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. Guzmán

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50(A) AFTER THE CLOSE OF EVIDENCE

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., William F. Aldinger, David A. Schoenholz and Gary Gilmer

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Defendants Household International, Inc., William F. Aldinger, David A. Schoenholz and Gary Gilmer (collectively "Household" or "Defendants") respectfully submit this Memorandum in support of their renewed motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, on the grounds specified in Defendants' April 22, 2009 Motion for Judgment as a Matter of Law Pursuant to Rule 50(a) and Memorandum in Support thereof ("Defs' April 22 Mem.", Dkt. No. 1567).[1] This Memorandum elaborates upon the insufficiency of Plaintiffs' evidence of loss causation and scienter, based on facts arising after Defendants' initial Motion was filed.

1. Additional testimony from Plaintiffs' loss causation expert has made it even more apparent that Plaintiffs have failed to prove "a causal connection between the material misrepresentation and the loss" allegedly arising from their "reaging" theory of fraud. *See Tricontinental Industries, Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, 843 (7th Cir. 2007) (citation omitted). (*See* Section I(C) of Defs' April 22 Mem.) In particular, Professor Fischel has admitted that certain alleged fraud in Household's 2001 10-K was not corrected until an amended 10-K was filed in March 2003, some five months after the end of the Relevant Period. This admission precludes a finding of loss causation with regard to the statements at issue.

2. As a result of statements by counsel for Plaintiffs at the April 24, 2009 charging conference, it became clear that Plaintiffs seek to prove scienter on the part of the corporate defendant on the basis of patently insufficient evidence regarding the alleged state of mind of six former employees who are not defendants (Megan Hayden-Hakes, Craig Streem, Walter Rybak, Paul Makowski, Joseph Vozar and Steven McDonald). The three former employees who were called and questioned by Plaintiffs testified without contradiction as to their lack of knowledge of or complicity in any misstatement or omission. Plaintiffs also seek to impute scienter to the three former employees they elected not to call, solely on the basis of inferences of intent that Plaintiffs seek to draw from unfounded speculation about the meaning of certain unidentified and unexplained exhibits. In neither situation have Plaintiffs adduced sufficient evidence that any of

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[1] Docket Numbers 1567, 1568, 1569, 1570 and 1571 are hereby incorporated by reference.

these individuals acted with the requisite "mental state embracing intent to deceive, manipulate, or defraud." *Tellabs*, *Inc.* v. *Makor Issues & Rights, Ltd.,* 551 U.S. 308, 315 (2007). (*See* Section VIII of Defs' April 22 Mem.)

ARGUMENT

I. PLAINTIFFS' FAILURE TO PROVE LOSS CAUSATION AS TO THEIR REAGING THEORY ENTITLES DEFENDANTS TO JUDGMENT AS A MATTER OF LAW

As demonstrated in **Section I(C)** of Defendants' April 22 Memorandum, Plaintiffs cannot prove a "clear nexus" between the fraud they allege and any resulting harm. Instead, the trial evidence renders a finding of loss causation impossible. As this Court stated, if Plaintiffs "fail to prove a sufficient nexus between their losses and the untrue statements they allege, then they will not prevail." (Mar. 16, 2009 Minute Order re: Defendants' Motion to Exclude Allegedly False and Misleading Statements Not Identified by Plaintiffs in Discovery (Dkt. 1510), citing *Tricontinental,* 475 F.3d 824. This week's rebuttal testimony of Plaintiffs' loss causation expert Daniel Fischel reinforced Defendants' previous showing that Plaintiffs cannot satisfy the essential element of loss causation.

With respect to Plaintiffs' theory of "reaging" fraud arising from alleged misstatements made in Household's 2001 10-K report (filed in March, 2002; Def. Ex. 852) and at an April 9, 2002 Financial Relations Conference (*see* Pl. Ex. 725), Professor Fischel's "Specific Disclosure" event study identified only a single alleged corrective disclosure date within the period subsequent to the alleged misstatements and prior to the end of the Relevant Period.[2] The date was September 23, 2002 (*see* Tr. 2968:6-23 (Fischel)), and the alleged corrective disclosure,

