1146. Moreover, Countrywide's electronic underwriting system was not alleged to be a risk management system, as represented, but rather a tool that alerted senior management to revise underwriting guidelines downward when sales declined. *Id.* at 1148. Under these extreme circumstances (which have no parallel here), the court held that making positive statements about a system to achieve "consistency of underwriting standards" while senior management was systematically depressing such standards may be

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[6] The court's recognition that vague statements "will have little price effect" is particularly telling here, given the acknowledgment of Plaintiffs' loss causation expert that **not a single one** of the statements at issue (and for that matter, not a single one of the Class Period statements at issue in this action) introduced inflation into the price of Household stock. *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment Dismissing All Remaining Claims of the Class at 15-23; *and* Defendants' Statement Pursuant to Local Rule 56.1(a)(3) in Support of Their Motion for Summary Judgment at ¶ 38.

deemed actionable statements of fact. *Id.* at 1153. Even then, the court explained what a significant departure this was from normal securities fraud law. In the words of the court: "It cannot be emphasized enough that in the vast majority of cases such statements would be non-actionable puffery." *Id.* at 1146.

Unlike the facts of *Countrywide* and *Lindelow*, the "predatory lending" denials Plaintiffs allege here cannot serve as a predicate for securities fraud because those statements do not purport to report objectively discernible facts, but rather convey the speaker's viewpoint about a concept that Plaintiffs admit is not susceptible to a standard definition. The same was true in *Searls*, where the defendant's expression of the opinion that it was "recession-resistant" was so vague as to preclude liability. As in *Searls*, Defendants' statements denying the vague characterization of "predatory" cannot serve as a basis for any Defendant's liability and Plaintiffs should not be allowed to submit them to the jury.

In a final desperate pass at this issue, Plaintiffs argue that Defendants' *denials of "predatory lending" accusations* must have been material because the stock market reacted unfavorably to certain disclosures that allegations of lending abuse had been asserted against Household. (Pl. Br. at 8). This apples-to-oranges argument does not even make sense. In the first place, the filing of a lawsuit or the airing of allegations is an event that can create uncertainty and thereby impact the stock price of the target of the allegations, whether the allegations are valid or, as here, groundless. (Elsewhere, Defendants explain why Plaintiffs' insistence on equating unadjudicated allegations and truth ought to be precluded at trial.[7]) Securities fraud liability may *not* be predicated on a denial of allegations. Household was entitled to vigorously

[7] (*See* Defs.' Omnibus Mot. *in Limine* to Exclude or Limit 14 Categories of Evidence, Section C (Complaints in Other Litigations)).

defend itself against these charges, and was not required to admit a disputed liability in order to avoid violating the securities laws. *See*, *e.g.*, *Anderson* v. *Abbott Laboratories*, 140 F. Supp. 2d 894, 906-07 (N.D. Ill. 2001) (Moran, J.) ("[A company's] maintenance of its innocence is not fraud. SEC rules do not create a duty to confess contested charges. . . . Where there exists a good faith dispute as to facts or an alleged legal violation, the [law] only requires disclosure of the dispute.") (citation and internal quotation marks omitted), *aff'd sub nom. Gallagher* v. *Abbott Laboratories*, 269 F.3d 806 (7th Cir. 2001).

III. DEFENDANTS CANNOT BE FOUND LIABLE FOR STATEMENTS MADE BY THIRD PARTIES

Plaintiffs try to distinguish the "entanglement" doctrine invoked in Defendants' opening brief by claiming that it applies solely to statements by third-party analysts, whereas this action involves statements by third-party reporters. (Pl. Br. at 9). As a matter of doctrine, that is a distinction without a difference. Courts require an indication of acknowledgement — through ratification or entanglement — before imposing liability for statements made by third parties because the speaker and the one alleged to be liable are not the same. *See, e.g.*, *In re Gupta Corp. Securities Litigation*, 900 F. Supp. 1217, 1237 (N.D. Cal. 1994) (noting the concern that analysts "might quote corporate spokespersons out of context or inaccurately interpret remarks made by corporate insiders [or] . . . bring to bear other knowledge and opinions about the defendants' industry in writing their reports"). Thus, the rationale underlying the rule applies with equal force regardless of the identity of the third-party speaker, so long as that third-party speaker is not the defendant. Indeed, the seminal decision establishing the "entanglement" doctrine queried a defendant's liability for statements made by a reporter in the Wall Street Journal. *See Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 949 (2d Cir. 1969).

Equally unavailing is Plaintiffs' argument that, because Craig Streem and Megan Hayden-Hakes were Household's corporate spokespeople, Defendants are liable for any state-

ment attributed to them by any third party that was not contradicted by Household. (Pl. Br. at 10-11 ("[A]t no time during the class period did anyone in senior management indicate that the wrong message had been sent to the public via any of the news articles.")). That is not the law: "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." *Raab* v. *General Physics Corp.*, 4 F.3d 286, 288 (4th Cir.1993); *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.") (citing *Electronic Specialty Co.*, 409 F.2d at 949). Instead, where a plaintiff seeks to impose upon the defendants liability for statements made by someone other than the defendants, courts require a showing that "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.) (internal quotation marks omitted).

There is no allegation of such "entanglement" in Plaintiffs' complaint, in the proposed pretrial order materials, or in the materials submitted in opposition to this motion. In the face of that waiver and failure of proof, Plaintiffs are precluded from submitting those inactionable third-party statements to the jury.

CONCLUSION

For the foregoing reasons and for the reasons stated in Defendants' moving brief, the Court should enter an Order precluding Plaintiffs from attempting at trial to predicate liability on the inactionable statements identified in Defendants' moving brief and should omit those statements from the Court's jury instructions and verdict form.

Dated: February 13, 2009
New York, New York

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