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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN,
On Behalf of Itself and All Others
Similarly Situated,

Plaintiffs,

v.

HOUSEHOLD INTERNATIONAL, INC.,
et al.,

Defendants.

FILED

MAR 7 2005 WH

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

) Lead Case No. 02-C-5893

) (Consolidated)

) Ronald A. Guzman

) Magistrate Judge Nan R. Nolan

**DEFENDANT ARTHUR ANDERSEN LLP'S MOTION TO DISMISS IN PART
PLAINTIFFS' [CORRECTED] AMENDED CONSOLIDATED COMPLAINT
OR, IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS**

Defendant Arthur Andersen LLP ("Andersen") respectfully moves, pursuant to Fed. R. Civ. P. 12(b)(6), for an order dismissing with prejudice, as time-barred, those claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 ("Section 10(b) Claims"), asserted in Count I of plaintiffs' [Corrected] Amended Consolidated Complaint (the "Complaint") (the only claim of the Complaint being pursued against Andersen) that arose prior to July 30, 1999. Specifically stated, and as explained below, the Court should dismiss with prejudice all claims based upon any statement allegedly made by Andersen prior to March 28, 2000, including but not limited to Andersen's 1998 and 1999 audit reports with respect to Household. In the alternative, Andersen moves, pursuant to Fed. R. Civ. P. 12(c), for judgment in its favor on the pleadings on such time-barred Section 10(b) Claims. In support of this motion, Andersen submits its Memorandum, which is incorporated herein by reference, and states the following:

1. By Order dated December 3, 2004, this Court certified this case as a class action only as to the Section 10(b) Claims asserted in the Complaint.¹ Count I of the Complaint is the only Count of the Complaint which purports to assert Section 10(b) Claims against Andersen, and it purports to state Section 10(b) Claims against Andersen on behalf of the class of investors who allegedly purchased Household securities from October 27, 1997 to October 11, 2002. Cmpl. ¶ 1.

2. In ruling on defendants' previous motions to dismiss, this Court has already determined that the earliest of the now-consolidated suits was filed on August 19, 2002, and that the Complaint relates back to that date. 3/19/04 Mem. Op. & Order, p. 27. Thus, the Complaint attempts to assert Section 10(b) Claims based on purchases that were completed more than three years before suit was filed.

3. Such claims are time-barred under the three-year statute of repose adopted for Section 10(b) Claims by the Supreme Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991) (adopting limitations provision from 15 U.S.C. §78i(e) for use in § 10(b) cases).

4. Although the Public Company Accounting Reform and Investor Protection Act of 2002 ("Sarbanes-Oxley"), Pub. L. No. 107-204, § 804, 116 Stat. 745, 801 (2002) (codified in part at 28 U.S.C. § 1658(b)), extended the statute of repose for securities fraud claims from three years to five years, Sarbanes-Oxley does not apply retroactively to revive Section 10(b) Claims that were already time-barred, under the previous three-year statute of repose, when Sarbanes-Oxley became effective on July 30, 2002. This point was only recently established as the law of this Circuit when, in a controlling decision issued on January 11, 2005, the United States Court

¹ The named plaintiffs also assert Section 11 claims. Those claims are not class claims and Andersen understands that they are not being prosecuted in this case.

of Appeals for the Seventh Circuit ruled that Sarbanes-Oxley's new statute of limitations is not to be given retroactive effect to revive already time-barred claims. See *Foss v. Bear, Stearns Co., Inc.*, 394 F.3d 540 (7th Cir. 2005). The Seventh Circuit in *Foss* adopted the reasoning of a decision from the Second Circuit, issued in December 2004, that likewise held that enactment of Sarbanes-Oxley did not revive already time-barred claims. See *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d 401 (2d Cir. 2004).

5. Accordingly, plaintiffs' Section 10(b) Claims that arose more than three years before the enactment of Sarbanes-Oxley on July 30, 2002 (*i.e.*, all claims that arose by July 30, 1999) were already time-barred when Sarbanes-Oxley was enacted, and were not revived by the new statute. Those expired claims include all claims based on Andersen's 1997 and 1998 audit opinions, issued on January 21, 1998, and January 20, 1999, respectively. (See Cmplt. ¶¶ 175, 202, 227). Such claims were time-barred under *Lampf's* three-year statute of repose by January 21, 2001 and January 20, 2002, respectively—well before the effective date of Sarbanes-Oxley (July 30, 2002) and the date when suit was filed (August 19, 2002). Given that Andersen is not alleged to have made another statement for which it can be liable under Section 10(b) until it issued its audit opinion concerning Household's 1999 year-end financial statements, which the Complaint acknowledges was published to the market when incorporated by reference in Household's Form 10-K, filed with the SEC on March 28, 2000 (see Cmplt. ¶¶ 246, 248, 249), it is clear that there are no timely Section 10(b) Claims against Andersen based on any representation made prior to March 28, 2000.

6. Plaintiffs' time-barred Section 10(b) Claims should be dismissed with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6). See *Whirlpool Financial Corp. v. GN Holdings, Inc.*, 67

F.3d 605, 608 (7th Cir. 1995); *Trogenza v. Great Am. Communications Co.*, 12 F.3d 717, 718-19 (7th Cir. 1993).

7. Because Andersen's motion to dismiss is based on new controlling authority, not available when Andersen filed its previous motion to dismiss, this Court should consider Andersen's motion as a motion to dismiss under the law of this district. See *Muhammad v. Village of Bolingbrook*, 2004 U.S. Dist. LEXIS 12726, at * 4 (N.D. Ill. July 8, 2004); *Donnelli v. Peters Securities Co.*, 2002 U.S. Dist. LEXIS 16305, at * 11 (N. D. Ill. Aug. 29, 2002); *Strandell v. Jackson County, Illinois*, 648 F. Supp. 126, 129 (S.D. Ill. 1986). There is no point in expending valuable resources on matters which are patently time-barred under the law of this Circuit.

8. In the alternative, if the Court is disinclined to consider a second motion to dismiss, Andersen's motion should be considered and granted as a motion for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c). *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1115 (7th Cir. 1970); *Merk v. Jewel Food Stores Division, Jewel Companies, Inc.*, 702 F. Supp. 1391, 1396 (N.D. Ill. 1988).

WHEREFORE, Andersen respectfully requests that this Court grant Andersen's motion, and dismiss as time-barred all Section 10(b) Claims that are based on alleged representations made prior to March 28, 2000, or, in the alternative, grant judgment in favor of Andersen on the

pleadings on such time-barred Section 10(b) Claims.

Dated: March 7, 2005

Respectfully submitted,
ARTHUR ANDERSEN LLP

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