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[2] As discussed in Defendants' April 22 Mem. and in Defendants' *Daubert* briefs, Professor Fischel's "leakage" model cannot identify corrective disclosures (or demonstrate the required causal nexus) because it admittedly includes as inflation stock price movements that were "not at all fraud related." (Tr. 2959:24 - 2960:17.) This type of "leakage" model has been repeatedly rejected for failure to comply with the requirements of *Dura Pharmaceuticals* v. *Broudo*, 544 U.S. 336 (2005), most recently by the Tenth Circuit Court of Appeals. *See In re Williams Securities Litigation*, 558 F.3d 1130, 1135 (10th Cir. 2009).

a CIBC analyst's report (Pl. Ex. 1435), was plainly no such thing. During his rebuttal trial testimony this week, Professor Fischel stated that the alleged "reaging" fraud in the Spring of 2002 was in fact not exposed or cured until March 2003 — five months after the close of the Relevant Period — when Household filed an amended 10-K for the year ending December 31, 2001. (Tr.4285:4-11; *see* Pl. Ex. 1267.) As set forth below, the facial insufficiency of the September 23, 2002 disclosure, and the untimeliness of the alleged March 2003 correction leave Plaintiffs with literally no proof that during the Relevant Period "the value of the stock declined once the market learned" of alleged "reaging" deception in the 2001 10-K or April 2002 FRC presentation. *Ray* v. *Citigroup Global Markets, Inc.,*482 F.3d 991, 995 (7th Cir. 2007).

A. Plaintiffs Cannot Demonstrate That the Alleged False Statements Regarding Reaging in 2002 Were Corrected On September 23, 2002 Or At Any Other Time Within the Relevant Period

The September 23, 2002 CIBC report provided absolutely no new *facts* to the market regarding reaging. Its primary focus was on alleged predatory lending and regulatory issues, and it noted only in passing that "mounting credit quality concerns related to Household's loan workout and re-aging practices have also been a drag on the stock." (Pl. Ex. 1435) This report expressly stated that this information was already known to the market (well before the article was published) and hence was "a drag on the stock"; therefore, it cannot constitute a corrective disclosure as to reaging. (Tr. 4220:16 - 4224:9 (Bajaj).) A disclosure that does not reveal anything new to the market is, by definition, not corrective. *See In re Omnicom Group, Inc. Securities Litigation*, 541 F. Supp. 2d 546, 551 (S.D.N.Y. 2008); *In re Apollo Group, Inc. Securities Litigation*, No. CV 04-2147-PHX-JAT, 2008 WL 3072731, at *2 (D. Ariz. Aug. 4, 2008) (citations omitted). In order to be considered a "corrective" disclosure, a statement must provide some "new, fraud-revealing analysis." *Apollo*, 2008 WL 3072731, at *3 (granting judgment under Rule 50(b) where plaintiff's loss causation theory was "demonstrably false" because the same concerns were published in an article five days before the analyst report alleged as a corrective disclosure); *Retek*, 2009 WL 928483, at *13-14 (D. Minn. March 31, 2009) (granting summary judgment on loss causation where press release alleged as corrective disclosure "was not the first time the relevant truth" was revealed; a "re-characterization of previously disclosed news cannot be a corrective disclosure") (internal quotation marks omitted).

As in *Tricontinental,* 475 F.3d at 842,where the Court of Appeals affirmed the dismissal of securities fraud claims for failure to show a causative link between the allegedly fraudulent statement and the claimed loss, the lack of a coherent nexus between the supposed "reaging" fraud in March and April 2002 and this supposed corrective disclosure would preclude a finding of loss causation even if Plaintiffs had met their companion burden of proving that the "alleged misrepresentations artificially inflated the price of the stock." *Ray,* 482 F.3d at 995; *see generally* Defendants' April 22 Mem., Section I(B).

B. Plaintiffs' Admission that Any Corrective Disclosure Post-Dated the Relevant Period Precludes a Finding of Loss Causation as to Alleged "Reaging" Fraud

Both Plaintiffs' accounting expert Harris Devor and Professor Fischel have testified that alleged misstatements regarding reaging policies in Household's 2001 10-K (filed March, 2002)[3] were not corrected until Household filed an amended 10-K for the same period in March 2003 — one year after the original filing and five months after the end of the Relevant Period. (Tr. 2451:22 - 2453:14 (Devor); Tr. 4285:4 - 11 (Fischel).) Moreover, Messrs. Schoenholz and Rybak testified that the minor mistakes made in the course of the FRC presentation were *never* corrected during the Relevant Period. (Tr. 2154:1 - 2159:3 (Schoenholz); Tr. 2325:6 - 2329:6 (Rybak).) As a matter of law, loss causation requires a corrective disclosure that "reveals the truth behind the alleged misrepresentation." *See Ray*, 482 F.3d at 995; *In re Retek Inc. Securities Litigation*, Civ. No. 02-4209, 2009 WL 928483, at *13 (D. Minn. Mar. 31, 2009)(plaintiff required to prove that "the value of [defendant's] stock declined just when the alleged misrepresentations were revealed ."). As it is undisputed that the statements in the 2001 10-K were not "corrected" within the Relevant Period, judgment for Defendants on this claim is "inevitable," *Ray,* 482 F.3d at 995-96 (affirming summary judgment for defendant where price of stock had already declined before the alleged corrective disclosure).

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[3] Plaintiffs have focused on the following statement from the originally-filed 2001 10-K: "Our policies for consumer receivables permit reset of the contractual delinquency status of an account to current, subject to certain limits, if a predetermined number of consecutive payments has been received and there is evidence that the reason for the delinquency has been cured." (*See* Def. Ex. 852 at HHT 0015798.)

II. PLAINTIFFS HAVE NOT INTRODUCED EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT SIX INDIVIDUAL NON-DEFENDANTS ACTED WITH SCIENTER

During the April 24, 2009 jury charge conference, counsel for Plaintiffs asserted that scienter could be imputed to the corporate Defendant by reason of alleged evidence of fraudulent intent on the part of certain non-defendant former employees. For the first time, they identified six individuals whom they allege possessed the requisite state of mind: Plaintiffs' witnesses Megan Hayden-Hakes, Craig Streem and Walt Rybak, and non-witnesses Paul Makowski, Joseph Vozar and Steven McDonald.[4] To demonstrate scienter, Plaintiffs must prove "an intent to deceive, demonstrated by knowledge of the statement's falsity or reckless disregard of a substantial risk that the statement is false." *Higginbotham* v. *Baxter International, Inc.*, 495 F. 3d 753, 756 (7th Cir. 2007). Plaintiffs have introduced no evidence showing that any of these six individuals acted with scienter. Accordingly, the jury could not reasonably impute scienter to Household on the basis of their respective statements and acts.

At trial, Ms. Hayden-Hakes and Mr. Streem denied ever making any statement with doubts as to its falsity, or lack of a good-faith believe in its truth (*see* Tr. 1559:7 – 1560:12, 1524:15-16 (Hayden-Hakes); Tr. 1662:11 – 1663:16, 1666:13-19, 1652:3-7, 1660:18 – 1661:2, 1649:1-2 (Streem); and Plaintiffs presented no evidence that called these sworn statements into question. Plaintiffs also questioned Mr. Rybak, who did no more than admit to an honest mistake implicating an immaterial subset of his business unit's reaged accounts; indeed, he cited the small number of affected accounts as the reason he forgot to mention them in an internal summary of reaging policies. (Tr. 2356:5 – 2357:3, 2358:3 – 2359:13, 2360:6-8.)

Plaintiffs subpoenaed Messrs. Makowski, Vozar and McDonald as trial witnesses, but elected not to call them or introduce their deposition testimony. Instead, they introduced into

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[4] Plaintiffs' Proposed Jury Instruction No. 66 (Liability of a Corporation), included in Exhibit I-1 to the Pretrial Order (p. 143), requests an instruction that Company scienter could be shown through that of an "executive officer of Household," which was defined as including "defendants Aldinger, Schoenholz and Gilmer, among others." (*Id.*) None of these six individuals could be considered an executive officer.

evidence a handful of ambiguous and/or inconclusive documents received or authored by these former employees, in each case in order to explain the basis of certain expert's opinions. The expert witnesses who sponsored such documents had no competence to identify the documents, explain their context or testify as to the writer's state of mind. Intent is a question of fact and Plaintiffs need to offer far more than speculation based on the inferences drawn from these documents to support their effort to attribute scienter to any of these former employees and to impute that alleged scienter to Household. This is too speculative a house of cards. *See FMC Corp.* v. *Manitowoc Co., Inc.*, 835 F.2d 1411, 1416-17 (Fed. Cir. 1987) (internal citations omitted) (distinguishing between "permissibly drawing an inference from an already established fact" and "impermissibly using an inference to establish a fact," and noting that "[a]n inference can and often must be drawn from established facts and direct proof of wrongful intent is not required, but drawing an inference on an inference on an inference is not the role of the fact finder"); *see also McCarthy* v. *United States*, 1 Cl. Ct. 446, 462 (U.S. Cl. Ct. 1983) ("[T]he absence of testimony bearing on fraudulent intent [in another case] resulted in a failure of proof because a 'compelled inference' of fraud could not be drawn from the documents themselves.") (alteration in original) (internal citations and quotation marks omitted); *Institut Pasteur* v. *Chiron Corp.*, No. Civ. A 03-0932 (JDB), 2005 WL 366968, at *15 (D.D.C. Feb. 16, 2005) (affirming judgment for defendant where plaintiff relied "on three inferences that it believe[d] [could] be drawn from the documentary record at trial" but failed to offer testimony from a competent witness as to the plaintiff's state of mind); *cf. United States* v. *Dyer*, 546 F.2d 1313, 1315 (7th Cir. 1976) (where only proof of fraudulent intent was document alleged to be forged, prosecution had not proved intent).

Plaintiffs' failure to meet their burden can be attributed largely to their decision not to call certain available individuals whom they served with trial subpoenas but then elected not to call as witnesses. Instead, they want the jury to infer from facially ambiguous documents alone (a) that the absent writer was referring to X and not Y (*e.g.*, financial reports *versus* internal operating plans) and, from that inference, (b) that the absent writer intended to deceive investors. Plaintiffs offered no explanation, satisfactory or not, for their decision not to call these witnesses. Under the circumstances presented here, testimony from these individuals would be essential to any possible finding of individual or corporate scienter. *See Institut Pasteur*, 2005 WL

366968, at *15 & n.21 ("It is telling that although Chiron came forward with strong testimonial evidence of its knowledge and intent in negotiating the contract, Institut Pasteur did not offer the testimony of anyone who was at Institut Pasteur and participated in the negotiations . . . . [T]his Court need not infer that [Pasteur's general counsel] would have provided unfavorable testimony to Institut Pasteur. It is sufficient to note that Institut Pasteur was unable to provide any compelling insight into its intent at the time of the relevant events because none of the witnesses it offered could speak directly to that crucial issue.").

A. The Testimony of Megan Hayden-Hakes and Craig Streem Does Not Support an Inference of Corporate Scienter

In the course of Plaintiffs' case, Megan Hayden-Hakes and Craig Streem, company spokespeople, expressly denied under oath having known or believed any material statement attributed to them or to Household to be false or misleading, and denied having had any intent to deceive investors. Ms. Hayden-Hakes testified that nobody at the Company ever told her to lie to the press, conceal information or mislead anyone, and that based on her close familiarity with Household's operations and staff, she had no reason to believe that any of her public statements on behalf of the Company was false. (Tr. 1559:7 - 1560:12.) She testified that as a company spokesperson she did not have firsthand knowledge of the statements she made, but she did not doubt the veracity of her statements at the time: "Somebody else told me that, and I believed that to be true." (Tr. 1524: 15 - 1524:16.) Similarly, Mr. Streem testified that he got the information for the statements from those in the business units "who would have expertise or knowledge of that particular subject," and that he had "full and unfettered access" to these individuals; no one ever refused to answer questions or told him to conceal or lie. (Tr. 1662:11 - 1663:16.) He also testified that Mr. Aldinger and Mr. Schoenholz provided him with information, which he believed to be true, and that in other instances he had independent knowledge of the relevant facts. (Tr. 1666:13 - 19.) He unequivocally testified that Mr. Schoenholz and Mr. Aldinger never told him to conceal or mislead the public and that he never personally heard either of them lie to investors. (Tr. 1652:3 - 7, 1660:18 - 1661:2.) In addressing his statements to the press, Mr. Streem said, "It was always my intent and my objective to be as accurate and responsive as I possibly could be." (Tr. 1649:1 - 2.)

Having introduced no contrary evidence, Plaintiffs cannot meet their burden of proof "by relying on the hope that the jury will not trust the credibility of the witnesses." 9B Wright & Miller, *Federal Practice & Procedure* Civ.2d § 2527, "Credibility of Witnesses" (2008); *See Bose Corp*. v. *Consumers Union of United States, Inc*., 466 U.S. 485, 512 (1984) (internal citation omitted) (testimony that is not believed may simply be disregarded but "is not considered a sufficient basis for drawing a contrary conclusion"); *Heft* v. *Moore*, 351 F.3d 278, 284 (7th Cir. 2003) (internal citation omitted) ("To avoid a directed verdict, the plaintiff must do more than argue that the jury might have disbelieved all of defendant's witnesses. Rather, the plaintiff must offer substantial affirmative evidence to support her argument."); *Millbrook* v. *IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002) (if plaintiff's only evidence is that "defendants' witnesses were not worthy of belief," jury verdict cannot stand because it is a "no-evidence case" that plaintiff must lose because he has the burden of proof).

B. A Finding of Corporate Scienter Cannot be Inferred from the Testimony of Walter Rybak as to Immaterial Mistakes

Mr. Rybak testified that he provided information regarding reage policies to management that was inaccurate in two respects due to innocent mistakes.[5] He testified that he discovered in April 2002 that the stated policy for real estate loans (allowing restructure once every twelve months with two payments received) was inaccurate as to two small exceptions, at which point he contacted Gary Gilmer and two of Gilmer's subordinates to inform them of the mistakes. (Tr. 2325:13 - 2326:25, Pl. Ex. 1100.) Mr. Rybak testified that one minor omission pertained to a very small subset of accounts, which is the reason he had forgotten to break them out. (Tr. 2325: 6 - 14, 2357:15 - 21, 2358:24 - 2359:3 & Pl. Ex. 1100.) Another resulted from an inadvertent computer coding error. (Tr. 2355:4 - 2357:21 ("[T]he people who programmed the

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[5] In order to demonstrate scienter, Plaintiffs must demonstrate that a defendant knew that an undisclosed fact **was material**. *See Schlifke* v. *Seafirst Corp.*, 866 F.2d 935, 946 (7th Cir. 1989) ("[t]he question is not merely whether the Bank had knowledge of the undisclosed facts; rather, it is the '*danger of misleading buyers* [that] must be actually known or so obvious that any reasonable man would be legally bound as knowing") (internal citation omitted) (emphasis in the original); *City of Philadelphia* v. *Fleming Companies, Inc.*, 264 F.3d 1245, 1261 (10th Cir. 2001) (scienter requires that a defendant be "aware both of [the undisclosed fact's] materiality and that its non-disclosure would likely mislead investors.").

automated transactions basically coded it incorrectly. They didn't keep the 12-month -- they didn't exclude accounts that were on -- where they were less than 12 months since the last re-structures out of that [] EZ Pay restructure. Q: Mistake? A: Mistake.").)

Mr. Rybak testified without contradiction that he believed these mistakes were immaterial. (Tr. 2358:3 - 2359:9, 2360:6-8.) For example, the error resulting from a computer coding mistake was immediately corrected by the responsible unit managers. (Tr. 2356:5 - 2357:3.) Further, the relative number of loans in the temporarily overlooked portfolio was declining, constituting less than two percent of the total portfolio of a single business unit. (Tr. 2358:20 - 2359:13 A mistake potentially implicating only two percent of the Consumer Lending portfolio, affecting only one of the Company's five major business units (Tr. 3288:9 - 13 (Aldinger)), is patently immaterial.

The only other document Plaintiffs introduced as purported evidence of Mr. Rybak's state of mind is the antithesis of proof of scienter. The document was Plaintiffs' Exhibit 1103, a July 29, 2002 email relaying Mr. Rybak's concerns about headline risk as a result of sales of Household's insurance product. As he testified, he was simply concerned that problems in only a few accounts could create headline risk in the prevailing environment . (Tr. 2363:10 - 2364:5.) The document reflected his disfavor of "insurance packing" and wish to have Household avoid it, and Mr. Rybak confirmed that his observations related at most to only 600 accounts per year. (Tr. 2362:9 - 2363:7.) Out of three million customer accounts in the Consumer Lending business, this percentage (two hundredths of one percent) is patently immaterial. In the context of Household's total customer base of 48 million (Tr. 3270:20 - 3271:18 (Aldinger)), it is specious to suggest that Mr. Rybak's internal inquiry is proof one way or another of the parent's intent.

B. Plaintiffs Have Not Demonstrated Scienter as to Former Employees Dropped From Plaintiffs' Witness List

Plaintiffs chose not to call Mr. Vozar as a witness, despite having listed him on all of their trial witness lists, chose not to present their previously designated portions of Mr. Makowski's deposition, and chose not to call Mr. McDonald by deposition or otherwise. Plaintiffs cannot choose not to call a witness, introduce miniscule segments of the witness's files through incompetent witnesses, and then argue from the selected excerpts that the absent witness har-

bored fraudulent intent that should be imputed to the corporate Defendant. *See Institut Pasteur*, 2005 WL 366968, at *15 & n.21.

The only testimony remotely implicating Mr. Makowski occurred during the testimony of Mr. Schoenholz, Mr. Rybak, and Ms. Markell. Mr. Schoenholz testified that Makowski told him *after* the FRC on April 9, 2002 that some of the figures Makowski had calculated for him for a first-ever recap of reaging practices were incorrect because of a mistake. (Tr. 2184:19 - 2185:13.) Upon learning what the corrected numbers were, Mr. Schoenholz concluded that the mistake was not material. (Tr. 2185:14 - 19.) Plaintiffs have proven nothing more than this. Mr. Rybak testified that he did not believe that the exceptions were material, and Plaintiffs have submitted no evidence that Makowski disagreed. As for Plaintiffs' Exhibit 649, regarding one-payment re-ages, the uncontroverted testimony is that of Mr. Schoenholz: Despite Mr. Makowski's note that it created "headline risk," Mr. Schoenholz testified that "I didn't think it was a material disclosure. I thought it was materially correct." (Tr. 1944:1 - 2.) In fact, even Ms. Markell never spoke to whether Mr. Makowski believed unnecessary reaging was a material problem, and did not testify that she told him so. (Tr. 2242:2 - 3.) Plaintiffs would ask the jury to draw an impermissible "inference on an inference on an inference" in their attempt to impute knowledge of the falsity of statements on Mr. Makowski through secondhand testimony and a handful of documents.

As for Mr. Vozar, there was no direct evidence as to his state of mind. Plaintiffs introduced a document during the testimony of Defendants' expert John Bley, containing a handwritten note that stated: "It seems to me our policy encourages 'flipping'. . . .We need to be very careful of doing rewrites -- flipping." Simply displaying a document during an expert deposition does not establish the facts, create competent evidence, or provide any indication about what Mr. Vozar's state of mind may have been. *See In re James Wilson Associates*, 965 F.2d 160, 172–73 (7th Cir. 1992) (even where inadmissible evidence is used as the premise of an expert's opinion, such evidence does not become admissible for purposes independent of the opinion: "If for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party's lawyer told him, the lawyer cannot in closing argument tell the jury, 'See, we proved X through our expert witness, A.'"). Moreover, Mr. Bley fairly interpreted the document to reflect

Mr. Vozar's opposition to "flipping", which is the only testimony on point. (Tr. 3808:12 – 3809:6, 3810:3-9)

Plaintiffs elected not to call Steven McDonald live at trial or by presenting deposition testimony. Having chosen not to introduce testimony from Mr. McDonald, Plaintiffs should not be permitted to imply that because Mr. McDonald participated in preparing certain documents, he had fraudulent intent that may be imputed to his employer. There is no testimony or evidence that points to Mr. McDonald's state of mind, even by someone other than Mr. McDonald. Nor has any evidence been introduced to suggest that he disagreed with Household's public disclosures or had any reason to believe they were false. Any proposed inferences regarding Mr. McDonald's state of mind would therefore be pure speculation. Plaintiffs should not be allowed to ask the jury to make an apparently insupportable inference of scienter that could have been tested by the very testimony they chose not to adduce. *See Institut Pasteur*, 2005 WL 366968, at *15 & n.21.

In light of the direct testimony on point, Plaintiffs' intended speculation as to the state of mind of Mr. Makowski, Mr. Vozar and Mr. McDonald from a handful of documents is unfounded and patently insufficient to support an inference of individual or corporate scienter. *See FMC Corp.*, 835 F.2d at 1416-17 ("[D]rawing an inference on an inference on an inference is not the role of the fact finder.").

CONCLUSION

For the foregoing supplemental reasons and those previously asserted in Defendants' April 22, 2009 Memorandum of Law, Plaintiffs, after being fully heard, have failed to offer sufficient evidence for a reasonable juror to find that Defendants committed violations of § 10(b), Rule 10b-5 or § 20(a) with regard to Defendants' restatement, alleged "predatory lending," or reaging policies and practices. The Court should resolve all claims in Defendants' favor and grant Defendants' Renewed Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(a).

Dated: April 29, 2009

Respectfully submitted,

CAHILL GORDON & REINDEL LLP

By: /s/Thomas J. Kavaler

Thomas J. Kavaler
Bar No. 1269927
Howard G. Sloane
Bar No. 1197391
Patricia Farren
Bar No. 1198498
Susan Buckley
Bar No. 1198696
Landis C. Best
David R. Owen

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

-and-

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

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